CHAPTER 19

A NEW TYPE OF CONFLICTS LAW AS
THE LEGAL PARADIGM OF THE POSTNATIONAL CONSTELLATION

Christian Joerges
Bremen

CONTENTS

I. Some Explanatory Remarks 1
   I.1. TERMINOLOGY............................................................................................................. 2
   I.2. STRUCTURING THE ARGUMENT............................................................................. 3
II. The Economy as Polity and its Law of Law-production 4
   II.1. THE LEGACY OF THE PRIVATE/PUBLIC DIVIDE................................................. 5
   II.2. KARL POLANYI’S COUNTERMOVE.................................................................... 8
   II.3. THE ECONOMY AS POLITY AND ITS CONFLICTS LAW................................. 10
III. Conflicts Law as Legal Paradigm in the Postnational Constellation I: The European Union 13
   III.1. CONFLICTS LAW’S FIRST DIMENSION: A HORIZONTAL CONSTITUTION FOR THE EUROPEAN UNION 14
   III.2. CONFLICTS LAW’S SECOND DIMENSION: CONSTITUTIONALISING TRANSNATIONAL CO-OPERATION 17
   III.3. WHEN DO PARA-LEGAL ORDERS DESERVE RECOGNITION? ON THE INDESPENSABILTY THE THIRD DIMENSION OF THE CONFLICTS LAW APPROACH.............................................................. 19
   IV. An Interim Conclusion on Europe’s Conflicts Law................................................ 21
IV. Conflicts Law as the Legal Paradigm of the Postnational Constellation II: A New Type of International Constitutionalism 22
   IV.1. THE FIRST DIMENSION OF CONFLICTS LAW IN TRANSNATIONAL MARKETS............................... 24
   IV.1.1. A Transnational Conflicts Law With a Cosmopolitan Imprint............................ 24
   IV.1.2. The Affinities of the First Dimension of Conflicts Law with WTO Law.............. 26
   IV.1.3. An Interim Conclusion on WTO Conflicts Law.................................................. 30
   IV.2. SECOND ORDER CONFLICTS LAW AND ITS AFFINITIES WITH GAL.......................... 31
   IV.3. PARA-LEGAL REGIMES AND THE POLITICISATION OF TRANSNATIONAL MARKETS; “FACTS WITHOUT NORMS”?................................................................. 34
V. Summary and Outlook: the Idea of a Three-dimensional Conflicts law 36

I. SOME EXPLANATORY REMARKS

This concluding contribution has systematic ambitions, but is, at the same time, both an epilogue and an outlook. Its main systematic objective is to clarify the contours and prospects of the endeavour to provide a comprehensive framework for the juridification

of the postnational constellation through the conflicts law approach. The many methodological and theoretical premises of the argument will be identified, but cannot be presented in all of their facets. The chapter will also, albeit only occasionally, engage in discussions of competing approaches. This rigidity pays tribute to the constraints of space, but will hopefully further the clarity of the argument submitted.

I.1. TERMINOLOGY

The note on terminology concerns “conflicts law”. This notion is used in this contribution in an unusual way. “Conflicts law” does not invoke the legacy of traditional private international law or the prevalent understanding of conflicts of laws. Unlike these disciplines, it is not concerned with “the choice between national systems of rules”, with “spatial justice”, a search for the “most significant relationship” or the “proper law”. Instead, the term seeks to capture the specifics of our contemporary postnational constellations, in which conflicts arising out of legal divergences typically can no longer be conceptualised as conflicts between insulated and autonomous jurisdictions. This is but an economic, sociological and political truism – and it seems obvious that the law of the Europeanising and globalising economy has to conceptualise postnational constellations accordingly. Our usage of the term is even more comprehensive. It is not restricted to reconstructing international and transnational constellation, or to the fragmentation (“Zerfaserung”) of international legal regimes and multi-level governance phenomena. Building upon Rudolf Wiethölter and Gunther Teubner,1 we extend the use of the term to conflicts within the legal systems of nation states and even the pluralism of state law and other para-legal orders. Last, but not least, “conflicts law” is not an additional legal discipline, but seeks to defend the notion of law-mediated legitimacy at all levels of governance. Its transnational agenda is indebted to the Kantian insistence on a cosmopolitan “lawful condition” (Rechtszustand)2 as a regulative idea; the elaboration of this project is


indebted to the procedural paradigm of law – at all and between all levels of governance.  

I.2. **STRUCTURING THE ARGUMENT**

The first step of the argument will, accordingly, defend the comprehensive importance of the conflict laws methodology. It will hence assume an infra-state constellation without mentioning explicitly inter-state diversity and multi-level governance. Its objective, however, is to conceptualise – in legal terms – the notion of “always socially embedded markets” in a way which is compatible with the postnational constellation. This conceptualisation, so we suggest, has to start by replacing inherited distinctions between the private – the economic – sphere and the public – the political – sphere by an understanding of the “economy as a polity” with “conflicts law” in the sense defined above as its inherent legal structure (Section II *infra*). The following section on European law criticises both the view and the expectation that the law of the European Union will develop into an ever more comprehensive substantive *corpus juris* of supranational validity. The conflicts law approach seeks to replace this striving for unity as homogeneity with a striving for *unitas in pluralitate*: a law structuring the process of Europeanisation through a fair and prudent management of the tensions arising out of Europe’s socio-economic, political and cultural diversity (Section III *infra*). The postnational extra-European constellation and its transnational markets are, of course, different, but are, nonetheless, also institutionally “embedded” and characterised by continuous contestation over normative, social and political issues which involve both actors “within” the economy *and* the affected jurisdictions. Where law engages in mediation between the affected interests and political perspectives, it cannot invoke some legitimated authority, but can only operate horizontally – as conflicts law – and could, properly conceptualised, “constitutionalise” the transnational constellation (Section IV *infra*). As a consequence of all this, Karl Polanyi will be mentioned throughout this chapter. We do indeed believe that for one, the conceptualisation of the “economy as polity” rephrases the notion of the “always socially embedded” economy in a meaningful way, and, then, that the conflicts law approach provides perspectives for a (re-)embedding of the economy through law.

---

II. THE ECONOMY AS POLITY AND ITS LAW OF LAW-PRODUCTION

As already indicated, in the first step of our argument, the post-national constellation will be addressed only implicitly. And yet, in our conceptualisation of “the economy as polity”, the erosion of the inherited rigid distinctions between national and international configurations through the opening of economy and society is present as a background condition with far-reaching substantive and methodological implications. The most important implication stems from the insight that the economy has long ceased to be the Volkswirtschaft of the nation state, as Max Weber portrayed it at the turn of the Nineteenth century. The nation state is no longer able to control and steer its post-Volkswirtschaft, and the citizens of the nation state are no longer the only stakeholders of its formerly national economy. The core normative argument of the conflicts-law approach with its insistence on the “democracy failure” of constitutional nation states responds to the irreversible and increasingly dramatic separation between “Entscheidungszuständigkeit” (political decision-making powers) and “Entscheidungsbetroffenheit” (affectedness by political decisions) with two moves, namely, first, the request to take “foreign concerns” into account in internal decision-making processes, and, second, the recognition – in principle – of the validity claims of supranational law which can be based upon a compensation of the democracy failure of nation states. It is, however, essential to underline that, through the conceptualisation of “the economy as polity”, we seek to overcome the rigid separation of “the national”, from “the international”,

4 “Der Nationalstaat und die Volkswirtschaftspolitik”, in: M. Weber, Gesammelte Politische Schriften, 3rd ed. (edited by J. Winckelmann), (Tübingen: Mohr/Siebeck, 1971), p. 1 et seq. (“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 nation State”, thus at 14 et seq; translation by Iain Fraser).

5 The distinction stems from the analysis of risks in Niklas Luhmann’s Soziologie des Risikos, (Berlin: de Gruyter, 1991); Risk: A Sociological Theory, (New Brunswick NJ: Transaction, 2005). Luhmann was not concerned with the problems of democracy. But his distinction articulates the democracy problématique of the postnational constellation which Habermas has articulated in his first literary encounter with the integration process: “For the citizen, this translates into an ever greater gap being passively affected and actively participating. An increasing number of measures decided at a supranational level affect the lives of more and more citizens to an ever greater extent”, Staatsbürgerschaft und nationale Identität, (Citizenship and national identity), (Zurich: Erker, 1991), reprinted as Annex II to Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy [1992], (Cambridge MA: MIT Press, 1999), pp. 491-516, at 503).
sphere, as the perception of the postnational constellations as an *aliud* to “regular” configurations which would be purely internal to some national jurisdiction has simply become inadequate. “A new type of conflicts law” is, so we assert, the proper lawful form of the postnational constellation, including the economies of constitutional democracies. This assertion is certainly counter-intuitive. It is, however, of such fundamental importance for our argument that it will be built up in four distinct steps, namely, a reference to the conceptual background history to the situating of the economy and its law in the private sphere (1), the critique of this legacy in legal and social science (2), a reconstruction of Polanyi’s oxymoronic notion of the “economy as instituted process” and, lastly, the methodological reflections of these developments in an understanding of the proceduralisation of the category of law, which responds to the conflicts and contestations (4). However, we refrain from elaborating on both the links and analogies between the positions referred to, and the current debates on the legal conceptualisation of the postnational constellation.

