

Post-critical Private International Law: From Politics to Technique A Sketch

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Conflict of laws is en vogue again.¹ After a period of intellectual fatigue with yet another methodological proposal in the United States, yet another legislative proposal in Europe, conflicts has become core of much legal analysis again, far outside its traditional realm of conflicts between sovereign states. The reason for the recent rise in interest in conflict of laws lies in the rise of legal fragmentation.² It is being more and more acknowledged that if a conflict between laws is recognized, the discipline most suited to deal with that conflict is the discipline that was made for this precise purpose.

This emergent joinder between conflict of laws and legal theory is exciting, though it is still in its beginnings. Unfortunately (though perhaps not surprisingly), the rise of conflict of laws as a lens goes hand in hand with a decline of trust in its methods. The biggest criticism against traditional methods of conflict of laws is, perhaps, the absence of politics. Traditional doctrine, so it is alleged, ignores, or sidelines, political issues. And this becomes, of course, more and more problematical the more conflict of laws expands beyond its traditional are of conflicts between private laws and is used on other areas of law, or even conflicts between law and non-law.

¹ See Karen Knop, Ralf Michaels & Annelise Riles, Foreword, 71 *Law and Contemporary Problems* 1-17 (Summer 2008).

² Legal fragmentation is not social fragmentation, and legal pluralism is not the same as social, or political, pluralism. See Ralf Michaels, *On Liberalism and Legal Pluralism*, in Miguel Maduro, Kaarlo Tuori & Suvi Sankari (eds), *Transnational Law—Rethinking European Law and Legal Thinking* (2014).

We can see such a disdain for traditional doctrine in several recent attempts to expand private international law, and ground it more in legal theory.³ A first strand of scholars consists of theoreticians of law who do not emerge from conflict of laws but find it helpful for their projects. In particular Gunther Teubner and Karl Ladeur, are intrigued by the fact that conflict of laws deals with conflicts among incommensurate normative systems, and find that to be a helpful lens for their own legal theories of fragmentations. However, they ignore, or openly reject, the precise ways in which conflict of laws deals with conflicts. Teubner, for example, explicitly rejects the idea that traditional conflict of laws can help with fragmentation of international law and instead suggests the development of a new substantive law approach.⁴ In the end, then, they adopt the problem descriptions from conflict of laws but not its solutions.

Another strand, represented by Robert Wai and Horatia Muir Watt, comes the other way from conflict of laws and attempts to uncover its underlying potential for global governance.⁵ These authors point out the relevance of political considerations for their expanded views of private international law. They also, however, have little patience with traditional doctrine. Muir Watt in particular chastizes the empty formalism of European private international law thinking and asks for an expanded instrumentalism.

A third strand, finally, combines conflict of laws and legal theory at equal levels. This strand is epitomized by Christian Joerges' conceptualization of EU law as a conflict of laws regime.⁶ Unlike the first strand I named, Joerges comes from conflict of laws—two of his earliest, and most influential, publications were devoted to the

³ Andreas Maurer and Moritz Renner have recently summarized, very helpfully, the recent attention given to conflict of laws methods – or, perhaps more accurately, conflict of laws talk – in legal theory, especially in Germany. Moritz Renner & Andreas Maurer, *Kollisionsrechtliches Denken in der Rechtstheorie*, in: *Konflikte im Recht—Recht der Konflikte* (Archiv für Rechts- und Sozialphilosophie, Beiheft 125, 2010) 207-224.

⁴ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* 154 ff (2012). For a suggestion of how conflict of laws can be used for conflicts within international law, see Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law* (with Joost Pauwelyn), in *MULTI-SOURCE EQUIVALENT NORMS IN INTERNATIONAL LAW* 19-44 (Tomer Broude & Yuval Shany eds., Hart, 2011); republished with slight modifications in *22 DUKE JOURNAL FOR INTERNATIONAL AND COMPARATIVE LAW* 349-376 (2012).

⁵ Eg Robert S Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 *Colum. J. Transnat'l L.* 209 (2002); Horatia Muir Watt, *Private International Law Beyond the Schism*, 2011 *2(3) Transnational Legal Theory* 347-427.

⁶ Eg Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, (2004) 14 *Duke Journal of Comparative and International Law* 149.

discipline.⁷ Unlike the second strand, he applies conflicts to new areas. And although it may seem as though conflict of laws was only one of his various interests (others including private law and economic law), I think it can be said that, just as a specific idea of private law informed already his early analyses of conflict of laws, a certain conflict of laws sensitivity has characterized much of his work that is ostensibly in other areas.

It is for these reasons that his suggestion of a new conflicts law as constitutional law of Europe is the most sophisticated elaboration of such a system. I find myself in fundamental agreement with Joerges' attempt to use conflict of laws as a discipline for a more appropriate understanding of EU law. But I worry that the useful recognition of a number of areas in which conflicts of rationalities exists does not lead, in Joerges' approach and its reception in the literature, to an equally robust technique to deal with these conflicts. Essentially, although much energy is devoted on the recognition and classification of conflicts, less clarity exists with regard to the technique with which to deal with these conflicts. Or, more precisely, instead of such technique, what we find, frequently, is a recourse to some type of balancing, or a priority for one rationality over the other – a political, rather than a legal, response. I believe (though I may of course be wrong) that Joerges' aversion to developing such a technique can be traced back to his preference for the work of Brainerd Currie in specific, and interest analysis more generally. Currie's analysis was extremely helpful, I believe, in unveiling the shortcomings of the formalist doctrine prevalent at his time. Often, this is viewed as his main contribution; his own suggestion on how conflicts should be resolved is called impractical. By contrast, I think his own aversion to the formulation of a new method to replace the old one was quite justified. Simply put, Currie's own analysis of conflict of laws is not equipped to generate a new positive approach to conflict of laws, and the later numerous attempts to build such an approach on the basis of his suggestions are therefore seriously misguided. What we need instead is to step beyond the realizations that conflicts exist everywhere, and that therefore a law of conflicts is needed, and actually find out the extent to which the existing techniques can deal with these conflicts. We have to move from politics to technique.

