Die Achtung des Fremden

Herausgegeben von
FLORIAN HEINDLER und
MARTINA MELCHER

Mohr Siebeck

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Leerformel oder Leitprinzip im Internationalen Privatrecht?

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Vorwort

Nach Tagungen in Bonn (2017), in Würzburg (2019) und – Covid 19-bedingt digital – in Hamburg (2021) fand die bereits 4. IPR-Nachwuchstagung am 23. und 24. Februar 2023 in Wien an der Sigmund Freud PrivatUniversität (in Kooperation mit der Universität Graz) zum Thema „Die Achtung des Fremden – Leerformel oder Leitprinzip im Internationalen Privatrecht?" statt. Mit dem Fremden als Schibboleth für das subjektiv als andersartig Wahrgenommene im Kontrast zum subjektiv als vertraut Wahrgenommenen, hat die 4. IPR-Nachwuchstagung einen weiten thematischen Bogen gespannt. Dieser Bogen wird von dem Bedürfnis nach selbstkritischer Befassung mit dem Internationalen Privatrecht, Hinterfragen tradierter Lehrsätze und Rechtsprechungslinien, Nachdenken über Methode, Integration in Europa und in der Welt und nicht zuletzt auch von der Frage nach der Wahrnehmung der eigenen Rechtsordnung zusammengehalten. Der Einladung, an diesem diskursiven Nachdenkprozess und wissenschaftlichen und persönlichen Austausch teilzunehmen, sind rund 100 Nachwuchswissenschaftler*innen gefolgt.

Die Eröffnung erfolgte methodisch innovativ und mit Tiefgang durch Vorträge von *Vanessa Grifo* und *Victoria Garin Giménez* zum postmigrantischen IPR und der Verwertbarkeit kulturrelativistischer Standpunkte im IPR. Daran schloss die Keynote von *Horatia Muir Watt* an, die in Fortsetzung ihrer Beschäftigung mit Alterität im Internationalen Privatrecht anhand der Metapher des „dismal swamp" einen „ökosophischen (ecosophical)" IPR-Ansatz zur Diskussion stellte. Es folgten Vorträge von *Shahar Avraham-Giller, Raphael Dummermuth, Selina Mack, Tess Bens, Tabea Bauermeister, Sophia Schwemmer* und *Lena Hornkohl* zu konkreten Fragestellungen des allgemeinen und besonderen Teils, wie dem kontrastierenden Einsatz von Eingriffsnormen und Rechtswahlregelungen (*Shahar Avraham-Giller*), dem erbrechtlichen *ordre public* (*Selina Mack*), dem RL-Vorschlag zur Corporate Sustainability Due Diligence (*Tabea Bauermeister*, *Sophia Schwemmer*) und extraterritorialen Drittstaatenregelungen (*Lena Hornkohl*), sowie im Kontext des Internationalen Verfahrensrechts zur Auslegung des LugÜ (*Raphael Dummermuth*) und zu Anpassungsmechanismen bei der grenzüberschreitenden Durchsetzung von Entscheidungen (*Tess Bens*). Alle diese Vorträge und die stets lebhafte und wertschätzende Diskussion waren geprägt von der Reflexion über die Wahrnehmung des Fremden, ihrer Ausprägungen und deren Folgen.

Um die Gelegenheit für Diskussion zu erweitern, teilte sich das Tagungspublikum ein Panel hindurch in drei Parallelgruppen, die mit Impulsreferaten von

Stefano Dominelli, Michael Cremer, Adrian Hemler, Felix Aiwanger, Lukas Klever und *Aron Johanson* eröffnet wurden. Um die stets mit Recht geforderte Beachtung der Anwendungspraxis auch im Rahmen der Tagung zu gewährleisten, berichteten mit *Dietmar Czernich, Georg Kodek* und *Judith Schacherreiter* im IPR ausgewiesene Praktiker*innen in aufgelockerter Atmosphäre über ihre Wahrnehmungen und Erfahrungen zur Achtung des Fremden in der Rechtspraxis – und stellten sich kritischen Fragen aus dem Publikum.

Mit der Veröffentlichung der deutsch- und englischsprachigen Tagungsbeiträge in diesem Band können die im Rahmen der Tagung erarbeiteten Überlegungen und Fragen noch stärker in den wissenschaftlichen Diskurs einfließen.

Großzügig finanziell unterstützt wurde die 4. IPR-Nachwuchstagung – in alphabetisch-namentlicher Nennung – durch die Deutsche Notarrechtliche Vereinigung e. V., die Lindemann-Stiftung, den Nomos Verlag, Sernetz Schäfer Rechtsanwälte, die Sigmund Freud PrivatUniversität, die Stadt Wien, die Studienstiftung ius vivum und die Universität Graz. Der vorliegende Tagungsband wird erneut durch den Verlag Mohr Siebeck in äußerst freundlicher Weise gefördert. Ihnen allen sei an dieser Stelle herzlich gedankt!

Wir freuen uns außerdem bereits jetzt auf die 5. IPR-Nachwuchstagung, die dieses erfolgreiche Format im Frühjahr 2025 in Heidelberg einer Fortsetzung zuführen wird. Bis dahin hoffen wir, dass der vorliegende Tagungsband mit seinen kritisch-reflektierenden Beiträgen zur weitergehenden Auseinandersetzung mit der Achtung des Fremden im IPR anregt.

