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Conflicts Law as Constitutional
Form

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Christian Joerges is Professor at the Centre for European Law and Politics (ZERP), University of Bremen. E-mail: cjoerges@sfb597.uni-bremen.de

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Abstract

'Constitutionalisation' is the key concept in the search for legitimate governance in the European Union and in the international system. This paper suggests revitalising of a discipline which is widely neglected in European law and international law scholarship. It does not, however, recommend a return to the conflict of laws (private international law) in the traditional sense. The new type of conflicts law which it advocates is not concerned with selecting the proper legal system in cases with connections to various jurisdictions. This conflicts law is conceptualised as a response to the increasing inter-dependence of formerly more autonomous legal orders and to the democracy failure of constitutional states which result from the external effects of their laws and legal decisions on foreign systems and on their citizens who cannot understand themselves as their authors. European law has a vocation and many means both to compensate for the democracy failures of member states and to build upon this potential in its constitutionalisation. The conflicts law approach also provides new, albeit more restrained, perspectives at international level. WTO law is used to explore and document its constitutional perspectives.

The conflicts law approach is differentiated into three dimensions. With this differentiated fabric, the approach responds to transformation processes which have affected contemporary law at all levels of governance after the rise of regulatory politics and the turn to governance. In its second dimension, conflicts law seeks to constitutionalise co-operative problem-solving under the lead of administrative bodies, while its third dimension is concerned with both the recognition and the supervision of transnational governance arrangements and para-legal regimes.

Keywords

Deliberative Democracy - Economic Law - Europeanisation - Multilevel Governance - Private International Law - Rule of Law - Social Regulation - Supranationalism - WTO

Introduction

The 'idea of a three-dimensional conflicts law' is both a product and a project. The development of the product started with the first common presentation of the Cooperative Research Centre on 'Transformations of the State'.¹ Conflicts law, so we suggested, has a twofold analytical and normative potential. It can be used to re-conceptualise the law of the post national constellation in general, and of transnational markets in particular – sociologically adequate (*gesellschaftsadäquat*²) terms which bridge the schism between legal and political science. This re-conceptualisation will also provide a framework within which legal developments can be critically evaluated. This vision was then developed primarily inductively in analyses of European and WTO law and in field studies on the aspirations, problems and accomplishments of transnational social regulation. The composition of the volume on *Constitutionalism, Multilevel Trade Governance and Social Regulation*, edited by the present author jointly with Ernst-Ulrich Petersmann,³ mirrors these endeavours. The contributors to this book represented different disciplines; lawyers and political scientists interact in each chapter; the case studies, which deal with the tensions between trade liberalisation and social regulation in fields of exemplary importance, are contextual in their approaches. The Epilogue⁴ explores the potential of the conflicts law approach to capture legal developments, to articulate in legal terms – the conflict patterns which the case studies document, and to provide orientation for their assessment.

Since then, the conflicts law approach has been refined and its scope has been extended.⁵ Its renewed presentation here takes a step further. It will systematise the

¹ Ch. Joerges and Ch. Godt (2005) 'Free Trade: The Erosion of National and the Birth of Transnational Governance', in S. Leibfried and M. Zürn (eds) *Transformation of the State*, Cambridge, UK: Cambridge University Press, pp. 93-117.

² The term has been used by Niklas Luhmann already in his 1974 *Rechtssystem und Rechtsdogmatik*, Stuttgart: Kohlhammer, and explicated anew in id., (1993) *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp, at pp. 277 et seq., but is 'applicable' also beyond systems theory – wherever jurists reflect the context in which law operates, when they consider the transformation 'Gesellschaftsverhältnisse' (social constellations) in 'Rechtsverhältnisse' (legal constructs).

³ Ch. Joerges and E.-U. Petersmann (2006) *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart.

⁴ Ch. Joerges (2006) 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in Joerges and Petersmann, *supra*, note 3, at pp. 491-527.

⁵ Pertinent publications include Ch. Joerges (2009) 'Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation', in R. Nickel (ed) *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, RECON Report No. 7, Oslo: ARENA, pp. 531-60; Ch. Joerges (with F. Rödl) (2009) 'Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation', in G.-P. Calliess, A. Fischer-Lescano, D. Wielsch, P. Zumbansen (eds) *Soziologische Jurisprudenz. Festschrift für Gunther Teubner*, Berlin: De Gruyter, pp. 765-78; Ch. Joerges (2009) '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 Adjudication*, Utrecht: Eleven International Publishing, pp. 67-84; Ch. Joerges (2007) 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws', in B. Kohler-Koch and B. Rittberger (eds) *Debating the Democratic Legitimacy of the European Union*, Lanham, MD: Rowman and Littlefield, pp. 311-28. For the development of the theoretical underpinnings of the whole project I am more indebted to Florian Rödl than our common publications reveal. For a recent summary and elaboration of his perspectives cf., 'Demokratische Verrechtlichung ohne Verstaatlichung: Kollisionsrecht statt Globalstaat', in O. Eberl (ed.)

various elements and dimensions of the work undertaken so far, refer to related endeavours and consider objections. The argument that we submit remains, in many respects, unconventional. It does certainly not – more euphemistically, not yet! – present a comprehensive new theory, but, for the time being, resigns itself to a project, albeit one with quite a substantiated agenda. Our emphasis will be on the clarification of this agenda, its premises and its aspirations.

The essay will proceed in six steps: we will start with terminological remarks which seek to substantiate our understanding of the term 'conflicts law' and to defend its use in post national constellations. In the following section, the discussion of all post-, inter- and transnational connotations of the notion will be suspended. The focus will, instead, be on substantive and methodological developments in the legal systems of constitutional democracies. This move is of central importance for the whole argument for two reasons. The first concerns our terminology and the use of the conflicts law notion *within* the legal systems of nation states. The second concerns the above-mentioned transformation processes which have, after the increase in regulatory tasks and then through the turn to new forms of governance, affected both the social functions of law and its methodological orientations profoundly. Only after these terminological clarifications in the first section and the re-construction of the legal transformation in the second section will the essay turn to the European and trans-European levels of governance. The conflicts law approach will be used at both levels – with an important refinement. It will be submitted that the 'geological' transformations that have been re-constructed with the legal systems of constitutional democracies necessitate the development of a differentiated, three-dimensional conflicts law approach with *the first* dimension reflecting the inter-dependence of formerly more autonomous jurisdictions, *the second* responding to the rise of the regulatory state, and *the third* dimension considering the turn to governance, in particular the inclusion on non-governmental actors in regulatory activities and emergence of para-legal regimes. It seems clear, however, that the elaboration of these perspectives should distinguish between the European and the international system. In the European Union, which will be discussed in the fourth section of this paper, the conflicts law approach can build in all of its three dimensions on legal commitments, regulatory and administrative competences which are not available and cannot be grafted on to the transnational level. The need to respond to regulatory concerns and to generate transnational governance structures is nevertheless irrefutable at all levels of governance. Hence, there is a basis for a three-dimensional conflicts law, albeit one which takes the discrepancies between the European and the international constellation into account. 'Irrefutable need' is a notion with normative, as well as functional, connotations. The functional dimension will be examined in the analytical frameworks of economic sociology within which we seek a non-legal basis for our understanding of markets as 'social institutions'. The Polanyian notion of the 'always socially embedded' economy is a particularly challenging conceptualisation of the non-legal foundations and dependencies of markets, not only those of the formerly national economies but also contemporary 'markets beyond the state'. This contextual background does not provide the 'solution' to the functional and normative issues of transnational governance. It is, nevertheless, instructive and of significance for the

Transnationalisierung der Volkssouveränität. Festschrift für Ingeborg Maus, Stuttgart: Franz Steiner Verlag, forthcoming 2010.

broader debate on constitutionalism beyond the state – according to eminent scholars 'the central challenge faced by international philosophers in the 21st century.'⁶ Our own perspectives are alluded to in the title of this essay: conflicts-law, we submit, is the proper constitutional form of law-mediated transnational democratic governance. Polanyi's economic sociology will be invoked in the defence of this vision, because it has the potential to capture the unruliness of the post national constellation – including the recurrent tensions between dis-embedding strategies and re-embedding counter-moves.

Introductory observations on the methodological nationalism of traditional conflict of laws and the institutional dimensions of the choice-of-law *problématique*

The presentation of the substantive and methodological arguments which we are going to submit in this essay has first to address the irritations which our terminology is bound to, and, indeed, meant to, generate. These irritations will be twofold. With the notion of conflicts law, we recall connotations of a tradition from which we will distance ourselves because of its striking 'methodological nationalism'. Notwithstanding this, we will then argue that European law should be re-conceptualised with the help of a modernised understanding of this tradition. Move and counter-move are even *meant* to provide new perspectives on institutional core problems and the constitutionalisation of transnational governance.

The legacy of classical private international law and its methodological nationalism

The history of 'modern' private international law is said to commence in Germany in 1849 by a Copernican turn against pre-modern legal traditions with the publication of Volume 8 of von Savigny's famous treatise,⁷ and, in the US, with Joseph Story's legendary *Commentaries*.⁸ The in many respects congenial conceptualisations of private international relations by these two founding fathers should, notwithstanding their seemingly technical and doctrinal emphasis, be understood in the broader context of the political history of the sovereign nation state. The 'juridical' conceptualisation of international relations by the various legal disciplines was based upon the same paradigm as traditional theories of international relations. To give a very brief account,⁹ traditional (public) international law (*ius gentium*) was confined to the ordering of interstate relations. National public law – administrative law in particular – was conceptualised as an emanation of the power of the sovereign; hence,

⁶ Ph. Allot (2001) 'The Emerging Universal Legal System' *International Law Forum du droit international*, 3(1): 12-17, at p. 16; in even stronger words, this query 'is emerging as one of the central questions – perhaps the central question – in contemporary world politics', see A. Moravcsik (2004) 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis', *Government and Opposition*, 39(2): 336-63, at p. 336.

⁷ F. C. von Savigny (1849) *System des heutigen römischen Rechts*, Berlin: Veit.

⁸ J. Story (1846) *Commentaries on the Conflict of Laws*, third edition, Boston, MA: Little and Brown.

⁹ This history is no longer well-known but very well explored. See, recently, A. Mills (2006) 'The Private History of International Law', *International and Comparative Law Quarterly*, 55(1): 1-50.

a truly 'international' public law was inconceivable, and *international* public and administrative law was, instead, confined to the delineation of the sphere of application of national provisions. It had to operate 'one-sidedly', because, in the heyday of legal positivism, any subjection to the commands of the law of another sovereign seemed inconceivable.¹⁰

In contrast, private international law in the von Savigny tradition was more universalistic in its orientations. Its universalism was, however, based upon an understanding of private law as the organiser of strictly private relations in a – by definition – apolitical (civil) society. The private law orders of civilised (Christian) nations could be treated as equivalent, and the application of foreign law was not perceived as involving, let alone threatening, the sovereignty of the *forum* state. This type of universalism is fully compatible with the refusal to support foreign regulatory objectives. Such 'political' dimensions are beyond private law. Friedrich Carl von Savigny, Germany's *maître penseur* of all times, knew, of course, about public law and the public order. But to incorporate what we now call regulatory or political objectives into the legal order was about realising non-legal (*außerrechtliche*) values, and thus stepping outside the law. If private international law was to engage in such activities, it would, in his understanding, cease to be law at all.¹¹

Why should one be aware of this legacy? The traditional dichotomies of private law and public (including administrative) law are generally held to be definitely outdated. And, in fact, the disciplines of international private, economic and administrative law all became aware of the post-*laissez-faire* transformations of the 'private law society', the intrusion of regulatory objectives into our legal systems. They took them, albeit often hesitantly, into account in the choice-of-law process. But even where this happened, any move beyond a 'unilateral' or 'one-sided' determination of the international sphere of the application of domestic law (the *lex fori*) towards some transnational co-operative legal responses for all the concerned jurisdictions, remained enormously challenging, if at all conceivable. This hesitancy is often expressed as a refusal to comply with the commands of a foreign sovereign. However, it need not be based upon nationalist parochialism. Objections against the validity claims of foreign laws are quite often based on constitutional grounds. Subordination to legal provisions which are not generated in, and legitimated by, domestic democratic processes, so the argument goes, would be irreconcilable with the principles and rules to which the forum state owes its constitutional allegiance.

It should be readily apparent how deeply the prerogatives of European law have both affected and transformed the normative ordering enshrined in these disciplinary traditions – including their 'methodological nationalism', i.e., their entanglement in the concepts and methodologies of presumably sovereign nation states and their

¹⁰ See K. Vogel (1965) *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*, Frankfurt am Main: Metzner, pp. 176-239; for alternative traditions, see Ch. Tietje (2001) *Internationalisiertes Verwaltungshandeln*, Berlin: Duncker and Humblot.