This brief paper is more a sketch than an actual argument, but I hope it can suggest why this move is necessary and how it is possible. I first address what conflict of laws actually is, and how our description of the problem it tries to resolve is intimately connected with our methodological solutions to the problem. I then move to the politics of conflicts, in particular Brainerd Currie's important but, as I argue, ultimately misunderstood contribution to the discipline. I then lay out how a return to technique, as an alternative to the open politicization of the discipline, is more promising.

⁷ Christian Joerges, *Zum Funktionswandel des Kollisionsrechts—Die "Governmental Interest Analysis" und die "Krise des Internationalen Privatrechts"* (Berlin: de Gruyter and Tübingen: Mohr, 1971); Christian Joerges, *Christian Joerges, Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts*, (1979) 43 *RabelsZ* 6-79.

I. Foundations

I want to start with a curiosity of the field of conflict of laws. Conflict of Laws is an ambiguous name for a legal discipline. It is ambiguous because it means two things at the same time—the problem with which the field deals, and the responses to this problem given by the law. Of course, other disciplines also use the problem addressed for the definition of the legal discipline – consumer protection law (as opposed to consumer law); non-discrimination law, etc. But in these fields, the definition of the problem is an inspiration for, but analytically different from, the field's name: consumer protection is different from consumer protection law. By contrast, although we sometimes speak of a “law of conflicts” or even “law of conflict of laws,” usually we refer to the field by the exact name of the problem it is aimed to resolve.

a) Conflicts as Problem

This implies two things. First, speaking of conflict of laws precommits us to thinking about issues in a certain way. If we speak of a conflict of laws, then the conflict is the problem we have to resolve, and the absence of a conflict means no problem actually emerges. This is somewhat problematic because, of course, a conflict of laws is a metaphor.⁸ Laws are never actually in conflict. Typically, not even sovereigns are in actual conflict. Who is in conflict are private parties, who invoke the conflict of laws (the question for the applicable law) as a trope in their quest for the ultimate result. If this is true, it follows that whether an actual conflict of laws exists (as opposed to a mere difference between laws) is a matter not of observation but of construction. And we can see that such construction happens differently in different countries. It is in the common law world in particular (but, at least in terminology, also in France) that we speak of actual conflicts of law. Notably, the introduction of actual conflicts predates the US conflicts revolution by several centuries. In fact, one of Currie's contributions to the field is not the insight that conflicts exist (as clashes of values and cultures) but to the contrary that fewer conflicts exist than we may think, simply because laws do not claim universal application and thus many apparent conflicts are actually false conflicts. The avoidance of conflicts, rather than their resolution, is a relatively frequent topic in the literature.

Notably, continental conflict of laws, tellingly entitled private international law, makes do without the concept of a conflict. The question which law applies is asked, typically, with no attention to the content of that law, much less to whether several potentially applicable laws actually differ or are in conflict. Although in contemporary private international law substantive considerations come more and more to the fore, the notion of conflict is still, in almost all contexts, irrelevant.

It has been argued that this ostentatious blindness for politics and actual conflicts make traditional savignyan conflict of laws normatively inadequate, at least for the law of the welfare state. I will have more to say about this later. For now, what is relevant is that such private international law is not a priori epistemologically

⁸ See also Joseph Singer, *Real Conflicts*, 69 B.U. L. Rev. 1 (1989).

inadequate. It is possible to describe the situation that conflict of laws faces without determining whether a conflict exists or not.

A second implication, however, may be even more striking: If the field is defined as the problem it aims at resolving, this suggests that the problem has to be resolved without recourse to a separate body of law. Law appears as the object of conflict of laws, but not as its solution. That can mean two things: it can mean that conflict of laws is an area not of law but of something else – politics, ontology – or it can mean that conflict of laws is a matter for the laws in conflict themselves. Not surprisingly, both avenues have been attempted time and time again. What is striking, when we look at these attempts, is that they all have ultimately failed—they all produced, in the end, rules of conflict of laws.

b) Conflicts as non-law

If conflicts of laws should be resolved without recourse to any law at all, this could be because these conflicts may belong to the realm of politics and, for that reason, not the realm of law.⁹ This is indeed a trope that has existed, for a long time, in *public* international law when it is thought to be just politics (a thought that had some recurrence in recent US scholarship in public international law.) It can be found in discussions of legal fragmentation, too.¹⁰ But it is also a trope in *private* international law. The reason that the Dutch school of private international law in the 17th century places comity at the core of its analysis is precisely the absence of legal rules to deal with conflicts. The traditional source of private international law, the *ius commune*, has broken down under the pressure of sovereignty. Modern public international law is still emerging. The idea that sovereign states should ever, for some legal reason, be bound to apply the law of another sovereign state, seems preposterous. At the same time, it seems desirable that foreign law is applied, at least sometimes. The consequence is comity, later defined by the US Supreme Court as “neither a matter of absolute obligation, nor of mere courtesy and good will,”¹¹ in other words, some type of quasi-legal obligation but certainly no law.

