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Fundamental rights and recognition in private international law

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Summary : This article attempts to respond to the question of the editors of this journal, on the implications of fundamental rights and recognition for private international law. It suggests that the paradigmatic transformations which are taking place in post-modern thought in the name of recognition within the social sciences, have implications for the law which are already apparent in contemporary theories of justice and democracy. In particular, recognition comes with an epistemology and a critical project which may mean that, in the end, there is little that is specific to « international » legal cases ; few grounds on which to distinguish the public (international) from the private (international) as distinct legal disciplines ; and no real sense in separating the need for recognition as a matter of individual experience or collective transmission. It is likely that the changing fault lines within the law, which are already at work to transform the idea and effects of sovereignty in public international law, will lead to an analogous rethinking of the way in which law governs personal relationships in multicultural – including crossborder - settings. In order to track the demands that recognition is making of the law in the later context, this article begins by examining the focus of the current doctrinal debate on recognition, which concerns the frontiers of the conflict of laws as method. It then explores the deeper epistemological and axiological implications of recognition, which are brought within private international law through the gateway of human rights. In this light, it seeks finally to show that recognition can also be seen as excavating an unfinished project of methodological pluralism.

1. *Introduction.* From the perspective of a sociology of knowledge, the contemporary emergence of a neo-Hegelian ¹ vocabulary of recognition within the law, sweeping in from other disciplinary fields²,

¹On the current debate in political philosophy, and its Hegelian legacy, an excellent overview can be found in « Social and Political Recognition » in *Internet Dictionary of Philosophy*. The recognition concept in Hegel's early social philosophical works (on 'struggle for recognition' : *kampf um anerkennung*) is re-read by Axelle Honneth in *The Struggle for Recognition: Moral Grammar of Social Conflicts* (Polity Press 1996). Similarly, Charles Taylor's Hegelian scholarship inspires his own work on recognition within a multicultural society (*Hegel and Modern Society*, 1979; *Multiculturalism. Examining the Politics of Recognition*, Princeton University Press, 1994).

²Honneth's theory of recognition draws explicitly upon converging trends in communication ethics (Habermas), social psychology (George Herbert Mead) and

is no doubt part of a more general response to the widespread perception of crisis and the correlative quest for philosophical, or utopian, re-foundation³. In moral and political philosophy, sociology, anthropology, psychoanalysis and social psychology, recognition is associated with the turn from redistributive to identity politics⁴. Concern for social and economic inequalities has to a large extent been overtaken (or taken over?) by a new focus on collective and individual dignity, through which it is proposed to give voice within the (domestic or global) community, to the Other⁵ - the different, the discriminated, or the minoritarian⁶. In this function, recognition is a performative concept,

psychoanalysis (Donald Winnicott). Equally foundational is the critical social theory of the Frankfurt school (of which he is the continuator), which Honneth relates in turn to Foucault's critique of power (*The Critique of Power: Reflective Stages in a Critical Social Theory* MIT Press, 1993). The influence of Habermas' critical social theory is also very present in the contribution of French philosopher Paul Ricoeur (*The Course of Recognition*, trans. David Pellauer. Cambridge, MA: Harvard University Press, 2005). In sociology, the quest for recognition has been hailed as "a new total social phenomenon" (see A. Caillé, *La quête de la reconnaissance, nouveau phénomène social total*, Paris, la Découverte, 2007). In political theory, the recognition concept is discussed in relation to theories of justice and democracy, specifically "proximate democracy" or *démocratie de proximité*" (see Pierre Rosenvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité*, Le Seuil, Essais, 2008, p. 277; in English, *Democratic Legitimacy Impartiality, Reflexivity, Proximity* (translation Arthur Goldhammer), Princeton University Press, 2011). It is also at the core of anthropological scholarship (often at work in international law: v. E. Jouannet, *Qu'est-ce qu'une société internationale juste? Le droit international entre développement et reconnaissance?* Pédone, 2012, p. 167 et s.; an English version of this work is forthcoming in 2013).

³ On the turn to utopia in times of crisis as an issue of sociology of knowledge, see J.M. Vincent, "La lecture symptomale chez Althusser, in *Sur Althusser. Passages*, in *Futur antérieur*, Harmattan, 1993, p.128. Disenchantment of modernity (and its turn away from religion) is also a central topic in the reflection of Charles Taylor (see, for ex., *A Secular Age*, Belknap Harvard, 2007). See too, disenchantment and societal reactions to the perceptions of crisis of democracy, Pierre Rosenvallon, *La légitimité démocratique...*, p. 56.

⁴ This move is famously critiqued by the feminist philosopher Nancy Fraser in « Rethinking Recognition », in *New Left Review*, n° 3, May-June 2000. Her feminist critique also extends, by the same token, to Foucault's normatively neutral stance on power, which inhibits attempts to identify and resist unacceptable forms of domination (*Unruly Practices: power, discourse and gender in contemporary social theory*, Cambridge: Polity Press, 1989).

⁵ The move to obtain recognition through voice within the community may be part of a Hegelian social struggle (Honneth), or a dignitarian aspiration towards universalism born of the disenchantment of modernity (Taylor).

⁶ Or the subaltern: in the international arena, subaltern critique expressed in the name of those who are socially, politically, and geographically outside of hegemonic colonial or post-colonial power structures, stems from similar objection as that of Nancy Fraser as to the way in which recognition, operating on the level of the symbolic, works to distract from issues of economic exploitation and redistributive issues (See Gayatri

which belongs the realm of the symbolic. Common notional threads are a phenomenology of the suffering induced by the social denial of individual or collective worth, and the acceptance of the universal human need for self-esteem⁷. It is closely associated, therefore, with values of reciprocity, altruism and pluralism in a multicultural society. The distributional effects of such a move are controversial, however, to the extent that structural social-political categories and correlative claims for economic inclusion may well be losing visibility under the (arguably) easier, or less costly, cover of the ethical category of culture⁸. Moreover, identitarian politics inevitably leave open crucial questions of legitimacy, both in respect of the identification of authority to recognize and the exclusive effects of recognition of some, while not of others.

2. While debates about recognition thrive across the Atlantic in connection with theories of justice⁹, they are - somewhat paradoxically, given their Hegelian or Foucauldian heritage - only gradually gaining ground in the European legal field¹⁰. However, in this latter

Chakravorty Spivak, "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*. Eds. Cary Nelson and Lawrence Grossberg. Urbana, IL: University of Illinois Press, 1988: 271-313).

⁷The identification of social pathologies and the projection of utopian alternatives for personal and social transformation that would counter and heal the effects of unjust societies, are a common thread in the works of Taylor, Honneth and Ricoeur, cited above.

⁸ The elements of the debate can be found in *Recognition or Redistribution? A Political-Philosophical Exchange* (Verso 2003), co-authored by Axelle Honneth and Nancy Fraser.

⁹ Legal « translations » of the recognition concept within the democratic state (on which, see too, in France, the work of Pierre Rosanvallon, *La légitimité démocratique*, cited above), directly linked to the influence of Habermas on critical social theory, are discussed notably within the field comparative constitutionalism, which has given rise to significant developments in the United States (Kahn, Paul W., "Comparative Constitutionalism in a New Key" (2004). Faculty Scholarship Series. Paper 324. http://digitalcommons.law.yale.edu/fss_papers/324). The intensity of interest and controversy in the United States may also be due to not only to the wider space occupied by identity politics, but to the fact that justice as recognition (rather than distribution) is notably opposed to the influential theory of justice of John Rawls.

¹⁰For instance, Ricoeur's publications on recognition (in French!) are given - at best - a cursory reference in French legal academic doctrine. But Foucault himself hardly fares better (with rare exceptions in the field of criminal law and criminology). On the reasons for the disciplinary compartmenting of French legal scholarship, see Ph. Jestaz and C. Jamin, « La Doctrine », Dalloz, 2004.

context, both as a discourse and a process¹¹, recognition certainly encounters stronger implicit political resistance to communitarianism and identitarian politics, and runs up against very different practices and understandings of democracy, equality or indeed justice itself¹². It may well be, too, that much of the critique in the United States draws upon a post-structural heritage, which, straddling the disciplinary divide between law and philosophy, is (again paradoxically¹³) untapped in Europe, where, the academic practice of the law still tends to steer clear of interdisciplinary mixes¹⁴. Thus, in France for example, while recognition has been brought into the limelight within social and political theory, or in moral and political philosophy¹⁵, there is little apparent interest among native lawyers for the topic, with the quasi-exception of recent reflection in the field of philosophy of law on historical harms and the duty of memory¹⁶. Strikingly, however - and whereas North-American debate on recognition tends to occupy the domestic scene - recognition seems to have found a quite remarkable opening in Europe, in international law.