II.1. **The Legacy of the Private/Public Divide**

The law of market economies is routinely equated with private law, while public law is perceived as operating in a distinct political sphere under a different logic. The former is supposed to organise private relations, while the latter is the origin of interventions into market processes, which have the objective of correcting market failures, the protection of the weaker party, the promotion of distributive concerns and the management of macro-economic processes. To be sure, the erosion of this distinction has been proclaimed over and over again. And yet, both this legacy and its impact continue to re-surface in ever *nouvelles costumes*. In part, it owes this strength to its theoretical basis – and sister –, the distinction between state and society, which has been conceptualised, and institutionalised in many ways, in Germany, under the heading of *Staatsrecht*, as the master disciplines of public law, on the one hand, and private law as a distinct discipline, on the other. Its more recent strong *renaissance*, however, is anchored in the globalisation process.

---


The critique of this legacy is, to a large degree, a critique of both its socio-economic premises and its democratic deficits. The traditional understanding, as well as the current defences of the functions of private law, is premised upon the assumption of the self-regulating market. The critique of this assumption is complemented by the political quest for democratically-legitimated state action. Apparently paradoxical, the moves and countermoves were of very limited importance within legal scholarship. The German case is specific, but not a real Sonderweg. Post-war Germany witnessed an unprecedented and unique success with the idea of an autonomous private law which derived its normative dignity from its commitment to the transpositive ordo of the economy, and which was to provide the ideational infrastructure for the new republic and its “social market economy”. It may seem ironic, but it is, in fact, well founded in the traditions of Germany’s Staatsrecht, that the dominant strands in public law scholarship did not interfere, and tended, instead, to treat the ordo-liberal school and its “theory of the economic constitution” with benign neglect. While this attitude was to erode, somewhat, in the social-democratic era of the Bonn Republic, the strange complacency of public scholarship was re-established as strong as ever at European level. The ideational strength of this view and its practical influence was only occasionally commented upon by public-law scholarship, and, if so, mostly affirmatively.

Not accidentally, those critical of the tradition had to rely on the backing of allies in non-legal quarters. Suffice it to mention here the two maîtres-penseurs of post-war German social and legal theory, Jürgen Habermas and Niklas Luhmann, who can both, although not mentioning Polanyi, be read as analysts of the social disembedding of the economy. Luhmann replaced the state/society dichotomy with his theory of functional differentiation. This meant a new type of insulation of the economy, which was further accentuated with the turn to autopoiesis. Functional differentiation need not be read as propagating an autonomous functioning of the economy outside society. The self-reproduction of this societal sub-system is dependent on its societal environment, and the functioning of

---

8 Equally remarkable, the patterns in pertinent European legal debate seem, on the whole, less significant than the varieties of capitalism and the diversity of European wellarian; the text takes the German example as pars pro toto.


functional differentiation. This process may, if radicalized and not tamed by internal reflexive mechanisms, distort the functioning of other systems and its human environment.\(^\text{12}\) Jürgen Habermas, in his 1961 habilitation thesis,\(^\text{13}\) complemented his twofold analysis of the sociological facticity and the practical-political implications of the separation of state and society by suggestions on its transformation into a democratic social state.\(^\text{14}\) However, in *The Theory of Communicative Action* his perspectives changed markedly. His new dichotomy of system and lifeworld, in a strange loop, restored the old world in that the economy was now conceptualised as a “system” functioning “as if” it were dominated comprehensively by strategic and instrumental action.\(^\text{15}\) This dualism was replaced in *Between Facts and Norms* by the new co-originality of private and public autonomy.\(^\text{16}\) With this move, private autonomy obtained a new constitutional dignity. This, however, was not meant to endorse the type of autonomy, which all varieties of market liberalism seek to institutionalise in private law in market economies. “Co-originality” occurs through the application of the discourse principle to “the general right to liberties … and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy”.\(^\text{17}\) Hence, the legitimacy of law depends on:

“undistorted forms of public communication and indirectly on the communicational infrastructure of the private sphere as well. This is the key to a proceduralist understanding of law.”\(^\text{18}\)

---


\(^\text{16}\) J. Habermas, *Between Facts and Norms*, note 5 supra, p. 118 et seq., (at 122).

\(^\text{17}\) Ibid., p. 121.

\(^\text{18}\) Ibid., p. 409.
It is precisely through this normative endorsement of the prerogative of democratic political processes that Habermas has again distanced himself again from Luhmann’s sociological theory of functional differentiation.19

II.2. KARL POLANYI’S COUNTERMOVE

Can one expect Karl Polanyi, writing so many decades ago, to teach us a new lesson?20 His core messages concern our queries quite directly. To be sure, his analyses of the rise of capitalism are embedded in many contexts and therefore lack the elegance and comprehensiveness of the grand social theories. But they do reveal concrete patterns which we continue to observe: an evolutionary dynamic on the one hand, and deliberate political intervention on the other. The proponents of the self-regulating market, he warns us, expose economy and society to economic and social risks, which will provoke, and, indeed, may be dependent upon, counter-movements striving for stability and protection. There is neither an invisible hand at work, which would ensure prosperity and social integration as a lasting effect of the expansion of market rationality, nor will the double movement somehow find some stable social equilibrium automatically. Stability will, in the last resort, be dependent upon political action. Our fascination with Polanyi’s analysis stems precisely from his refusal to provide us with recipes upon which society could rely complacently or derive instructions in the disciplines of social and economic engineering. This reading of Polanyi’s work as confronting us with a co-originality of disembedding strategies and of countermoves striving for social protection is certainly controversial. How likely is it, however, that the émigré Polanyi, writing after the breakdown of the liberal world economy and confronted with the rise of fascism, national socialism and bolshevism, should have envisaged a return to some cosy pre-modern world, or, on the basis of his bitter experiences, would envisage an economy in which soft modes of governance and softness would ensure stability and progress?21

Rejection of such reading does not, however, lead us to safe grounds. If “Polanyi’s message is decidedly not that a market economy works better, or works only, if it is underpinned by a network of non-economic, community-type social relations”,22 what kind of

---

22 W. Streeck, ibid.
conflicts does the economy harbour and what means has the state and/or society at its disposal to control these processes and domesticate their agents? The answers to that query are, of course, not uniform. Fred Block can be quoted as an authority among those who derive from Polanyi’s work the need for reformist welfare state politics:

“Once it is recognized and acknowledged that markets are and must be socially constructed, then the critical question is no longer the quantitative issue of how much state or how much market, but rather the qualitative issue of how and for what ends should markets and states be combined and what are the structures and practices in civil society that will sustain a productive synergy of states and markets.”

This argument, Alexander Ebner objects, downplays the Polanyian critique of the commodification of labour, land and money. The notion of the “always socially embedded market” and the political messages associated with it fail to distinguish between the policies which stabilise the market mechanism and the counter-movements which strive for its replacement.

“Indeed, the Polanyian concept of embeddedness is not associated with the rules of the market as such. Rather, it is the content of these rules with regard to the commodity fiction regarding labour, land and money that matters. A Polanyian viewpoint thus implies an integrated perspective on embeddedness and commodification: the former addresses types of social integration and the latter is concerned with the socio-ecological substance of commodity production.”

The difference is theoretically important, but seems, at the same time, too schematically constructed as well. The phenomena which, for example, Nico Stehr characterises as a “moralisation” and “politicisation” of today’s markets, are more ambiguous and more multi-faceted. Consumers, once portrayed as rent-seeking monads in the

---


24 A. Ebner, “Transnational Markets and the Polanyi Problem”, this volume, Chapter 1, Section 3.

25 A. Ebner, Ch. 1, Section 3.

models of economic theory, are increasingly perceived as politically active market citizens by consumer policy analysts and historians. They have become, Nico Stehr argues, agents in the moralisation and politisation of modern markets. Their much cited “greening” affects – in fact or potentially – one false commodity; legislation protecting consumers in cases of over-indebtedness is directly involved with the kind of social protection which labour law sought to ensure – a second false commodities is at stake. Lines which were probably formerly clear or clearer are apparently being blurred. Such evidence may appear anecdotal, but is, nonetheless, certainly compatible with the suggestions of Polanyians who underline that “congealed into every market exchange is a history of struggle and contestation”. Polanyi’s conceptualisation of the “economy as instituted process” seems to capture precisely these dynamics, “a universal tendency for societies to self-protect against ‘unregulated’ market exchange”, which Streeck’s explains by a “fundamental tension between stable social integration and the operation of self-regulating markets, [with] the latter inevitably eating away at the former unless society mustered the capacity and the will to put markets in their place and keep them there.”