Die Herausgeber*innen

Inhaltsverzeichnis

Reclaiming the "Dismal Swamp": a Most Dangerous Method in the Conflict of Laws

Horatia Muir Watt

This contribution reclaims the well-worn metaphor of the "dismal swamp" used to describe the perceived technical complexity of private international law in support of an alternative vision of this discipline. In this respect, a swamp can be seen as an ecosystem made of intricate interconnections and interdependencies. It is indeed moreover a place of mystery, whether in Western fiction or in indigenous cosmologies, a space of crossing between the visible and the invisible, the world of earthly life and the universe of spirits. Above all, it is a place of encounter and intermingling between alien forms, and as such may serve heuristically to think about the place of alterity within our "naturalist" worldview. Running counter to modernity's quest for closure and order, there may be a new path for the law, albeit methodologically "most dangerous". Taking its cue from indigenous epistemologies, this article will use two non-anthropomorphic figures, the jaguar and the shaman, to help further this reversal. Firstly, to follow the "gaze of the jaguar" means to enter a reflexive web of mutual sensitivity: the contrary of imposing our own standpoint on others. Thus, in a radical form of decentering, the gaze of the jaguar turns back on oneself, the observer; it brings us to scrutinise our own community or life-world. Secondly, the shaman, symbolic mediator in animist traditions between humans and the spirits of nature or the other-world, is witness to the plurality and permeability of other, different forms of life (both spiritual and material). In its mediating role, it can take on multiple shapes, both human and animal, emphasising thereby the value and centrality of hybridity in an ontology of the in-between.

The trope of the "dismal swamp" (or indeed, the "quaking quagmire") is well known to students of the conflict of laws, who generally understand it to be connoted negatively.[1] It is used to point to the reiterative – perhaps obsessive – focus of scholarship within the field on "mysterious" questions of legal method. Since method is the very content of the whole discipline itself – in this respect, it is a meta-method, a set of rules about the scope of all other rules, or indeed, a "law of laws"[2] –, the constant refinement and redefinition of the choice-of-law

[1] "The realm of conflict of laws is a dismal swamp filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.". This sentence is attributed (by *Reed/Goodrich*, Forward. Directive or Dialectic?, 6 Vanderbilt Law Review [1953], 441 to Dean William Prosser. See for a canonical example of the use of the trope, *Nordstrom*, Ohio's Borrowing Statute of Limitations – A Quaking Quagmire in a Dismal Swamp, 16 Ohio St. L.J. [1955], 183).

[2] *Lauren Benton's* exploration of the spaces of colonial empire makes the important point that the rule of law evolved as a "rule about rules", and that in such a context, it is the shape of

process[3] seems to undermine the obvious need for clarity and precision to which such efforts strive. The point of this contribution is to reclaim the well-worn metaphor of the swamp in support of an alternative vision of this discipline.[4] In this respect, a swamp can be seen not as disorder but as an ecosystem made of complex interconnections and interdependencies. It is indeed moreover a place of mystery, whether in Western fiction[5] or in indigenous cosmologies,[6] a space of crossing between the visible and the invisible,[7] the world of earthly life and the universe of spirits. Above all, it is a place of encounter and intermingling between alien forms, and as such may serve heuristically to think about the place of alterity within our "naturalist" worldview[8]. Running counter to modernity's quest for closure and order, there may be a new path for the law,[9] albeit methodologically "most dangerous".[10]

The singular relevance of the conflict of laws in this latter respect is that it possesses a methodological duality that can serve to underscore two opposing patterns or models of law. In other words, there is a constant dialectic between a rationalist project of legal ordering (monism) pursued from an overarching external standpoint, and a shrouded (or less rationalist) penumbra of entanglement[11] between multiple normative worlds. Thus, on the one hand, the most widespread contemporary method within the conflict of laws is, broadly speaking monist, "multilateralist" and codified.[12] Although it accepts, increasingly,

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jurisdiction (not land, territory or geographical place) that is crucial: *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, 2010.

[3] This is the title of *David Caver's* seminal book, republished by Michigan Univ. Press (1981).

[4] This contribution is part of a wider project published by Hart (2023) under the title The Law's Ultimate Frontier: Towards an Ecological Jurisprudence.

[5] Among which, George Sand's *La petite Fadette*, 1849.

[6] See the focus of the developments below.

[7] *Descola*, Par-delà Nature et Culture, 2005.

[8] *Ibid*.

[9] The reference is to *O. Wendell Holmes'* The Path of the Law, 1987. Like the path of the law in *Holmes'* representation, any crossing of the swamp requires experience, not logic.

[10] It is certainly appropriate to invoke *Carl Jung* when speaking here in Vienna! On Jung's characterisation of psychoanalysis in these terms, see *Kerr*, A Most Dangerous Method, Vintage Books, 1994, http://www.psychanalyseactuelle.com/textes/a-dangerous-method (accessed 2.10.2023). Jung conceived psychoanalysis as a cultural theory. See *Vannoy Adams*, Interdisciplinary Applications of Jungian Psychoanalysis, 2014. The danger is that of unsettling well-established or path-dependent ideas.