¹¹On the difference between discourse (in the form of publicly stated reasons) and process (as an analytical construct), see Jacco Bomhoff, *Two Discourses of Balancing*, 2012, p.17, §1.4.

¹²On the historical reasons for which, in France, the development within the social sciences of a "corporatism of the universal" (term borrowed from Bourdieu: *Les Règles de l'Art. Genèse et Structure du Champ Littéraire*. Post scriptum: "Pour un corporatisme de universel", Paris, Seuil, 1992) induced a specific turn in theories of law and state at the end of the nineteenth century, in a very different mode from contemporaneous developments in the United States, see Pierre Rosnavallon, *La légitimité démocratique*, p.67 et s. See the example of the reception of Rawls in France (in the account under this title, by Catherine Audard, *European Journal of Political Theory* October 2002 vol. 1 no. 2 215-227) who notes that this has been "an extremely complex story where forces of innovation have been, in the end, overwhelmed by the resistance of 'philosophical nationalism'".

¹³ On the same paradox in respect of structuralism and post-structuralism, which have not been used by French lawyers, see Duncan Kennedy, « A Semiotics of Legal Argument. European Introduction », p. 324, quipping, in response to critique, that the « merely conservative » may be a masquerade for the « underdeveloped ».

¹⁴ See again, Ph. Jestaz and C. Jamin, « La Doctrine », op cit. (cited above, FN 10).

¹⁵ P. Ricoeur, *The Course of Recognition*, op cit; A. Caillé, *La quête de la reconnaissance, nouveau phénomène social total*, La Découverte, coll. « textes à l'appui », Paris, 2007; P. Rosnavallon, *La légitimité démocratique*, op cit.

¹⁶ See A. Garapon, "Justice et reconnaissance", *Esprit*, March/April 2006. How paradoxical, too is the fact that an unexpected source of concern for recognition in contemporary French (non-legal) theory may be the non-human, having somehow bypassed humanity itself! (see Bruno Latour, *Politics of Nature: How to Bring the Sciences Into Democracy* (2004, Harvard Univ. Press, translation Catherine Porter) focussing on the role of the spokesperson who must speak for otherwise mute things in order to ensure that the collective involves both humans and non-humans).

3. Interestingly, too, the concept has made its way into this latter field on parallel, and mutually indifferent, tracks in the public and private spheres. This simultaneous development is once again a reason to question the sense of the public/private divide in international law, and may well (as will be discussed below), constitute an opportunity for a constructive conversation across the current schism¹⁷. In public international law, the claim has recently been made by Emmanuelle Jouannet that recognition could be the most promising candidate for a refoundation of the discipline, as geared to the establishment of a fair and decent international society¹⁸. While clearly normative, this thesis calls to witness the content of the most recent post-colonial « generation » of cultural rights, which have opened space in the international arena for collective identitarian concerns¹⁹. Furthermore, the spectacular spread of the post-colonial idea of reparation for historical wrongs²⁰ provides concrete expression to the idea that beyond financial compensation, the symbolic recognition²¹ of past harms suffered by a group by reason of its specific characteristics (gender, race) or shared beliefs (whether religious or racial or sexual), may be the only way to break the chain of intergenerational transmission of perceptions of inferiority. Such ideas obviously call for a sophisticated articulation of the relationship between recognition and economic development, and are indeed criticised, along familiar lines, by subaltern studies, for allowing neo-liberal international economic law to govern distributional issues unchecked²².

4. In private international law, the idea of recognition has been given significance, at least in Europe²³, by Paul Lagarde²⁴. In a nutshell, the

¹⁷See H. Muir Watt, « Private International Law beyond the Schism », (2011) 2(3) *Transnational Legal Theory* 347–427.

¹⁸E. Jouannet, *Qu'est-ce qu'une société internationale juste ?*, op cit.

¹⁹*Ibid.* p. 154 et s. showing how the emergence of recognition in international law as a means to end stigmatization of (colonized) peoples took place only after decolonization (and not in the 1945 United Nations Charter which continues to differentiate between peoples according to their degree of “civilization”).

²⁰*Ibid.* p. 260 on the 2001 Durban Conference; see too A. Garapon, *Peut-on réparer l'histoire ? Colonisation, esclavage, Shoah*, Paris, éd. Odile Jacob, 2008.

²¹The recognition considered here, rather than that of the individual perpetrator of his or her crimes (through criminal law), is by international community at large, for example through its judicial institutions.

²²These can either be seen as distinct functional regimes participating in the much-criticized fragmentation of international law, as competing paradigms of the latter.

²³ This particular debate has not generated much interest in the United States (probably) for the triple reason that : the conflict of laws no longer does, generally ; the issues which give rise to interaction or competition between private international law

idea is that personal relationships²⁵ created elsewhere, under a foreign law (and according to a potentially different understanding of their meaning and content), should be given a place (within the society and under the law of the forum) as such, respecting their specific, initial characteristics²⁶. Here, the potential implications of recognition may well be less immediately perceptible than in the discipline's public international counterpart. Indeed, the vocabulary of recognition has

and fundamental (including constitutional) rights would be characterized in the American context essentially as federalism issues, which are dealt with as such under the Federal Constitution; the debate in French and German is largely dogmatic, focussing on issues of which the relevance is conditioned upon methodological assumptions which have long been rejected across the Atlantic. One notable exception in the literature is Ralf Michaels, « EU Law as Private International Law? Re-Conceptualising the Country-Of-Origin Principle as Vested Rights Theory » (*ZERP Diskussionspapier* 5/2006 (2006), available at: http://scholarship.law.duke.edu/faculty_scholarship/1573), but the thesis according to which « mutual recognition » under European Union has anything to do with « vested rights », is not really convincing; at least, no more so than any attempt to correlate mutual recognition and the recognition debate considered above. Comp. also, H. Muir Watt, « European federalism and the new unilateralism », 82 *Tulane Law Review* 1983 (2008).

²⁴ See notably, P. Lagarde, "Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures", *Revue de droit international* 2004, p. 225; P. Mayer, "La méthode de la reconnaissance en droit international privé", in *Le droit international privé : esprit et méthodes : Mélanges en l'honneur de Paul Lagarde*, Dalloz-Sirey 2005, p. 547; P. Lagarde, "La reconnaissance mode d'emploi", *Mélanges en l'honneur d'Hélène Gaudemet-Tallon*, éd. Dalloz 2008, p. 481; C. Pamboukis, "La reconnaissance-métamorphose de la méthode de reconnaissance", *Revue critique de droit international privé* 2008, 513.

²⁵ The scope of recognition cannot be defined dogmatically, in the way in which traditional methodological tools determine their purview, for the epistemological reasons that will be explained later. Recognition responds, rather, to a need stemming from the denial of identity, which will tend to circumscribe its use to personhood and family relationships (see Gianpaolo Romano, « La bilatéralité éclipsée par l'autorité », *Revue critique de droit international privé* 2006, 457). It is clear however that a tort or criminal law case may involve issues of recognition, as for instance in disputes brought under the American federal *Alien Tort Statute* (on the interaction between criminal law and recognition see too below FN 73).

²⁶ Drawing attention to the renewal of method in the field of cross-border personal relationships, Gianpaolo Romano, « La bilatéralité éclipsée par l'autorité », op cit, FN 25.

always been central to the conflict of law ²⁷ – encompassing vested rights, judgments, public acts, personal status and, now under the influence of European Union law, « mutual recognition »; moreover, traditional concern for the understanding of the « foreign » has always existed, at least in the discourse of the discipline, so that under cover of a common signifier, there is a tendency to assume substantive similarity between the conventional goals of private international law as « management of pluralism » ²⁸ with more recent, collectively identitarian or individually dignitarian, forms of recognition ²⁹. Furthermore, form and substance³⁰ in this field have always been kept tightly separate, so that the focus of the ensuing debate has been essentially methodological³¹; the site of ideological disagreement within the discipline has been, not the politics or the values encapsulated in recognition, but the impact on private international law of human rights, through which the courts have given it effect, and thereby replaced or displaced more traditional tools.

5. The judicial impetus for this methodological unsettling of private international law has been the ECtHR³², and more recently the ECJ to the

²⁷Of this is also partly true of public international law (recognition of states). On the various meanings and uses of recognition in the private international law context, see D. Bureau & H. Muir Watt, *Droit international privé*, Thémis, PUF, 2^{ème} éd., §238 s.

²⁸This recurring phrase was coined (within this specific context) by Ph. Francescakis, preface to the French translation of Santi Romano's *Ordinamento giuridico* (*L'ordre juridique*, P François and P Gothot (eds), French translation, Dalloz, 1975).