II.3. THE ECONOMY AS POLITY AND ITS CONFLICTS LAW

What might all this have to do with the law? What should be readily apparent is that Polanyi’s instituted economy leaves the separation of the state and society, from which we started, far behind. The main importance of his notion for our argument, however, concerns the “social embeddedness of markets”, his messages about the provocation of “counter-movements” by disembedding strategies, the intertwinenment of market expansion and social protection, the inevitability of political contestation provoked by these tensions. The characterisation of the “economy as a polity” refers to these processes without, however, subscribing to the notion of an autonomous or self-referential economic system. It fits well

29 See note 6 supra.
31 Streeck, note 22 supra, pp. 247-248.
32 A. Ebner, Ch. 1, Section I.3; but see G. Teubner, “Societal Constitutionalism”, (note 12 supra), p. 12; B. Jessop, “Regulationist and Autopoietic Reflections on Polanyi’s Account of Market Economies and...
into widely perceived developments in the governance of capitalist economies. The more challenging issue, however, concerns the role of law. This change is both substantial and methodological. The substantial challenge concerns the legacy of the state-society and public-private division. In this regard, it seems possible – with the help of the Habermasian co-originality thesis – to reconstruct a perspective for the constitutionalisation of the “economy as polity”. It seems equally possible to establish a methodological link with the procedural paradigm of law: proceduralisation is still the only chance to defend the idea of law-mediated legitimate governance after the failures of political interventionism, hierarchical administrative governance and “substantive” legal rationality. The conceptualisation of the economy as polity brings one additional aspect to the fore, namely, the exposure of economic activities to divergent, and often conflicting, concerns, and the need for an ongoing management of these tensions. Law production, “Recht-Fertigung”, has to be accomplished in de-centralised arenas – and the legal system and its courts are required to exercise mediating and co-ordinating functions in such complex conflict constellations. This kind of law would then organise the counter-movement against the reliance on self-governing markets, on the one hand, and the practices of de-legalised quasi-political bargained co-ordination, on the other. The main query with this counter-movement is, of course, its dependence upon so many favourable conditions. We can – instructed by Karl Polanyi – assume that conflict and contestation in the economy concerns the order of the economy, and that both societal and politically formally accountable actors will make their voices heard in such processes. We can – instructed by Jürgen Habermas – underline that any legal claims, any communication in the shadow of the legal system, will assert and argue that they are justified. When we consider the implications for the design of a proper legal framework, we realise that there is realism in the procedural legal paradigm, and further note that it would, in Polanyi’s world, seem reasonable to try to make use of the potential of law in order to promote a fair handling of complex conflict constellations. We may, then, even submit that

33 “Change in the governance of capitalist economy is best captured by reference to (1) a new division of labor between state and society (e.g., privatization), (2) an increase in delegation, (3) proliferation of new technologies of regulation, (4) formalization of interinstitutional and intraintitutional arrangements of regulation, and (5) growth in the influence of experts in general, and of international networks of experts in particular. Regulation, though not necessarily directly by the state, seems to be on the increase despite efforts to redraw the boundaries between state and society”, thus David Levi-Faur, “The Global Diffusion of Regulatory Capitalism”, (2005) 398 Annals AAFSS, pp. 12-32, abstract – no mention of law and/or the role of institutional configurations.

34 A striking confirmation, at any rate more than merely anecdotic evidence is the observation of “de facto governance” phenomena in the field of nano technology by Arie Rip. “Whatever governance arrangement or
a socially-embedded economy requires what Rudolf Wiethölter has, somewhat enigmatically, called the “Justifications of a Law of Society” (Recht-Fertigungen eines Gesellschafts-Rechts) – and we would underline that this type of law remains dependent upon the quality of the inter-actions among the law-producing actors, the intensity of societal scrutiny, and the capability of courts and other legal fora to examine whether such law production “deserves recognition”.

All of these dimensions – the need to respond to a broad variety of economic and non-economic concerns; the need to examine the validity of conflicting claims continuously – are clearly present in postnational constellations – albeit in distinct institutional settings. To this distinctiveness and its legal importance we now turn, in the presentation of “Conflicts Law as the Legal Paradigm in the Postnational Constellation”. We herein distinguish between Europeanisation (Section III.) and globalisation (Section IV.). The affinities between all these levels and the importance of their institutionalised specifications should become apparent in the course of argument.

approach will be developed and implemented, this occurs in a context in which actors are already attempting to put forms of governance in place. And where patterns emerge which shape thinking (e.g., about risks) and action (e.g., about regulation) and thus have a governing effect without necessarily linked to intentional arrangements (e.g., a specific political culture). Governance, he continues, is hence to be “understood as the result of interaction of many actors who have their own particular problems, define their goals and follow strategies to achieve them. Governance therefore also involves conflicting interests and struggle for dominance. From these interactions, however, certain patterns emerge, including national policy styles, regulatory arrangements, forms of organisational management and the structures of sectoral networks. These patterns display the specific ways in which social entities are governed. They comprise processes by which collective processes are defined and analysed, processes by which goals and assessments of solutions are formulated and processes in which action strategies are coordinated. (…) As such, governance takes place in coupled and overlapping arenas of interaction: in research and science, public discourse, companies, policy-making and other venues”. It is remarkable, albeit unsurprising, that policy-makers need to resort to expertise and management capacities that are simply not available in the political and administrative sphere. It is equally unquestionable that these processes have to cope with multi-faceted issues and require the coordination or balancing of potentially conflicting concerns. We should recognise, Rip argues, that those involved in the development of the new technology are aware of the need to ensure its acceptance in the long run. Even where its proponents qualify public anxieties as irrational, they will nevertheless have to care about the “trust” of the broader public” (“De facto governance of nanotechnologies”, paper delivered by a.rip@utwente.nl at the TILTing Conference, 10-11 December 2008; on file with author).


Contrasting, but also in many ways converging the views of G. Teubner, (supra note 12) and (infra note 106) and, idem., “State Policies in Private Law? A Comment on Hanoeh Dagan”, in: (2008) 46 American Journal of Comparative Law, pp. 835-848. “Polytexturality” of private law captures many facets of the “economy as polity”. The contrast is with the legitimacy problématique. It is difficult to find out with some precision how these regimes come about, and hence difficult to understand why they should deserve recognition simply because they (may?) establish some primary and secondary rules. It is, of course, also difficult to demonstrate that the shadow of law and democracy in conjunction with reputational interests and societal observation and critique is strong enough to promote civilised contestation and deliberated conflict resolution as civilised as it is envisaged here.
III. CONFLICTS LAW AS LEGAL PARADIGM IN THE POSTNATIONAL CONSTELLATION I: THE EUROPEAN UNION

The plea for a re-conceptualisation of European law rests upon intuitively stringent assumptions. In the Union of twenty-seven – and, in the future, even more – jurisdictions, in which socio-economic diversity is deepening rather than diminishing, which continue to live with different historical memories and a diversity of, for the most part bitter, experiences, in which cultural diversity is a commitment of constitutional importance, and which is witnessing a re-vitalisation of regionalism, the search for “unity” cannot mean the establishment of political, economic and cultural homogeneity. The Union is better advised to promote mutual respect and toleration, to develop fair and prudent mechanisms for continuous conflicts management – and to make productive use of its diversity. The conflicts law approach seeks to provide a robust legal framework in which such perspectives can be legitimately pursued and developed. This framework has little more than its name in common with the search for private law justice in the von Savignyian tradition of private international law; it has also leaving other conflict-of-laws methodologies behind which seek organise the the law of the postnational constellation on the basis of legal principles guiding the choice between national systems of rules. All of these traditions remain, more or less intensively, overshadowed by the legacy of “methodological nationalism”, and, by now, counter-factual assumptions of territorial integrity and political autonomy. In contrast, postnational constellations are, instead, characterised by mutual interdependences which the EU has juridified very strongly (see Section IV.1), in which transnational governance arrangements become inevitable (Section IV.2), and which, last, but not least, are bound – even more than political system of nation states – to seek the co-operation of non-governmental actors (Section IV.3). The three dimensions are distinct. They do not, however, represent alternative disciplines. With its three dimensional fabric, the conflicts law approach seeks to respond to general post-interventionist developments of legal systems and the varieties of the legal patterns which these developments have generated at transnational level.

37 Article 3(3) Treaty of Lisbon.
III.1. **CONFLICTS LAW’S FIRST DIMENSION: A HORIZONTAL CONSTITUTION FOR THE EUROPEAN BUND**

The first, and, indeed, fundamental, step of the re-orientation which Jürgen Neyer and I suggested back in 1997 was the replacement of traditional – in our terminology “orthodox” – doctrinal understanding of legal supranationalism with the notion of “deliberative supranationalism”. Our argument sought to avoid the debate about Europe’s democratic deficit by inverting the usual perception of Europe’s legitimacy dilemma. Instead of lamenting that Europe does not meet the standards of democratic constitutional states, we suggested that European law could be legitimated because of its potential to cure the structural democracy failures of the nation states. As we then phrased it:

“The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies pre-suppose and represent collective identities, they have very few mechanisms to ensure that ‘foreign’ identities and their interests are taken into account within their decision-making processes.”