And yet, it is not so. Today, when scholars focus on Huber, they focus almost exclusively at his famous three maxims of private international law as foundational for the field.¹² They focus, in other words, on the political foundations of his

⁹ Note the implication of this argument: it is not that law can be thought free of politics (the usual stereotype of classical legal thought) but the flipside, that politics can be thought free of law.

¹⁰ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2012).

¹¹ *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹² Huber’s maxims are these:

- 1) “The laws of each state have force within the limits of that government, and bind all subject to it, but not beyond.
- 2) “[t]hose people are held to be subject to a sovereign authority who are found within its boundaries, whether they are there permanently or temporarily.”
- 3) [I]t is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state,

approach. They thereby overlook that Huber's main attention is to actual rules of conflict of laws. They also overlook that these rules provide, in substance, a striking continuity to the earlier statist school of private international law.¹³ The rules do not emerge from the maxims; in fact they have fairly little to do with them. In the end, it seems almost as though Huber switched, quite radically, the foundations of the discipline, while leaving the discipline itself intact.

Remarkably, a similar idea – that conflicts of laws have to be resolved without recourse to a body of law – exists in the vested rights theory, the other grand theory of the common law. Here, the idea is that judges never apply foreign law at all. All that they do is to enforce rights vested under foreign law, which come to the court not as laws but as facts that the judge has to take into account.¹⁴ That idea was discredited as circular as early as the 19th century: we cannot know whether a right vested under foreign law unless we know that the foreign law applies in the first place.¹⁵ This meant that the vested rights theory needed to rely on conflicts rules that determine the applicable law. And indeed, we find long and detailed treatises consisting of such rules both in England (Dicey) and the United States (Beale). Again, these rules are not directly deduced from the non-law idea of vested rights (although they are, for the most part, consistent with the idea), and recourse to the idea of vested rights is rarely necessary for their application. Again, what matters in practice are rules of conflict of laws.

c) Conflicts as Substantive Law

Another way to deal with conflicts of laws is the resort to the substantive law in question themselves. We can see this most obviously in the statist school, which determined the respective scope of a statute in order to both recognize and resolve conflicts. Wächter presented a 19th century approach that, though unilateral rather than multilateral, suggested similar solutions. Finally, of course, the US conflicts revolution revived the idea of resolving conflicts on the basis of an interpretation of underlying statutes. This is still the approach the US Supreme Court takes to the extraterritorial reach of federal statutes

that effect is given to foreign laws exercised upon the property within its territory, out of respect for the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject.

¹³ Nikitas Hatzimihail, *Pre-Classical Conflict of Laws* (SJD Thesis, Harvard, 2002).

¹⁴ For the theory, and its reemergence in the country-of-origin doctrine, see Ralf Michaels, *EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested Rights Theory*, 2 *Journal of Private International Law* 195-242 (2006).

¹⁵ CG Wächter, "Ueber die Collision der Privatrechtsgesetze verschiedener Staaten (Fortsetzung)", (1842) 25 *Archiv für die civilistische Praxis* 1, 4-5; cf. KH Nadelmann, "Some Historical Notes on the Doctrinal Sources of American Conflict of Laws", in Nadelmann, *Conflict of Laws: International and Interstate* (1972), 1, 16; Michaels, previous note, at 229-30.

And yet, this approach has also been turned into a rules approach. The essential principle of the statisticians is this: Personal statutes followed the person's origin; territorial statutes remained in the territory; so-called "mixed statutes" were allocated in one or the other realm. To some extent, this characterization of statutes as personal or territorial is a matter of statutory interpretation. When Bartolus takes the text of a statute as the starting point¹⁶ he suggests, if haphazardly, that the scope of such laws must be determined by these laws themselves. More often than not, however, the characterization occurred objectively, on the basis of the area of law. The same happens in interest analysis, where the question of whether legal rules are loss-allocating or conduct-regulating (which determines whether they are personal or territorial) is typified. The basis is statutory interpretation, but the result tends to be a conflicts rule that uses different connecting factors for different kinds of issues: common domicile for loss-allocating rules, place of the tort for conduct-regulation. In the end, this is not so different from conflicts rules like Article 4(2) and Articles 4(1), 17 of the Rome II Regulation, respectively.

d) Conflicts as Special Rules

The idea that conflict of laws requires special rules is thus at the same time relatively new and old at the same time. It is new in the sense that an explicit treatment of such rules as legal rules, grounded neither in politics or nature or substantive law but instead of independent assessment of what is most proper, really emerged only since the rise of legal positivism. Traditionally, such positivization takes place in a decentralized way, in the respective member states. Of course, conflict of laws has long been an object for legislation (most famously perhaps in Article 3 of the French Civil Code of 1804).¹⁷ But at the same time legislators have long been hesitant to legislate on conflict of laws. The German lawmaker of 1896 for example refrained from laying down multilateral rules and merely defined unilaterally the scope of German law; only courts and scholars interpreted these unilateral rules as multilateral.¹⁸ But scholars in the 19th century prepared the path towards such a positivization of conflicts. Mancini suggested that private international law, just as public international law, could and should be the object of treaties, a desire that remains until today. Franz Kahn shared the preference for treaties but added significant analysis of the possibility for states to lay down their own choice-of-law rules, different in substance from their substantive law counterparts.¹⁹ Klaus Schurig, finally, moves Kahn further still and suggests that the preference for treaties is not automatic: it may make sense for states to develop their own autonomous approach to the resolution of conflicts of

¹⁶ Nikitas E. Hatzimihail, Bartolus and the Conflict of Laws, 60 *Revue hellénique de droit international* 11 (2007).