²⁹See however, spelling out the « recognitive function » of private international law in the field of personal status: Daniel Gutmann, *Le sentiment d'identité : étude de droit des personnes et de la famille*, Preface by François Terré, LGDJ Paris, 2000. 192

³⁰Duncan Kennedy's analysis of the relationship between form and substance, and the politics of their separation within the « jurisprudence of rules » (see « Form and substance in private law adjudication », 89 *Harv. L. Rev.* 1685) holds all the more true in this field, that forms represent a large part of the content of the discipline, which (in the European tradition) is predominantly methodological.

³¹See the various contributions cited above FN 24.

³²To a large extent the private international law issues were anticipated by the national courts. Thus, for instance, once the right of trans-sexuals to accede to a change of civil status had been recognized by the ECtHR on the grounds of article 8 ECHR in a domestic case (in *B. v. France*, no. 13343/87, 25 March 1992 finding for a violation of article 8 ECHR that the applicant « finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life »), the French court

extent that issues of personhood and family are now seen to come within the purview of European Union law³³. The specific instances in which recognition has been used - whether explicitly or not - in the appeal to fundamental rights are well-known. The leading cases from each of these jurisdictions - *Wagner*³⁴ and *Garcia-Avello*³⁵ - related respectively to intercountry adoption, and to family names, and while both cases imposed upon the defendant States to set aside their usual rules of private international law in order to provide appropriate protection to the individuals involved, neither involved any form of cultural conflict over the intrinsic content of the relevant legal institutions³⁶, and no collective identity claim was at stake. Fundamental rights were invoked, on the one hand, to impose cross-border continuity of a parent-child relationship on the dignitarian ground of the right to a normal family life; on the other, the stability of a child's identity was ensured through the more utilitarian concern for the coherence of individual status of mobile citizens within the internal market. Both instances led to revision of traditional tools; both have

extended this right to an Argentinian trans-sexual (Court of Appeals of Paris, 14 juin 1994: « *La matière des droits de l'homme étant d'ordre public et la protection de ces droits devant être assurée tant à l'égard des nationaux qu'à l'égard des ressortissants des États non parties à la convention s'ils sont domiciliés sur le territoire national, en vertu des articles 1^{er} et 14 de la convention européenne de sauvegarde des droits de l'homme, laquelle est d'application directe en France, l'action d'un transsexuel de nationalité argentine, résidant régulièrement en France, doit être déclarée recevable, sans considération du statut personnel de l'intéressé, dès lors qu'elle a pour objet de mettre fin, par une nouvelle désignation du sexe dans les documents officiels, à une discrimination sociale subie en France* »). This decision came under fire for creating the concept of a « limping sex » (Y. Lequette, case-note, *Revue critique droit international privé* 1995.323).

³³ The principal point of entry of European Union law into the private international law of personal status is through the concept of European citizenship (see ECJ 2nd March 2010, *Grunkin Paul* C-353/06). In the discussion that follows, I focus on the fundamental or human rights codified in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the European Convention on Human Rights), because it is these rights which have been associated with the methodological changes affecting private international law. However, similar methodological issues could arise under the Charter of Fundamental Rights of the European Union, in relation to the application of European Union rules of private international law.

³⁴ *Wagner et J.M.W.L. c. Luxembourg* (requête no 76240/01), 28 June 2007.

³⁵ Case C-148/02 *Carlos Garcia Avello v. Belgium*.

³⁶ The difficulties encountered in respect of Convention rights were linked to the concrete ways in which the tools of private international law in the forum (defendant) State worked out in the circumstances of the case, but neither inter-country adoption by a single mother (*Wagner*), nor the child's double name (*Garcia Avello*) raised a fundamental contrariety to public policy of the type which would later be encountered in the *Mennesson* case (v. *infra* FN 48).

been identified as involving a new methodology implementing the imperative of recognition.

6. Whatever the forms or expressions of recognition on either side of the public-private international law divide, it is both heralded or challenged as providing, on the one hand, a credible explanation of contemporary mutations within the field, on the other, a convincing normative foundation for a renewal of its perspectives and methods. In each sphere, changes simultaneously taking place in the name of recognition are now also unquestionably linked to the discourse of fundamental rights³⁷. However, the specifically doctrinal content of the discipline of private international law raises questions which may not arise in exactly the same way as do the potentially paradigmatic transformations³⁸ on the other side of the international legal looking-glass. Moreover, the respective understandings of the content and architecture of those rights through which recognition operates may differ considerably. Indeed, it seems that, for the moment, recognition in private international law is perceived largely as a competing, and opposing, methodological approach to individual transborder relationships, for which traditional tools have had to make room due to the direct vertical and horizontal effects of hard-core human rights instruments. This contrasts with the emphasis placed on the axiological dimension of recognition on the side of public international law, where efforts tend to focus on a quest for meaning within a more heterogeneous web of collective rights³⁹.

7. This article, then, attempts to respond to the question of the editors of this journal, on the implications of fundamental rights and recognition for private international law. It suggests that the paradigmatic transformations which are taking place in post-modern thought in the social sciences⁴⁰, have implications for the law which are already

³⁷ This does not mean that recognition in private international law would necessarily have to pass through human rights discourse. See for example, Daniel Gutmann's analysis of the "recognitive function" of private international law (*Le sentiment d'identité*, *op cit* FN 29), which does not use human rights as a basis but appeals directly to individual dignitarian and community identitarian concerns. Nevertheless, the courts appeal naturally to the instrument which provides both the most visible and the most mandatory legal basis for following this path.

³⁸ E. Jouannet, *op cit*, p.167.

³⁹ See for instance, the specific evolving mix of practice, soft-law, textual reinterpretation and political philosophy that goes into the public international law of cultural rights, see E. Jouannet's account, *op cit.*, p.174 et s.

⁴⁰ We are not asking here whether law is or is not a social science (see Geoffrey Samuel, "Is Law Really a Social Science? A View from Comparative Law", *Cambridge Law*

apparent in contemporary theories of justice and democracy⁴¹. In particular, recognition comes with an epistemology and a critical project which may mean that, in the end, there is little that is specific to « international » legal cases; few grounds on which to distinguish the public (international) from the private (international) as distinct legal disciplines; and no real sense in separating the need for recognition as a matter of individual experience or collective transmission. It is likely that the changing fault lines within the law, which are already at work to transform the idea and effects of sovereignty in public international law, will lead to an analogous rethinking of the way in which law governs personal relationships in multicultural – including crossborder – settings. In order to track the demands that recognition is making of the law in the later context, this article will begin by examining the focus of the current doctrinal debate on recognition, which concerns the frontiers of the conflict of laws as method (I). It then explores the deeper epistemological and axiological implications of recognition, which are brought within private international law through the gateway of human rights (II). In this light, it seeks finally to show that recognition can also be seen as excavating an unfinished project of methodological pluralism (III).

I–Recognition as method : the current debate

8. Concerns for individual and collective dignity and identity, associated in other disciplinary fields with the recognition paradigm, have made a recent entrance into private international law through fundamental rights. This contact has been the source of considerable friction, when, for the first time during the 1990s and from the dual perspectives of economic freedoms and human rights, the use of traditional legal tools by the courts in crossborder cases was judged to contravene European Union or Convention law respectively. It is not the use of a discriminating connecting factor which is at stake here⁴² –

Journal, 2008, vol. 67, n°2, p. 288-321). It is however notable that some of the most interesting pluridisciplinary discussions on contemporary theories of justice (for instance from the perspective of gender) do not include lawyers (see for example, *Sous les sciences sociales, le genre*, La Découverte, 2010, ed. by D. Chabaud-Rychter, V. Descutres, A.-M. Devreux, E. Varikas, some of the contributions to which will be cited below).

⁴¹On which, see Pierre Rosanvallon, *La Légitimité démocratique*, op cit.

⁴² Unlike much of the debate which arose over the constitutionality of (functionalist) conflict-of-laws approaches in the United States during the 1990s, to the extent that they deviated from the use of territory as connecting factor within the federal system (see Douglas Laycock, “Equal Citizens of Equal and Territorial States: The

although the inevitable issue of the relationship between discrimination and differentiation of personal status on the basis of foreign nationality or residence arose in the recent *Harroudj* case⁴³ and will no doubt resurface in the future. Neither do these instances act out a vertical or horizontal conflict⁴⁴ of fundamental rights – although, here again, the jury is still out on this point in the case of crossborder child abduction⁴⁵. And while it is clear that much of the hostility to fundamental rights in private international law is linked to the content of the rights invoked⁴⁶, no fundamental public policy issue is necessarily involved in the violation, which is characterized even in the absence of a direct collision between a fundamental right and a conflicting value protected by the national forum. It is the lack of protection – through the operation of private international law rules – given to the effective parent-child relationship *whatever its content* that is considered to violate Convention rights in *Wagner*⁴⁷. It is only with the *Mennesson* saga⁴⁸ involving the

Constitutional Foundations of Choice of Law”, 92 *Colum. L. Rev.* 249 (1992) and our analysis in “Aspects économiques du droit international privé”, *Recueil Cours Académie Droit International*, t307, 2005, §192 s.).