40

The functional topicality of the argument rests on its potential to respond constructively to the openness and inter-dependence of formerly national societies and their *Volkswirtschaften*. Its normative attractiveness rests upon its appeal to democratic values of fundamental importance. If, and if so, because, to rephrase our intuition in Habermasian terms, “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted”, the commitment to democracy is not only compatible with, but also requires a supranational complement. This complement cannot be the democratic state itself. Such a condition would only perpetuate our difficulty *ad infinitum*.


41 J. Habermas, Between Facts and Norms (note 5 supra), Contributions to a Discourse Theory of Law and Democracy, trans. William Rehg, (Cambridge MA: The MIT Press, 1996), p. 110. Again, concurring: R. Howse & K. Nicodatis, ibid., p. 185: “At least since Rousseau, the essence of democratic self-determination has been the notion that citizens can only be legitimately coerced by laws of their own making ....”
In our reading of important provisions of European primary law and a very substantial amount of the case law of the ECJ, the European project found a way to constitutionalise itself. European law had, so we argued, validated principles and rules that both met with and deserved supranational recognition because they constituted a palpable community project. This kind of law, we concluded, was not undemocratic, but was compensating for the democratic deficits of the nation state. 42

The conflicts approach diverts from traditional conflict-of-laws reasoning not only with this normative justification of a supranational legal duty to respect foreign private and public law, 43 but is also designed as a response to the specifics of multi-level governance, as so lucidly summarised by Renate Mayntz:

[The conflicts approach] “distinguishes between vertical, horizontal, and diagonal legal conflicts in the EU, i.e., conflicts about which legal norms apply to a given case. These three types of legal conflict can be applied to MLG generally. Vertical conflicts are conflicts between legal regimes at different territorial levels; they occur both between national law and EU legislation, and between EU law and WTO rules. In horizontal conflicts, the injunctions of different national laws to a given case diverge. Horizontal legal conflicts occur typically in the context of transactions involving the movement of persons, goods, or finances (24) across national borders. Diagonal legal conflicts finally occur if regimes at two different levels that apply to different aspects of a given case make contradictory demands.” 44

It would, however, amount to a performative self-contradiction to present the conflicts approach as a recipe through which responses to the controversies arising from the tensions between European and national law could be derived through syllogistic conclusions. What the approach does provide is, first of all, a framework, within which these

42 It seems noteworthy that the German Constitutional Court, in its heavily attacked judgment of 30 June on the Treaty of Lisbon (available at: www.bundesverfassungsgericht.de) has introduced a conflicts-law dimension in its interpretation of the Basic Law. This occurred by assigning equal constitutional status to Germany’s commitment to European integration as enshrined in Article 23 of the Basic Law, on the one hand, and to the defence of the democratic essentials of the Basic Law as laid down in the “eternity clause” of Article 79(3), on the other. See D. Chalmers, “A Few Thoughts on the Lisbon Judgment”, in: A. Fischer-Lescano et al. (eds), The German Constitutional Court’s Lisbon Ruling: Legal and Political-Science Perspectives, (Bremen, ZERP-Discussion Paper 4/2009). The co-originality and categorical difference of both, democracy and the commitment to integration, could have (and should have!) been more constructively approached by dint of a conflicts-law methodology.


tensions can be adequately addressed. This quality is of particular importance in the vast area of “diagonal” conflicts mentioned by Mayntz. Their legal and institutional background is an allocation of powers to authorities at different governance levels where problems can be resolved only if the fragmented powers are co-ordinated. It follows from the principle of the enumerated empowerment of the European Community, now the Union, and confirmed by Article 7 of the Treaty of Lisbon, that the primacy rule can find no application here. At the same time, it should be evident that ready-made answers to these constellations, as suggested by the proponents of “orthodox” supranationalism and an extensive understanding of the pre-emption doctrine, are misconceived. The conflicts approach can, instead, base its horizontal constitutionalism on the conceptualisation of the Union as a “Bund” (Federal Union). This category was re-discovered by Christoph Schönberger. His re-discovery – and, of course, even less so Carl Schmitt in his Verfassungslehre – did not, in contrast to the approach developed here, base these commitments upon the structural democracy deficits of nation states, which can be, and, in fact, have, in important respects, been compensated by European law and the jurisprudence of the ECJ. European primary law, in this view, has the vocation to ensure its own normative quality, 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.


46 The first to use it in a European context was none other than the Dark Lord of German Constitutionalism: Carl Schmitt, in a brief section of his Verfassungslehre (Berlin: Duncker & Humblot, 9th ed. 1993, p. 363 et seq.). According to Schmitt, the Bund is an entity established by a free agreement between the constituent Member States. It establishes a lasting order, charged with the realisation of the objectives common to the Member States among which the achievement of lasting peace is paramount. As such, the Bund requires a significant change in the legal and political status of the Member States; for a detailed analysis, see Matej Avbelj, “Theory of European bund”, Ph.D Thesis EUI Florence 2009; Chapter 3, p. 109 et seq.


48 See, on these terms, notes 1 and 36 supra.
III.2. CONFLICTS LAW’S SECOND DIMENSION: CONSTITUTIONALISING TRANSNATIONAL CO-OPTION

Rainer Schmalz-Bruns was the first to expose the notion of “deliberative supranationalism” to a thorough critical analysis. 49 To present the European Union’s opaque comitology system as a legitimate mode of transnational governance meant, the apparently fair (deliberative) committee proceedings notwithstanding, that a “traditionally technocratic model of policy consultation” had to be favoured. Deliberative supranationalism was irreconcilable with, if not diametrically opposed to, deliberative democracy. This has become a standard critique, albeit one which mis-states its object. 50 Schmalz-Bruns, has later deepened his critique: an equation of transnational co-operation and democratic rule, he argued, is a categorical error and is inconceivable. 51 This, however, is precisely the problem which the “second dimension” of conflicts law seeks both to address and to resolve through a “constitutionalisation” of transnational co-operation. A categorical difference does indeed exist as long as transnational co-operation does not transform itself into the formation of a single democratically governed polity. When we realise this difference, the Achilles heel of Schmalz-Bruns’ objection becomes apparent. The categorical denial of the possibility of legitimate – democracy-compatible – cooperation between democratically legitimated polities is to negate the potential of conflicts law – and by the same token the political philosophy of republican cosmopolitanism from Kant and its contemporary followers. 52 It fails to take the structural democracy deficit of constitutional states into account. It implies, if thought through, that democracies must respond to the external affects of their activities by some kind of merger. Conflict of laws is based upon the opposite premise for sound factual and normative reasons. It is the normative core conflicts law that accepts divergence and seeks justice between different entities. This acceptance is a response to the socio-economic and political diversity of the concerned jurisdictions. It means, by the same token, that their democratic autonomy is respected. To accept these premises is to define a challenge which the critique of deliberative supranationalism fails to address. The challenge is to

conceptualise transnational co-operation in such way that it “deserves recognition”. “Constitutionalisation” is the term which defines this task. The categorical distinction between “regular” and “conflicts-law” justice is an indispensible pre-requisite for the proper design of co-operation. This is by no means an easy task. To submit that this is the real challenge of transnational governance does not, however, infur that one defends transnational technocratic rule.  

It is, nevertheless, to some degree understandable that deliberative supranationalism has been identified with the technocratic reputation which Europe has built up and continues to strengthen through the establishment of its ever more sophisticated machinery of transnational governance. Pertinent self-descriptions openly propagate technocratic visions which downplay the political dimensions of the European praxis. De-legalisation strategies, as initiated by the “turn to governance” in the Commission White Paper of 2001, strengthen these tendencies.  

These developments are, apparently, have their fundamentum in re. Deparlamentarisation, bureaucratisation and judicialisation are all sideeffects of Europeanisation and, even more so, of globalisation. The factual strength of these tendencies does not, however, invalidate the critique of technocratic reason. It rather necessitate its re-design and Aufhebung in new visions of democratic administration and governance. Such perspectives do exist: Europe seems better equipped than any international arena to establish regimes under which transnational governance can derive its

53 Admittedly, a broad range of issues need to be considered: the selection of the expert circles should also be included, ties with parliamentary bodies, on the one hand, and with civil society, on the other; reversibility of decisions taken in the light of new knowledge or changes in social preferences. See Ch. Joerges & M. Everson, “Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication”, in: H. Hofmann & A. Türk (eds), EU Administrative Governance, (Cheltenham: Edward Elgar 2006), 512-540. and, with quite similar intuitions, L. Viellechner, “Können Netzwerke die Demokratie ersetzen?”, in: S. Boysen et al., (eds), Netzwerke – 47. Assistententagung Öffentliches Recht, (Baden-Baden: Nomos, 2008), pp. 36-57, at 48 et seq.


legitimacy from an institutional design in which European citizens can understand transnational governance activities as a product of the ensemble of both EU and national policy-making. Precisely because of these tendencies and the need for modern modes of governance to liaise with non-governmental bodies, the conflicts law approach needs to develop its third dimension, namely, the means and yardsticks for the supervision of non-governmental regimes.