¹⁷ Jean-Louis Halpérin, *Entre nationalisme juridique et communauté juridique* 24-26 (1999).

¹⁸ Michael Behn, *Die Entstehungsgeschichte der einseitigen Kollisionsnormen des EGBGB* (1980).

¹⁹ Franz Kahn, *Die einheitliche Kodifikation des internationalen Privatrechts durch Staatsverträge* (1904).

laws, but the states' positive rules are still special conflict of laws rules.²⁰ Here, positivization coexists with decentralization.

But positivization can also come from centralization. Federal systems in particular provide the unique opportunity for central allocation of issues to respective states.²¹ Remarkably, most federal systems do not provide such legislation.²² In the United States, for example, calls for a general federal statute on choice of law remained unheeded.²³ At the same time, hopes that the US Constitution could be used as basis for the resolution of interstate conflicts have not yielded results; the US Supreme Court has mostly refrained from developing such a doctrine "without a rudder to steer us".²⁴ The European Union is arguably the first federal system that has truly federalized and constitutionalized, in this sense, the conflict of laws between different member states – both through quasi-codification in a number of "Rome" conflict of laws regulations, and through ECJ case law on the common market, especially common market. This has been described as the core of the new European choice-of-law revolution.²⁵

The idea that conflict of laws creates a separate legal field is old, however, in another sense. I have tried to show that legal rules have always characterized the discipline. Comity as a quasi-political way of resolving conflicts has been turned into doctrine; the vested rights theory has spawned detailed rules on conflict of laws, the statisticians also developed such rules. Does this mean that such specific conflicts rules are a necessary element of the discipline? In order to approach this question, I now focus in some more detail on the work of Brainerd Currie.

II. Politics, Approaches, and Theory: Currie, Again

Rules thus appear to be almost omnipresent in choice of law, even though they sometimes emerge, so to speak, *sub rosa*. This rule focus has been challenged in two strands of ideas in US conflict of laws in particular, of which only one is truly relevant to me.

The irrelevant (for me) strand suggests that rules should be replaced by approaches. This strand criticizes what it views, in traditional private international law, as an undue fixation on strict and inflexible rules (although at the same time it opposes the numerous so-called "escape clauses" like characterization and *renvoi* that make these rules flexible). It wants to substitute flexible approaches for these rigid rules. This changes the form of the normative demands on judges in determining the

²⁰ Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* (9th ed. 2004).

²¹ See Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 *Tul. L. Rev.* 1607-1644 (2008).

²² There is, however, legislation on a related issue, namely the scope of application for personal statutes in countries such as India and Israel.

²³ Michaels 1617f. with references.

²⁴ Jürgen Basedow, *Federal Choice of Law in Europe and the USA—A Comparative Account of Interstate Conflicts*, 82 *Tul. L. Rev.* 2119 (2008).

²⁵ Michaels 1641ff.

applicable law. It thereby changes, arguably, the institutional competence of such determination because it gives judges as decisionmakers more discretion. It does not, however, alter the general idea of conflict of laws as an area that creates normative demands on how an applicable law is to be determined in the first place. Approaches are to rules what in another debate standards are to rules, a different normative formulation, but no escape from doctrine.

The relevant strand for me is the one that refutes the idea of conflict of laws rules altogether. In my understanding, Brainerd Currie is the only consistent proponent of such an idea.²⁶ We can see in his work how he struggles with the idea (and ultimately comes close to giving it up), and we can see in the reception of his ideas how the non-law approach is ultimately given up.

a) Currie as Politics

Brainerd Currie's approach to conflict of laws is well-known in its core, though surprisingly badly understood in many of its preconditions and implications. Normally, we take his main contribution to be that conflicts of laws should be resolved on the basis of the governmental interests involved. We thereby ignore to a considerable extent how he reached this result, and also his elaboration of what this would mean in specific case situations.

It is important to note some elements in this approach that are often misunderstood. First, Currie's foundational question is not which law applies in the case of a conflict of laws. Instead, his question is when, if ever, forum law can be replaced by foreign law.²⁷ The starting point is not, for him, conflict of laws; the starting point is domestic law. Second, the reason that he opposes the application of foreign law is not pure parochialism, as has been argued frequently, but instead an idea about separation of powers: if a state's law expresses the societal policies and preferences of that state, then it would be institutionally wrong for that state's judges to curtail its application.²⁸ Third, Currie does not advocate an unlimited imposition of the forum's own governmental interests. These interests are not just limited by the call for restraint and moderation that Currie borrows from his friend, Judge Traynor.²⁹ More importantly, they are constrained, according to Currie, by the federal system and the US Constitution, which Currie thought should play an essential role in the resolution of conflicts.³⁰

The background for Currie is then, as Joerges and others have rightly pointed out, a political understanding of law, and – as a consequence – of conflict of laws. This conception has traditionally been juxtaposed with the allegedly apolitical conception of private law – and therefore of conflict of laws – in the 19th century, especially in the work of Savigny. Savigny, so the traditional story, supported a

²⁶ Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963).