¹¹ J. Israël (2004) *European Cross-Border Insolvency Regulation*, Antwerp and Oxford: Intersentia, at p. 102; R. Michaels (2007) 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization', in M. Stolleis and W. Streeck (eds) *Dezentralisierung. Aktuelle Fragen politischer und rechtlicher Steuerung im Kontext der Globalisierung*, Baden-Baden: Nomos, pp. 119-44, and 129-30.

difficulties to envisage and to conceptualise in their categories a legitimate transnational order. European law imposes on the member states of the Union the duty to 'recognise' mutually, not only foreign private law, but also – to a large extent – the mandatory provisions of foreign 'sovereigns' *regardless* of their 'private' or 'public' legal nature. It has overcome both the 'one-sidedness' (*Einseitigkeit*) of international administrative law *and* the disregard for 'foreign' concerns and interests by national polities. The argument that we submit will neither deny nor obfuscate the presence of conflicts of laws and of interests in Europe. However, we do claim that Europe has institutionalised what, in an important respect, is a revolutionary 'new type of conflicts law'. Before submitting our plea for a re-conceptualisation of European law from such perspectives,¹² and before examining to what degree equivalent accomplishments are conceivable at international level through WTO law,¹³ we need to take further preparatory steps.

Institutional dimensions of the choice-of-law problem

In order to illustrate the emergence and the institutional delicacy of the choice-of-law problem, we will take another historical detour and recall the ardent critique of traditional conflict of laws by Brainerd Currie, the highly contested leader of the American 'conflict of laws revolution' of the 1960s.¹⁴ This is not to insinuate that his positions could, or even should, be revitalised after more than half a century. His rigid arguments remain nevertheless instructive, and deserve to be taken seriously,¹⁵ in particular, for two inter-related reasons.

The first has already been addressed.¹⁶ Laws, statutes and even common law rules, Currie argued, should be read as pursuing some form of policy. At first sight, this message may sound like a trivial confirmation of the widely accepted insights of American legal realism. On closer inspection, however, his views turn out to be more subversive because they build upon daring conceptualisations of the links between law and the political system.¹⁷ These aspects and assaults on the traditional notions of

¹² See the third section of this paper; 'European law as conflicts law'.

¹³ See the fourth section of this paper; 'Constitutionalising transnational governance through conflicts law'.

¹⁴ Currie's work is collected in B. Currie (1963) *Selected Essays on the Conflict of Laws*, Durham NC: Duke University Press.

¹⁵ See, for example, L. Kramer (1991) 'Vestiges of Beale: Extraterritorial Application of American Law', *Supreme Court Review*, pp. 179-224; it is not by chance that the titles of his essay sometimes allude to seminal articles of Currie's, see, in particular, L. Kramer (1991) 'More Notes on Methods and Objectives in Conflict of Laws', *Cornell International Law Journal*, 24: 245-78; id. (1990) 'Rethinking Choice of Law', *Columbia Law Review*, 90: 277-345 See, more recently, P. S. Berman (2005) 'Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental interests in a Global Era', *Pennsylvania Law Review*, 153: 1819-82, at p. 1845 et seq., and, for a thoughtful evaluation which covers and contrasts American and European approaches, see H. Muir Watt (2003) 'Choice of Law in Integrated and Interconnected Markets: a Matter of Political Economy' *Electronic Journal of Comparative Law*, Volume 7.3, September 2003. Available at: <<http://www.ejcl.org/73/art73-4.html>> (accessed 25 May 2010).

¹⁶ See the first section of this paper, under 'The legacy of classical private international law and its methodological nationalism'.

¹⁷ See, Ch. Joerges (1971) *Zum Funktionswandel des Kollisionsrechts. Die 'Governmental Interest Analysis' und die 'Krise des Internationalen Privatrechts'*, Berlin-Tübingen: Walter de Gruyter/Mohr Siebeck, pp. 38-54. These intricate relations between law, politics and the judicial function is often interpreted too

private law in general, and the citadel of private international law in particular, which they imply, come to the fore where Currie substantiates the implications of this seemingly trivial realist insight into intra-state settings: the application and implementation of policy-guided laws, he submitted, will often be backed by the 'governmental interests' of that state, which courts must not disregard. In a nutshell:¹⁸

If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy [...].

This is, he explained, because the:

[...] choice between the competing interests of co-ordinated 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; and the Constitution specifically confers that function upon Congress.¹⁹

It has often been underlined, in particular, by adherents of the governmental interest approach,²⁰ that Currie later softened his position somewhat when he recommended a 'moderate and restrained interpretation'.²¹ This concession, Currie's opponents, as well as a good number of his followers, have argued, needs to be interpreted as a retreat from his original position. 'Weighing' and 'balancing' is to be acknowledged as an inherent dimension of the judicial function, and hardly anybody hesitates to 'weigh a bushel of horse fevers against next Thursday'. This type of softening of Currie's radicalism fails to consider that his argument was not epistemological, but institutional. His resistance to any judicial derogation from the *lex fori*, where the governmental interests of the forum state are affected, should not be understood as a merely parochial defence of the 'self-interested state'. If there is a kernel of truth in the realist lessons about the political quality of modern law, it is only conclusive to insist on the involvement of politically accountable bodies in the 'weighing' and 'balancing' processes which characterise modern law production and upon which its legitimacy seems to depend. The topicality of Currie's argument should then become apparent. Within the legal systems of constitutional democracies, we have found ways and means to ensure the presence, or the correcting re-entry, of the political system into the administration of law. We are also becoming aware of the difficulty of establishing equivalent processes at European and international level. What we are witnessing here is a de-coupling of the legal system from the political system, which then nurtures anxieties about judicialisation and bureaucratisation phenomena. We will

simplistically, even by A. Fischer-Lescano and G. Teubner (2004) 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' *Michigan Journal of International Law*, 25(4): 999-1046, in their critique of the governmental interest analysis (p. 1023).

¹⁸ B. Currie, 'Notes on Methods and Objectives in the Conflict of Law' (1959), in *id.*, *supra*, note 14, 177-187, at pp. 183-84. See, for another brief summary, *id.* (1963) 'Comment on *Babcock v. Jackson*', *Columbia Law Review*, 63: 1233 et seq., and p. 1242 et seq.

¹⁹ B. Currie, (1963) 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', in *id.*, *supra*, note 14, pp. 188-282, at p. 272.

²⁰ See, for example, L. Kramer, *supra*, note 15.

²¹ B. Currie (1963) 'The Disinterested Third State', *Law and Contemporary Problems*, 28: 754-93.

return to this issue.²² Before considering this query further, however, we have to take a closer look at the 'geology' of national law. This detour is an indispensable step in our turn to conflicts law, which seeks to explain why this law has to become 'three-dimensional'.

The geology of the law of constitutional democracies: from 'law as regulation' to 'law as governance' and the defence of the rule of law through proceduralisation

'Geology' is a term borrowed from Joseph Weiler, who introduced it to explain transformations of international law of paradigmatic importance.²³ 'International law as regulation is a notion which he contrasts with 'international law as transaction' and 'international law as community'. It represents 'a new mode of international law, specific in its normativity and legitimacy'. This latter insight corresponds to the grand debates on the new functions and normative qualities of the law of post-*laissez-faire* welfare states, which dominated the agenda of the pre- and post-1968 generations.

The post-interventionist law of constitutional democracies

We can discern two waves in these debates. The first wave was embedded in a critique of the social deficits and methodological flaws of 'legal formalism'. Carried away by a broad social reform agenda, learned jurists engaged in a critique of 'formal rationality' in private and administrative law, which they sought to replace with substantive rationality criteria.²⁴ 'Law as regulation' was not the then prevailing terminology, but it was a core concern of the reformist movement, articulated and analysed in a specific parlance, namely, as a shift from 'conditional', to 'purposive', legal programming. Such grand theoretical concepts were invoked to articulate the paradigmatic importance of the reformist project. Contemporary accounts were, of course, controversial. The ambitious perspectives were perceived as the Achilles heel of the whole movement, in particular by Niklas Luhmann, who had invented the dichotomy in his sociology of law.²⁵ Such moves, Niklas Luhmann observed from his proverbial ironic distance, were bound to fail because they were at odds with the functioning of the legal system in functionally differentiated societies.²⁶ Alternative theoretical assessments are conceivable, Rudolf Wiethölter objected, and their realisation can build upon the 'fact' that 'purposive programming' is the living law and legal *conditio sine qua non* of modern democracies,²⁷ although, he added, we have

²² Section the fourth section of this paper, *infra*, under 'Regulatory prudence through WTO conflicts law as response to fragmentation'.

²³ J. H. H. Weiler (2004) 'The Geology of International Law - Governance, Democracy and Legitimacy', *Heidelberg Journal of International Law*, 64: 547-62, at p. 552.

²⁴ See Ch. Joerges (1989) 'Politische Rechtstheorie, and Critical Legal Studies: Points of Contacts and Divergencies', in *id.* and D.M. Trubek (eds) *Critical Legal Thought: An American-German Debate*, Baden-Baden: Nomos, pp. 597-643.

²⁵ N. Luhmann (1972) *Rechtssoziologie, Band II*, Hamburg: Rowohlt, pp. 227 et seq.; see, later, *id.* (1993) *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp, pp. 195-204.

²⁶ Concise and beautifully ironic is his look at the doctrinal art of jurists in Luhmann, *supra*, note 2.

²⁷ See R. Wiethölter (1973) *Rechtswissenschaft in Kritik und als Kritik*, Mainz: Universitätschriften; see also

to become aware of the ambivalences, and learn how to discipline the 'political administration' that it has established, and we also have to understand it as a potential and ongoing counter-movement against the shadows of German law's undemocratic past.

These controversies could not, and were not, resolved. Instead, the attention shifted by the 1980s to the failures and to the fallacies of social reform projects. Economists provided theories of regulatory failures, sociologists and political scientists uncovered failures in the implementation of political programmes, and legal theorists, who became aware of all this, started a new search for the concepts of a 'post-interventionist' law.²⁸ The search was again inspired by grandiose social theories (*Gesellschaftstheorien*). Jürgen Habermas had revealed how the law of the welfare state contributed to a 'colonisation of the lifeworld'.²⁹ It became ever more apparent that economic and social processes were embedded in a much more complex way in modern societies than the dichotomies that pitted market and state, economy and intervention, law and economics in (quasi-) oppositional relations. Systems theory embarked upon the long-term project of re-constructing the functions of law in its own terms.³⁰ For the time being, however, it seemed both possible *and* constructive to suspend the efforts to anchor legal conceptualisations faithfully in 'grand theories', and to focus, instead, on a re-design of 'legal rationality', which would be sufficiently sensitive towards the new insights into the failures of legal interventionism, while, nevertheless, avoiding a regression into the formalist traditions. 'Proceduralisation of the category of law'³¹ and 'reflexive law'³² became the two main reference points in the efforts to re-conceptualise the law's 'geology'.

The long-term impact and the practical importance of these endeavours do not so much stem from their theoretical ambitions, or their conceptual elegance, let alone from some German idiosyncrasies, but primarily from the broad range of contextual studies which they have inspired. They triggered the search for soft-law and regulatory alternatives to command and control regulation; they realised that the law of constitutional democracies is, on the one hand, expected to operate effectively and to organise economic and social regulation accordingly, but that, on the other hand, it still needs to maintain its responsiveness to wider social legitimacy concerns; they engaged in the re-fashioning of the constitutional and administrative legal spheres

id. (1972) 'Wirtschaftsrecht', in A. Görnitz (ed.) *Handlexikon zur Rechtswissenschaft*, Munich: Ehrenwirth, pp. 531-9.

²⁸ See G. Brüggemeier and Ch. Joerges (1984) 'Workshop zu Konzepten des postinterventionistischen Rechts', Bremen: Zentrum für Europäische Rechtspolitik, Materialien 4.

²⁹ J. Habermas (1981) *Theorie des kommunikativen Handelns. Band II. Zur Kritik der funktionalistischen Vernunft*, Frankfurt am Main: Suhrkamp, p. 522 et seq.; J. Habermas (1985) 'Law as Medium and Law as Institution' in G. Teubner (ed.) *Dilemmas of Law in the Welfare State*, Berlin: Walter de Gruyter, pp. 203-20.

³⁰ See G. Teubner (ed.), *ibid.* and G. Teubner (1987) 'Juridification - Concepts, Aspects, Limits, Solutions', in id. (ed.) *Juridification of Social Spheres*, Berlin: Walter de Gruyter, pp. 3-48.

³¹ R. Wiethölter (1989) 'Proceduralisation of the Category of Law', in Ch. Joerges and D.M. Trubek (eds) *Critical Legal Thought: An American-German Debate*, Baden-Baden: Nomos, pp. 501-10; J. Habermas (1999) [1992] *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA: The MIT Press, pp. 414-46.

³² G. Teubner (1983) 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review*, 17: 239-85.

and the development of constructive and legitimate synergies between markets and hierarchies.

This section is not meant to contribute new insights into legal theory and legal sociology. Its objective is to pave the way for a systematic move in the elaboration of the conflicts law approach. This objective both necessitates and justifies a drastic simplification of the conceptualisation of the law's contemporary 'geology', namely, the distinction between 'law as regulation' and 'law as governance'. The distinction is not categorical, but gradual. It is meant to underline the dimensions of post-interventionist law, which are omnipresent and even inter-dependent, even though they have different weight in 'regulatory programmes' and 'governance arrangements'.