III.3. WHEN DO PARA-LEGAL ORDERS DESERVE RECOGNITION? ON THE INDISPENSABILITY THE THIRD DIMENSION OF THE CONFLICTS LAW APPROACH

At all levels, we can observe the “privatisation” trend in governance practices, which is difficult to reconcile with the inherited notions of law-making and the division of powers in constitutional democracies. Within constitutional democracies, we can somewhat confidently assume that both “pure” civil and hybrid governance arrangements remain exposed, in multifaceted ways, to examination under the public constitution. Perhaps more surprisingly, there are, at EU level, functional equivalents which are both available and actually in operation.

To date, the most significant move towards the privatisation of European governance, namely, the “new approach to technical harmonisation and standards”, provides an example of exemplary importance. On closer inspection, the adoption and implementation of this project looks very much like a Polanyian story about disembedding movements and re-embedding countermovements. It was the strategic objective of this project, as designed, in particular, by Lord Cockfield in the early 1980s, to overcome the many non-tariff barriers to trade in the European market. This move towards European market-building was never as disembedded as many observers and supporters tended to perceive it. 58 Quite to the contrary, the type of “private transnationalism” (Harm Schepel) which the new approach established re-constructed the embeddedness of the European market in a particularly sophisticated fashion. True, under this approach, European legislation disburdened itself significantly by focussing on essential safety requirements alone, while the concretisation of the latter was delegated to the European standardisation organisations CEN, CENELEC and ETSI. True, the inclusion of non-state actors signified de facto a delegation of legislative competencies. And yet, the new arrangements proved to function as a highly civilised polity. Widely accepted and stable procedures have emerged, which synthesise legal principles, professional standards and participation opportunities, and lead repeatedly to consensual problem-solving.

Significantly, European standardisation has refrained from centralisation, and, with its non-unitary network structure, guarantees that national delegations can make their viewpoints heard. Not only the national and European bureaucracies, in particular, the European Commission, but also courts are always latently, and, at times, actually, present. Information systems alerting pertinent bodies to product risks, product safety and product liability law can be invoked, and European competition law has a potential to supervise the internal constitution of standardisation bodies. The laws strong shadow is complemented by internal operational modes. Harm Schepel, not citing Polanyi, probably even unaware of his work, grasped the political dimension of the economy, and the co-existence of disembedding politics and re-embedding movements very succinctly. As he argued, the reason for the success of Europe’s standardisation policy was that its procedures followed a political, and not merely economic or scientific, rationale. Fair procedures, transparency, openness and balanced interest representation are the yardsticks according to which consultations within the respective institutions are geared. 59

It should be readily apparent that all of these observations coincide with what we have asserted about the economy as an instituted polity and about its mode of leaving the inherited public-private notion behind. 60 What is so noteworthy about the example of standardisation is the indirect impact of the official legal system. Admittedly, the political processes ordered by the law of private transnationalism are not directly reached by public policy or public law. In other words, their juridification seemingly emanates “from below”. This sort of “law-making” takes account of the fact that the modern economy and its markets simply are not executing some economic Gesetz, but need to address politically-sensitive issues. The law’s shadow has very clear contours. European standardisation is bound by agreements with the European Commission; the supervision of the standardisation practices is in place; European competition law can be used as a means of structuring standardisation procedures; product liability law and tort law can both exert indirect controls and such supervision can be complemented by reporting systems, private testing, and other mechanisms. 61

59 Ibid., p. 223.
60 Section II.3 supra.
Is all this still accessible to conflict-laws methodologies? The example of European standardisation is not radically different from the comitology pattern; the role of the politicised economy is significantly stronger here. But the step to be taken is not too difficult. Conflict of laws has throughout its long history dealt with the acceptability of the laws of “foreign” jurisdictions. Once we recognise that our statal law cannot operate autonomously, but is dependent upon the norm generation in non-stat al spheres, we need re-define its scope. However, this re-definition must not follow the privatisation patterns by which the prevailing strands of conflict of laws theories have decoupled transnational private governance arrangements from any significant public scrutiny. The recognition of para-legal arrangements must be conditioned by their normative quality. The yardsticks of the criteria to be applied will primarily concern norm-generation processes, and their implementation will have to engage in various legal areas such as anti-trust and tort law. This, then, is the model for the constitutionalisation of private governance.  

IV.4. AN INTERIM CONCLUSION ON EUROPE’S CONFLICTS LAW  
The defence of the rule of law – of a law which is procedural in its approach and hard in its prescriptions – is well conceivable in theory, but not so likely to succeed in practice. In all of its three dimensions, the conflicts-law approach to European law is under stress. It is threatened by new tendencies towards a very orthodox and centralist reading of supremacy, which contrast markedly with the, heretofore regularly prudent handling of the tensions between “unity and diversity”. Similarly, the prospects for a constitutionalisation of the second dimension of conflicts law seem by no means promising, and one cannot even be confident that the standardisation system will defend its established qualities. One intervening variable of crucial importance for its future development is, of course, the globalisation process, to which we now turn.

---


64 See Ch. Joerges, “Integration”, note 35 supra; more optimistic, however, E. Vos, “50 Years of European Integration, 45 Years of Comitology”, in: A. Ott & E. Vos (eds), Fifty Years of European Integration: Foundations and Perspectives, (The Hague: T.M.C. Asser Press, 2009), pp. 31-56, at 49 et seq.
IV. CONFLICTS LAW AS THE LEGAL PARADIGM OF THE POSTNATIONAL CONSTITUTIONALISM

Polanyi’s messages on the embeddedness of markets and the co-originality of disembedding processes and re-embedding countermovements concern “all levels of governance”. Not only in national markets, but also in the European market-building project, and now at international level, we are witnessing this duality. Legalisation and regime-building are, in fact, accompanying economic globalisation – this much we know for sure, although, to date, there is not much in terms of social impact and normative quality.

The most important institution concerned with the functioning of international markets is the WTO. And the parallels between its operation and the European experience, the back and forth between disembedding strategies and re-embedding counter-movements, seem striking. Just as within the European Community, efforts to defend the health and safety of citizens have proven to be both powerful irritants and transformative accelerants of the European market-building project, and, as a consequence, international trade has experienced a shift of paradigmatic significance. The main objective of the General Agreement on Tariffs and Trade (GATT), concluded 1947, was the reduction of the tariffs introduced by states to protect their national economies. Since the early 1970s, however, non-tariff barriers to free trade have become the main focus of attention. This shift was necessitated by the intensification of domestic economic regulation, especially in the fields of health and safety, consumer and environmental protection (the period of legal materialisation). In 1994, the international trade system adapted itself to this situation by transforming the GATT into the World Trade Organisation (WTO). The tensions between trade liberalisation and non-trade concerns have become the prime object of WTO activities and litigation.

Hence, it seems worthwhile to explore the potential of the conflicts methodology in the WTO context. Such an exploration has to consider that Europeanisation and globalisation differ markedly in various, sociologically important and institutionally obvious respects. They relate to all three dimensions of the conflicts law approach. This is most obvious with regard to the first dimension. The analytical and normative core upon which the re-conceptualisation of European law as conflicts law is based, namely, the irresistible expansion of functional inter-dependencies, on the one hand, and the quest for a cure of democracy failures, on the other, concern the transnational constellation in general.65

65 Very similarly, see R. Howse & K. Nicolaïdis, “Democracy without Sovereignty”, (note 37 supra), pp. 183-
tariff” barriers to trade do have external effects; inter-dependencies of the economies of WTO Members do exist. Resort to law as a means not of “constraining democratic regulatory choices” but of “disciplining the process” by which those choices are arrived at, including requiring policymakers to have at least turned their minds to alternatives less restrictive of trade”, seems legitimate. However, it has to be taken into account that the supranational validity of the European conflicts law as we propagate it rests upon a commitment endorsed by the “Bund” among European states and societies, which has no equivalents in the WTO Agreement.

This weakness has implications also for the second dimension of conflicts law. Non-tariff barriers to trade are one of the factors that have generated a new “geological layer” in international law, namely, “international law as Regulation”. Regulatory policies are closely linked to WTO law. There is an irrefutable need for the second dimension of conflicts law, which the GATT had been able to neglect. However, the establishment of an equivalent at international level to the European legislative and administrative competences upon which Europe can build in its co-ordination and implementation of regulatory policies is inconceivable. The transnational “regulatory layer” must organise itself in different modes. Transnational regulatory policy is bound to resort to an even stronger involvement of non-governmental actors and self-regulation. And, in this respect, Europe is again much better equipped to organise and to supervise that type of praxis.

To rephrase these assumptions and conjectures: the three-dimensional fabric of the conflicts approach has a – so to speak – universal fundamentum in re. Both the European and the international development follow the same evolutionary logic. Their development responds to differentiations which national legal systems experienced in the transformations of liberal Rechtsstaatlichkeit to the welfare state, to regulation and to new modes of governance. This diagnosis does not, of course, inform us about the efficiency and

---


68 Reliance on courts as agents of transnational law is wide-spread but difficult to understand if not qualified by an acknowledgment of the cognitive and managerial restraints under which the judiciary operates. It is even more difficult to accept that Courts, or a “Verbund” of courts should be the leading institutional actor in the
performance of these re-arrangements, let alone about their normatively proper design. This problématique has to be examined separately in all three dimensions. For obvious reasons, we will have to proceed here extremely selectively and refrain from any systematic survey of the present?/contemporary theoretical debates, as well as from detailed analyses of individual fields.