[11] Entanglement is a metaphor to be found very frequently in ecological thought of all kinds, and is often used in opposition to linear or grid-like division between humanity and nature induced by modern 'jurisdictional thinking' (see *McVeigh*, Jurisprudence of Jurisdiction, 2016).

[12] See *Symeonides*, Codification and Flexibility in Private International Law, in: Brown/Snyder (eds.), General Reports Of The XVIIIth Congress Of The International Academy Of Comparative Law, 2011. On monism in (legal) theory and its critique (as opposed to pluralistic pragmatism), see *James*, A New Name for Some Old Ways of Thinking (1906/07), reprinted in The Project Gutenberg E-Book of Pragmatism, 2004.

its own contingency (insofar as its expressions in positive law usually offer all sorts of escape clauses and exceptions), it nevertheless presupposes a substantial degree of commensurability of legal knowledge and a unitary definition of legality. The latter takes the form and content of Western legality,[13] which has evolved in cadence with statehood, secularism and capitalism (with its intrinsic colonial dimension and successive trans-formations).[14] In the terms of political ecology, law in this shape has facilitated the collective cecity and amnesia that allow the "anthropocentric machine"[15] to hurtle on regardless, devastating life in its path and devouring the very resources it needs to survive.[16]

On the other hand, however, this scheme is haunted by its very own shadow opposite, which resurfaces unexpectedly from within the "quagmire" from time to time. In the European history of the conflict of laws, "statutism" was first a mode of interpretation of local derogations to the overriding rational authority of Roman law, before becoming an autonomous method of determining the (personal or territorial) scope of (sovereign) statutes. Contemporary American neo-statutism emerged in a similar structural context (the reach of derogatory statutes against a background of common law) but later surfed on Cold War legal realism and the influx of rational choice, game theoretic and other social science models.[17] Current controversy in the United States over the methodology of the *Third Restatement of the Conflict of Laws* leaves open the question of its continued place.[18] The point is that it is a process that works in counterpoint to the dominant rule-based method, insofar as it starts from the purpose of a given statute and works "outwards" to determine whether or not it is applicable

[13] In this context, our contemporary condition is described in various terms in as many disciplinary vocabularies: late-modern, anthropocentric, capitalocentric, neo-liberal, or naturalist. As suggested above, "our" here refers to a perspective either of individual liberal and supposedly free subjects; of the Western tradition as superior, more rational or more "civilised" than all others; or again of humanity as naturally endowed with specific intelligence and virtues in respect of other species. The common factor linking these various labels is a worldview that separates human society from nature, empties places of all other belief systems and neglects other forms of life (see for example, *Smith's* "extinction studies", in which he confronts the sense of the world and senseless extinction in ecological terms: *An Ethics of Place: Radical Ecology, Postmodernity, and Social Theory*, 2001). Legality has participated in the shaping of this perception. However, as will become clear, what follows is *not* an indictment of modernity as such, nor of enlightenment *per se*, nor indeed of technology. Nor does it signify that our *nomos* cannot change, as we shall see.

[14] *Brabazon* (ed.), Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project, 2016.

[15] *Agamben*, Open: Man and Animal, 2002, taking up Descartes' concept of the "animal machine".

[16] See *Fraser/Jaeggi*, Capitalism, A Conversation in Critical Theory, 2018.

[17] *Bomhoff*, A Dark Science: Rationalizing Mid-Century Conflicts of Laws, publication forthcoming, conference delivered in January 2023 at Sciences po Paris ("Recitals" seminar).

[18] See, using the trope of the dismal swamp in the controversy over the methodology of the Third Restatement of the conflict of laws in the United States, *Brilmayer*: https://tlblog.org/a-theory-less-restatement-for-conflict-of-laws/ (accessed 2.10.2023).

in a specific context. In this respect, this methodology can be thought of as a "minor jurisprudence".[19] It operates in a pluralist, de-centered mode insofar as it accepts the possibility of multiple outcomes (even though, when "true" conflicts arise, some sort of priority rule[20] is needed) and above all, allows an "interested" statute to apply on its own terms.

Monism indubitably co-produced the aesthetic of modernity in its mapping out of space in visual terms[21]. It drew frontiers – between territories and empires, centres and peripheries, sovereigns and proprietors, simultaneously extending empires and enclosing land. This legal enterprise of division and classification, hierarchisation and structuration, carved up both society and planet in an obsessive "rage for order"[22]. Such a particular, obsessional form of legal ordering – in the name of science, nature or reason – reinforced the severance of humanity from its surroundings. A separatist approach to "nature" in such terms rests upon assumptions that are analogous to modern legal views of alterity in cultural, political or human form. In stark contrast to this dominant legal aesthetic, a shadow model helps address the question of what the legal signature of entangled, symbiotic life-worlds might look like.[23] Following *Philippe Descola's* invitation to explore the (often invisible) "forms of the visible",[24] an alternative vision, to be found in various non-modern (ecological) epistemologies and (indigenous) cosmologies, might help us "disincarcerate" the subject/object divide[25] and increase our awareness of the interdependence of all forms of biological and cultural life on a planetary scale.