One characteristic feature of modern post-interventionist law is its dependence upon non-legal expertise. Wolfgang Schluchter has conceptualised this move by distinguishing between *Amtsautorität* and *Sachautorität* respectively;³³ institutionally-derived authority as opposed to authority based upon some specific expertise which is supposed to strengthen the merits of decisions taken by administrators, regulators, and, of course, legislatures. Typically, this kind of 'cognitive opening' of law will be accompanied by a 'practical opening', namely, the resort to the management capacities and the knowledge resources of non-governmental actors and organisations. Both openings present a challenge to the rule of law. Expertise does not simply generate 'objective' answers to normative questions pre-fabricated by law. The inclusion of societal actors in the preparation and implementation of policy programmes cannot be reduced to a servicing function, but will open participatory mechanisms and channels of influence.

In what respects and to what degrees these developments seem either challenging or deplorable, and what kind of responses they require depends upon the theoretical perspectives from which they are observed. Jürgen Habermas, in his *magnum opus* on legal theory seems very deeply concerned, if not embarrassed:

When faced with political decisions relevant to the whole of society, the State must be able to perceive, and if necessary assert, public interests as it has in the past. Even when it appears in the role of an intelligent advisor or supervisor who makes procedural law available, this kind of lawmaking must remain linked back to legislative programs in a transparent, comprehensible and controllable way.³⁴

Habermas' *monitum*, which reflects core messages of his discourse theory of law, cannot be 'applied' literally to the law of regulatory politics and governance arrangements. Habermas' concession that legislation has to resort to procedural techniques of supervision, implies that the idea of law-mediated governance needs to be re-defined and adjusted so that it can continue to provide orientation in the assessment of both regulatory practices *and* the development of new modes of

³³ W. Schluchter (1985) *Aspekte bürokratischer Herrschaft. Studien zur Interpretation der fortschreitenden Industriegesellschaft*, Frankfurt am Main: Suhrkamp, 1972, pp. 145-76.

³⁴ J. Habermas, *supra*, note 29, at p. 441.

governance. The 'proceduralisation' of the category of law implies a shift to the 'constitutionalisation' of regulatory bodies and of de-centralised arenas of law production.³⁵ The extension of constitutionalism into both dimensions has only recently become a widespread concern, although it responds to much older and broader developments which can be observed, albeit in specific varieties, in all constitutional democracies. To document these parallels, it may suffice here to refer to Jody Freeman's analysis of 'The Private Role of Public Governance',³⁶ on the one side of the Atlantic and to Harm Schepel's discovery and defence of a 'Constitution of Private Governance' in the realms of standardisation on the other.³⁷ Freeman suggests defining 'governance as a set of negotiated relationships between public and private actors'. One of the examples that she discusses is *regulatory* standard-setting,³⁸ which is usually presented as an *aliud* to the generation of standards by private organisations. Freeman, however, notes:

In truth, agencies routinely promulgate rules developed, not internally, but by private parties. Private standard-setting groups are so well integrated into the standard-setting process that their role appears to give neither administrators nor legal scholars pause. However, by adopting privately generated standards after a cursory notice and comment process, agencies may effectively (if not formally) share their standard-setting authority [footnote omitted]. In this sense, even traditional regulation illustrates public/private interdependence.³⁹

Harm Schepel has reviewed equivalent phenomena at national, European and international level. His notion of a 'constitution' of such regimes is based upon the two dimensions of legitimate governance to which the conflicts law seeks to respond:

The sociological question of the law's recognition of private governance is, then, indissolubly connected with a normative question of democratic theory: can law recognise legal validity and democratic legitimacy outside the constitution, without constitutional political institutions and beyond the nation state?⁴⁰

Intra-state conflicts law

We will return to the sociological dimension of the legitimacy of transnational governance in the section on economic sociology.⁴¹ For now, it suffices to underline

³⁵ See, in different terminology, F. I. Michelman (1999) *Brennan and Democracy*, Princeton, NJ: Princeton University Press, at p. 34 (law of law-production), and R. Wiethölter, (2005) 'Justifications of a Law of Society', in O. Perez and G. Teubner (eds) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart Publishing, pp. 65-77. See, for a transcultural interpretation, M. Everson and J. Eisner (2007) *The Making of the EU Constitution: Judges and Lawyers Beyond Constitutive Power*, Milton Park: Routledge-Cavendish, in particular, p. 41 et seq.

³⁶ J. Freeman (2000) 'The Private Role in Public Governance', *New York University Law Review*, 75: 543-675.

³⁷ H. Schepel (2005) *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing.

³⁸ See Schepel, *supra*, note 37, at p. 638 et seq.

³⁹ See Schepel, *supra*, note 37, at p. 639.

⁴⁰ See Schepel, *supra*, note 37, at p. 2.

⁴¹ See the fifth section of this paper; 'The legacy of Karl Polanyi'.

again that we can observe – even within constitutional states many decades before both globalisation and privatisation attracted so much attention – the emergence of a 'geology' of legal layers, each 'specific in its normativity and legitimacy'.⁴² This is the basis of our plea for a three-dimensional conflicts law in post national constellations.

Before exploring these issues, we have to emphasise an analogy and a difference between the law of the nation-state democracies and that of transnational constellations. The analogy concerns the similarity of transnational and intra-national conflicts, while the difference concerns the means available for their resolution. The first point on the observation of national legal systems in conflicts law perspectives is of crucial importance for our whole argument. The analogy suggests itself because what we are witnessing in the domestic legal systems of constitutional democracies are precisely the selfsame difficulties which have caused the 'crisis of private international law' and led Brainerd Currie to open bankruptcy procedures over the inherited doctrines of his beloved discipline. Not only internationally, but also domestically, we are confronted with conflicting policies. These conflicts quite regularly concern constitutionally endorsed objectives which may have been concretised in much detail in environmental, labour market or consumer protection laws, but tend to jeopardise each other.

Rudolf Wiethölter, in a kind of summa of his own private international law scholarship which he dedicated to his academic mentor,⁴³ was the first⁴⁴ to uncover these structural similarities, or, rather, challenging implications, of the intrusion of policy commitments into legal programmes. The most prominent answer to the response – on the part of constitutionalists – to these methodological and substantive difficulties is the search for *praktische Konkordanz*;⁴⁵ legal theorists have established an *Optimierungsgebot*;⁴⁶ while the Community legislature provided *Querschnittsklauseln* (such as Article 11 TFEU, ex Article 6 TEC on Environmental Protection Requirements). It is not incidental that all these terms are German and pose apparently insurmountable obstacles to translators.⁴⁷ To my mind, the main reason is the need to perform a genuinely political task *outside* regular legislative and judicial processes.⁴⁸ This may be a daring assertion, but it helps us to understand the

⁴² J. H. H. Weiler, *supra*, note 23.

⁴³ R. Wiethölter (1977) 'Begriffs- oder Interessenjurisprudenz: Falsche Fronten im IPR und Wirtschaftsverfassungsrecht – Bemerkungen zur selbstgerechten Kollisionsnorm', in A. Lüderitz and J. Schröder (eds) *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts: Bewahrung oder Wende? Festschrift für Gerhard Kegel*, Frankfurt am Main: Metzner, pp. 213-63, at p. 232.

⁴⁴ Partisan positions are cited in G. Teubner (2005) 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter', in O. Perez and G. Teubner (eds) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart Publishing, pp. 41-64.

⁴⁵ K. Hesse (1999) *Grundzüge des Verfassungsrecht der Bundesrepublik*, 20th edition, Heidelberg: C.F. Müller, par. 72.

⁴⁶ H. Alexy (1985) *Theorie der Grunsrechte*, Frankfurt am Main: Suhrkamp, pp. 75-6.

⁴⁷ *Praktische Konkordanz* is 'practical concordance'; *Optimierungsgebot* seems to be an 'optimizing maxim' *Querschnittsklausel* is a 'clause improving a general obligation'.

⁴⁸ 'Discovery procedure of practice' was a notion used against von Hayek's 'competition as discovery procedure; see, for example, Ch. Joerges (1986) 'Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples', in T. Daintith and G. Teubner (eds) *Contract and Organization*, Berlin: Walter de Gruyter, pp. 142-63; more sophisticated and more recently, see K.-H.

dilemmas at transnational levels. Even within the EU, the interaction between the political system and the judicial system has become ever more deficient.⁴⁹ At international level and, in particular, at WTO level, we are confronted with the *problématique* of fragmentation, which does indeed pose – as Jürgen Bast has argued – a fundamental problem to democratic legitimacy.⁵⁰

Conflicts law issues, we can conclude, are present at *all* levels of governance. They pose problems everywhere. Their intricacies, however, become more disquieting from level to level. The legally significant differences and their sociological background are such that we will deal with Europeanisation and WTO law in two separate sections.

European law as conflicts law

‘The democratic deficit of international law and global governance [...] is crucial because it de-legitimises international law and offers a reason for states not to apply and observe international law.’⁵¹ This is a lucid re-statement of a widely, albeit not universally, shared thesis. The normative core message of the conflicts law approach departs from an antithesis. The difference can best be illustrated by the European example, which is so intensively pre-occupied with the European ‘democracy deficit’. The debate on the democratic constitutionalisation of the European polity, we submit, should be turned downside up, i.e., re-conceptualised fundamentally. It should depart from the insight that democracy – as nation states organise it – is *necessarily* deficient, whereas European law has the potential to cure such deficits. Thus, Europe is not the problem, but the potential cure, a pre-condition for legitimate governance, a point which Jürgen Neyer and I submitted for the first time back in 1997.⁵² Even then the argument was not fundamentally new. Jürgen Habermas identified it as the core normative problem of supranational decision-making in his very first essay on European integration.⁵³ In the same year, Niklas Luhmann addressed the discrepancy between *Entscheidungszuständigkeit* (political decision-making powers) and *Entscheidungsbetroffenheit* (affectedness by political decisions), without framing it as a democracy problem, in his sociological analysis of risks. The argument clearly has

Ladeur (1974) *Kritik der Abwägung in der Grundrechtsdogmatik. Plädoyer für eine Erneuerung der liberalen Grundrechtstheorie*, Tübingen: Mohr Siebeck; A. Fischer-Lescano (2000) ‘Kritik der praktischen Konkordanz’, *Kritische Justiz*, 41: 166-77.

⁴⁹ See *infra*, note 93.

⁵⁰ J. Bast (2009) ‘Das Demokratiedefizit fragmentierter Internationalisierung’, in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft, Soziale Welt, Sonderband [Special Issue] 18*, pp. 185-94.

⁵¹ A. Peters (2009) ‘Dual Democracy’, in J. Klabbers, A. Peters and G. Ulfstein (eds) *The Constitutionalization of International Law*, Oxford: Oxford University Press, pp. 263-341, at p. 263.

⁵² Ch. Joerges and J. Neyer (1997) ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, *European Law Journal*, 3: 273-99, at p. 293, and Ch. Joerges (1997) ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective’, *European Law Journal*, 3: 378-406, at p. 390.

⁵³ J. Habermas (1991) *Staatsbürgerschaft und nationale Identität*, Zurich: Erker, reprinted as Annex II to Habermas, *supra*, note 31, pp. 491-516, at p. 503: ‘For the citizen, this translates into an ever greater gap between being passively affected and actively participating’. See also N. Luhmann (1991) *Soziologie des Risikos*, Berlin: Walter de Gruyter [N. Luhmann (2005) *Risk: A Sociological Theory*, New Brunswick, NJ: Transaction].

some appeal.⁵⁴ But it needs an analytical framework which will allow one to situate it in the wider field of European studies, and it needs to be specified so that its normative orientations can be operationalised in legal arguments.