²⁷ Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 *Colum. L. Rev.* 964 (1958).

²⁸ Currie, *Essays* 181-3.

²⁹ Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 *Tex. L. Rev.* 657 (1959)

³⁰ E.g. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 *University of Chicago Law Review* 9 (1958).

strictly apolitical private law that existed prior to intervention by the state and was, at the same time, strictly distinguished from public law. This enabled Savigny to strip conflict of laws from its relation to international politics: if private law relations predate the state and are of no interest to it, then conflicts of laws are not conflicts among sovereigns but merely technical questions of applicability. It is therefore possible to create strictly private rules of conflict of laws.

This picture is not fully accurate. It is not the case, for example, that Savigny detaches private law from the state.³¹ Most scholars, Savigny certainly included, were aware that the idea of a private, apolitical, law, was itself an eminently political one. Finally, the idea of conflict of laws rules as merely technical could suggest that any rules are equally appropriate as long as they favor predictability, whereas Savigny suggested that such a criterion exists in that of the seat of a legal relation, a criterion later developed into an idea of the closest connection.

In particular, there is a remarkable but normally overlooked similarity between Currie and Savigny. On the one hand, Savigny agrees with Currie that politically relevant laws of the forum trump any colliding claims for application from foreign law.³² On the other hand Currie agrees with Savigny that cases that do not involve policy interests of states – “no interest cases” – cannot be resolved with his method. Where they differ is the degree to which laws without policies exist. Whereas Savigny considers substantive interests and policies in private law largely irrelevant (at least for the purpose of conflict of laws), they are central to Currie’s analysis, which is deeply engrained in ideas of democratic self-determination and representation. For Savigny, most private law is apolitical; for Currie, all law must be understood as political. And whereas Savigny has no solution to offer to political private law, Currie deals with nothing other.

b) Currie as Anti-Rules

But does Currie actually offer more solutions than Savigny? The typical presentation of his theory, one that he himself endorsed in principle in his later publications, distinguishes three types of cases: true conflict (both states interested), false conflict (only one state interested, or policies of both states coincide), no-interest case (no state interested). In a false conflicts case, the law of the only affected state is app. In a true conflicts case that cannot be resolved by applying restraint and moderation in

³¹ See Ralf Michaels, *Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge from Europeanization and Globalization*, in *AKTUELLE FRAGEN POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG* 119-144 (Michael Stolleis & Wolfgang Streeck eds, Baden-Baden: Nomos, 2007).

³² With regard to such rules, Currie is actually more open to the application of foreign laws: whereas Savigny does not envisage the applicability of foreign political laws at all, Currie favors it in cases where the forum is uninterested. It is somewhat surprising that this openness toward the applicability of foreign “public” law did not catch on in US conflicts law where laws are still characterized as public. See William S Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 *Duke J. Comp. & Int’l L.* 371 (2008).

the reinterpretation of the respective interests, the forum law always applies if the forum is interested.³³ The no-interest case does not really find a resolution in his approach.

This way of presenting the issue does not do justice to the fact that, for the early Currie at least, the forum is always the starting point; consequently, it makes Currie's preference for the forum law a contingent and surprising response instead of a logical implication. In this sense, an earlier formulation seems more accurate.³⁴ Logically, the first step in the analysis is not to look for all states that have an interest, but only to determine whether the forum is interested – if that is the case, forum law applies and the analysis is over. Only if the forum is uninterested is it even necessary to analyze whether a foreign law is interested, in which case its law applies. Where no law is interested, Currie suggests application of forum law (while finding this an uninteresting case); more recent theorists suggest that in this claim the plaintiff must lose because neither law provides him with a claim.³⁵

There is a way, however, in which both these formulations of clear rules seriously misrepresent Currie's own position. Currie was quite adamantly opposed to rules, suggesting that “[w]e would be better off without choice-of-law rules,” (though he added that Congress should legislate in some specific areas).³⁶ Even more tellingly, he suggested that “we would indeed do well to scrap the system of choice-of-law rules for determining the rule of decision, though without entertaining vain hopes that a new ‘system’ will arise to take its place. We shall have to go back to the original problems, and the hard task of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods.”

This opposition to rules – or approaches – telling us how to resolve conflicts has an actual pedigree in the conflicts revolution, though that pedigree is rarely recognized.³⁷ Thus, for example, we read the early critiques of conflicts by the likes of Cook and Cavers as attempts to improve the field. But quite arguably they were not, at least not primarily. Cook, following his teacher Hohfeld, had in mind, it seems,

³³ Currie has a somewhat complex answer for cases in which the conflict is between two non-forum laws. See Brainerd J Currie, *The Disinterested Third State*, 28 *Law & Contemporary Problems* 754-794 (Fall 1963).

³⁴ Brainerd J. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *Duke L.J.* 171.

³⁵ Larry Kramer, *The Myth of the “Unprovided-for” Case*, 75 *Virginia Law Review* 1045-74 (1989); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of our Intelligence by Language*, 80 *Notre Dame Law Review* 1821 (2005).

³⁶ Currie, *Essays* 183. See also *ibid.* at 185: “we would indeed do well to scrap the system of choice-of-law rules for determining the rule of decision, though without entertaining vain hopes that a new ‘system’ will arise to take its place. We shall have to go back to the original problems, and the hard task of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods.”