⁴³*Harroudj v. France* (n° 43631/09, 4 Oct. 2012). The ECtHR ruled that refusal of permission for a French national to adopt an Algerian baby girl already in her care under the Islamic-law form of guardianship (“kafala”), on the grounds that adoption was prohibited by the child’s personal status applicable under the French choice of law rule, did *not* violate the Convention right to a family life.

⁴⁴On conflicts between two fundamental rights, see *infra* § 27.

⁴⁵ See, showing a clash between EU objectives of procedural expediency and the ECtHR’s protection of the interests of the child, see ECJ. 22 December 2010, C-491/10 PPU,

Revue critique de droit international privé 2012 p. 172, note H. Muir Watt, D. 2011. 248; *ibid.* 1374, obs. F. Jault-Sesek; RTD eur. 2011. 482, obs. M. Douchy-Oudot; Cour européenne des droits de l’homme (2^e Sect.). - (n° 14737/09). 12 juillet 2011, D. 2012. 1228, obs. H. Gaudemet-Tallon et F. Jault-Sesek; AJ fam. 2011. 504; *ibid.* 2012. 97, Pratique A. Boiché.

⁴⁶ The political argument, familiar to federalism debate (Rosen), is that giving effect to relationships between foreigners which would not be allowed domestically (same-sex marriages, sex-changes, and now surrogacy arrangements in *Mennesson* : see the text below) will erode domestic barriers.

⁴⁷*Wagner v Luxembourg*, cited above FN 34. Under the case-law of the European Court of Human Rights, article 8 in particular has been read as being of particular import in cases with crossborder implications. But it is not the content of regime itself which comes under scrutiny (the way in which Luxembourg regulates adoption, or in which Belgium regulates family names), but the way in which effects of national rules play out in international situations, interfering with an otherwise effective relationship.

⁴⁸ECtHR *Mennesson*, forthcoming 2013. See for the last stage of the saga before the French courts, Civ. 1^{re}, 6 avr. 2011, n° 10-19.053, *Revue critique de droit international privé* 2011 p. 722, note Petra Hammje,

legal effects of surrogacy that recognition of a foreign relationship has been linked to the acceptance of the alien – here, in the sense of not only different but unwelcome – content of foreign law in the interests of the child⁴⁹.

9. This may explain why, in the cases identified as exemplifying a new approach based on « recognition », the tension between fundamental rights and private international law is perceived to be essentially methodological⁵⁰. Thus, the focus of the academic debate has been on the displacement by recognition of the line dividing the respective scope of the method of determining the applicable law (conflict of laws *stricto sensu*) and the legal requirements for the enforcement of foreign judgments⁵¹. In French legal literature, the current model owes much to the influential ideas of Pierre Mayer on the distinction between rules and decisions in private international law⁵². According to his argument, the method of the conflict of laws, which means determining the governing law by means of a connecting factor among innumerable private law rules all virtually applicable, is relevant every time the issue before the court is governed by (general, abstract) rules

D. 2011. 1522, AJ famille 2011. 262, obs. F. Chénéde; AJCT 2011. 301, obs. C. Siffrein Blanc.

⁴⁹See the current reactions in France to the proposal of « marriage for all » based on the perception of gay marriage as a Trojan horse for various forms of medically assisted procreation (including surrogacy conventions for male same-sex couples) in domestic law. The *Mennesson* case relates to crossborder recognition, whatever the position of domestic law on this point.

⁵⁰The arrival on the scene of a new method associated with human rights has generated considerable resistance: see for example, Lena Gannagé, *La hiérarchie des normes et les méthodes du Droit International Privé*, Tome 353, 2001, Preface by Y Lequette.

⁵¹ The difficulty of trying to capture the change is in part due to the fact that the vocabulary of « recognition » has long been part of private international law. Far from the identity concerns that the concept involves today, recognition was first associated with the effects of foreign laws and judgments within the forum despite the formal exclusiveness of the sovereignty of the forum (how can a court apply foreign law?). Another meaning relates to the ways in which an unfamiliar legal institution (such as a trust) can be “fitted” among the institutions of the forum? In the private international law context, this is not a question for the legislature (should a civil system recognize trusts?) but whether court can articulate – make any sense out of – an unfamiliar legal object which is claimed must be articulated its own institutions (can a notaire deal in any significant way with a trust?).

⁵²*La distinction des règles et des décisions en droit international privé*, Paris Dalloz, 1973.

(of private law)⁵³, as opposed to (individual) decisions (of which the prototype is a judgment), which call either for recognition within the forum legal order, or refusal (for reasons of lack of jurisdiction or public policy). The second methodology is perceived to be more liberal, or more facilitative, since it does not condition legal effects of the foreign judgment upon compliance or conformity with the forum choice of law rule. In practical terms, then, this re-formulation of the respective methodological scope of the conflict of laws (related to choice between rules) and recognition of decisions led to reallocating certain issues from one category to the other – more specifically, the topical issue of the effect to be afforded to post-independence expropriations or nationalizations were moved under the latter, less restrictive, regime applicable to foreign decisions⁵⁴.

10. While the distinction between rules and decisions for the purpose of determining the relevant methodology raised a first set of difficulties in the case of foreign public acts without any substantive decisional content which were difficult to classify as being one or the other (celebratory acts of religious bodies distinct from the state⁵⁵ ; quasi-public acts of registrars, etc⁵⁶), the binary model managed to hold until the arrival on the scene of fundamental rights. Hitherto, giving effect to foreign relationships created elsewhere had meant using the forum choice of law rules in their « cognitive function »⁵⁷. However, after

⁵³These are virtually in unlimited supply since the assumption is that in every legal system, there is always a rule of private law which is potentially applicable (by virtue of the completeness of the legal order, whose lack of prescription on any point should be read as signifying that no causal relationship exists between a set of facts and a claimed legal consequence). This supposes in turn a structural distinction between private and public law : when the State is involved in the terms of the relationship (does this citizen qualify for French citizenship ?), there is only one possible source of governing law.

⁵⁴ This meant that the nationalization by Algeria of a French ex-colonial company did not require looking for the applicable law under existing connecting factors for corporate issues – an approach which courts had used until then, with disastrous results. See Civ. 1^{er} juill. 1981, *Total Afrique*, *Revue critique de droit international privé*, 1982. 336, note P. Lagarde, *Clunet* 1982. 148, note P. Bourel, *Rev. sociétés* 1982. 878, note JL Bismuth.

⁵⁵R. El Hussein Begdache,

Le droit international privé français et la répudiation islamique Tome 361 L.G.D.J 2002, préface J Foyer.

⁵⁶ Ch. Pamboukis, « L'acte quasi public en droit international privé », *Revue critique de droit international privé* 1993 p. 565

⁵⁷On this idea see D. Gutmann, *Le sentiment d'identité*, op cit FN 29.

Wagner, the right to a normal family life under article 8 meant recognising a relationship already effectively constituted elsewhere ; « social reality » prevailed henceforth over the legal requirements of the choice of law rule⁵⁸. Applied to civil partnerships, for instance, this line of reasoning mandates that an effective relationship registered elsewhere should be acknowledged and produce the legal effects attached to such relationships in the forum country⁵⁹, even if this would run contrary to the law governing the partners' personal status, under the forum's conflict rule⁶⁰. Moreover, for want of consensus on the appropriate connecting factor for same-sex partnerships, there is a tendency in comparative private international law to consider that a public officer or authority which is asked to register or celebrate such a partnership will also be applying its own law. In other words, as long as there is a sufficient jurisdictional link (usually through current residence, social environment or « milieu de vie » of either party), each authority will by-pass conflict of law methodologies and apply its own law, while the relationship once created will be afforded recognition elsewhere. An author has aptly described the change taking place in this respect as an « eclipse of bilaterality by authority »⁶¹.

⁵⁸The Court took the view that the decision not to declare the judgment enforceable did not take account of « social reality ». The family ties created by the full adoption granted in Peru could not take full effect in Luxembourg. As a result, the applicants encountered obstacles in their day-to-day lives and the child did not enjoy the legal protection which would enable her to fully integrate into her adoptive family. It is to the extent that the *Wagner* case refused the detour by the forum's choice of law rule in order to ensure the recognition of a foreign adoption, that it was seen as implementing a new approach.