Multi-level governance as analytical paradigm in European studies and the misery of methodological nationalism

The study of European integration in legal quarters is one in which the resorting to political science has, by now, become routine. The present interdisciplinary opening of the academic legal world is – to a considerable degree – the result of the rise of the European ‘regulatory state’ and its subsequent ‘turn to governance’.⁵⁵ But the foundations for trans-disciplinary endeavours were laid much earlier. Some decades ago, William Wallace had already famously realised and explained why Europe was ‘less than a federation’, but ‘more than a regime’.⁵⁶ Lisbeth Hooghe and Gary Marks pioneered the efforts to define positively the European Community’s status between the two poles by the notion of ‘multi-level governance *sui generis*’.⁵⁷ The contours of that notion, however, remain puzzling for both political scientists⁵⁸ and academic jurists, both of whom seek to loosen the ties of their inherited categories with the

⁵⁴ See R. Howse and K. Nicolaïdis (2008) ‘Democracy without Sovereignty: The Global Vocation of Political Ethics’, in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity*, Oxford: Hart Publishing, pp. 163-91, at p. 167: ‘[Our] horizontal reading of subsidiarity and supremacy follows directly from the limits of the notion of sovereignty in a world where laws and actions within a polity increasingly have external effects. Supremacy and subsidiarity therefore can be defined in a dialectic way as complementary principles to deal with the fundamental conundrum of transnational democracy. Supremacy serves as a meta-norm of conflict of law between Member States such as to enhance the representation of foreigners inside the jurisdiction of every Member State, and to ask when and to what extent these interests should trump the domestic social contract.’ Similarly, Th. Cottier (2009) ‘The Legitimacy of WTO Law’, in L. Yeh (ed.) *The Law and Economics of Globalization*, Cheltenham: Edward Elgar Publishing, pp. 11-48, at p. 15: ‘The principles of the WTO, much as those of EU law [...] compensate for deficiencies in domestic democratic processes as these do not inherently take into account the interests of those not represented by the electorate. WTO law, in other words, addresses a structural failure inherent in the principles of representation. It ensures that democratic processes take into account interests that are not formally represented.’ Similarly, much earlier, A. von Bogdandy (2001) ‘Law and Politics in the WTO – Strategies to Cope with a Deficient relationship’, *Max Planck Yearbook of United Nations Law*, 5: 609-74, at p. 666: ‘[M]ore and more purely domestic decisions are having a transnational impact: when a sovereign decision affects the economic interests of people in other states, their interests must be taken into account [...]’. The normative basis of the argument and its democratic credentials have also provoked interesting critical responses, in particular by A. Somek (2010) ‘The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement’, *European Law Journal* 16: 315-44; and id. (forthcoming) ‘The argument from transnational effects II: Establishing transnational democracy’, *European Law Journal*, 16.

⁵⁵ As proclaimed by the European Commission in ‘European Governance. A White Paper’, COM(2001) 428 final of 25 July 2001, OJ 2001, C 287/5. Available at: <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf> (accessed 27 May 2010).

⁵⁶ W. Wallace (1983) ‘Less than a Federation, More than a Regime: The Community as a Political System’, in H. Wallace and W. Wallace (eds) *Policy-Making in the European Community*, second edition, Oxford: Oxford University Press, pp. 403-36.

⁵⁷ G. Marks, L. Hooghe and K. Blank (1996) ‘European Integration since the 1980s: State-Centric versus Multi-Level Governance’, *Journal of Common Market Studies*, 34(3): 343-78.

⁵⁸ See, instructively, B. Kohler-Koch and B. Rittberger (2006) ‘Review Article: The “Governance Turn” in EU Studies’, *Journal of Common Market Studies. Annual Review*, 44(1): 27-49.

nation state and to transform the notion of 'governance' into a legal category.⁵⁹ Michael Zürn has characterised this situation dramatically as a 'misery of methodological nationalism'.⁶⁰ His diagnosis is so valuable because it rests upon robust descriptions of the irreversible transformations of the contexts of policy-making in the European, and extra-European post-national, constellation. The nation state is quite clearly no longer in a position to define its political priorities autonomously (as a 'sovereign'), but is, instead, forced to co-ordinate them transnationally. The citizens of constitutional democracies can no longer be sure of whether and, if so, how, they can be – in the last instance – the authors of the laws which they are expected to adhere to, while the nation states to which they belong have become accountable to transnational bodies to which their politics are subject to evaluation.

The conflicts-law approach, so we assert, offers new perspectives for the understanding of the Union's *sui generis* characteristics. This is because the multi-level 'system' is portrayed as a web of potentially conflictual and unstable relationships, rather than some new coherent entity. The conflicts law approach:

Distinguishes between vertical, horizontal, and diagonal legal conflicts in the EU, i.e., conflicts about *which* legal norms apply to a given case.⁶¹ These three types of legal conflict can be applied to MLG [multi-level Governance] 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 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.⁶²

The pure diversity of these conflict constellations militates against any hierarchical reconstruction of the European polity – and the variety within the European constellation suggests a differentiating, three-dimensional approach in their legal conceptualisation. In a nutshell: the compensation of democratic deficits of nation states is the prime task of European conflicts law – the essence of its 'first dimension'.

⁵⁹ This is by now a transnational debate; see, among the contributions in English by authors from Germany H. Hofmann and A. Türk (2006) (eds) *EU Administrative Governance*, Cheltenham: Edward Elgar Publishing. For two excellent recent interdisciplinary reviews of the whole debate see P. F. Kjaer (2010) *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-National Constellation*, Oxford: Hart Publishing and M. Dawson (forthcoming) *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination*, Oxford: Oxford University Press.

⁶⁰ M. Zürn (1999) 'The State in the Post-National Constellation – Societal Denationalization and Multi-Level Governance', ARENA Working Paper, 99/35, Oslo: ARENA; see, very similarly, Habermas, *supra*, note 53.

⁶¹ See Ch. Joerges (2000), *supra*, note 52, at p. 378; Ch. U. Schmid (2000) 'Vertical and Diagonal Conflicts in the Europeanisation Process' *European Review of Private Law*, 8: 155-72.

⁶² R. Mayntz (2007) 'The Architecture of Multi-level Governance of Economic Sectors', Cologne: Max-Planck-Institut für Gesellschaftsforschung Discussion Paper 07/13, pp. 23-4.

However, Europe has not only to unburden itself from its nationalist and parochial legacy, it also has to provide constructive responses to its increasingly inter-dependent regulatory tasks and problems, i.e., it has to establish co-operative frameworks which ensure that its performance as a transnational regulatory machinery 'deserves recognition' – this is the challenge of the second dimension of its conflicts law. Last, but not least, it has to realise that its steadily widening tasks and commitments overburden its administrative capacity, so that the resort to non-legal expertise and the inclusion of non-governmental bodies in the management of public affairs, is becoming irrefutable. We are, in fact, witnessing a multitude of new governance arrangements which compensate the lack of a political hierarchy in the Union and rely on the self-regulatory schemes and/or the co-operation of non-governmental actors – this is why a third dimension of conflicts law needs to develop mechanisms which ensure the proper performance of these modes of transnational governance.

The three-dimensional fabric of European conflicts law

The elaboration of our suggestions in the following sections cannot be comprehensive. We will, instead, illustrate the three dimensions of the conflicts law approach with the help of enquiries into European primary law, regulatory mechanisms and governance arrangements of exemplary importance. Our objective is again twofold; we will seek to document to what degree the conflicts-law approach reflects in its three dimensions, on the one hand, the 'facticity' of the European polity Union, and how it can, on the other hand, be used to ensure its legitimacy. In all of these enquiries it should then once more become apparent why the juridification of the Europeanisation process needs to build upon a proceduralisation of the category of law.⁶³

Conflicts law I: horizontal constitutionalisation of the European 'bund'

'Conflict of laws' and its continental equivalent have come of age. The discipline seems to have lost much of its former prestige, and is *terra incognita* for the majority of the academic European law community. The conflict of laws issues which were present in so many leading cases in our teaching materials were hardly ever noticed.

⁶³ The notion of a three-dimensional conflict of laws as Europe's constitutional design is also used by P. F. Kjaer (2009) 'Three-dimensional Conflict of Laws in Europe', ZERP Discussion Paper 09/2 Bremen: ZERP; id. (2010) *supra*, note 59, pp. 141-62. Kjaer's theoretical framework is sociological not only in his approach to the integration process but also in his analysis of the functions of law and the specifics of constitutions. He does not seek to translate his analyses of the integration process into legal categories with specific normative connotations and into a legal methodology which reflects these normative concerns and seeks to guide the law's operations accordingly. These differences come to the fore in all of the three dimensions of conflicts law. The notion of 'diagonal conflicts', which reflects the asymmetric distribution of powers in the European multi-level system, goes unnoticed in his distinction between horizontal and vertical collisions (but see R. Mayntz, *supra*, note 62). The sociological imprint is more clearly visible in the 'third dimension', namely Kjaer's notion of conflicts between functionally differentiated systems which have no legal equivalent. See, also, the discussion of G. Teubner's 'societal constitutionalism' [G. Teubner (2004) 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in: Ch. Joerges, I.-J. Sand and G. Teubner (eds) *Transnational Governance and Constitutionalism*, Oxford: Hart Publishing, pp. 3-28], in D. Grimm (2009) 'Gesellschaftlicher Konstitutionalismus – Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?', in M. Herdegen et al. (eds) *Staatsrecht und Politik, Festschrift für Roman Herzog zum 75. Geburtstag*, Munich: Verlag C.H. Beck, pp. 67-81.

The most spectacular example is the legendary *Cassis de Dijon* case of 1979.⁶⁴ There, the European Court of Justice (ECJ) held that a German ban on the marketing of a French liqueur – the alcohol content of which was lower than its German counterpart – was incompatible with the principle of the free movement of goods (then Article 30 EC Treaty, now Article 41 TFEU). The ECJ's response to the conflicts between French and German policies was as convincing as it was trifling: the confusion of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by disclosing the low alcohol content of the French liqueur. With this observation, the Court defined *en passant* the constitutional competence to review the legitimacy of national legislation which presented a non-tariff barrier to free intra-Community trade in a new way. This move was of principled theoretical importance and had far-reaching practical impact.

The ECJ's holding is, of course, mainly perceived as confirming the constitutional status of the economic freedoms, and imposing restrictions on the regulatory autonomy of member states. Precisely this reading leads to the type of queries which were immediately articulated, for example by Ernst Steindorff,⁶⁵ and have never satisfactorily been answered: Are the European freedoms meant to impose a neo-liberal economic constitution which would replace, erode, or transform the welfare traditions of European constitutional democracies?⁶⁶ To date, the critique directed against the ECJ is bitter: What kind of constitutional mandate can the ECJ invoke and implement in its control of member state policies.⁶⁷ Fritz Scharpf, a prominent opponent, had, some 15 years earlier, submitted a more accommodating alternative interpretation of the Court's jurisprudence, by suggesting that the ECJ was mainly quite prudently mitigating between the respect of national political autonomy and the protection of the integration project.⁶⁸ In the same spirit, the conflicts law approach suggests that the excitement over the ECJ's jurisprudence is unnecessary because its celebrated argument can be translated into the language of conflict of laws. This translation reveals nothing less than a European conflicts revolution which was more radical than its American predecessor of the 1960s: the ECJ required Germany to 'recognise' (i.e., to apply!) foreign public law. It considered whether Germany could plead an *ordre public* exception, but concluded that the German 'requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest'.⁶⁹ What the ECJ imposed was a 'meta-norm', which started

⁶⁴ Case 120/78, ECR [1979] 649.

⁶⁵ E. Steindorff (1984), *Probleme des Art. 30 EWG*, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 148: 338-55.

⁶⁶ See, recently, M. Höpner and A. Schäfer (2010) 'Grenzen der Integration – wie die Intensivierung der Wirtschaftsintegration zur Gefahr für die politische Integration wird', *Integration*, 33: 3-20; and their edited volume: M. Höpner and A. Schäfer (2008) *Die Politische Ökonomie der Integration*, Frankfurt am Main: Campus.

⁶⁷ See R. Herzog and L. Gerken (2008) 'Stoppt den Europäischen Gerichtshof', in *Frankfurter Allgemeine Zeitung*, 8 September 2008, at p. 8; F.W. Scharpf (2008) 'The only solution is to refuse to comply with ECJ rulings', *Social Europe Journal*, 4: 16-21.

⁶⁸ F.W. Scharpf (1994) 'Community and Autonomy: Multi-level Policy Making in the European Union', *Journal of European Public Policy*, 1(2): 219-42.

⁶⁹ But, so D. Chalmers has objected, the *Cassis* case 'was, after all, not between the French producers of *Cassis de Dijon* and the German authorities. The parties to the dispute were exclusively German. It was between *Rewe*, a German distributor, and the German regulatory authorities. It was not only the parties

from the premise that both France and Germany were committed to the objective of free intra-Community trade and were hence bound to accept limitations to their political freedom, as long as they do not substantially interfere with essential regulatory concerns.⁷⁰ Last, but not least, the conflicts law approach allows one to come to terms with the adjudicative functions of the ECJ. It is much easier to understand why the ECJ must arbitrate in cases of conflicts in the European *Bund* than it is to accept that the ECJ, whose holdings enjoy a *de facto* definite validity, can transform itself into Europe's highest authority, at times even its *pouvoir constituant*.