Indeed, such (aesthetic) representations of nature have also played an essential role within the further (ontological) register of law's mode of existence. Modern legality has often been depicted by means of metaphors that partake in the "ruse of naturalism", insofar as they make a given worldvision carried by law seem to go without saying or "*allant de soi*"[26]. In this respect, the Western metaphysical tradition has given rise to a belief in the "natural" severance of society (or cul-

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[19] *Goodrich*, Law in the Courts of Love: Literature and Other Minor Jurisprudences, 1996.

[20] "Priority rules" are part of the language of the reporters of the Third U.S. Restatement project, to designate conflict of law rules that come into play when different statutes are simultaneously applicable.

[21] On the denial of the irrational and the reign of the visual, see *Descola* (Fn. 7).

[22] *Benton/Ford*, Rage for Order. The British Empire and the Origins of International Law 1800–1850, 2017.

[23] In aesthetic terms, there is a contrast to be expected between the forms or styles induced by coloniality (as defined by *Mignolo*, see below) and those of entanglement. On the aesthetic dimensions of deep ecology ethics and ecofeminist throught see below.

[24] *Descola*, Les formes du visible, 2021.

[25] *Latour*, Enquête sur les modes d'existence. Une anthropologie des Modernes, 2012, p. 10. Borrowing from another perspective would part of a "symmetrical anthropology" of the moderns. Such a gaze turned on self, would mean, in legal terms, observing one's own legal world.

[26] *Descola* (Fn. 7), 349.

ture, or "Man") from the surrounding world, over which it exercises an innate mastery. In other words (those of *Philippe Descola*), the separatist understanding of our relationship to our surroundings (biological and geological, sentient and non-sentient, visible and invisible, human and animal) has largely supported the assertion of "humanity's ontological privilege" over all other forms of life.[27] It rests on the (self-) ascribed essence of "human nature", understood as exclusively endowed with rationality (or intelligent access to reality). Legal modernity reflects and reinforces this understanding through the axial categories through which it channels our access to the real world, splitting mind from body, persons from things, agency from environment.[28] The distinction between *res/persona* still structures our thought (as seen above) in ways that are "profoundly juridical"[29]. In the terms of *Kyle McGee*, it explains indeed "why chains of legal reasoning take the shape they do".[30] The initial divide between persons and things was mirrored in turn by further epistemological separations between subject and object, self and environment. Law – along with science and technology, sovereignty and politics, metaphysics and economics – partook thereby in the vast co-production of modernity.

Both these aesthetic and ontological dimensions of legality are emblematically present in the conventional account of private international law and its specific legal technologies.[31] As *Pierre Schlag* again observes in his study on (Ameri-

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[27] According to *Descola's* expression, *ibid*., 306.

[28] Indeed, law was present at the very origin of this severance of nature from society. Gradually detaching its abstract forms from the materiality of life, it shaped modern metaphysics, co-producing the conditions for humanity's subjugation of its surrounding world. Modern law's "first" nature is to be found, then, in the terms of the bifurcation between the natural and cultural or social worlds that reflected the originary Roman legal (and Byzantine theological) distinctions between mind and body, persons and things. In this respect, the twin fathering of (asymmetrical) anthropology and (modern) comparative law in *Summer Maine's* Ancient Law (1863) began from the premise that Roman law still governed the institutions of civil(ised) Society *Ancient Law: In Connection with the Early History of Society and its Relation to Modern Ideas,* 1863.

[29] *Pottage*, Introduction to *Pottage/Mundy*, Law, Anthropology and the Constitution of the Social, 2004, 4.

[30] *McGee*, Latour and the Passage of Law, 2015, 102. This text must be understood with reference to *Newcomb Hohfeld*, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale Law Journal (1917), 710. According to *McGee*, Hohfield proposes an "immanent modalization of each transformation composing a chain of legal reasoning". *McGee* goes on to evoke the role of such modalization within the hidden "universe of the infra-juridical" or the invisible "locus of beings of law" – an imagery that it most appropriate here, in the discussion of the swamp!

[31] A recurrent trope of doctrinal discourse within the discipline is its association with the smooth, secure harmonious ordering of the transnational economy (or of non-state relationships more generally). This has an echo in contemporary governance discourse, that as *Kjaer* observes (The Law of Political Economy, 2020), represents capitalism's all-inclusive global stateless (or in which states are in the background) economic space, coded by law, in the form of "flows" and "networks", somehow streaming into place naturally, smoothly and correlatively de-politicized. And yet all the while, we realise, the "grand project of de-structuring the

can) legal aesthetics, the conceptual architecture of law not only carries differential distributive consequences for the real economy, but in conceptualising, formalising, and naming the stakes in the first instance, it has already enacted an allocation. This is true, very literally, for private international law. It can therefore also be used to reintroduce greater plurality within law's separatist aesthetic and binary ontological scheme. Here, the "dismal swamp" comes into its own. The existence of a shadow avatar of the discipline of the conflict of laws will serve to show that there is nothing inevitable, nor above all universal, in this particular understanding of law's "second nature".