³⁷ I draw here on Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *Buffalo Law Review* 973-1033 (2005).

an applied theory of law, for which conflict of laws just served as an appropriate field of application. Similarly, Cavers reports that he saw the entire law in development, and he picked conflict of laws almost at random as the field in which he was interested. Both, then, did not, at least by themselves, want to contribute to a further development of the discipline; they used the discipline as a particularly apt field in which to experiment with legal realism.

Of course, even if their ideas were largely theoretical, they were nonetheless taken as actual policy suggestions by later scholars – including Cavers himself, who later withdrew his opposition to rules and preferences and formulated his own list. This is how interesting suggestions on solving conflicts issues were born, but it is also, as Riles argues, a reason for the decline of the field. She suggests that the attempt to turn theories into tools had to fail – especially if the theories themselves were deeply anti-instrumental theories.

I believe we can see the same struggle within the work of Currie. His analysis of governmental interests was an attempt at realist jurisprudence, but it was largely just a description of the problem that conflict of laws deals with, not, at the same time, an element in the solution of this problem. Time and time again, in his work, he points out how important it is that there are no easy solutions to conflicts problems. And yet, governmental interest analysis was turned into exactly that – a recipe that generates, nearly automatically, results. Even the most radical politicization of conflict of laws cannot escape being turned into rules.

III. From Politics to Technique

It is not hard to see why Currie was so opposed to seeing his approach turned into rules. His whole impetus was to point out the political aspect of substantive law and the consequent political character of conflict of laws. If the political character of conflicts derives from that of substantive law, any attempt to distinguish the two would depoliticize conflict of laws. We are reminded of Wiethölter's critique of Kegel, who, in Wiethölter's view, sharply recognized the autonomy of substantive law as untenable and yet overlooked that the alleged autonomy of private international law was just as problematic.³⁸

And yet, the fact that even Currie's own approach was translated into rules suggests that some type of rulification is unavoidable. The political critique of private international law's rules stays, it appears, necessarily outside of the field. Once the antiformalism and politicization of conflicts, important as they were as *political* moves, have given us reason to doubt that rules can ever do the job, but also left us in dire need for something to replace the old rules. And what that has been was, time and time again, new rules.

What we need then are two things—to make sense of the irrepressible need for rules, and a justification for such technique in the face of the politics of the field. I can only sketch here what that would imply.

³⁸ Wiethölter, *Begriffs- und Interessenjurisprudenz - falsche Fronten im IPR*, in: *Festschrift für Kegel*, 1977, 213.

a) The Irrepressible Need for Rules

First, the need for rules. Some conflict of laws technique is observable in most approaches: the combination between principled applicability of “foreign” law and a public policy exception. This is true not just in traditional private international law but also in other areas; *Cassis de Dijon* is an early example from EU law. This combination is unsuspecting for a political theory. A role of politics is preserved in the public policy exception, and all that matters is the scope of the exception: narrow for liberal theory (and leading doctrine), broad for a more political approach.

At the same time, however, this two-step approach, which neatly distinguishes law and politics, is intellectually unsatisfactory. Or, put differently, it requires us to deal with a lot of complexity under a very crude legal instrument. Although public policy represents a welcome re-entry of politics into the law, this re-entry takes place without much adaptation. The result is that the complexity of politics enters the law, but in a second step, neatly distinguished from a first step that could, it seems, remain free from politics. If every relevant consideration must fall under the public policy exception, we should expect an internal differentiation of that exception. This is exactly what we saw in the American conflict-of-laws revolution, which grounded, arguably, all conflict of laws rules on what had been the policy exception.

Now, even if we want politics to be informative for the law, we do not, necessarily, want to have to translate all legal conflicts into political ones. This would rob law of its function to make political conflicts resolvable. Not surprisingly, the most radical (and consequent) critique of law (as superstructure, false consciousness, etc.) has always been not merely a critique of the particular form that law takes but of law at large. (Recall Pashukanis’ biting criticism of attempts to replace “bad” liberal law with “good” socialist law.) This radical critique is reflected in the unwillingness to replace “bad” formalist conflicts rules with good conflicts rules.

Thus, if we want the law to perform its function (and I will say more in the next paragraph about why we would want that) we need to resort to technique, and more than just public policy. The *Viking* case of the ECJ is a case in point: although it addresses what is essentially a conflict of laws, it does not treat it as such.³⁹ Christian Joerges, like many others, has been critical of this methodological shortcoming. Unlike many others, however, he has linked the decision back to conflict of laws method, and here to a trope of the traditional method: characterization.⁴⁰ At stake is, if I understand him correctly, whether we characterize the issue as one of labor law—in which case it is allocated to the member state – or as one of the internal market—in which case it is allocated with EU law.

³⁹ Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v. Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779.

⁴⁰ Christian Joerges, *Integration through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation*, in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* 377, 394 (Rainer Nickel ed. 2010).

I agree.⁴¹ But I would like to add that this move is actually more dramatic than it seems. Joerges rightly calls characterisation “the primary operation of conflicts law,” but of course he is aware that precisely this operation has been a core object of critique in the conflict of laws revolution. And the hope of interest analysis (amongst other approaches to conflicts) was that characterization would become, if not unnecessary, then at least far less important.⁴² On closer analysis, interest analysis cannot ultimately free itself from issues of characterization.⁴³ If we are asked to distinguish, in choice of law for torts, between issues of loss allocation (that are governed by the parties’ common domicile, if any) and issues of conduct regulation (that are governed by the law of the place of the tort), we face, quite obviously, a question of characterisation.