Cassis was an easy case because Germany's consumer protection philosophy was not credible. But the messages of this judgment were anything but trivial. With the imposition of a legal duty to recognise the validity of foreign law regardless of its private law or public law 'nature', the ECJ had established a horizontal constitutional bond between the member states. Equally important, the ECJ did neither *impose* a bond which would forge the member states into a uniform legal structure, nor did it assume any comprehensive European power nor grant itself the powers of a regular constitutional court. Scharpf's formula captures this self-restraint well. The court required the member states both to recognise and to respect a mitigating function which only a Community court could credibly exercise: neither can the Community blatantly disregard the regulatory priorities of national polities and insist upon an abolition of non-tariff obstacles to free trade, nor can its member states unilaterally and autonomously invoke exceptions to the disciplining requirements of free trade. The establishment of an independent judiciary body entrusted with the task of identifying the rules and principles under which the free trade objective and the respect for legitimate regulatory concerns become compatible does, to use Habermas' formula, 'deserve recognition'.⁷¹

All of these reasons militate in favour of a re-conceptualisation of mutual recognition jurisprudence from the perspectives of the conflicts law approach. Jona Israël has characterised these developments as a transformation of voluntary and diplomatic co-ordination into a legal duty of co-operative problem-solving.⁷² In quite the same vein,

to the dispute that were domestic, the centre of gravity of the dispute was also domestic. *Cassis de Dijon* is not a widely sold drink. Instead, it was used as the touch paper to resolve a wider redistributive question between German distributors and German producers'. D. Chalmers (2007) 'Deliberative Supranationalism and the Reterritorialization of Authority', in B. Kohler-Koch and B. Rittberger (eds) *Debating the Democratic Legitimacy of the European Union*, Lanham, MD: Rowman and Littlefield, pp. 329-43, at 334. It is certainly true and also unsurprising that interested actors are trying to instrumentalise European law continuously and often successfully: If the law were to rubberstamp such practices, the conflicts law approach would indeed collapse. But more benevolent readings of European law are usually possible and plausible. In the *Cassis* case, the policies at stake had been endorsed by legitimated legislators and their adaptation to Community requirements was supervised the ECJ quite stringently. The parties to the *Cassis* proceedings may have been after a 'Faustian Pact' with DG III. See, on this notion, G. Peters and J. Pierre (2004) 'Multi-level Governance and Democracy: A Faustian Bargain?', in I. Bache and M. Flinders, *Multi-level Governance*, Oxford: Oxford University Press, pp. 79-92; however, the ECJ's holding remains convincing and unaffected by such practices - and the conflicts-laws reading of *Cassis* remains a sound choice.

⁷¹ J. Habermas (2001) 'Remarks on Legitimation through Human Rights', in id., *The Postnational Constellation: Political Essays*, Cambridge, MA: The MIT Press, pp. 113-29, at p. 113.

⁷² J. Israël (2005) *European Cross-Border Insolvency Regulation*, Antwerp/Oxford: Intersentia, pp 123, 150-2, and 323-34. See also, the concise restatement of the doctrinal historical background and discussion of its *problématique* in the co-ordination of regulatory policies by R. Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational

Christoph Schönberger has revitalised the notion of the German *Bund*,⁷³ thereby building on Carl Schmitt's *Verfassungslehre*.⁷⁴ This notion assumes – just like the conflicts approach – a *horizontal* constitutionalisation of the Union. This use of the notion of *Bund* is by no means to be equated with the kind of *konkrete, seinsmäßige* (concrete and substantial) homogeneity⁷⁵ which Carl Schmitt read into the *Bund*. One can also safely assume that Schmitt was far from considering the need to compensate the democracy failures of nation states. The use of the notion and understanding of a horizontal constitutionalisation through conflicts law as a legal basis is, instead, indebted to the vision of 'unity in diversity' as once envisaged as the motto of the Union in the Draft Constitutional Treaty.⁷⁶

Conflicts law II: constitutionalising Europe's "political administration"

'Horizontal constitutionalism' cannot, however, be reduced to the compensation of democracy failure in parochial national decision-making. The European *Bund* has also created the 'positive' duty of its member states to engage co-operatively, and participate actively, in the administration of regulatory programmes. This positive commitment is a result of the opening of national markets, the establishment of the internal market – and the insight that markets will always transform into embedded social institutions: markets both generate and require regulatory frameworks in which they can operate. This is a lesson to be learned from the institutional development of all constitutional democracies. With the 'completion' of the European internal market as designed by the White Paper of 1985,⁷⁷ this lesson was taught again. The

Social Regulation through Plural Legal Regimes', in Ch. Joerges and E.-U. Petersmann (2006) *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, pp. 229-262.

⁷³ C. Schönberger (2004) 'Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas', *Archiv des öffentlichen Rechts*, 129, p. 81 et seq., and p. 88 et seq. On precursors and followers cf. C. Franzius (2010) *Europäisches Verfassungsrechtsdenken*, Tübingen: Mohr Siebeck, pp. 62-8.

⁷⁴ First published in 1929, cited here after the ninth edition (1993, Berlin: Duncker and Humblot): 'The *Bund* is a stable association [of states], grounded on a freely entered into agreement, serving the common purpose of political self-preservation of all the *Bund* members, an association by virtue of which the general political status of each individual member will be changed in view of the common purpose' (p. 363).

⁷⁵ 'Any *Bund* rests on an essential assumption, namely the *Homogeneity of all Bund-members, i.e.,* it presupposes a substantive uniformity which underlies the concrete, mutual understanding of the Member States and thus guarantees that the extreme case of a conflict within the *Bund* does not occur', *ibid.*, p. 375; for a detailed analysis, see M. Avbelj (2009) 'Theory of European bund', Ph.D Thesis, EU Florence; p. 109 et seq.

⁷⁶ Article IV-1 of the DCT, OJ C 310/2004, 1 of 16 December 2004. That vision of *unitas in pluralitate* is quite Habermasian and can content itself with his 'constitutional patriotism' as recently re-formulated in J. Habermas (2005) *Zwischen Naturalismus und Religion* [Between Naturalism and Religion], Frankfurt am Main: Suhrkamp Verlag, at p. 111: 'Contrary to a widely spread misunderstanding, constitutional patriotism means that citizens embrace the principles of the Constitution not only in their abstract content but also concretely, out of their own national historical context. If the moral content of fundamental rights is to take practical root, the cognitive process does not suffice. Moral intuitions and the universal agreement which arises as indignation towards massive human rights violations, as such, would suffice only for the very superficial integration needs of the politically created world society citizenry. Between state citizens arises in truth a solidarity – as always partially abstract and legally-mediated – only when the principles of justice find an entry point into the network of cultural value-orientation'.

⁷⁷ European Commission, 'White Paper to the European Council on Completion of the Internal Market',

institutional forms which have been used and generated in this process vary with regard to the intensity of bureaucratic co-operation, the role of expertise, the involvement of non-governmental actors, and the interaction between the European Commission and the Council. Within this rich spectre, comitology remains the most fascinating phenomenon. The practical importance of this machinery is as obvious as its political sensitivity and salience. This is why the normative core of democratic constitutionalism, namely, the commitment to idea law-mediated legitimacy, requires the establishment of a legal framework that generates legitimate rule. To summarise its role,⁷⁸ there are, first, stringent functional needs for this system. It has been quite stringently documented that this system performs – in spite, or, indeed, because, of its de-centralised modes of operation – reasonably well. However, such performance rests on contingent grounds. This is why comitology needs to be ‘constitutionalised’, i.e. stabilised and supervised by an adequate legal framework.

Comitology committees, which are composed of administrative practitioners and experts from the member states, are supposed to support the Commission in the ‘implementation’ of European legislative programmes; they are also involved in the continuous process of amending the existing legislation, filling legislative gaps and preparing new initiatives. These committees embody the functional and structural tensions which characterise internal market regulation. They hover between ‘technical’ and ‘political’ considerations, between the functional needs and the ethical/social criteria which inform European regulation. Their often very fluid composition not only reflects upon the regulatory endeavour to balance the rationalisation of technical criteria against broader political concerns, but also forcefully highlights the schisms that exist among the political interests of those engaged in the process of internal market regulation. Even where they are explicitly established to support and oversee the implementing powers delegated to the Commission, committees are deeply involved in political processes and often resemble ‘mini-councils’, in that they are the forum in which the balancing of a European market-building against the concerns of the individual member states has to be achieved.⁷⁹ The notion of ‘political administration’ reflects these activities best⁸⁰ – it is not by chance that this oxymoron was coined in the 1970s to characterise the new law of ‘purposive programming’.⁸¹

‘Political administration’ is a term through which the comitology system can be distinguished from, and defended against, such notions as ‘administration without government’ or ‘technocratic deliberation’. The rise and success of the committee system is attributable to its potential to organise the administration of the internal market co-operatively, rather than by a fusion of national bureaucracies or the institutionalisation of a hierarchically-structured command-and-control machinery. These are still primarily descriptive characterisations. The normative challenge,

COM(85) 310 final, 14 June 1985.

⁷⁸ Ch. Joerges and J. Neyer, *supra*, note 52.

⁷⁹ See, in much more detail, Ch. Joerges and E. Vos (eds) (1999) *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart Publishing.

⁸⁰ Ch. Joerges, “‘Good Governance’ Through Comitology?”, in Joerges and Vos, *supra*, note 79, pp. 311-38.

⁸¹ See the second section of this paper; ‘The geology of the law of constitutional democracies: from “law as regulation” to “law as governance” and the defence of the rule of law through proceduralisation.’

however, concerns the normative quality of its operation. It is precisely this challenge which the 'second dimension' of conflicts law seeks to address through a 'constitutionalisation' of transnational co-operation. Categorical differences to the constitutionalisation of administrative law in constitutional democracies, on the one hand, and to the search for mitigating meta-norms as advocated within the first dimension of conflicts law, on the other, do, indeed, continue to exist in the absence of the transformation of transnational co-operation into a single democratically-governed polity, but, nevertheless, needs to ensure that regulatory policies can be pursued transnationally. The second dimension of conflicts law does not control the external effects of national political decision-making, but is to be understood as a response to their inability to accomplish regulatory objectives autonomously and in isolation.

A broad range of issues needs to be considered when such perspectives are pursued and substantiated.⁸² It should be underlined that there are no built-in guarantees that comitology will develop further along such lines.⁸³ De-parliamentarisation, bureaucratisation and judicialisation are all side-effects both of Europeanisation and, even more so, of globalisation.⁸⁴ The factual strength of these tendencies does not,

⁸² They include the selection of the expert circles, the establishment of ties with parliamentary bodies, on the one hand, and with civil society, the reversibility of decisions taken in the light of new knowledge or changes in social preferences; see Ch. Joerges and M. Everson (2006) 'Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication', in H. Hofmann and A. Türk (eds) *EU Administrative Governance*, Cheltenham: Edward Elgar Publishing, pp. 512-40, and, with quite similar intuitions, L. Viellechner (2008) 'Können Netzwerke die Demokratie ersetzen?', in S. Boysen et al. (eds) *Netzwerke - 47. Assistententagung Öffentliches Recht*, Baden-Baden: Nomos, pp. 36-57, at p. 48 et seq. The most recent analysis in political science which reviews what is by now an impressive number of pertinent studies is found in G.J. Brandsmas (forthcoming 2010) 'Backstage Europe. Comitology, accountability and democracy in the EU', Ph.D. Thesis, Amsterdam.

⁸³ See Ch. Joerges (2008) 'Integration through De-legalisation?', *European Law Review*, 33: 219-312, at p. 297 et seq.; more optimistic, however, E. Vos (2009) '50 Years of European Integration, 45 Years of Comitology', in A. Ott and E. Vos (eds) *Fifty Years of European Integration: Foundations and Perspectives*, The Hague: T.M.C. Asser Press, pp. 31-56, at p. 49 et seq. Unfortunately, the most recent steps towards reform of comitology upon the basis of Articles 291 and 290 of the TFEU, as suggested by the Commission, do not nurture such hopes. Both the Communication of 9 December 2009, [COM (2009) 673 final], on delegated acts and proposal the exercise of implementing powers of 9 March 2010 [COM (2010) 83 final] seek to strengthen the Commission's role significantly. The first of these communications underlines the Commission's belief that '[d]elegations of power should in principle [...] be of indefinite duration' (par. 3.2), that it 'enjoys a large amount of autonomy' in implementing its powers (par. 4.1). Furthermore, the Commission expects that the legislator exercised a right to revocation provided for in a pertinent legislative act to be under a 'duty to explain the reasons behind it' (par. 5.2.). This type of inversion of powers seemed inconceivable at the beginning of the inquiries into the possibilities of a constitutionalisation of comitology; see, for example, Ch. Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures', in Ch. Joerges, K.-H. Ladeur and E. Vos (1997) *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations*, Baden-Baden: Nomos, pp. 295-324, at p. 324. The legal system must continue its search for guarantees of regulatory reasonableness, procedural safeguards and the protection of rights. This search should be complemented by the institutionalisation of political accountability. Such institutional innovations would have to correspond to the emerging structures of governance beyond intergovernmentalism and below orthodox supranationalism. One conceivable step might be the entrustment of parliamentary committees, composed of both European parliament members and national delegates, with the task of regularly reviewing the experiences of Community and national officials, of organising hearings to which experts and non-governmental organisations would be invited, and of initiating legislative action at the European and national level.

⁸⁴ See D. Chalmers (2006) 'Administrative Globalisation and Curbing the Excesses of the State', in Joerges

however, invalidate the critique of technocratic reason. Instead, it necessitates its re-design and *Aufhebung* in new visions of democratic administration and governance. Such perspectives do exist,⁸⁵ and Europe seems better equipped than any international arena to establish regimes under which transnational governance can derive its 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. It is precisely because of both these tendencies and the need for modern modes of governance to liaise with non-governmental bodies that the conflicts law approach needs to develop its third dimension, namely, the means and yardsticks for the supervision of non-governmental regimes.