IV.1. THE FIRST DIMENSION OF CONFLICTS LAW IN TRANSNATIONAL MARKETS
The discipline traditionally dominating the law of international trade and economic relations was a branch of conflict of laws, albeit an unruly one which steadily experienced the blurring of its various boarder lines. 69 “International economic law” sought, first of all, like its mother discipline private international law, to determine the applicable law in cases with links to different legal orders; and, just like international administrative law, it had to examine the international (extra-territorial) scope of the mandatory rules of the forum, and to assess the extra-territorial effects of practices originating in other jurisdictions. The development of these objectives had, on the one hand, to respond to the rise of the regulatory and the welfare state – and hence to establish ever new sub-branches of conflict of laws, and, on other, to respect the impact of international organisations – and, hence, to come to terms with international law.

IV.1.1 A Transnational Conflicts Law With a Cosmopolitan Imprint
Among the handful of scholars 70 who have mastered this process of differentiation and sought responses to the risks of the legal fragmentation is Andrew F. Loewenfeld, the author of a truly comprehensive treatise 71 and the/a/0 spirits rector of the Third Restatement of Foreign Relations, 72 which states in § 402 and § 403, the pertinent provisions on the “Bases of Jurisdiction to prescribe”:


70 On the following, see the analysis in F. Rödl, “Weltbürgerliches Kollisionsrecht“, note 39 supra, Teil 1, C II 2.

71 Lehrbuch AL ##

“Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)

(a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory.

(2) the activities, interests, status, or relations of its nationals outside as well as inside its territory …”

§ 403

“(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including …”

What these provisions seek to accomplish is a nothing less than a comprehensive “juridification” of international economic relations. This is an objective which departs quite radically from the traditions which have dominated the field. The Restatement, and even more so Loewenfeld himself, in his academic writing, seeks to get beyond the “methodological nationalism” which dominates the tradition of private international law. Systematic comprehensiveness and cosmopolitanism, however, come at a price. The suggested vague formula very much resembles those used by the protagonists of a cognitive opening of the law of the world society to such a degree that one wonders with Karl-Heinz Ladeur as to whether they can meaningfully be called “law”. The second difficulty concerns the empowerment of judges to adjudicate matters of high political sensitivity, and economic and social complexity. To both of these queries, the three-dimensional conflicts law approach seeks to respond by its internal differentiations. Since it is not possible to

74 See the analysis of Germany’s leading minds in the field by F. Rödl, “Weltbürgerliches Kollisionsrecht”, (note 39 supra), Teil 1, B.
75 In this volume, see, in particular, M. Amstutz, Ch. 15.
76 This volume Ch. 16.
extract, from the general clauses of some “social” human rights, meaningful guidelines for
the decision of issues with complex economic, social or technological dimensions, national
law has to provide respect for the inclusion of expertise in regulatory issues, to establish
adequate institutional mechanisms – and to resort to proceduralised supervision. It cannot be
otherwise in transnational contexts.

IV.1.2 The Affinities of the First Dimension of Conflicts Law with WTO Law

WTO law may serve here to illustrate how these difficulties can be overcome and where the
potential of the first dimension of conflicts law ends. The transformation of the GATT into
the WTO in 1994 can be understood as the international response to the growing importance
of non-tariff barriers to trade. These barriers reflected the same kind of concerns about the
protection of health, safety, and the environment, which have led to the entanglement of the
European internal market project with wide areas of social regulation and the establishment
of Europe’s sophisticated regulatory machinery. However, this example cannot be emulated
at international level. These institutional discrepancies, it is submitted, militate for a turn to
civil law at WTO level, which must reflect the lower level of legally-binding
commitments and the lack of genuine regulatory and administrative competences. It is by no
means paradoxical to assert that it is precisely upon the basis of such an acceptance of the
restraints on substantive decision-making powers that the WTO law may find constructive
responses to its precarious legitimacy. It is furthermore unsurprising, that the WTO, as it is
actually administered, can, in fact, be read as a conflicts law exercise, or that the conflicts
perspective would, at least, offer sound alternatives to the actual practice. In Hormones, such
an affirmative reading of the Appellate Body Reports is, indeed, possible, while the Panel
Report in the GMO proceedings is immune against such benevolent exercises.

V.1.2.1 Hormones in Beef: A Case of Manageable Proportions and Prudently Managed

In Hormones,78 the subject matter was the administration of growth hormones to cattle —
illegal in the EU, but a/0 common practice in the US. Which law is applicable? This is the
question that traditional conflict of laws would pose. But this is not the question that the
Appellate Body (AB) was confronted with. The Appellate Body had to look for guidance in
the SPS Agreement, which provides, in its Article 2.2, that trade-restricting measures cannot

77 The following draws on Ch. Joerges, “Judicialization and Transnational Governance: The Example of WTO
Law and the GMO Dispute”, in: B. Iancu (ed), The Law/Politics Distinction in Contemporary Public Law
78 Appellate Body Report EC—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R
be “maintained without sufficient scientific evidence”, and adds, in Article 5, that they must be based upon the risk assessment methods of the relevant international organisations. The similarity with/to the resort to “objective” meta-norms in European litigation on the justification of national regulatory provisions is striking. The SPS provisions just cited can be rationalised as committing litigants to transnationally-acceptable meta-norm, namely, the recourse to “science” as on objective arbiter. Clearly, this is not to say that “science” could provide such objective guidance. The invocation of scientific knowledge as a peacemaker is not that innocent. Science typically cannot answer the questions posed by politicians and lawyers. It cannot evaluate ethical and normative controversies about numerous technologies; and last, but not least, consumer angst can be so significant that neither policy-makers nor the economy dare to ignore it, although scientific experts might assess a risk as being tolerable or even marginal.

All these difficulties, however, do not stand in the way of extending the conflicts law approach to WTO law. They do not jeopardise the insight that – when dealing with regulatory differences – the pursuit of a meta-norm might be more convincing than the search for substantive transnational rules. Even when the meta-norms remain too hard to find or look all too indeterminate, they may, nevertheless, further the search for a fair compromise. The hesitancy, even the refusal to hand down an authoritative holding on the substance of the hormones litigation, must not be equated with a refusal to answer questions which the litigants are entitled to obtain. The answers which WTO law can legitimately give must reflect the limits of its own competencies. This is, indeed, what the Appellate Body did. It has accepted, in principle, the need to integrate regulatory policies into the system of free trade. It, nevertheless, shied away from telling the litigants whether the Americans or the Europeans had found the proper universally valid answer. The Appellate Body even understood and respected the limits of science-based positive criteria – and found a prudent way out of an apparent dilemma. By pointing to the need for a risk analysis without determining the definite meaning of that specific yardstick, it was nevertheless able to structure the ongoing controversy, and generated a generally civilised conduct of the ongoing conflict.

However, this jurisprudential caution is in striking contrast with the Panel Report in the GMO case.


80 The Report of the Appellate Body of 16 October 2008 on the Continued Suspension of Obligations in the EC
The Example of the GMO Dispute: An Exercise in Commodification

GMOs are the most technologically advanced and the most controversial of all foodstuffs, if not of all consumer products. As is well known, the US and the EU, again the main actors in the dispute, differ in their regulatory approaches to GMOs in two significant respects: while the US focuses on the health risks posed by food, the EU follows a more comprehensive approach, placing an additional and greater emphasis upon environmental risks. Unless evidence exists which confirms a risk, the US authorities will approve products. In contrast, the 1992 Treaty on European Union constitutionalised the “precautionary principle”, so that all legislative, administrative and judicial decision-making within Europe must respect the notion that any indistinct hazard must be guarded against (Article 174 (2) EC).

Again, we have to ask whether this type of conflict can be resolved properly by “science”? It is, of course, to be underlined that EU’s precautionary principle does not provide much guidance. Small wonder that the AB, in the Hormones Case, had found that:

“[the precautionary] principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement.”

But by this rejection of the European enigma, it did not empower another emperor without clothes. The GMO panel takes a very different step. Recalling “that, according to the Appellate Body, the precautionary principle has not been written into the SPS Agreement as a legitimate ground for justifying SPS measures”, the panel proceeds to explain that “even if a Member follows a precautionary approach”, its SPS measures need to be “based on a (‘sufficiently warranted’ or ‘reasonably supported’) risk assessment”. This is a strange constitutionalising move. It seems readily apparent that the WTO panel is not prepared to recognise the constitutional commitment of any of its Members to precaution. WTO

---

Hormones Dispute (Complainant: EC), WT/DS320/AB/R is equally cautious. It confirmed that the inclusion of the risks of an abuse in the administration of hormones in EU law is compatible with Article 5.1 of the SPS Agreement (paras. 548-555; 617-619) and refused to determine definitely what level of uncertainty is uncertain enough where WTO members base precautionary measures on Article 7.1 of the SPS Agreement (paras. 617-619; 685-686, 701-703).


Note 85 supra, para. 124.