In terms of legal aesthetics, an alternative *nomos* resonates strongly with ideas of plurality, interstitiality and in-betweenness currently developed within indigenous ecological epistemologies.[32] Here, the suggested path involves a reversal of standpoint, the embracing of a "perspectivist" aesthetic.[33] In stark contrast to "jurisdictional thinking" that empties, divides, disenchants and flattens the world, separating humanity and the planet (us and them; the body politic and its surroundings), the alternative, shadow scheme that has always haunted the history of the conflict of laws resonates with an ecological "jurisprudence of the border",[34] drawing our attention to the paradoxical centrality of the "in-between". It understands frontiers not as exclusionary dividing lines but as a passing-places, in which existence can "take place" in a hybrid and inter-mediating mode. In this respect, instead of dividing and sundering, legality might also give expression to a "non-naturalist" ontology: a mode of being in the (legal) world as interdependent and enmeshed, linking up all the infinitely various forms of life that co-inhabit the earth's fragile crust, each with its own worldview or

common" (*Kjaer*, 22) is *en marche*, setting the stage in its most recent expressions for "surveillance capitalism" (*Zuboff*, The age of surveillance capitalism : the fight for a human future at the new frontier of power, 2019), to the tune of general indifference, resignation or apathy (when it is not enthusiasm!). From a political economy perspective, *Brabazon* writes ("Introduction. Understanding Neoliberal legality", Neoliberal legality, [Fn. 14], 7 et seq) that the significance of the neoliberal turn in law "extends beyond the content of the laws in question to the form of law itself". Moreover, she observes, while "neoliberalism is not reducible to merely juridical phenomena … the specificities of the legal form enable law to play a unique and crucial role in this process that extends beyond law's previous mediation of social relations".

[32] In a "pluritopical" aesthetic vein, indigenous ecological epistemologies invite us to adopt the cognitive standpoint of the other – to follow "the gaze of jaguar", think like a mountain, enjoy life like a fish, or imagine ourselves as mushroom spores- instead of viewing the world – and dividing it up, flattening and emptying it – from a unitary, external, stable and overarching viewpoint.

[33] *Schlag*, The Aesthetics of American Law, 115 Harv. L. Rev. (2002), 1047: "perspectivism" is one of the three models of legal aesthetics (along with "grid" and "energy") he proposes.

[34] *Mignolo*, Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking, 2000, evoking a border ontology, epistemology and gnosis: if a pluriverse is not a world of independent units, but a world entangled, then a way of thinking and understanding that dwells in the interstices of entanglement, at its borders, is needed. To think pluritopically is to think from within the borders.

mode of access to reality. Borrowing from non-modern cosmological schemes of intelligibility,[35] this alternative legal mode "dwells" in the interstices of entanglement[36] or indeed on the borderline of law itself.

At first sight, entanglement would seem to be particularly difficult to translate into a credible legal form.[37] Modernity has so accustomed us to the existence of a monist (or grid-like[38]) aesthetic in law – meaning a unitary viewpoint embodies in a rule of decision that operates "closure" of legal conflicts – that plurality in law would seem to be a contradiction in terms.[39] The idea of a weaving, unstable, shamanic, legal form is likely to meet with derision or condescendence and requires some further explanation with reference to the way in which law envisages perspective. The shadow avatar of the conflict of laws will serve to make visible these faint and alien shapes of law.[40] Below, then, is an attempt to renew the terms of the reflection on legal plurality in this vein, with

[35] But what of the risk of romanticisation (anew) of the "noble savage"? Today, indigenous peoples and their various cosmologies are at risk of becoming the contemporary counterparts of the exoticised native (and indeed are perfectly aware of this). A further trap is to think of indigenous law as unitary. Quite obviously, there is a risk of essentialization in suggesting that all such epistemologies form one homogeneous block. *Descola's* quadripartite scheme of various traditions of relationality in respect of alterity is evidence enough of their diversity (Fn. 7). Nevertheless, indigeneous communities throughout the world do form a sort of transnational epistemic alliance of the non-modern, with a common refusal to distance themselves from nature (and animal life) as understood in the West (see again *Descola* [Fn. 7], on the various non naturalist cosmologies that beyond differences share a non exclusionary relationship to the natural or non human world; on the strategic alliance, see the aboriginal scholar Naomi Metallic's Comment on "Deference and legal Frameworks Not Designed By, For or With Us", https://www.administrativelawmatters.com/blog/2018/02/27/deference-and-legal-frameworks-not-designed-by-for-or-with-us-naiomi-metallic/ (accessed 2.10.2023); *Sieder*, To Speak The Law: Contested Jurisdictions, Legal Legibility and Sovereignty In Guatemala, 43 PoLAR – Political and Legal Anthropology Review (2020). We must also remember, however, that "prejudices, in the neutral sense used by *Gadamer*, can only be managed, not eliminated" (*Ruskola*, Legal Orientalism, 2013, 51).

[36] *Mignolo* (Fn. 34).

[37] Insofar as they echo indigenous ecological cosmologies: see from the perspective of literary critic *Coelho*, "Improvisations of a Tropical Cartesianism". Vol. 7 No. 1, 2011: Brazilian Improvisations/Improvisações Brasileiras: "For some thinkers improvisation and its corollaries are proof that these countries and their people would live forever on the margins or in negative dialectics within the heritage of Enlightenment reason, (but) for others it is precisely there – in the possibility of reinventing reason from hybridisms, strategic appropriations, and re-readings – that the creative and autonomous potentials in the post-colonial world lie".

[38] *Schlag* (Fn. 33).