Conflicts law III: the irresistible rise of para-legal regimes and the need for their legal supervision

The most ingenious among the strategies of European market building was 'the new approach to harmonisation and standards'.⁸⁶ The new approach was a sophisticated reaction to a profound dilemma. Free trade in the Common Market depended upon the 'positive' harmonisation of countless regulatory provisions. The legislative harmonisation was a Sisyphean task, which remained a nightmare even after the old unanimity rule of Article 100 EC Treaty was replaced by qualified-majority voting in Article 100a EC Treaty as introduced by the Single European Act of 1987. Judicial governance – as promoted by the *Cassis de Dijon* decision of 1979 – could only proceed selectively and required a bundle of accompanying measures in order to exert practical effects.⁸⁷ Seemingly paradoxically, self-regulation, a technique very widely used in Germany in particular, was by no means easier to live with. Voluntary product standards were 'private' obstacles to trade, which the Community legislature could not overcome by legislative fiat.

The new approach managed to overcome that *impasse* through a series of inter-related measures: European legislation was confined to laying down 'essential safety requirements', while the task of detailing the general requirements was delegated to the experts of both European and national standardisation organisations. The involvement of non-governmental actors involved a *de facto* 'delegation' of law-making powers, which could not be openly admitted. Harm Schepel⁸⁸ cites, with a

and Petersmann, *supra*, note 3, pp. 351-80.

⁸⁵ See, recently, E. Fisher (2007) *Risk Regulation and Administrative Constitutionalism*, Oxford, Hart Publishing and id. (2006) 'Beyond the Science/Democracy Dichotomy: The WTO SPS Agreement and Administrative Constitutionalism', in Joerges and Petersmann, *supra*, note 3, pp. 327-49; see, also, D. Curtin (2009) *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford: Oxford University Press, *passim*, conclusions, pp. 277-304.

⁸⁶ The story of the new approach has often been told; see, for example, J. Falke and Ch. Joerges (1991) "'Traditional' Harmonisation Policy, European Consumer Protection Programmes and the New Approach', EUI Working Paper Law 91/14; recently and brilliantly, H. Schepel (2004) *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing, pp. 225-58.

⁸⁷ See S. Schmidt (2007) 'Mutual recognition as a new mode of governance', *Journal of European Public Policy*, 14: 667-681; K. Nicolaïdis (2007) 'Trusting the Poles? Constructing Europe through mutual recognition', *Journal of European Public Policy*, 14: 682-98.

⁸⁸ *Ibid.*, p. 65.

somewhat ironic undertone, a leading representative of the standardisation community, who stated that the new approach

makes it possible to distinguish better between those aspects of Community harmonisation activities which fall within the province of the law, and those which fall within the province of technology, and to differentiate between matters which fall within the competence of public authorities and those which are the responsibility of manufacturers and importers.⁸⁹

This language both covers and hides the political dimensions of standardisation. This is small wonder, because the advocates of the new approach had to present their project in legally-acceptable clothes. They were perfectly aware of the limited guidance that 'essential safety requirements' can offer in the standardisation process. But they had good reason to trust in the responsibility of the standardisation community, and the engineers of the approach were happy to see their creation functioning so smoothly.⁹⁰ Do we have to conclude that 'private transnationalism' had replaced public legislation and administration? That would be too simplistic. The new "private transnationalism" did not operate in a vacuum. Interaction between the standardisation community, the Commission and national officials remained intense. Product liability law, tort law, and competition law retained powerful multi-faceted potential of control and supervision, while national and European public authorities retained the means to intervene if their trust were disappointed.⁹¹ It is in the shadow of the law that "private transnationalism" flourishes; it is by no means an autonomous legal order.

Why should this order, to take up the Habermasian formula, 'deserve recognition'?⁹² As Harm Schepel has shown in his ground-breaking analysis, 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, it 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 which alert pertinent bodies to product risks, product safety and product liability law can be invoked, and European competition law has the potential to supervise the internal constitution of standardisation bodies. The law's strong shadow is complemented by internal

⁸⁹ F. Nicolas (1995) *Common Standards for Enterprises*, Luxembourg: Office of Official Publications, p. 94.

⁹⁰ See. Schepel, *supra*, note 86, at p. 37 et seq., 101 et seq., 225 et seq; J. Falke (2001) 'International Standards for the Elimination of Barriers to Trade - An Analysis of the Agreements and of the Discussion of Standardisation Policy', Report Commissioned by the Commission for Occupational Health and Safety and Standardisation [KAN], Bremen: ZERP.

⁹¹ See Ch. Joerges, H. Schepel and E. Vos (1999) "'Delegation" and the European Polity: The Law's Problems with the Role of Standardisation Organisations in European Legislation', EUI Working Paper in Law 99/9; Schepel, *supra*, note 86, pp. 234-56, 309-38 and 347-400.

⁹² J. Habermas (2001) 'Remarks on Legitimation through Human Rights', in J. Habermas, *The Postnational Constellation: Political Essays*, Cambridge, MA: The MIT Press, pp. 113-29, at p. 113.

operational modes. The reason for the success of Europe's standardisation project, Schepel concluded, 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.⁹³

Can all this be plausibly characterised as a dimension of conflicts law? The example of European standardisation is not radically different from the comitology pattern. Undoubtedly, the role of non-governmental actors 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-statal spheres, we need to re-define its scope. This re-definition must not copy the privatisation patterns by which private international law theory and practice have de-coupled 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.⁹⁴

We conclude that the conflicts law approach to European law is not a purely contractual normative fantasy. We have, however, to warn against any Panglossian wishful thinking. In all of its three dimensions, the conflicts-law approach to European law is under stress. It is threatened by new tendencies in European primary and secondary law, which promote a very orthodox and centralist reading of supremacy.⁹⁵ Similarly, the prospects for a constitutionalisation of the second dimension of conflicts law are by no means promising.⁹⁶ However, in the field of standardisation, promising prospects for innovative further refinements of 'good' transnational governance have been identified.⁹⁷ One intervening variable of crucial importance for its future development is, of course, the globalisation process, to which we now turn.

⁹³ Ibid., p. 223. Transnational governance arrangements need to adapt continuously to changing contexts, respond to new experiences, refine and renew their machinery. It is fascinating to observe that European standardisation is coping successfully with these challenges. See, for a detailed analysis, J. Falke (forthcoming 2010) 'Produkt- und Lebensmittelsicherheit in der Europäischen Union und in der WTO', in J. Falke and Ch. Joerges (eds) *Handelsliberalisierung und Sozialregulierung in transnationalen Konstellationen*, Baden-Baden: Nomos.

⁹⁴ The parallel to the recognition of foreign law and foreign judgments seems obvious, but is rarely drawn. But see E. Schanze (2005) 'International Standards - Functions and Links to Law', in P. Nobel (ed.) *International Standards and the Law*, Berne: Stämpfli, pp. 84-103, at p. 90-1.

⁹⁵ See, for private law, H.-W. Micklitz and N. Reich (2009) 'Crónica de una muerte anunciada', *Common Market Law Review*, 46: 471-519; for labour law, see Ch. Joerges and F. Rödl (2009) 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', *European Law Journal*, 15: 1-19.

⁹⁶ See Joerges (2008) and Vos (2009), both *supra*, note 83.

⁹⁷ See Falke, *supra*, note 93.

Constitutionalising transnational governance through conflicts law⁹⁸

The so-to-speak revolutionary transformative move in European law, in our conceptualisation, both implies and pre-supposes a radical break with methodological nationalism. Seemingly paradoxically, but in fact for very stringent reasons, private international law – its *quasi* cosmopolitan name notwithstanding – is inextricably linked to the nation state, and even the proponents of an un-political ‘spatial’ justice as a methodological *credo* of the discipline do not overcome this legacy.⁹⁹ There are, of course, theoretical alternatives, but, in practical terms, the most important chance for a re-orientation towards cosmopolitanism is provided by WTO law – ironically, a fragment of international law and hence, according to the still prevailing view, a dangerous threat to the law’s unity.

The potential importance of European experiences for the understanding of WTO law and transnational governance is not so widely acknowledged. The obvious institutional discrepancies between both systems are one reason for the hesitancy to enter into systematic comparisons; the fact that they are studied by different scholarly communities is probably of similar weight. But there is a growing body of bridging enquiries,¹⁰⁰ which discuss the affinities and functional similarities: both institutions have to balance free trade objectives and regulatory concerns, or, as the Appellate Body in the *Hormones* case put it, ‘the shared, but sometimes competing, interests of promoting international trade and of protecting [...] life and health’.¹⁰¹ The non-tariff barriers to trade to which the proponents of international free trade increasingly had to pay attention in the last decades, are requirements which the EU tends to recognise as legitimate restrictions to the freedom of intra-Community trade. The SPS and TBT Agreements are institutionalised responses to health and safety concerns, and the legitimacy of the trade restrictions which result from environmental policies is explicitly recognised in the Preamble of the WTO Agreement.

Our discussion of these parallels in this section will deal with conflict resolutions under these agreements. We will, on the one hand, contrast juridified and judicialised modes with intergovernmental, diplomatic and political conflict resolution. In the present context, our analysis will focus on ‘product’ – as opposed to ‘process’ –

⁹⁸ The following sections draw on the previous edition and two more recent essays: Ch. Joerges, (2009) ‘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 Adjudication*, Utrecht: Eleven International Publishing, pp. 67-84; id., (forthcoming 2010) ‘A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation’, in Ch. Joerges and J. Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford: Hart Publishing.

⁹⁹ See the analysis in F. Rödl (2008) ‘Weltbürgerliches Kollisionsrecht. Über die Form des Kollisionsrechts und seine Gestalt im Recht der Europäischen Union’, Ph.D Thesis, EUI Florence.

¹⁰⁰ See G. de Búrca and J. Scott (eds) (2001) *The EU and the WTO: Legal and Constitutional Issues*, Oxford: Hart Publishing; J. Scott (2002) ‘Mandatory or Imperative Requirements in the EU and the WTO’, in C. Barnard and J. Scott (eds) *The Law of the Single European Market – Unpacking the Premises*, Oxford: Hart Publishing, pp. 269-94, and id. (2004) ‘International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO’, *European Journal of International Law*, 15: 307-54.

¹⁰¹ Report of the Appellate Body on *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, par. 177.

regulation, and the governance patterns in this area. Both of these distinctions refer to separate debates, but are, nevertheless, inter-dependent. Clearly, product regulation is more closely linked to the realisation of free trade than process regulation, because product-related mandatory requirements can hinder the importation of goods directly, while process regulation need not affect the quality of the output of production. Stricter and more costly standards can be a competitive disadvantage, and conflicts arising from such differences are often primarily economic. However, the distinction is of limited use: environmental and safety at work requirements may relate to the product itself; low environmental standards may have external effects on other countries; safety-at-work standards may have a human rights basis; and, last, but not least, international agreements often do not apply the product/process distinction. Here, it is sufficient to mention the 'measures necessary for the protection of human, animal or plant life or health' in the Preamble and in Article 2.1 of the SPS Agreement. Nevertheless, it seems plausible to assume that the juridification of transnational product regulation will be more intense than transnational standardisation in the field of safety at work and environmental protection. The latter can, presumably, be better explained by political processes, while the former will more often be dictated by functional necessities.

Re-interpreting WTO law as conflicts law

As argued in the previous section,¹⁰² the celebrated jurisprudence of the ECJ on Article 41 (ex Article 28 TEU) which seeks to 'harmonise' the principle of freedom of intra-Community trade with respect for the legitimate regulatory concerns of EC member states can be understood as a modernisation, if not a revolution, of traditional conflict-of-laws principles. Our re-interpretation has pointed to the 'non-discrimination' between mandatory provisions of public and private law and based the ECJ's interventions into the law of the member states upon meta-norms which the jurisdictions involved can accept as a supra-nationally valid yardstick for evaluating and correcting their legislation. It is submitted that the same interpretative scheme can be applied to the reports of the WTO Appellate Body, which assess the compatibility of health- and safety-related non-tariff barriers to trade with the SPS Agreement.¹⁰³ With regard to the SPS Agreement, this interpretation does not seem far-fetched. That agreement does not invoke some supranational quasi-legislative authority. It can be understood as a framework within which WTO Members may seek a resolution for conflicts arising from the extra-territorial impact of their regulatory policies. An elaboration of these parallels is more than some doctrinal *l'art pour l'art*. As in European law, the conflicts approach should be understood as a potentially more convincing way of justifying the validity claims of transnational law, which would take some tensions out of the debate on the 'constitutional' status of WTO law. It would also allow a re-definition of the functions of the Appellate Body; its operation as 'a court in all but its name'¹⁰⁴ is easier to accept – and, in fact, better to understand – if one acknowledges its conflict resolving tasks. It is precisely for these reasons that we propagate the understanding of conflicts law as 'constitutional form'.