⁵⁹ This may generate difficulties of adjustment or "transposition" between the foreign partnership and the effects attached to it under forum law. See (among many) Ch. s Pamboukis, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue critique de droit international privé* 2008 p. 513 ;

⁶⁰ At a time when the status of such unions was still highly controversial (notably because they were authorized between persons of the same sex), ICCS Convention n° 32 (*Convention sur la reconnaissance des partenariats enregistrés*, Munich 5 septembre 2007: no official text in English) introduced a principle of recognition of partnerships registered in other Contracting States (article 2) and of their civil effects (article 3), allowing for only limited exceptions (article 7: including public policy, but excluding any reference to the forum's conflict of law rule). The ICCS/CIEC is an intergovernmental organisation whose aim is to facilitate international co-operation in civil-status matters and to further the exchange of information between civil registrars.

⁶¹

11. Recognition then came to be theorized with a « mode d'emploi » designed to fit these new developments among existing methods⁶². When a relationship had been « cristallised » by the intervention of a public authority⁶³, the jurisdiction of which was conditional upon an adequate connection with the applicant(s), then that relationship could be accepted as such within the forum without prior recourse to the forum's choice of law rules. In this context, debate now focuses, firstly, on whether a « purely factual » relationship (such as a common law marriage or a *de facto* partnership), should be subjected to the same methodology⁶⁴; secondly, on whether the object of recognition in such circumstances is the factual situation, the law under which it grew up, or the relationship as thus formed⁶⁵; thirdly on what type of link is required of the authority which claims to create a relationship which potentially produce effects abroad⁶⁶. Moreover, the issue of the level of tolerance of forum public policy arises here. The public policy exception, which is usually available to eject a foreign law when its content leads to an outcome that is judged to be undesirable in the light of current societal values, switches traditionally into in a mitigated or « attenuated » mode when confronted with a judgment (a vested right) created outside the jurisdiction on which the parties may have placed their reliance⁶⁷. The issue here is the extent to which the relationship

GP Romano, « La bilatéralité éclipée par l'autorité. Développements récents en matière d'état des personnes », *Revue critique de droit international privé* 2006 p. 457

⁶²P. Lagarde, « La reconnaissance mode d'emploi », op cit.

⁶³P. Mayer, *La reconnaissance en droit international privé*, Mélanges en l'honneur de Paul Lagarde, préc., p. 547.

⁶⁴ It is difficult however to see why not, to the extent that it is effective. If effective, it must be recognized under article 8.

⁶⁵ S. Bollée,

« L'extension du domaine de la méthode de reconnaissance unilatérale »,

Revue critique de droit international privé 2007 p. 307

⁶⁶ See on these points, D. Bureau & H. Muir Watt, *Droit international privé*, t. I, n° 569 s..

⁶⁷ Outcomes similar to those obtained under the French theory of attenuation of public policy are reached under the German theory of *Inlandsbeziehung*, see N. Joubert, *La notion de liens suffisants avec l'ordre juridique (Inlandsbeziehung) en droit international privé*, Credimi, 2008, preface P. Lagarde.

created abroad, without any decisional input from a public authority, must nevertheless benefit from the more liberal regime.

12. Therefore, while the focus of the debate is mostly doctrinal or methodological, there is far more ideology to the opposition than first meets the eye. Beyond the way in which the dividing line is drawn as between recognition and the conflict of laws (or the method of determination of the applicable law), the stakes are the impact of the new methodology in cases where it might be applied to relationships not protected, and indeed rejected, by domestic law. The example of the ostensibly doctrinal debate over the treatment due (within a prohibitive forum) to foreign civil partnerships, which began to be opened to same-sex couples in the 1990s, is once again topical in this respect. The political objection, then, to the enlarging the scope of recognition methodology comes in a form familiar to federalism debates⁶⁸: giving effect to relationships between foreigners which would not be allowed domestically (same-sex marriages, sex-changes, surrogacy arrangements) will inevitably erode domestic policy restrictions, thereby raising issues of local democracy⁶⁹.

⁶⁸ M. Rosen, « Extraterritoriality and Political Heterogeneity in American Federalism », 150 *University of Pennsylvania Law Review* 856 (2002).

⁶⁹This is true, too, of course, under the exception of public policy regime. Thus, over time, by virtue of the “attenuated” effect of public policy, relationships involving the clash of societal values (as between the forum and a foreign legal system, generally that of the common nationality of the parties) such as divorce, divorce by mutual consent, polygamous marriage...have been allowed to produce their legal effects within the forum. This was at one point the case, too, with respect to the effect of muslim repudiations (which usually took place abroad, in the couple’s country of origin) on women living in the forum state. The foreign repudiation was considered as ending the marriage and the wife was left on her own with little financial protection. In other words, in this « intersectional » conflict of values, deference to other cultural practices overrode the gender equality issue. However, the entry into force of *Protocol n° 7 du 22 November 1984 (Article 5)* to the European Convention of Human Rights was then considered as mandating the reverse solution. The (adjudicatory) jurisdictional link to the forum (domicile of the family) automatically satisfied the (prescriptive) jurisdictional requirement under article 1 of the European Convention, bringing the dispute squarely within the ambit of the repudiated spouse’s right to equality
Revue critique de droit international privé 2004 p. 423, P. Hammje

13. However, in Europe, the human rights dimension of such situations adds a further twist to this debate, to which we shall now in turn in the following section. While, as in the *Wagner* case, human rights may mandate recognition of effective foreign family relationships, these may also impose substantive changes upon domestic law, overriding any local policy objections. This double, simultaneous effect of fundamental right is illustrated in the transgender case discussed below. Moreover, human rights operate in a similar fashion, necessarily claiming the same reach, whether the relationship has originated elsewhere, or within the forum state. The crucial issue then becomes the identification of the jurisdictional link which, by virtue of article 1 of the European Convention, legitimates imposing European values on relationships also connected to third countries. This looks familiar - much like a form of neo-statutism⁷⁰. While such implications of human rights might represent a new swing of the methodological pendulum - a characteristic of private international law according to its most popular historiography - , they may run far deeper. For indeed, the recognition concept also has far-reaching epistemological and axiological implications.

II. The epistemology and values of recognition : the prism of fundamental rights

Rejet des répudiations musulmanes

Cour de cassation (1^{re} Ch. civ.). - 17 février 2004, D. 2004, p. 824, concl. F. Cavarroc, p. 815, chron. P. Courbe, AJ famille 2004, p. 140, obs. S. David, RTD. civ. 2004, p. 367, obs. J. Marguénaud

One analysis of this development is to consider that the courts have introduced flexibility into the operation of public policy to that the extent that it has absorbed human rights values, so as to allow full effect to such values when the relationship of the parties to the forum is close enough that it is likely to develop there. This is the concept of « public policy of proximity ». An alternative analysis is to consider that the same result is imposed by the right itself, which defines its own « reach » under the jurisdictional requirement of article 1. Much of the discussion of human rights in private international law has therefore been related to the ways in which the traditional modes of operation of public policy should be articulated with fundamental rights, each of which claims its own scope. See Petra Hammje, "Droits fondamentaux et ordre public",

Revue critique de droit international privé 1997 p.

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⁷⁰ On this analogy, which has formed round the concept of « milieu de vie », see Myriam Hunter-Hénin, *Revue critique de droit international privé* 2006 p. 743

« Droit des personnes et droits de l'homme : combinaison ou confrontation ? ».

14. While the methodological debate described above is linked to the resettling of categories and dividing lines perceived to be central to the understanding of the discipline, a highly significant, yet less visible, part of the challenge raised by fundamental rights is that they imply new epistemological foundations for the treatment of individual cases. In turn, this change is driven by values of reciprocity and respect for alterity, which have significant implications in terms of the perception of the relationship between the Self and the Other, the forum and the foreign⁷¹. Such transformations are rarely identified from within legal practice. However, they come to light in when viewed through the lenses of the various other disciplines which, in dealing with alterity, are now increasingly adhering to the recognition paradigm. Identity politics, psychoanalysis or moral philosophy show how recognition both contextualises and de-centers.

15. In the field of human rights, which as we have seen, arguably overlaps in many cases with private international law, the vocabulary of recognition corresponds to the use of a specific epistemology, which challenges the traditional binary distinction between facts and law. This vocabulary is to be found, emblematically, in the European Court of Human Rights *Christine Goodwin* case in 2002⁷². Here, the Court abandoned its previous, prudent position on the legal status of transgendered persons, and considered that the refusal by the United Kingdom to give civil effect to post-operative sex change in the particular case of Christine Goodwin, represented a failure to respect her right to private life in breach of Article 8. Having defined the claim itself in the language of recognition (“The applicant complained about the lack of legal recognition of her post-operative sex in the United Kingdom”), the Court uses the same wording to explain why the time had come for change. Thus it considered “significant that the condition had a wide international recognition for which treatment was provided. It was not convinced that the inability of the transsexual to acquire all the biological characteristics took on decisive importance. There was clear and uncontested evidence of a continuing international trend in

⁷¹ See, on the recognition paradigm, Ivana Isailovic, *Global Governance and Sites of Recognition: Identity, Private International Law and Patterns of Marginalization* PhD Sciences-po, Paris 2013 (forthcoming). This work focuses in the (foucauldian) sites of *misrecognition* created by the tools of private international law.