[39] This is the point made by *Roughan* and *Halpin* in their quest for a pluralist jurisprudence (In Pursuit of Pluralist Jurisprudence, 2017). Conversely, see too the observation by anthropologist *Eduardo de Viveiros de Costa* as to the necessary circularity of (metaphysical) monism that presupposes distinctions that are impossible to draw (see The Relative Native, Essays on Indigenous Conceptual Worlds, 2016, 113, comp. the same author with *Danowski*, The Ends of the World, 2017).

[40] On the definitions of avatars and totems in indigenous traditions, see *Descola* (Fn. 7). The avatar is a figure much used in political ecology, including as an art form (see for example, *Erb*, A Spiritual Blockbuster: Avatar, Environmentalism, and the New Religions, 66 Journal

reference to an alternative legal aesthetic. This penetration of another universe requires the aid of an avatar. Thus, the shadow version of the conflict of laws helps move from a grid-like linear vision towards a multi-sided or pluri-topical understanding of our relation to alterity (whether as other life-worlds, our surroundings, or other species) that is accessible only by accepting to dwell in the in-between[41]. Taking its cue from indigenous epistemologies, it will use two non-anthropomorphic figures, the jaguar and the shaman[42], to help further this reversal. Firstly, to follow the "gaze of the jaguar"[43] means to enter a reflexive web of mutual sensitivity: the contrary of imposing our own standpoint on others. Thus, in a radical form of decentering, the gaze of the jaguar turns back on oneself, the observer;[44] it brings us to scrutinise our own community or life-world (Part I). Secondly, the shaman,[45] symbolic mediator in animist traditions

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of Film and Video [2014], 3–17). For the law, see *Borrows* (Kegedonce), Drawing Out Law: A Spirit's Guide, University of Toronto Press, 2010.

[41] *Mignolo* (Fn. 34) emphasises the dimension of "dwelling" pluritopically, or "inhabiting" the border, as the reverse of *Hegel's* philosophy of history (as grounded in territory). The idea of dwelling" in our environment is also central to *Tim Ingold's* work (see The Perception of the Environment. Essays in Livelihood, Dwelling and Skill, 2000, in which the "dwelling perspective", is about perception, a view of the relational self in which awareness and activity in and of the world are rooted in an organism's active engagement with the world.

[42] The Jaguar and the shaman are twin figures of indigenous mythologies. Each represents a specific, decentered mode of encounter with the strange. While both inhabit the "space of the in-between", the jaguar (whose gaze represents a reversal of perspective, an "anti-narcisse") and the shaman (who takes on the shape of the other, including an animal, jaguar-like form) should not be conflated (on their distinctiveness, see *Viveiros de Costa*, Métaphysiques Cannibales, 2009; on their signification, see *Clastre*, Échange et pouvoir : philosophie de la chefferie indienne, L'Homme, 1962; La Société contre l'État. Recherches d'anthropologie politique, Paris, Éditions de Minuit, coll. "Critique", 1974). These two burlesque figures are invested with a cathartic and highly constitutional function, inducing derisive laughter in order to exorcise their power. In the context of this book, to follow the gaze of the jaguar is to see ourselves as seen by the other, while the shaman leads us into the underworld (or otherworld, the hinterland) by taking on the attributes of the other. Moreover, in enacting a specific relationship to alterity, the jaguar may devour the other (by eating the relation), while the shaman becomes the other by changing identities.

[43] Perspectivism is a concept associated with *Costa de Viveira's* immersive exploration of the modes of thought of Amazonian Indian communities. "Pour les Amérindiens, l'homme n'est pas le seul à être une personne au sens fort. Tous les habitants du cosmos sont des humains, sous le vêtement des espèces, des corps, des formes distinctes. Si l'on prend au sérieux cette proposition et qu'on essaie de réfléchir dans cette perspective, c'est un autre monde qui s'ouvre à nous, multiple, ondoyant, vertigineux". He makes the point that this is also an essential resource for confronting the ecological crisis, which is all at once metaphysical, political and economic.

[44] *Renvoi* in the conflict of laws (of "foreign court theory" its other, common law version) is emblematically, or perhaps anecdotally, the legal device that does exactly this reflexive move. See again, *Viveiros de Castro*, Exchanging Perspectives: The Transformation of Objects into Subjects in Amerindian ontologies, 10 Common Knowledge (2004), 463–484.

[45] On the varieties of shamanism, see *Descola* (Fn. 7), 428: In a strict sense (see *Pollock*, Shamanism, Oxford Bibliographies), shamanism is specific form of religious practice found in Siberia, where the Tungus religious practitioner called *šamán* provided the model. However,

between humans and the spirits of nature or the other-world, is witness to the plurality and permeability of other, different forms of life (both spiritual and material). In its mediating role, it can take on multiple shapes, both human and animal, emphasising thereby the value and centrality of hybridity in an ontology of the in-between (Part II).

I. The gaze of the jaguar

"For the Amerindians, when a jaguar sees itself in the mirror, it sees a human being".[46] The ecological implications behind this striking representation by *Eduardo Viveiros da Costa* of the object of the jaguar's gaze are far-reaching.[47] They eradicate humanity's distance from other species. For the Western metaphysical and legal tradition, of which we have already seen that its relation to human (cultural) alterity is inseparable from its approach to the (nonhuman) natural world, the reversal is just as significant. The deflected mirror effect of the jaguar's gaze suggests a world of confusing reflexivity, that upsets our modes of access to reality.[48] The mirror of the other sends back our own image, decen-

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anthropology tends to use this concept to describe a set of religious phenomena of historical depth and wide ethnographic extent, across very diverse indigenous traditions (sub-Saharan Africa, East Asia, Latin America) that fulfil a variety of social roles (healing as well as harming) by intervention with spirits or through knowledge gained by communication with spirits.