Para. 7.0365 note 1905.
standards trump European constitutional commitments – this is the implication and the message.

It is instructive to contrast the European and the WTO constellations at this point. Although the ECJ has imposed significant burdens on Member States when invoking their autonomy in risk assessments, the Court has refrained from drawing any rigid lines. Why such self-restraint? Could it be that the ECJ did not want to settle the dispute on GMOs, but respected a framework within which competing positions are continuously discussed and negotiated? Themost problematical aspect of the Panel Report, in my view, is that it seeks to de-legitimate even this type of indeterminate response to scientific controversies and political contestation. Exercising prudence of a different kind, the panel decided that the SPS Agreement was applicable to the authorisation of GMOs, and could then point to Article 8 SPS Agreement, whose provisions require that applications must be processed without “undue delay”. This, again, is a strategic manoeuvre of fundamental substantive importance. The private right of applicants seeking authorisation for their products trumps political sensitivities; thus, the fact that time may be needed to debate domestic political and ethical issues is irrelevant. Why not consider and respect the enormous difficulties of the Union to settle its conflicts? The GMO panel found that completion of the approval process had been “unduly delayed” in 24 cases. Accordingly, it requested that the EU bring its measures “into conformity with its obligations under the SPS Agreement”, in effect, asking the EU to complete approval procedures for all outstanding applications.

The panel’s critique of EU Member State autonomy in relation to safeguard measures was equally indirect but effective. France, Germany, Austria, Italy, Luxembourg and Greece were told that their bans on the marketing and importation of EU-approved biotech products were incompatible with WTO law. Again, the panel arrived at this result in an indirect way. It did not question the validity of the European regulatory framework and/or its institutional balancing. It nonetheless opined that, since the EU’s scientific committee had judged the relevant biotech products to be safe, the named states had failed to undertake risk assessments that would “reasonably support [their] prohibitions” under the SPS Agreement. SPS standards overrule Europe’s precarious institutional settlement. Could it be that no authority (certainly not a WTO panel) is entitled to re-write European law of constitutional dimensions in the name of sound science?
IV.1.3 An Interim Conclusion on WTO Conflicts Law

The affirmative reading of the Hormones case, which was suggested here, endorses the hesitancy of the Appellate Body to hand down any definite decision, and the critique of the GMO Report complains about an illegitimate assumption of powers by that body. The basis of affirmation and critique is identical: The WTO lacks the power to take a definite stance on true conflicts which concern matters of high political-sensitivity and far reaching distributive implications. Positively put, this objection is a defence of both the rule of law and of its administration by bodies which we can understand as properly legitimated by us, the peoples. This provokes the follow-up question of whether the law may require not to decide. A positive answer to this question is not incorrect, although it is incomplete. The insistence on the rule of law and its administration by legitimated bodies is “hard” in that it implies that one has, especially at international level, to acknowledge that there are both factual and normative limitations to “legalisation” and “judicialisation”. It remains incomplete, however, because these non-legalised spheres may be open to alternative handlings of such disputes. They may be understood as diplomacy, or, closer to the traditions of conflict of laws, comitas. However, the ambivalent history of this notion need not concern us here. We do not seek to defend the refusal to enter into a “lawful condition” which, as Kant has insisted, should be considered an obligation. What we need to accept, however, are the varying intensities of positive commitments. Among the Member States of the European Union, comitas can be said to have mutated into a legal duty of co-operative problem-solving, while, at WTO level, such a wide-ranging conversion of comitas into mandatory commitments is inconceivable.

Seen in such perspectives, the Panel Report in the GMO litigation should not be rationalised as through the duty judicial and quasi judicial bodies to hand down decisions. Quite to the contrary, a Report reflecting the WTO’s precarious legitimacy in the assessment of regulatory policies, is precisely what the mandate of the WTO requires – and the litigants are entitled to received. This view implies, of course, that the uncertainties of science and the

85 J. Paul, “Comity in International Law”, (1991) 32 Harvard Journal for International Law, pp. 1-79. Its dark side is a subordination of law under political prerogatives and the denial of legal duties to respect foreign law and interests. Its brighter side, which we recall, are commitments that do not arise out of juridified obligations but, rather, out of friendship and trust among nations.
86 See the consideration in F. Rödl (note 39 supra), Teil 1, A and E.
diversities in their evaluation hinder the institutionalisation of transnational markets and that the economic actors have to adapt to this diversity. The American conflict-of-laws scholar Brainerd Currie would have qualified these cases as examples of “true conflicts” which courts, let alone WTO bodies, are not legitimated to adjudicate. This radical suggestion was developed against the background of the American federal system, in which a legitimated political body can step in. Such a fall-back position is not easily available at transnational level, neither in the enlarged EU nor in the WTO. But the Reports in Hormones can be read more constructively. They indicated in substantiated ways how the litigants should proceed in the handling of their conflict. Their disciplining impact seems considerable. This exercise of WTO authority is the current “Rechtzustand”:

“Global governance must live with a constant potential for mutual challenge of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure might be achieved.”

IV.2. SECOND ORDER CONFLICTS LAW AND ITS AFFINITIES WITH GAL

The emergence of a regulatory layer of international law, “specific in its normativity and legitimacy”, has functional equivalents in the European polity, but cannot be institutionalised in the same modes. Against the background of the WTO jurisprudence just reviewed, its specificity can be substantiated further. Our reading of this jurisprudence in conflicts law perspectives is based upon the apparent search for meta-norms which the involved jurisdictions can accept as a supra-nationally valid yardstick for evaluating, modifying or even correcting their legislation and policies. Since WTO law cannot establish legal equivalents to the European regulatory machinery through which general principles or legislative frameworks are concretised, it is bound to develop some functional ersatz. “Delegation of regulatory authority” does, indeed, occur, but is much narrower than within the EU. Legal commitments are “softer”. The two Agreements complementing the WTO

---

88 “[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: … the court is not equipped to perform such a function…” (B. Currie, “The Constitution and the Choice of Law: Governmental Interests and the Judicial Function (1958), in id., Selected Essays on the Conflict of Laws, (Durham NC: Duke University Press), pp 188-282, at 272.


framework operate in different ways. Where SPS measures adopted by WTO members are in conformity with the international standards, guidelines, and recommendations of organisations specified in that agreement or identified by the SPS Committee, compliance with WTO law is presumed.\(^{92}\) In contrast, the TBT Agreement, which refrains from identifying such organisations, contains prescriptions as to their operation. Legal “softness” is not to be equated with practical weakness, however. The mechanisms foreseen are remarkably powerful.

Their proper juridification is the challenge which the “second dimension” of conflicts law has to address. It follows from the very notion of law from which this essay departs,\(^{93}\) that we cannot simply equate the facticity of transnational governance and the functioning telle quelle of its mechanisms with “law”. As in the case of European governance, the law’s truth and justice needs to be discerned in the concrete operations in place. The concrete is, at the same time, the nitty-gritty, at international, even more so than at European, level. What we can safely assume is only that at both the European and the WTO level of governance, the factually existing regulatory layer” reflects practically irresistible needs – and that this facticity is exposed to the quest for “fair and just” problem-solving. Complex as the mechanisms certainly are, legal practice and legal scholarship should not, and cannot, avoid addressing the normative query: the potential of transnational governance to ensure that its practices “deserve recognition”. Pertinent contributions rarely use such Habermasian terms – and??/but are, nevertheless, often enough compatible with his regulative ideas.

The most important suggestions have been developed in the context of the GAL project at NYU Law School.\(^{94}\) Its protagonists have underlined that they deliberately refrain from designing a global constitutional vision;\(^{95}\) Richard Stewart has explicitly objected against any transplanting of EU models such as that of a constitutionalised comitology to the

\(^{92}\) For details, see J. Scott, The WTO Agreement on Sanitary and Phytosanitary Measures, A Commentary, (Oxford, Oxford University Press, 2007), p. 246 et seq

\(^{93}\) See Section I.1 and the references in note 3 supra.


global level.\textsuperscript{96} And yet, the considerations in the GAL project on a deepened “juridification” of transnational governance arrangements and practices is reflecting nothing else and nothing less than the possibility of a “law of law-production".\textsuperscript{97} In a recent essay, Richard Stewart and his collaborators have even developed a three-dimensional pattern of their project, which seems to have very much in common with the three-dimensional conflicts law.\textsuperscript{98} The affinity with the first dimension of conflicts law is first apparent from their definition of the objective of GAL disciplines to “cure political externalities by protecting foreign citizens and firms against local discrimination and exploitation”,\textsuperscript{99} and then, even more so, from their conceptualisation of the “inter-public” tensions between WTO law and the regulatory standards developed by other global bodies. Situations, in which such public entities “bump up against each other” will multiply, Benedict Kingsbury predicts that GAL will have to generate “conflict of laws arrangements” as GAL’s “horizontal dimension”\textsuperscript{100}