⁷² The applicant, Christine Goodwin, a United Kingdom national born in 1937, was a post-operative male to female transsexual. The applicant claimed that she had problems and faced sexual harassment at work during and following her gender re-assignment.

favour of not only increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals”.

16. The Court then goes on to identify the suffering which lack of recognition has induced. The way in which it does so avoids framing the legal issue in terms of discrimination (non-discrimination is not a “stand-alone” right under article 14 of the ECHR), but, side-stepping a tricky comparison (people whose gender is unaligned on their biological sex are deprived of equal treatment), uses the more radical idea that dignity is denied through refusal to give legal effect to sex change, *per se*. In doing so, it links recognitive identity politics and a contextual assessment of individual situations. Thus, “a serious interference with private life also arose from the conflict between social reality and law, which placed the transsexuals in an anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety”. The Court links the contextualised individual experience of everyday humiliation, and the symbolic stigmatisation of a group, putting to use insights from psychoanalysis and social psychology that are similarly very present in public international legal recognition claims⁷³.

17. It can be seen here that the epistemology of recognition brings about a reversal of perspective in legal reasoning, in three important respects. All of these can be attributed to a turn away from the formal rationality of the law⁷⁴ in favour of open-textured and deliberative normative modes, sensitive to the life experiences with which it interacts. On the one hand, the law is responding to individual, contextualized perspectives. On the other, it is no longer perceived as a set of abstract principles, based on binaries, distinctions and classifications⁷⁵. Finally, it may herald, or at coincide with, an increasing

⁷³ It is interesting to reflect upon the different work that human rights and criminal law (for instance, on hate speech) can do. Here, recognition is symbolic and non-repressive. Of course, the defendant here is a State and not a private person; when private conduct affects recognition, it will often work through criminal law rather than through the horizontal effect of human rights.

⁷⁴ On the question whether the law is gendered (as masculine), see Regina Graycar and Jenny Morgan

The Hidden Gender of Law The Federation Press, 2nd edition.

⁷⁵ Recognition has brought similar awareness of the “politics of method” described in the text into public international law, where it has been a powerful factor of decline of the way in which the foundational concept of state sovereignty has - far from its initial

awareness of the politics inherent in – any, including legal - methodology, particularly when it is designed to deal with difference. Each of these three changes requires in turn some further explanation.

18. i) Thus, the first change is the introduction of “standpoint”, in a vein which has become significant within the social sciences⁷⁶ and which is particularly visible in the ethics of care⁷⁷. Thus, Christine Goodwin’s claim is assessed by the Court through her specific experience, and is seen as expressing an individual, contextualised need for recognition; at

emancipatory function-, bolstered the fiction of abstract equality as between unequally endowed nations. It has also prevented indigeneous peoples from acceding to any form of voice in matters affecting their culture, identity or economy. The advent of recognition through cultural rights has shaken the axes of liberal doctrine of international law by advocating the representation plural interests (see E. Jouannet, *op cit*, p.169 et s.). In turn, this move has repercussions in private international law, which is similarly challenged by norms whose scope and origin are not aligned on the State. See R. Michaels, K. Karen Knopp, A. Riles, « Transdisciplinary Conflicts of Law », 71 *Law & Contemporary Problems* 1 (Summer 2008) (Symposium issue), and in particular Karen Knopp, *Citizenship, Public and Private*, p. 309.

⁷⁶ On standpoint theories in the sociology of knowledge, see L. Gassot, « Karl Mannheim et le genre : point de vue et connaissance située », in D. Chabaud-Rychter, V. Descoutures, A.M. Devreux, E. Varikas (eds), *Sous les sciences sociales, le genre*, 448, p. 453.

⁷⁷ Gilligan, C. *In A Different Voice*. Cambridge, Mass.: Harvard University Press, 1982 ; « The Ethic of Care for the Self as a Practice of Freedom » : An Interview with Michel Foucault on January 20, 1984 in *The Final Foucault : Studies on Michel Foucault’s Last Works*. Philosophy & social criticism 1987, vol. 12, n°2-3, pp. 112-131. See *Internet Encyclopedia of Philosophy* “V° Care Ethics: “Normatively, care ethics seeks to maintain relationships by contextualizing and promoting the well-being of care-givers and care-receivers in a network of social relations. Most often defined as a practice or virtue rather than a theory as such, “care” involves maintaining the world of, and meeting the needs of, ourself and others. It builds on the motivation to care for those who are dependent and vulnerable, and it is inspired by both memories of being cared for and the idealizations of self. Following in the sentimentalist tradition of moral theory, care ethics affirms the importance of caring motivation, emotion and the body in moral deliberation, as well as reasoning from particulars. One of the original works of care ethics was Milton Mayeroff’s short book, *On Caring*, but the emergence of care ethics as a distinct moral theory is most often attributed to the works of psychologist Carol Gilligan and philosopher Nel Noddings in the mid-1980s. Both charged traditional moral approaches with male bias, and asserted the “voice of care” as a legitimate alternative to the “justice perspective” of liberal human rights theory. Annette Baier, Virginia Held, Eva Feder Kittay, Sara Ruddick, and Joan Tronto are some of the most influential among many subsequent contributors to care ethics”.

the same time, her struggle for individual identity intersects with the collective need of the stigmatised group. The law sets the scene, therefore, for a “struggle over needs”⁷⁸, which tends to de-naturalize dominant interpretations and categories, along new identitarian lines. Social theory shows that these lines are not intangible; group identity may be subject to intersectionality so that individuals within one group (women) may cumulate other factors of discrimination (colour, age, sexual orientation); indeed, power relations (and the correlative need of recognition of subordinate or excluded groups) may cut cross various categories in different ways (some women, after all, may also be senior corporate executives). Whatever the conundra of identity politics, the emergence *within the law* of the perspective of the Other - seen as “unique, with a body, a history and emotions” – is as a significant a turn as within the ethics of communication. Indeed, Habermas’ own work reflects the changing perception of law, which from being a force in favour of “reification”, becomes the medium through which deliberations in the real world are brought within the system⁷⁹. “Le droit se trouve désormais dans le camp du monde vécu”⁸⁰. By joining the side of life experience, it legitimates its “intrusion within the sphere of the intimate”⁸¹.

19. ii) The second change, which is closely correlated to the first, is the perception of law itself which accompanies the recognition concept. Standpoint theory introduces relativity and contextuality in the place of absolutes and universals; once again, law as understood within the recognition paradigm is no longer an abstract form of (rule-based) knowledge⁸². Much work on this point comes from critical feminist and

⁷⁸ Nancy Fraser and Linda Nicholson, ‘*Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*’, *Theory, Culture & Society* 5(2-3): 373-394 (1988).

⁷⁹ See J Habermas, « Paradigms of Law », in M. Rosenfeld & A. Arato, *Habermas on Law and Democracy: Critical Exchanges (Philosophy, Social Theory, and the Rule of Law)*, p.13, and the various critical exchanges in this volume.

⁸⁰ Estelle Ferrasese, « Jürgen Habermas et le genre. L’expérience du décentrement par la discussion », in D. Chabaud-Rychter, V. Descoutures, A.M. Devreux, E. Varikas (eds), *Sous les sciences sociales, le genre*, 418, p. 425.

⁸¹ *Ibid.*

⁸² G. Samuel, *Epistemology and Method in Law*, Ashgate, p.95 et s.. While the civilian conception of law as a “formal set of axioms” can be opposed to the more seamless

gender studies, which have emphasised the gendered (masculine) character of liberal rationality, along with its claims of objectivity and scientificity⁸³. Postmodern, critical sociology rejects general and “totalizing” categories of social history⁸⁴. This is the work that recognition is also doing within the law, where the great liberal axes and binaries – public and private; domestic and international – are already giving way to various pressures. In this respect, the concept of human rights has itself changed, evolving from a list of rights to the expression of a “democracy of proximity”⁸⁵. As Foucault remarked in *La Volonté de savoir*: “*La vie, comme objet politique, a en quelque sorte été prise au mot et retournée contre le système qui entreprenait de la contrôler. C’est la vie, beaucoup plus que le droit, qui est devenue l’enjeu de luttes politiques, même si celles-ci se formulent à travers des affirmations de droit. Le “droit” à la vie, au corps, à la santé, au bonheur, à la satisfaction des besoins, le droit par delà à toutes les oppressions et ‘aliénations’, à retrouver ce qu’on est et tout ce qu’on peut être, ce droit, si incompréhensible pour tout système juridique classique, a été la réplique politique à toutes ces procédures nouvelles de pouvoir qui, elles non plus, ne relevaient pas du droit traditionnel de la souveraineté*”⁸⁶.