[46] *Eduardo Viveiros da Costa*, Le regard du jaguar, Introduction au perspectivisme amérindien, 2021.

[47] At this point, it is useful to refer to the author's own explanation of anthropological perspectivism (*Viveiros da Costa* [Fn. 39], 16–20), that sums up beautifully the point we are trying to make here in respect of legal perspectivism: "… When it comes to the question of whether the object of anthropology ought to be the native's point of view, the response must be both "yes" and "no." "Yes" (certainly!), because my problem (is) to discover what a "point of view" is for the native. In other words, what concept of a point of view do Amazonian cultures enunciate—what is the native point of view on the point of view? The answer is "no," on the other hand, because the native concept of a point of view does not coincide with the concept of "the native's of point of view." After all, my point of view cannot be the native's own, but only that of my relation with it. This involves an essentially fictional dimension, since it implies making two entirely heterogeneous points of view resonate with each other… As stated above, the experiment I am proposing posits an equivalence *de jure* between the anthropologist's and the native's discourses, taking them as mutually constitutive of each other, since they emerge as such when they enter into a knowledge relation with one another. They reflect…a certain relation of intelligibility between two cultures; a relation that produces the two cultures in question by back projection, so to speak, as the "motivation" of the anthropological concepts. As such, anthropological concepts perform a double dislocation: they are vectors that always point in the other direction, transcontextual interfaces that function to represent, in the diplomatic sense of the term, the other in one's own terms (that is, in the other's other's own terms)—both ways. In short, anthropological concepts are relative because they are relational, and they are relational because their role is to relate."

[48] The mirror of self as a (modern) ruse of naturalisation is exactly the point of *Haraway's*

tering being, as if the jaguar, the avatar, the incarnation of radical alterity, was part of our split self. It serves to remind us, within the Western eminently "centred" tradition, that the divide between us and them, subject and object, runs through ourselves, and that however rational, civilised or in control we think we are, we are produced and driven by our shadow lives and histories. In terms that ring true to deconstructive, post-structuralist ears, the gaze of the jaguar teaches that it is the perspective that creates the subject and not the other way round. This is singularly relevant in respect of the law, whose modern guise as order and closure certainly offers tenacious resistance to this reflexive, decentered aesthetic.

In order to understand the insights that can be gained in respect of the law from attempting to follow the "gaze of the jaguar", it is certainly useful to recall, briefly, various elements concerning the impact of methodological choices and their corresponding epistemological assumptions on the aesthetics of modern legality. Thus, from a conventional, monist perspective, the latter is an (exclusive or totalising) ontological order (for instance, a code, a nation-state constitution, or an imagined world legal system), all-encompassing, external and prior to social reality.[49] A denial, as it were, of "life before the law".[50] In private international law, this vision is instantiated by multilateralist methodology: choice of law is an exercise in fitting diverse national rules back into an overall frame administered by means of a set of complete, coherent and exclusive categories. In such a framework, conflicts of norms are anomalous: they look somewhat like a disassembled jigsaw puzzle, of which the pieces must be returned to their proper place within a pre-existing (and of course, internally consistent) order. Difference – in the form of alternative rationalities, or other world-visions – is, as it were, flattened out, or "squared", through a requirement of conformity with the forum's legal categories.

Conversely, statutism thinks of law in terms of prospective, negotiable assertions advanced outside any fixed, overarching frame. It involves a "distribution of agencies"[51], a constant change and exchange of perspectives, in a methodological incarnation of legal pluralism. The world beyond the state is cluttered with disorderly heterogeneous claims, rather than self-regulated as order undergird-

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"cyborg" critique (Simians, Cyborgs, and Women: The Reinvention of Nature, 1991, p. 178) when she challenges the naturalising stories that still haunt the bodies of everyone marked as other, whose task is to mirror the self.

[49] This vision is well illustrated by the idea of a "legal relation" central to *Carl von Savigny's* representation of private international law, deployed within a real or imagined community of laws. The legal relation was as it were, pre-configured before it became the object of normative conflict, in such a way that whatever the starting point (the applicable law or the social relationship), the result was the same.

[50] See *Castoriadis*, De l'Institution imaginaire de la société, 1975.