This suggests that a political approach to conflict of laws cannot take place without rules and doctrine. But it also suggests a more promising flipside: a doctrinal approach to conflict of laws can take place with political awareness. We know that the allocation of matters like those in Viking between the national and the European level is an eminently political affair. We do not lose awareness of this fact if we formulate the conflict as one of characterization. The language we use—that of characterization—may sound apolitical at first (though I will have more to say about that in a moment). But our awareness is not.

b) The Possibility of Rules

How is the formulation of rules justifiable in view of politics? I want to sketch an argument in two steps, drawing closely on work done together with Karen Knop and Annelise Riles.⁴⁴ The first of these steps tries to recreate what the use of doctrine and rules actually represents. In our article, we describe doctrine as part of law as technique. Technique encompasses, according to Riles,

(1) certain ideologies—legal instrumentalism and managerialism . . . (2) certain categories of experts—especially scholars, bureaucrats and practitioners who treat the law as a kind of tool or machine and who see themselves as modest but expertly devoted technicians; (3) a problem-solving paradigm—an orientation toward defining concrete, practical problems and toward crafting solutions; (4) a form of reasoning and argumentation, from eight-part tests to reasoning by analogy, to the production of stock

⁴¹ Cf. Ralf Michaels, *The New European Choice-of-Law Analysis*, 82 *Tul. L. Rev.* 1607, 1639-40 (2008).

⁴² Currie, *Essays* 184.

⁴³ Cf. Loukas A. Mistelis, *Charakterisierungen und Qualifikation im internationalen Privatrecht* 121.

⁴⁴ Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 *Stanford Law Review* 589 (2012).

types of policy arguments to practices of statutory interpretation or citation to case law.⁴⁵

Technique is not the same, thus, as rules; but rules are an important element of the technique. The technique of conflict of laws, we argue, does not view law in a purely instrumental vein, as an unfortunately necessary means to get to certain predefined end. Instead, the focus lies on the path itself. European conflict of laws is (allegedly) blind to outcomes altogether.⁴⁶ US conflict of laws takes results into focus and yet is not fully determined by them (if it were, the discipline would collapse completely into substantive law.) This is different from formalism in important ways. Formalism views the law as a mere constraint: the adjudicator becomes a mere machine that applies the law. Indeed, in conflict of laws, Currie has ridiculed the idea of the conflict-of-law machine.⁴⁷ Technique, by contrast, requires a technician. Conflict of laws as technique is a way of doing things, in relative oblivion to outcomes, and indeed (for the time being) politics.

Although technique is thus different from formalism, it still raises an objection that formalism faces, too: how can political matters be negotiated in oblivion of politics? Is not conflict of laws as technique guilty of justifying the unjustifiable? Will not technique become a handmaiden to the powerful? The second step in the argument must be a justification of technique in the face of politics. A part of this justification has already been made: conflict of laws as solution to problems is not possible unless it reduces complexity by resorting to rules and doctrines, unless it engages in technique. The politics as such (if that exists) are irresolvable; solving them with law automatically takes away from the politics. But this is of course not a full justification. If law is not possible without politics, we might reject law altogether.

Fortunately, there are ways to justify a technical approach to law without denying the politics. One such way has been suggested by Karen Knop, Annelise Riles and myself elsewhere in what we call an “as if” mode.⁴⁸ Legal discourse, we suggest, can succeed only as a fictitious discourse—in awareness of the politics, but held, for the time being, *as if* the politics did not exist. Like mathematicians who use the concept of a line, while recognizing that such infinitely thin lines do not exist in reality, private lawyers recognize that formal conflict of laws discourse operates with fictions, and yet these fictions are necessary to make meaningful statements. Private international laws negotiates its entities—the place of a corporation, decisional harmony, renvoi—as *if they* were actual entities. But it does not (or: it does not have to) treat these as actual entities. It can (and we argue: should) treat them as placeholders, as fictions.

⁴⁵ ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 64-65 (2011), cited after Knop et al, 595.

⁴⁶ For critique using this image, see J.E.J. Deelen, *De Blinddoek van von Savigny* (1967).

⁴⁷ Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 *Stan. L. Rev.* 719, 727 (1960-1961); for a more positive assessment, see Gerhard Kegel, *The Conflict-of-Laws Machine—Zusammenhang im Allgemeinen Teil des IPR*, *IPRax* 1996, 309-315.

⁴⁸ Knop et al, *supra* ___, at 647-8.

A second way would go further and assign more actual value to legal discourse as the actual language in which the problems of law are best presented. An example can be found in the work of Martti Koskenniemi, whose perspective has always also been that of a legal practitioner, and who therefore prioritizes the viewpoint of lawyers on the law over that of others.⁴⁹ When he suggests that, “[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before,”⁵⁰ he appears to view this as a danger⁵¹, but it may also be a promise. Politics is not absent from law but inseparably inscribed into it: “The politics of international law is what competent international lawyers do. And competence is the ability to use grammar in order to generate meaning by doing things in argument.”⁵² This is an understanding of law that – precisely because it is formally constrained⁵³ –is substantively liberating. In this understanding, the vernacular of private law does not cut off discourse; instead, it makes discourse possible. Private international law *theory* may have little to offer to this, even though the picture drawn by its detractors is not correct. Private international law *practice*, however (and Koskenniemi has always emphasized the interrelation between theory and practice)⁵⁴ is the richest field by far for such experience.