The affinity with conflicts law’s second dimension is apparent from the suggestion to subject transnational WTO governance practices more strongly to procedural legal principles which all affected parties can accept, their American legacy notwithstanding.\textsuperscript{101} This suggestion is accompanied by Benedict Kingsbury’s defence of the law’s normative proprium, which underlines that “… what it means to be ‘law’ is not a value-neutral statement”.\textsuperscript{102} It seems reasonably safe to generalise upon the basis of GAL’s most important considerations and yardsticks: Transnational governance must be organised as a co-operative venture of the concerned jurisdictions. Co-operation must respect democratically-legitimated concerns. It must specify this respect through requirements pertaining to the organisation and working procedures of the bodies involved in the preparation of standards and recommendations. It must be prepared to respect normative and ethical objections, and to take the socio-economic asymmetric implications of transnational ruling into account. This

\textsuperscript{96} “Mars or Venus? Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance”, mimeo 06; # check homepage.
\textsuperscript{97} R. Stewart \textit{et al.}, note 95 supra.
\textsuperscript{98} Section V, text following note 97.
\textsuperscript{99} B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law", (2009) 20 \textit{European Journal of International Law} 23-57, at 56; the reconstruction of this passage as a resort to conflict of laws doctrines which would govern these relationships by conflicts of law doctrines by Ming-Sing Kuo, Inter-public Legality or Post-Public Legitimacy? A response to Professor Kingsbury’s Conception of Global Administrative Law, (2009) 20 \textit{European Journal of International Law} (forthcoming) is a misunderstanding.
\textsuperscript{100} Ibid., in particular, Section II.C.
\textsuperscript{101} Ibid. (note #) p. 26.
implies decisional restraints and strategies in the form outlined at the end of the previous section.

IV.3. PARA-LEGAL REGIMES AND THE POLITICISATION OF TRANSNATIONAL MARKETS; “FACTS WITHOUT NORMS”? Following Marc Amstutz, I have left the most thorny issue for the end. Our object, namely, the para-legal regimes of the globalising economy, is the same. Our difficulties are, due to our premises, not identical. Since the approach submitted here places so much emphasis on the potential of democratically-legitimated law to supervise and to control both the involvement of non-governmental actors and the practices of governance even with the EU, how can the transnational arena, where the law’s shadow is obviously, on the whole, less clearly visible than at national and European level, be something other than the Achilles heel of the whole approach?

It all depends, however, on what we know about the phenomena under scrutiny. Through the observation of para-legal regimes in the perspectives of conflicts laws methodologies, we do, at least, gain access to yardsticks for their recognition. The emergence of these regimes can be related to the basic premises of the approach and their evaluation can be oriented accordingly. The impossibility of those affected by nation state decision-making to participate in decision-making processes and the inter-dependencies of once territorially-separated societies necessitate and justify transnational decision-making. The type of regulatory problems that are of paramount importance in transnational markets requires the inclusion of non-governmental organisations (NGOs) and of expert-knowledge. In such perspectives, it is simply too one-sided and reductionist to qualify these para-legal regimes as an alternative to state law and as a threat to the survival of that law. If one then considers the pre-requisites for the recognition of these arrangements, one can again resort to conflicts-law thinking. The generation of norms and standards needs to respect the concerns of all the jurisdictions affected, and it will, at the same time, have to take the political dimensions of markets into account.

However, an exploration of these mechanisms is beyond the scope of this essay. The perspectives in which they should be undertaken should, however, be identical with those that

---

102 Section IV.1.3 supra.
103 The phrase is Christoph Humrich’s; see his “Facts without Norms? Does the Constitutionalisation of International Law still have a Discourse-Theoretical Chance?”, in: C. Ungueranu et al., Vol. II (note 3.).
104 Chapter 16, Section II.4.
Conflicts law can build upon the politicisation of the economy, and on the not-so-trivial power of states and the shadow of their laws. Conflicts within the economy cannot be settled by experts, and will certainly not be settled spontaneously. The elaboration of regimes which strike a fair balance between the concerned economic interests and mediate between diverging political orientations will be dependent on the power of states to impose discipline on transnational norm generation and to defend exit options. This power is by no means negligible.

The normative strength and also its political and legal prospects rest upon its recognition of, and respect for, diversity. This starting point is normatively stringent simply because political preference and priorities cannot be uniform around the globe. However, the main factual obstacles here are not discretionary preferences, but the hard reality of socio-economic diversity. Concerns stemming from socio-economic asymmetries are omnipresent in transnational governance. They are the real Achilles heel of uniformity ambitions in transnational law. Even within the European Union, the exclusion of pertinent considerations in the evaluation of the tensions between free access to all parts of the European market and

---

105 Section III supra. In his earlier writings, Gunther Teubner framed these issues in a seemingly similar way: “If we abandon the old practice to obscure the de facto law-making in all kinds of ‘private governments’ and bring to light that what they are doing is producing positive law which we nolens-volens have to obey, then we ask more urgently than before the question: What is this ‘private legal regime’’s’ democratic legitimation? At the same time, we see how naïve it would be to demand a formal delegatory link of private governments to the more narrow parliamentary process. Rather, we are provoked to look for new forms of democratic legitimation of private government that would bring economic, technical and professional action under public scrutiny and control. That seems to me is the liberating move that the paradox of global law without the state has actually provoked: an expansion of constitutionalism into private law production which would take into account that ‘private’ governments are ‘public’ governments” “Breaking Frames: The Global Interplay of Legal and Social Systems”, (1997) 45 American Journal of Comparative Law, p. 149 et seq., at 159. What could constitute and characterise these “new forms of democratic legitimation”. In Teubner’s more recent work the response to radicalises the equation of de facto law-making with positive law, which is already present in the cited passage. It is difficult to see on what grounds a spontaneous self-validation of transnational private regimes (Zivilverfassungen) might “deserve recognition”. In a recent essay, however, Teubner uses formulæ which take up his earlier intentions and come close to our suggestions: “[I]n order for private ordering to qualify as genuine law, it is not sufficient that the pertinent behavioural rules are alloyed to the notion of legal or illegal. Instead, the rules must themselves be subjugated to a process, in which they are judged according to the legal code. This reflexive process requires certain institutional precautions, in particular, the development of actors or instances, who or which are responsible for the establishment, modification, interpretation and implementation of the primary norm formation. Fundamental to this is the growth of the central level of internal control and implementation organs, which mediates between the two other normative levels, thusly grounding the legal character of the corporate code”. And, later, he even adds: “One important condition for the success of corporate codes is their interaction with national legal systems. The effectuation of this interaction should be one of the most important tasks.” See, for a more elaborate discussion, Ch. Joerges & F. Rödl, “Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation”, in: G.-P.Calliess et al., (eds), Soziologische Jurisprudenz. Festschrift für Gunther Teubner, (Berlin: De Gruyter, 2009), pp. 765-778; F. Rödl, “Constitutionalisation Beyond the State: Self-righteous Private Regimes or Proceduralised Conflicts Law?”, in: R. Nickel (ed), Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification, Oslo, RECON Report No. 7/2009, pp. 307-324.
regional interests has become normatively indispensable. This implies that it may be often impossible to find solution to disputes which deserve recognition by all affected jurisdictions. Why should this be a weakness of the conflicts law approach? -- *Summum ius can mean summa iniuria.*

V. SUMMARY AND OUTLOOK: THE IDEA OF A THREE-DIMENSIONAL CONFLICTS LAW

This chapter did not strive for a comprehensive theory, let alone for some conceptual recipe, through which the social embeddedness of transnational markets could be realised. Instead, its objective was to elaborate a conceptual framework within which the juridification of transnational markets can be re-constructed and assessed. This framework is admittedly still insufficiently substantiated. However, the specifics of the approach should have become visible and can be summarised in five points:

1. The conflicts-law perspective submitted here defends a distinctively normative notion of law which builds upon the procedural paradigm of the discourse theory of law;

2. This understanding of proceduralisation responds to general developments of constitutional democracies and their legal systems. It seeks to renew the notion of law-mediated legitimate governance through the conditioned recognition of differentiated law-production processes in which legislatures, courts, governmental bodies and non-governmental actors are continuously involved.

3. The conflicts law approach departs from prevailing understanding of the legitimacy *problématique* of the postnational constellation. It starts from the sociological and normative premise that nation states are characterised by structural democracy deficits. Neither a European super state, nor a world republic are the proper response to these democracy deficits. Instead, the conflicts law approach envisages the institutionalisation of transnational responses which derive their legitimacy from the cure of the democracy deficits of nation states.

---


107 # Check source.
4. Europeanisation and globalisation generate transnational problem constellations for which the differentiated fabric of the conflicts approach into three distinct, albeit inter-dependent, dimensions seeks to respond. All of these responses – the search for meta-norms in cases of substantive diversity; the establishment of tranational co-operative arrangements, the inclusion of nongovernmental actors – remain in contact with democratically legitimated jurisdictions.

5. The project is theoretically indebted to Rudolf Wiethölter’s vision of “Rechtswissenschaft in Kritik und als Kritik” (Critique of legal science and legal science as critique). This formula captures and mirrors real world tensions and their controversial conceptualisations. It articulates the kind of tensions which Karl Polanyi re-constructed as moves and countermoves/movements and counter-movements.

---

108 # Check source.