[51] See *McGee* (Fn. 30).

ed by coherent principles.[52] Conflicts of laws are generated by the unruly encounter of concurrent, virtual aspirations and normative vocations, all necessarily formulated from an "internal" perspective – that is, from the standpoint of the would-be legal order, and not dictated by reference to an archimedean point. They "blur jurisdiction" and involve "the sharing of juridical space".[53] As we have seen above, "law passes", and indeed a pluralist account of private international law provides an emblematic illustration of legality's specific mode of existence in this respect. Far from being anomalous, the constant overlapping and negotiation of the claimed spatial thrust of different normative projects is an integral part of legality's mode of existence. A sort of legal "cosmopolitics", to borrow from Isabelle Stenger's account of the body politic.[54]

Law's morphological plurality is underscored, therefore, when its multiple bodies meet and interact. Such encounters may highlight the multiplicity of broad institutions or concepts, or singular rules or policies, as well as deeper normative and belief systems. The historical rivalry between monist and pluralist methodologies in private international law shows that there a significant normative choice to be made: either a claim based on foreign law is heard in its own language, on its own terms, along with its conceptual vocabulary and representation of spatiality, with the ensuing risk of irreducible mutual misunderstandings; or it is made to fit, at the risk of deforming all of its conceptual architecture and ideology, within the structure of the legal categories of the forum.[55] The former "perspectivist" vision, inherent in legal pluralism, is embodied in statutist doctrines within the conflict of law: the idea of "claim" is taken very seriously in this context. Thus, above all, such claims are accepted in their exist-

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[52] On the conceptualisation of transnational legal authority outside or beyond the state as *claim*, in the language of legal sociology, see *Cotterrel/del Mar* (eds.), Authority in Transnational Legal Theory Theorising Across Disciplines, Elgar Studies in Legal Theory, 2016. Examples of a pluralistic approach in positive private international law today are, on the one hand, the recognition of foreign judgments (and its contemporary avatar, the recognition of legal situations on human rights grounds); on the other, "governmental interests analysis" and "*lois de police*". All these examples start from and centre around the claim itself, that may require renegotiation or redefinition when it conflicts with another.

[53] See again *McGee* (Fn. 30)

[54] *La Découverte,* Cosmopolitiques I, 2003; and by the same author, The Cultivation of Ways of Overlapping: a Matter of Reclaiming, in: Latour et al. (eds.), A Book of the Body Politics Connecting Biology, Politics and Social Theory, 2020.

[55] See above: this is the "problem of characterisation" in the conflict of laws. If made to fit in an inappropriate category, difficulties or irritants may emerge downstream *(renvoi* or indeed conflicts of characterisation, *stricto sensu,* where the governing law thus designated in the light of an initial analysis of the "nature" of a legal institution then responds in completely different terms). As seen above there are endless examples in which monism's devices are deployed – notably, characterisation *lege fori* – show how foreign law is ironed out when its shape or content appear as alien or deviant. Indeed, the various conundra produced by multilateralist methodology – typically, *renvoi* generated by conflicting characterisation within the foreign legal system- are a direct result of this initial elimination of whatever does not, by and large, fit or conform.

ing shape or garb: in other words, statutism, like pluralism, refuses to smooth over difference.[56] For example, the muslim *kafalah* needs to be taken as it is understood in its own context and not made to fit in the (unfamiliar) categories of the forum, as should indigenous peoples' non-proprietary ideas of land use and occupation, or alien *persona* endowed with agency by a foreign law.[57] Judicial practice in such cases reveal underlying and historically variable assumptions as to what counts as law (as opposed to religious institutions, primitive practices, or alien legal fictionality).

The point here, however, is that under a monist approach, where law is synonymous with formal legality produced by state, the question of what counts as "law" is pushed into the background (there is little point in asking the law of a state whether it thinks of itself as law) and the focus is displaced towards a second issue, that of the spatial thrust and coordination of different systems of state legality. The *kefalah* as a religious institution will command attention only if it is embodied in the foreign state law governing (from the point of view of the court of a secular legal system) the personal status of the child; the same can be said of the indigenous usage of sacred land, that will be recognized as title only if formalised as such under the *lex rei sitae* [58]. The reach of (foreign) state law, as we know, has been the exclusive preoccupation of private international law since the early twentieth century. The irony of this, is that contemporary methods used in this context originated in circumstances where statehood was not the only parameter with which to identify legality. If there was no perceptible rupture in this respect in the nineteenth century, with the close entwinement of law and statehood, it was because the "concert" of European nation-states was still homogeneous: the displacement, into a wider international setting, of the methodologies initially designed to ensure the coordination of the laws of Germanic Roman Christian city states and princedoms seemed "natural" (or only to involve a very slight move). In reality, the change was considerable, because the

[56] Ensuing cases of irreducible conflicts between claims that will not concede or negotiate are admittedly more problematic, but in such cases a pluralist view consists in giving effect to the strongest (in terms of legitimacy or effectiveness). Statutism does not deny that this may entail a comparative, value-laden assessment of the strength and value of linkages in the context of particular cases. It says however that conversely to its monist counterpart, the initial opening to the other must be framed in the other's terms. This is complete reversal, but not a miraculous solution to all conflicts.

[57] These are all well-known examples of 'unfamiliar' categories that raise issues of characterisation in the conflict of laws. The example of unknown legal *personae* was usually illustrated by the problem of the appearance of the trust at the threshold of civilian legal systems, but has lost much of its punch by reason of a certain convergence around fiduciary institutions. However, the question of the legal standing of natural entities is more topical, though not without risk: see *Pottage*, Why Nature Has No Rights, forthcoming in: Nakagawa/Douzinas (eds.), Non-Human Rights. Critical Perspectives, 2023.

[58] Even then, categories of title to property can be instrumentalized: see on the infamous *Song Mao* case (involving Tate and Lyle and Cambodian "blood sugar"), *Mills/Harata/Le Meur*, in: Muir Watt et al. (eds.), Global Private International Law, 2017, 118 et seq.