IV. Conclusion

The argument just presented is fairly simple. A (pre-critical) formalism that is blind for the politics of conflicts is undesirable. However, a critical antiformalism that

⁴⁹ See Ralf Michaels, *Private Lawyer in Disguise? On the Absence of Private Law and Private International Law in Martti Koskenniemi’s Work*, *Temple Journal of International and Comparative Law* (forthcoming).

⁵⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001) 516.

⁵¹ The quote goes on: “But precisely at this moment it has lost the ability to articulate its politics: when everything is politics, Schmitt wrote, nothing is. Without the ability to articulate political visions and critiques, international law becomes pragmatism all the way down, an all-encompassing internalization, symbol, and reaffirmation of power.” *Id.*

⁵² Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (new ed. 2006) 571.

⁵³ Eg Koskenniemi (note 50) 502. On the constraint of form, see MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 180-82 (1988) (describing the efficacy of the “constraint of form”). A very similar point is Prosper Weil’s celebration of the “simplifying rigor” of the law: Prosper Weil, ‘Towards Relative Normativity in International Law?’, 77 *American JIL* 413, 441 (1983).

⁵⁴ Martti Koskenniemi, *The Politics of International Law* (2011) 299 (“I always have difficulties distinguishing [academic theory and doctrine] from each other”); see, in more detail, Koskenniemi (note 8) 1-4.

merely emphasizes the politics of the field without guiding response can lead to a critique of law altogether, but not to new law.⁵⁵ A legal response to conflict of laws requires technique. To be justified, such technique must maintain awareness of politics. The awareness can be maintained through an as if mode or by understanding doctrinal language as political language. Technique is not used in the ignorance of politics but, quite to the contrary, in sight of the impossibility of resolving political conflicts otherwise.

It has been suggested to me that this may work for the United States but not for Europe. The main problem in Europe, unlike in the US, is formalism, not antiformalism. If this is so then perhaps the most important project in Europe is not to find an answer to antiformalism, but first to break up the trust in formalism. But even if formalism is the problem, it seems to me that antiformalism is not the solution, and whether it is a necessary intermediate step towards a more successful way of doing conflict of laws is less than certain. The more promising way would be, it seems to me, to show the extent to which existing European rules are already capable of integrating and formulating the political concerns that underlie especially the US conflict of laws revolution.⁵⁶

I have not said which kind of rules is most helpful for these purposes. My sense is that traditional continental private international law tools are actually the most promising – precisely because they are not attempts to mirror some outside truth of politics or ontology (or even substantive law), they can function more easily as fictions, as a language of politics rather than things. Other rules, however, may be useful, too. What would be the wrong way, however, would be to think that critique is all that it takes, and that any technique is necessarily a step back.

Discussion in Loccum

Ulf

- can public international law influence private international law?
- Develop concrete conflicts rules
 - o Requires readiness
 - o Safeguards? (mandatory rules; ordre public)
 - o My answer: that is not a limit of conflict of laws; it is part of the method

⁵⁶ A comprehensive and brilliant analysis that does just that is Klaus Schurig, *Kollisionsnorm und Sachrecht: Zu Struktur, Standord und Methode des internationalen Privatrechts* (1981).

Harm: extra praise.

- “method metaphor or metanorm”
 - If it is a method we should take the paper seriously, and the matter of technique would matter
 - Metaphor is dangerous: **managerial** way of dealing with normative orders; that is not intrinsically connected with conflict of laws approach (or is it?)
 - Metanorm: **criteria of validity**: would need to be more robust
 - My answer: we are not managerial; instead we embrace the decentralized and self-reflexive position of conflicts
- Theme:
 - exposing law politics leads to paralysis, not to new law
 - As if as liberating
 - Does it have political criteria?
 - If so it is politics
 - If not then it does not help
 - My Answer: conflicts as a language into which we translate political conflicts
 - Luhmann: reentry
 - Habermas: communicative action to resolve political conflicts
- Joerges: the force of history. Tony Judt points out: invention of the welfare state as a reaction to history. Containing the social. Difference between labor law and market freedoms is a categorical one. Joerges: that is based on historical experiences, and history takes certain decisions away from us. Or: law is always something that reconstructs existing conflicts
- - Answer: Joerges (history)
 - Old characterization: blind for history (slavery characterized as property law)
 - Informed characterization: informed by history but able to use that
 -
-
- Ladeur
 - Freedom of the press versus protection of privacy
 - We cannot refer this to the French courts because that would interfere with freedom of the press as guaranteed under the German Constitution
 - Answer:
 - Jurisdiction/choice of law
 - Applicable law can include constitutional law
 - Recognition and enforcement: US “SPEECH Act”

- Florian Rödl
 - Characterization is not enough. It is not enough to say that this is labor law; what would be needed is the right conflicts rule.
 - Answer: from method of conflicts to conflict of methods
- (Carola)
- Tommi Ralli
 - Diagonal conflicts: are conflicts of characterization diagonal conflicts?
 - Answer: I think no.
- Maria
 - How can we tell whether something is good or bad conflicts law?
 - Answer: hardly with reference to some external values.
- Alexia
 - Translation as notion is different from as if
 - Answer: slavery and property
- Korean from Warwick
 - How can we choose among opposing directions?

Prosper Weil: simplifying ... of law