¹⁰² See the third section of this paper, under 'Conflicts law I: Horizontal constitutionalisation of the European "bund"'.

¹⁰³ See, on these parallels, Wai, *supra*, note 72.

¹⁰⁴ J. H. H. Weiler (2001) 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Journal of World Trade*, 35: 191-207.

Hormones: Political sensitivity in legal conflict resolution

The transatlantic conflict over hormones in beef¹⁰⁵ – widely discussed in this volume¹⁰⁶ – provides an instructive example. The US and (most of the member states of the EU are in disagreement regarding the addition of growth-promoting hormones to beef-producing cattle. Can both parties agree to expose their practices to a science-based analysis of the health risks which the consumption of hormone-enhanced beef may entail? The requirement in the SPS Agreement that the measures of the WTO members must not be ‘maintained without sufficient scientific evidence’ (Article 2.2) and that it must be ‘based on’ a risk assessment (Article 5) seems to suggest exactly that. But, as the involved actors know all too well, science, for a variety of reasons, cannot provide comprehensive answers to all the dimensions of transnational conflicts constellation. Science does not typically answer unambiguously and exactly the questions that policy-makers and lawyers are concerned with. Scientific debates are categorical distinct from ethical and normative deliberations. And, last, but not least, consumer anxieties about ‘scientifically speaking’ marginal risks may be so considerable that policy-makers may not be able to neglect them.¹⁰⁷

All these difficulties militate against accepting the standards of ‘sound science’ as a transnational ‘regulatory’ authority. However, they do not stand in the way of extending the conflicts law approach to WTO law. Nor do they jeopardise the insight that – when dealing with regulatory differences – the pursuit of a meta-norm might be more convincing than the search for some substantive ruling of transnational validity. Even when the meta-norms, which one can identify, remain vague and 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 hence 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, instead, reflect the limits of its own law-making powers. This is, indeed, what the Appellate Body did. It accepted, in principle, the need to integrate regulatory policies into the system of free trade. However, it nonetheless 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

¹⁰⁵See Appellate Body Report *EC-Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

¹⁰⁶See Ch. Gerstetter (2006) ‘The Appellate Body’s ‘response’ to the tensions and interdependencies between transnational trade governance and social regulation’, in Joerges and Petersmann, *supra*, note 3, pp. 111-32; A. Herwig (2006) ‘The precautionary principle in support of practical reason: an argument against formalistic interpretations of the precautionary principle’, in *ibid.*, pp. 301-26.

¹⁰⁷Lawyers and political scientists look at decision-making through very different lenses – but their insights into science remain unaffected: see Th. Hüller and L. Maier (2006) ‘Fixing the Codex? Global food-safety Governance under review’, in Joerges and Petersmann, *supra*, note 3, pp. 267-300, at p. 383 et seq.; see also Herwig, *supra*, note 106, at p. 304 et seq.; Fisher (2006), *supra*, note 83, pp. 327-50.; on European practices cf. J. Corkin (2008) ‘Science, Legitimacy and the Law: Regulating Risk Regulation judiciously in the European Community’ *European Law Review*, 33: 359-84.

conflict.¹⁰⁸ However, this jurisprudential caution is in striking contrast with the Panel Report in the GMO case.

The example of the GMO dispute: methodological and substantive failures

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).¹⁰⁹

Again, we have to ask whether this type of conflict can be resolved properly by 'science'. It has, of course, to be underlined that EU's precautionary principle does not provide much guidance. Small wonder that the Appellate Body, 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.'¹¹⁰

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'.¹¹¹ 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 standards trump European constitutional commitments - this is the implication and the message.

¹⁰⁸ The Report of the Appellate Body of 16 October 2008 on the Continued Suspension of Obligations in the EC 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, pars 548-55; 617-19, 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, pars 617-19; 685-6, 701-3).

¹⁰⁹ See, in detail, G. Shaffer and M. Pollack (2005) 'Reconciling (or Failing to Reconcile) Regulatory Differences: The Ongoing Transatlantic Dispute over the Regulation of Biotechnology', in D. Andrews, M. Pollack, G. Shaffer and H. Wallace (eds) *The New Transatlantic Agenda and the Future of Transatlantic Economic Governance*, Florence: European University Institute, pp. 167-229; A. Herwig (forthcoming 2010) *WTO Law, GMO Food Safety and Consumer Choice: The Limits of Legal Control*, Leiden: Nijhoff Publisher; M. Weimer (2009) 'Applying Precaution in Community Authorisation of Genetically Modified Products: Challenges and Suggestions for Reform', Recon Online Working Paper 09/14, Oslo: ARENA. Available at <http://www.reconproject.eu/main.php/RECON_wp_0914.pdf?fileitem=5456588> (accessed 27 May 2010).

¹¹⁰ *Supra*, note 105, at par. 124.

¹¹¹ *Supra*, note 105, at par. 7.0365.

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? The most problematical aspect of the Panel Report 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 of the SPS Agreement, whose provisions require that applications must be processed without 'undue delay'. This, again, is a strategic manoeuvre of fundamental importance. The private right of applicants seeking authorisation for their products trumps political sensitivities. In substantive terms, the Panel Report has disregarded the sensitivity of the GMO issue, which democratically legitimated legislatures cannot neglect; in methodological terms, it has disregarded the discrepancy between traditional conditional programming (through procedural safeguards) and the purposive programming of regulatory politics. In both respects, the Report failed to take the logic of 'political administration' into account, i.e., the 'normative fact' that time is needed for a democratically meaningful debate on political and ethical sensitive issues. On what grounds should WTO law be legitimated to disregard 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 interfere with such politically - and legally - sensitive issues in the name of sound science?

Regulatory prudence through WTO conflicts law as response to fragmentation

Our affirmative reading of the *Hormones* case endorses the hesitancy of the Appellate Body to hand down any definite substantive decision, whereas our critique of the GMO Report complains about an illegitimate assumption of decision-making powers by that body. The basis of both the affirmation *and* the critique is the same: the WTO simply lacks the legitimate power to take a definite stance on true conflicts which concern matters of high political sensitivity and far reaching economic implications. Positively put, our objection is a *defence* of both the rule of law and of the expectation that judicial and administration by bodies need - in the last instance - to be legitimated by us, the peoples.

This defence should be understood in the light of the differences and the discrepancies of the various levels of the interaction of law and politics within constitutional democracies and in post national constellations. Responses to conflicts between competing policy objectives have to be found as a matter of routine in democratic orders. Contrary to the nation state system with its comprehensive competences and mechanisms to deal with legally unresolved conflicts in political and legislative arenas, the possibility of organising equivalent processes beyond the nation states is limited. Within the European Union, transnational regulatory and administrative techniques to organise co-operative responses are available via the 'second dimension' of conflicts law. At the WTO-level, however, equivalent co-ordinating mechanisms are simply unavailable – and this entails the risk that fragmentation will be strategically exploited to erode the accomplishments of post-*laissez-faire* regulatory endeavours.¹¹²

All this provokes the follow-up question of whether the law may be required *not* to take definite substantive decisions. An exercise of this kind of restraint should not be misinterpreted as a return to the 'state of nature' and refusal to enter into a Kantian *Rechtszustand* ('lawful condition').¹¹³ What we need to acknowledge are both factual and normative limitations to the 'legalisation' and 'judicialisation' of transnational conflicts resolution, which reflect the varying intensities of positive commitments. Seen from such perspectives, the Panel Report in the GMO litigation should not be rationalised as through the duty of 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 what the litigants are entitled to receive. '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'.¹¹⁴

Second order conflicts law and its affinities with GAL

The emergence of a regulatory layer of international law, 'specific in its normativity and legitimacy',¹¹⁵ has functional equivalents in the European polity, but has not been institutionalised in the same modes at the international level. 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

¹¹² This concern is shared by many contributors to Joerges and Petersmann (2006), *supra*, note 3; see, in particular, J. Pauwelyn (2006) 'Non-Traditional Patterns of Global Regulation: Is the WTO "missing the Boat"?', in *ibid.*, pp. 199-228; for an impressive recent analysis of the risks of fragmentation, see E. Benvenisti and G.W. Downs (2007) 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', *Stanford Law Review*, 60: 595-631.

¹¹³ I. Kant (1796) 'Perpetual Peace. A Philosophical Sketch', in H. Reiss (ed.) (1991) *Kant: Political Writings*, Cambridge: Cambridge University Press, pp. 93-130.

¹¹⁴ N. Krisch (2006) 'The Pluralism of Global Administrative Law', *European Journal of International Law*, 17: 247-78, at p. 266. See, more recently, *id.* (2009) 'Global Administrative Law and the Constitutional Ambition', LSE Legal Studies Working Paper 09/10. Available at: <<http://eprints.lse.ac.uk/24563/>> (accessed 27 May 2010) .

¹¹⁵ See Weiler, *supra*, note 23, at p. 552.

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'¹¹⁶ did occur, albeit in a limited and indirect way; legal commitments are 'softer' and co-ordinative activities typically informal.¹¹⁷ The two Agreements complementing the WTO framework are the outstanding devices. They 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.¹¹⁸ 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. These mechanisms have proved to be 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 departs¹¹⁹ 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 - but are, nevertheless, often enough compatible with his regulative ideas.

The most important suggestions have been developed in the context of the Global Administrative Law project (GAL) at NYU Law School.¹²⁰ Its protagonists have

¹¹⁶ See T. Büthe (2008) 'The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization', *Law and Contemporary Problems*, 71: 219-55, at p. 226.

¹¹⁷ See the analysis of U. Ehling, 'Environmental Policies and the WTO Committee on Trade and Environment: A Record of Failure?', in Joerges and Petersmann (2006), *supra*, note 3, pp. 437-58.

¹¹⁸ For details, see J. Scott (2007) *The WTO Agreement on Sanitary and Phytosanitary Measures, A Commentary*, Oxford, Oxford University Press, p. 246 et seq.

¹¹⁹ See the second section of this paper; 'The geology of the law of constitutional democracies: from "law as regulation" to "law as governance" and the defence of the rule of law through proceduralisation'.

¹²⁰ See B. Kingsbury, N. Krisch and R. Stewart (2005) 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 68: 15-62. The project is enormous in its scope. It has, of course, predecessors and allies. It has, for example, been suggested that 'WTO law could be construed as concretizing what might be implicit in an adequate constitutional understanding of a State in an interdependent world', by A. von Bogdandy (2003) 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization', in S. Griller (ed.) *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, Vienna-New York: Springer, pp. 103-48, at p. 134. See, earlier, R. Howse and K. Nicolaidis (2001) 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in R.B. Porter et al. (eds) *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium*, Washington DC: Brookings Institution

underlined that they deliberately refrain from designing a global constitutional vision;¹²¹ Richard Stewart has explicitly objected against any transplanting of EU models such as that of a constitutionalised comitology to the global level.¹²² And yet, considerations in the GAL project on a deepened 'juridifiction' of transnational governance arrangements and practices seem to reflect nothing else and nothing less than the possibility of a 'law of law-production'.¹²³ 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.¹²⁴ 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',¹²⁵ 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 therefore predicts that GAL will have to generate 'conflict of laws arrangements' as GAL's 'horizontal dimension'.¹²⁶

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.¹²⁷ This suggestion is accompanied by Benedict Kingsbury's defence of the law's normative *proprium*, which underlines that the qualification of norms as law 'is not a value-neutral statement'.¹²⁸ 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

Press, p. 227 et seq. The core GAL group seems to me much closer to the distinction between various dimensions of conflicts law as suggested here. Because of the precarious legitimacy of substantive WTO decision-making, the 'first dimension' of conflicts law is indispensable - and equally irrefutable is in view of the 'privatisation' of regulatory tasks the need for the development of conflict law's third dimension.

¹²¹ B. Kingsbury (2009) 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law*, 20: 23-57; and see the contribution of R. Stewart, M. Ratton, S. Badin and F. Getulio Vargas, 'The World Trade Organization and Global Administrative Law', in Joerges and Petersmann, *supra*, note 3.

¹²² Mars or Venus? Accountability and the Discontents of Globalization: US and EU Models for Regulatory Governance', mimeo 06, unpublished manuscript (on file with the author).

¹²³ See, for this term, *supra*, note 35.

¹²⁴ See Stewart et al., *supra*, note 120.

¹²⁵ See the fifth section of this paper, text following note 98.

¹²⁶ See Kingsbury, *supra*, note 121, at p. 56; the reconstruction of this passage as a resort to conflict of law doctrines which would govern these relationships by conflicts of law doctrines by M.-S. Kuo (forthcoming) 'Inter-Public Legality or Post-Public Legitimacy? A Response to Professor Kingsbury's Conception of Global Administrative "Law"', *European Journal of International Law*, is, in my view, an inadequate interpretation of both Kingsbury's argument and of the proponents of conflicts law; but see more recently id. (2010) 'Between Law and Language: When Constitutionalism Goes Plural in a Globalising World', *Modern Law Review* 73 (forthcoming).

¹²⁷ *Ibid.*, in particular, Section II.C.