20. iii) The third change is also identifiable as a rejection of what has been described, in relation to the methods of the social sciences, as “methodological nationalism”⁸⁷. Although perceived, or at least presented as being purely methodological - and thus instrumental or

texture of the common law, both arguably belong nevertheless to the same paradigm of law as abstract (even if inductively produced) legal knowledge.

⁸³On laws’ (hidden) gender, see Graycar and Morgan, op cit FN 74.

⁸⁴V. Th. W. Adorno, *Minima Moralia* (1951), Payot, Paris, 1980; J.F. Lyotard, *Introduction: The Postmodern Condition: A Report on Knowledge*, 1979 (xxiv-xxv); leaving behind (masculine) “metanarratives”, binaries, and unilateral or closed principles or enunciations.

⁸⁵Pierre Rosanvallon, *Democratic Legitimacy*, op cit, identifying the components of such legitimacy as : *Impartiality, Reflexivity, Proximity*.

⁸⁶M. Foucault, *La Volonté de savoir* Gallimard 1976 , p.161 (in English *The Will to Knowledge*, trans. by Robert Hurley, Allen Lane, 1978).

⁸⁷ Interestingly, the terms is used by social scientists to denote nation-state centered thinking, and then used by comparatists to denote ethnocentric perspectives. On the first, see, Wimmer, A. and Glick Schiller, N. (2002), “Methodological nationalism and beyond: nation–state building, migration and the social sciences”. *Global Networks*, 2: 301–334. doi: 10.1111/1471-0374.00043. In this article, “methodological nationalism is understood as the assumption that the nation/state/society is the natural social and political form of the modern world”. On the second approach, see below, next FN.

neutral – legal tools designed to apprehend and structure the relationship between the self and the other, between the forum and the foreign, inevitably nevertheless reflect and project value judgements. The epistemology described above involves a de-centering, which can bring to light the ways in which the other is often framed with reference to one's own self-image, and reduced to sameness (or exoticized, as will be seen below). The awareness of the « politics of method » - that is, the politics behind the neutral appearance of methodological tools - has been gaining prominence in new approaches to comparative law⁸⁸ – where classical ways of thinking difference or otherness share much in common with private international law. Classifications of different national laws in terms of legal « families » have been shown to reflect and perpetuate a value judgment in terms of the relationship between the centre and the periphery. Significantly, for instance, according to René David's well-known taxonomy, which has exercised considerable influence over Western comparatism, the main legal « families » are civil (Roman-Germanic) law, common law, communist (« socialist ») law, and then, fourthly, the « religious and traditional » rest⁸⁹. The latter category presumably includes the Islamic legal tradition and other cultural practices to be found beyond the confines of Western Europe. Comparative legal analysis then focussed almost exclusively on differences⁹⁰ between the two « main » categories, whose importance was hypertrophied to the point that other cultural practices of law were to all intents and purposes disqualified as such.

21. However, at the same time as it rejects the tendency of classical legal thought to reduce the other to one's own image, this shift also represents a radical reaction against essentialization of beings and cultures. Here, recent critical thinking in comparative law has incorporated ideas from third world and subaltern studies, highlighting postcolonial representations of the « Rest » and their accompanying economics. Remarkable examples are Edward Saïd's work on orientalism⁹¹, or

⁸⁸Günter Frankenburg, *Critical Comparisons: Re-thinking Comparative Law*, 26. *Harv. Int'l L.J.* 411, 428–29 (1985); Veronica Corcodel, *Global Governance and Critical Comparisons*, PhD Sciences –po Paris, 2013, forthcoming.

⁸⁹ René David, *Les grands systèmes de droit contemporains* (Dalloz, 1963). The book has since been re-edited many times (11th ed. 2002, with C. Jauffret-Spinosi) without changing the taxonomy.

⁹⁰Or, as Pierre Legrand points out, sameness : see (among many formulations of the critique of the “axiomatization of sameness “ see his recent “Paradoxically, Derrida : For a Comparative Legal Studies”, 27 *Cardozo Law Review* 63].

⁹¹*Orientalism*, Routledge, London, 1978.

Teemu Ruskola's analysis of the fetishization of the exotic⁹². Otherness, then, appears to be primarily a construction, carrying not only politics of identity but also a certain understanding of history. More positively, the philosophical, psychological and ethical implications of recognition are that respect for the Other is the avenue towards the construction of Self⁹³. This can be traced to Habermas' « communicative ethics », geared to the inclusion of Others insofar that « *everyone* tests the acceptability of a norm, implemented in a general practice, also from the perspective of his own understanding of himself and of the world »⁹⁴. In a similar vein, Charles Taylor includes among the « Sources of Self », the social respect for group identity⁹⁵. In France, Paul Ricoeur makes the similar claim that there can be no achievement of the dignity of Self without acknowledgment of the dignity of the Other⁹⁶.

⁹²*Legal Orientalism. China, the United States, and Modern Law* Harvard Univ. Press, publication forthcoming June 2013.

⁹³P. Bourdieu, *The Course of Recognition*, op cit; see too the transdisciplinary collective, *The Politics of Misrecognition*, edited Simon Thompson, and Majid Yar, Ashgate 2011.

⁹⁴*The inclusion of the Other. Studies in Political Theory.* Jürgen Habermas. MIT Press, 1998, defining thus communication ethics: " As a child of the eighteenth century, Kant still thinks in an unhistorical way and consequently overlooks the layer of traditions in which identities are formed. He tacitly assumes that in making moral judgments each individual can project himself into the situation of everyone else *through his own imagination*. But when the participants can no longer rely on a transcendental preunderstanding grounded in more or less homogeneous conditions of life and interests, the moral point of view can only be realised under conditions of communication that ensure that *everyone* tests the acceptability of a norm, implemented in a general practice, also from the perspective of his own understanding of himself and of the world ... in this way the categorical imperative receives a discourse-theoretical interpretation in which its place is taken by the discourse principle (D), according to which only those norms can claim validity that could meet with the agreement of all those concerned in their capacity as participants in a practical discourse".

⁹⁵1989. *Sources of the Self: The Making of Modern Identity.* Harvard University Press

⁹⁶Paul RICŒUR, *The Course of Recognition*, op cit.

22. So what, it might be asked, has all this got to do with private international law, which is, or purports to be, a set of instrumental tools designed to answer highly formalistic or doctrinal questions of jurisdictional scope? The answer is, certainly, that these changes are of considerable significance. Of course, the Christine Goodwin case - discussed above as emblematic of the epistemological shift which accompanies recognition -, is a domestic case. The example would take on a private international law dimension if a transgendered person, on moving into the forum country, were to encounter difficulties - through differences in the way civil registers work - linked to the fact in line that her post-operative gender is not in line with her civil status. This was precisely what happened in a case judged by the Paris Court of Appeal of Paris in respect of an Argentinian transgendered woman⁹⁷. In consideration of *B v. France*⁹⁸, the court allowed a suit enjoining the French registrar to modify the French civil register (thereby affecting the administrative documents issued on that basis), even if this involved ignoring the (unchanged and unchangeable) birth certificate issued by the individual's country of origin. However, it matters little here that individual applicant who is "within the jurisdiction" of the forum State within the meaning of article 1 of the European Convention of Human Rights, is a foreigner to that country- in other words, whether or not the case is framed as one of private international law. The distinction between internal and international situations is of little import, since the methodology and the requirements of article 8 will always be the same in both cases.

23. This is not to say that private international law has not always been attentive to the values inherent in personhood⁹⁹; however, a different

⁹⁷ Court of Appeals of Paris, 14 juin 1994 cited above FN 32. See, for a similar stance in Spain:

« De la reconnaissance du transsexualisme par le droit espagnol. Direction générale des Registres et du Notariat (ministère de la Justice du Royaume d'Espagne) 24 janvier 2005 » by Sixto Sanchez Lorenzo, *Revue critique de droit international privé* 2005 p. 614.

⁹⁸ See above FN 32. Comp. already *Rees v United Kingdom*, Application no. 9532/81, 17 October 1986

⁹⁹ See D. Gutmann, *Le sentiment d'identité*, op cit FN29

epistemological frame is proposed by human rights law in this context, substituting a concrete, individualized approach for the more abstract concern for continuity and permanence of status whatever the circumstances. The values carried by the method are care, respect for alterity, protection of dignity and identity, which are to a large extent excluded by the abstraction of private international law methodology. The scope of recognition cannot be defined dogmatically, in the way in which traditional methodological tools determine their purview. This is because recognition responds, rather, to needs stemming from the denial of identities in real life. However, these are salient in the field which, in the vocabulary of the conflict of laws, belong to « personal status », and involve the impact of crossborder mobility on personhood and family relationships. Does this mean that, in this field, the tools and methods of this discipline are disqualified? The question, now, is the extent to which recognition could be seen to represent the excavation of an alternative axiological project which has always been contained within the conflict of laws.