¹²⁸ See Kingsbury, *supra*, note 121, p. 26.

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 implies decisional restraints and strategies in the form outlined at the end of the previous section.¹²⁹

Para-legal regimes: 'facts without norms'?¹³⁰

Para-legal regimes are of paramount importance in the globalising economy – and the most complicated challenge to the conflicts law project. 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 from the perspectives of conflicts law 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 both 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. From 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.

Any systematic exploration of these mechanisms is beyond the scope of this essay.¹³¹ The perspectives in which they should be undertaken should, however, be identical

¹²⁹ See the fourth section of this paper, under 'Regulatory prudence through WTO conflicts law as response to fragmentation'.

¹³⁰ The phrase is Christoph Humrich's; see C. Humrich (forthcoming 2010) 'Facts without Norms? Does the Constitutionalisation of International Law still have a Discourse-Theoretical Chance?', in C. Ungueranu, K. Günther and Ch. Joerges (eds) *Jürgen Habermas, Volume II: Law and Democracy in the Postnational Constellation*, Farnham: Ashgate Publishing.

¹³¹ They are being intensively discussed in the context of the Bremen project. See, in particular, A. Herwig (2004) 'Transnational Governance Regimes for Food derived from Bio-Technology and their Legitimacy', in Ch. Joerges, I.-J. Sand and G. Teubner, *Transnational Governance and Constitutionalism*, Oxford: Hart Publishing, pp. 199-222; Th. Hüller and M.L. Maier (2006) 'Fixing the Codex? Global Food-safety Governance under Review', in Joerges and Petersmann, *Constitutionalism, supra*, note 3, pp. 325-358; Falke, *supra*, note 93; see, recently, M.D. Masson-Matthee (2007) *The Codex Alimentarius Commission and Its Standards*, The Hague: T.M.C. Asser Press; D. Bevilacqua and J. Duncan, (2009) 'Towards a new cosmopolitanism: Global Reflexive Interactive Democracy as a new mechanism for civil society participation in agri-food governance', *Global Jurist (Advances)* 10:1, Article 2. Available at

with those that we have articulated.¹³² 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 the 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.

Its normative strength and also its political and legal prospects rest upon the 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 regional interests has become

<<http://www.bepress.com/gj/vol10/iss1/art2>> (accessed 25 May 2010).

¹³² See the third section of this paper; 'Multi-level as Analytical Paradigm in European Studies and the Misery of Methodological Nationalism'. In his earlier writings, Gunther Teubner framed these issues in a 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 *volens-nolens* 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' - thus his [G. Teubner] (1997) 'Breaking Frames: The Global Interplay of Legal and Social Systems' *American Journal of Comparative Law*, 45: 149-69, at p. 159. However, one wonders what could constitute and characterise these 'new forms of democratic legitimation'? In his more recent work, Teubner seems to radicalise the equation of *de facto* law-making with positive law, which is already present in the cited passage. 'Spontaneous self-validation' of transnational private regimes (*Zivilverfassungen*) seems an all too mysterious process. In a recent essay, however, Teubner uses formulae which take up his earlier intentions and seem 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 allowed 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 and F. Rödl (2009) '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: Walter de Gruyter, pp. 765-78; F. Rödl (2009) 'Regime-collisions, Proceduralised Conflict of Laws and the Unity of the Law: on the Form of Constitutionalism beyond the State', in R. Nickel (ed.) *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, RECON Report No. 7, Oslo: ARENA, pp. 341-60.

normatively indispensable.¹³³ This implies that it may often be impossible to find solutions to disputes which deserve recognition by all affected jurisdictions. Why should this be the weakness rather than the strength of the conflicts law approach?

The legacy of Karl Polanyi

Throughout this essay, we have operated upon the basis of implicit assumptions about the institutional and social embeddedness of markets – within the former *Volkswirtschaften* (national economies) and our – by now – Europeanising and globalising economies. These assumptions, so my ‘unsubstantiated fourth theses’¹³⁴ can be backed by a broad range of traditions of political economy,¹³⁵ economic sociology,¹³⁶ political sociology,¹³⁷ various strands of systems theory,¹³⁸ and theories of the knowledge society.¹³⁹ Related endeavours can be observed in the search for a normative social theory basis in international relations¹⁴⁰ and in the exuberant interdisciplinary debates on transnational governance¹⁴¹ – and, last, but not least, in human rights based economic constitutionalism, as defended by Ernst-Ulrich Petersmann.¹⁴²

¹³³ See K. Zurek (2001) ‘European Food Regulation after Enlargement: Should Europe’s Modes of Regulation Provide for more Flexibility?’, PhD Thesis, EUI Florence.

¹³⁴ See Joerges, *supra*, note 4, pp. 496-99.

¹³⁵ F. Block (2005) ‘Towards a New Understanding of Economic Modernity’, in Ch. Joerges, B. Stråth and P. Wagner (eds) *The Economy as Polity: The Political Constitution of Contemporary Capitalism*, London: University College London Press, pp. 3-16.

¹³⁶ See, out of a booming disciplinary renaissance, J. Beckert (2002) *Beyond the Market. The Social Foundations of Economic Efficiency*, Princeton, NJ: Princeton University Press.

¹³⁷ N. Fligstein (1996) ‘Markets as Politics: A Politico-Cultural Approach to Market Institutions’, *American Sociological Review*, 61: 656-73.

¹³⁸ H. Willke (2001) ‘Dekonstruktion der Utopie’, in id. *Atopia. Studien zur atopischen Gesellschaft*, Frankfurt am Main: Suhrkamp, pp. 7-65 (his argument concerns the utopia of the pure market).

¹³⁹ N. Stehr (2003) *Wissenspolitik. Die Überwachung des Wissens*, Frankfurt am Main: Suhrkamp, pp. 222-44.

¹⁴⁰ See, very explicitly, P. Nanz (2006) ‘Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory’, in Joerges and Petersmann, *supra*, note 3, pp. 59-82, and R. Nickel (2006) ‘Legal Patterns of Global Governance: Participatory Transnational Governance’, in *ibid.*, pp. 157-96.

¹⁴¹ See, for example, M. Zürn (2000) ‘Democratic Governance Beyond the Nation-State: The EU and Other International Institutions’, *European Journal of International Relations* 6: 183-221; for recent contributions in German literature, see B. Herborth and P. Niesen (eds) (2007) *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt am Main: Suhrkamp; R. Kreide and A. Niederberger (eds) (2008) *Transnationale Verrechtlichung, Nationale Demokratien im Kontext globaler Politik*, Frankfurt am Main: Campus; N. Deitelhoff and J. Steffek (eds) (2009) *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter*, Frankfurt am Main: Campus. Pertinent contributions in English can no longer be documented in a footnote. The debate on the constitutional quality of the WTO is an easier case, mirroring, however, the controversies in international and European law. See, for a recent critical survey, J. L. Dunoff (2006) ‘Constitutional Conceits: the WTO’s “Constitution” and the Discipline of International Law’, *European Journal of International Law*, 17: 647-75.

¹⁴² E.-U. Petersmann (2006) ‘Multilevel Trade Governance in the WTO requires Multilevel Constitutionalism’, in Joerges and Petersmann, *supra*, note 3, pp. 5-58; see the analysis by A. Herwig and Th. Hüller, (2008) ‘Towards Normative Legitimacy of the World Trade Order’, in Ch. Joerges and P. F. Kjaer (eds) *Transnational Standards of Social Protection. Contrasting European and Transnational Governance*, RECON Report No. 4, Oslo: ARENA, pp. 223-54, at p. 237 et seq.

The *locus classicus* – and by now also topical – reference point of pertinent discussions is, as Robert Wai has noted,¹⁴³ Karl Polanyi's *Great Transformation*.¹⁴⁴ Polanyi's analyses of the rise of capitalism are instructive for lawyers because they identify patterns which we continue to observe within nation states, in the European and also in transnational contexts: markets are contested social institutions. This is plainly visible from the political controversies and legal litigation over their proper ordering. Polanyi's messages reach beyond these phenomena. The proponents of the self-regulating market, he warns us, expose the economy and society to economic and social risks, which, in turn, 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 states and societies could complacently rely or derive instructions in the disciplines of social and economic engineering. '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'.¹⁴⁵ What kind of conflicts, then, does the economy harbour and what means are at the disposal of state and/or society to discipline these processes and their agents? The answers to this 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.¹⁴⁶

This argument, Alexander Ebner objects,¹⁴⁷ downplays the Polanyian critique of the commodification of labour, land and money. Protagonists of the 'always socially

¹⁴³ See Wai, *supra*, note 72, p. 244; such casual remarks are indicative of a real revival; see, with more than casually, G. Teubner, *supra*, note 63, at p. 12.

¹⁴⁴ Karl Polanyi (1944) *The Great Transformation: The Political and Economic Origins of Our Time*, Boston, MA: Beacon Press.

¹⁴⁵ W. Streeck (2009) *Reforming Capitalism. Institutional Changes in the German Political Economy*, Oxford: Oxford University Press, at p. 247.

¹⁴⁶ Thus, in a contribution to the workshop on 'The Economy as a Polity' at the European University Institute, 12-13 May 2003; this passage was not included in the later publication: F. Block (2005) 'Towards a New Understanding of Economic Modernity', in Ch. Joerges, B. Str ath and P. Wagner (eds) *The Political Construction of Modern Capitalism*, London: Clarendon Press, pp. 3-16. It remains, nevertheless, alive in topical contributions; see, for example, J. Caporaso and S. Tarrow (2008) 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', RECON Online Working Paper 08/01. Available at <http://www.reconproject.eu/main.php/RECON_wp_0801.pdf?fileitem=5456241> (accessed 25 May 2010).

¹⁴⁷ A. Ebner (forthcoming 2010) 'Transnational Markets and the Polanyi Problem', in Ch. Joerges and J. Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford: Hart

embedded market' and the political messages associated with it tend to disregard the distinction between 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.¹⁴⁸

When contrasted with the contestation which one observes in concrete 'cases', this dichotomy seems too schematically and opaquely constructed. The phenomena which, for example, Nico Stehr characterises as a 'moralisation' and 'politicisation' of today's markets,¹⁴⁹ are, however, more ambiguous and more multi-faceted. Consumers, once portrayed as rent-seeking monads in the models of economic theory, are increasingly more adequately portrayed as politically-active market citizens by consumer policy analysts and historians.¹⁵⁰ The much cited 'greening' of consumers affects one of Polanyi's 'false commodities'; legislation protecting consumers in cases of over-indebtedness is directly involved with the kind of social protection which labour law sought to ensure – and hence affects a second 'false commodity'. 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'.¹⁵¹ Polanyi's conceptualisation of the 'economy as instituted process'¹⁵² captures precisely these dynamics, 'a universal *tendency* for societies to self-protect against "unregulated" market exchange',¹⁵³ 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'.¹⁵⁴

Publishing.

¹⁴⁸ Ibid.

¹⁴⁹ N. Stehr (2008) *Moral Markets: How Knowledge and Affluence Change Consumers and Products*, Boulder, CO: Paradigm Publishers; see also N. Stehr, C. Henning and B. Weiler (eds) (2006) *The Moralization of the Market*, New Brunswick, NJ: Transaction Publishers.

¹⁵⁰ See M. Everson (2006) 'Legal Construction of the Consumer', in F. Trentmann (ed.) *The Making of the Consumer*, Oxford-New York: Berg, pp. 99-121; M. Everson and Ch. Joerges, (2008) 'Consumer Citizenship in Postnational Constellations?', in K. Soper and F. Trentmann (eds) *Citizenship and Consumption*, New York: Palgrave Macmillan, pp. 154-71.

¹⁵² K. Polanyi, (2001) [1957] 'The Economy as Instituted Process', in M. Granovetter and R. Swedberg (eds) *The Sociology of Economic Life*, second edition, Boulder, CO/San Francisco, CA/Oxford: Westview Press, pp. 31-50.

¹⁵² K. Polanyi, (2001) [1957] 'The Economy as Instituted Process', in M. Granovetter and R. Swedberg (eds) *The Sociology of Economic Life*, second edition, Boulder, CO/San Francisco, CA/Oxford: Westview Press, pp. 31-50.

¹⁵³ S. Randles, (2003) 'Issues for a Neo-Polanyian Research Agenda in Economic Sociology', *International Review of Sociology*, 13: 409-34, at p. 424.

¹⁵⁴ Streeck, *supra*, note 145, pp. 247-248.

Economic Sociology cannot generate conclusive answers to the problems which the law and legal scholarship have with the juridification of transnational governance. However, the Polanyian legacy does provides a key to the conceptualisation of the economy as polity – and to the double movement of *Rechtswissenschaft in Kritik und als Kritik* (Critique of legal science and legal science as critique).¹⁵⁵ Thus, Rudolf Wiethölter's formula both captures and mirrors real world tensions and their controversial conceptualisations. It rephrases the kind of tensions which Karl Polanyi re-constructed in his dis-embedding strategies and re-embedding counter-movements.

¹⁵⁵ *Supra*, note 27.

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