III. The space left for private international law ?

24. For private international law, in cases involving the issues of identity with which recognition grapples, the recognition project has two significant normative implications. This is because the turn to « standpoint » perspectives described above pays little heed to the very distinctions which are fundamental to private international law. On the one hand, the methodology of recognition focuses on contextualized needs, whether individual or social; on the other, it revisits assumptions about the « nature of law » as an abstract system of norms. However, both concerns are in fact addressed by the alternative methodology – disparagingly named « unilateralism » in the heyday of the twentieth century's turn to « multilateralism » (to a large extent a misnomer itself) – which has always served as a comparator or *faire-valoir*, a backdrop, and as a source of inspiration for « escapes », exceptions or alternatives when the dominant methods yield unsatisfactory results. But despite the received historiography of the evolution of the discipline as swinging regularly from one method to another, the change which recognition seems to imply is, predicability, more complicated than a mere return to a form of neo-feudal statutism, as is sometimes suggested¹⁰⁰. This is at least partly because of the advent of human

¹⁰⁰A. Supiot, "L'esprit de Philadelphie. La justice sociale face au marché total", Paris, Seuil, 2010, p. 103.

rights, through which the recognition concept seems to be entering the law, come equipped with their own methodology.

25. Traditional tools, still largely in use today – although in various increasingly flexible forms¹⁰¹ – are based on what is known as « multilateralist » methodology (in French « bilateralism »). Its attractive name conveys the liberal-universalist project of which private international law espoused the views at the end of the nineteenth century. The advent of recognition raises two sets of challenges to the traditional model. Firstly, since it is still based very largely, on categories which are largely modeled on the forum's own legal institutions, it has a deliberate and as it were, built-in, bias expressing what is sometimes termed, in other disciplinary fields, "methodological nationalism"¹⁰². This is expressed through the various stages of reasoning required by the conflict of laws, and most notably, the operation known as « characterization ». By contrast, recognition requires asking how the Other apprehends, constitutes, refounds and challenges the law¹⁰³. Secondly, at least in the continental legal tradition, private international law presupposes a strongly « normativist » or Kelsenian conceptual framework¹⁰⁴. Fact and law are sharply separated, while social practice is excluded from the definition of the latter, which remains positivist or state-centered. There is a causal link between such a conception of law as a system and the « reduction to self » which underlies the liberal representation of the Other.

26. The capacity of such a methodology to apprehend and accept differences in legal institutions has been constantly challenged by the alternative project – which bears the less flattering label, « unilateralism » – which it replaced. The turning point is generally considered to have taken place at the end of the nineteenth century, with the simultaneous discovery¹⁰⁵ in Germany and France of the lack of

¹⁰¹ This trend towards the gradual abandon by the law of a degree of formality within the numerous codifications are taking today, see S. Symeonides, S. Symeonides, *Private International Law Codifications: The Last Fifty Years* ___ (forthcoming 2013).

¹⁰² See above FN 87

¹⁰³ Ivana Isailovic, *op cit*.

¹⁰⁴ On this point, see D. Bureau and H. Muir Watt, *Droit international privé*, *op cit*, §24, 326.

¹⁰⁵ Or supposedly so. According to Didier Boden (*L'ordre public, limite et condition de la tolérance. Recherches sur le pluralisme juridique*, Paris I, 2002), it is quite possible that Bartin had read Kahn's work (which Bartin does not cite, however).

equivalence, assumed by von Savigny¹⁰⁶, between statist approaches (which start from the rule and determine its scope, in relation to its policy objectives) and the search for the « seat » of the legal relationship. This is because any coincidence between the two methodologies assumes that all the legal systems involved share a common understanding of the « nature » of such relationships (whether they are issues of contract, tort, personhood, etc) and what the factors are (visions, values or policies) which dictate where their « seat » is located. A turn from faith in universalism to the pre-eminence of local values encouraged by rising nationalism in Europe leading up to the first world war and equally salient in the period leading up to the second, induced, curiously, the decline of statism, and the pre-eminence of the « multilateralist » version, which became, in doctrines such as that of Bartin, the reflection of domestic world-vision¹⁰⁷.

27. However, although disqualified as a general method, the alternative project has constantly either been championed (unsuccessfully) or, more subtly, used in parcellar forms within the dominant methodology. For instance, whenever there is a conflicting view from elsewhere on the way in which a personal relationship should be structured or given effect, multilateralist tools tend to compress it into structures which are cognizable and acceptable to the forum. However, for every resulting mismatch, incoherence, or unfairness, there is an adjustment which usually borrows from « unilateralist » approaches. *Renvoi*, characterization, or preliminary questions are all instances of this mix. Moreover, the transformations of « private law » in the second half of the twentieth century have also raised radical difficulties (« overriding mandatory rules ») which do not fit into then multilateralist scheme and have been dealt with –formally as derogations or exceptions – through statist methods.

28. This state of affair has been systemized by Didier Boden, who has shown how unilateral ideas have invisibly colonized the « general theory » of private international law, at the price of frequent conceptual

¹⁰⁶ According to a widespread narrative (at least in France), von Savigny discovered enlightened multilateralism, after the « dark ages » of statism, see P. Gothot, 'Simples réflexions à propos du *saga* des conflits de lois' in *Mélanges en l'honneur de Paul Lagarde* (Dalloz, 2005) 343.

¹⁰⁷ On Savigniano-Bartinianism", Bartin's own strand of multilateralism which he himself attributes to Savigny, see B. Ancel, 'Destinées de l'article 3 du Code civil' in *Mélanges en l'honneur de Paul Lagarde* (Dalloz, 2005) 1.

confusion¹⁰⁸. Taking as a reference the most contemporary, and most sophisticated, modern version of unilateralist doctrine as elaborated by Quadri¹⁰⁹, Boden reconnects the form and the substance, or the methods and the values, to show that the choice between these available tools is neither a matter of neutral technique or jurisdictional allocation, but one of axiology. Borrowing and subverting vocabulary from public international law, he opposes the methodological « monism » under which multilateralism operates, to the respect of the other inherent in the « unilateralist » ideal. Thus depicted, the latter belongs to the pluralist school in law. It is ready - until the threshold of tolerance is crossed-, to accept diversity of shapes and sizes. It does not suppose that the other necessarily fits in the mould of self, but begins with an acceptance of things as they are, or as they have been shaped in their social context and through the expectations to which they give rise. Its values are tolerance ; its ethics reciprocity and communication ; its epistemology linked to standpoint and contextualization.

29. On all these points, this alternative methodological project clearly « fits » well with the concept of recognition. The requirements of recognition, however, go further than does unilateralism, to the extent that the latter has always been conceived, though through variable forms throughout its history¹¹⁰, as a conflict of laws methodology. In other words, it is designed to enable a court to choose between potentially overlapping or conflicting claims of different national legal systems. Despite the quite surprising degree of interest that even the most conservative of internationalists have professed for the sociological pluralism of Santi Romano¹¹¹, the vision of the « laws » that

¹⁰⁸ See D. Boden, *L'ordre public, limite et condition de la tolérance*. op cit. Among the consequences of this conceptual confusion are difficulties in distinguishing overriding mandatory rules from the exception of public policy, and various contradictory positions on renvoi, conflicts of characterization and preliminary questions.

¹⁰⁹ R Quadri, *Lezioni di diritto internazionale privato* (Liguori, 5th edn 1969); for an instructive account of the Italian School of private international law in a wider context, see E Cannizzaro, 'La doctrine italienne et le développement du droit international dans l'après-guerre: entre continuité et discontinuité' [2004] *Annuaire Français Droit International* 1.

¹¹⁰ On the various forms of statutism throughout its history, see D. Bureau and H. Muir Watt, *Droit international privé*, op cit, §349 s. See too, B. Ancel and H. Muir Watt « Du statut prohibitif (droit savant et tendances régressives) », *Etudes à la mémoire du Professeur Bruno Oppetit* (2010).1.

¹¹¹ Santi Romano, *L'ordre juridique*, P François and P Gothot (eds), French translation,

this methodology is designed to coordinate has remained, until now, a liberal one, centered on State-made rules. Nothing of course would prevent enlarging this vision to the social practices which actually shape individual relationships. However, even then, the methodology has inherent structural limits to extent that it stops at the acceptance of relationships illegally constituted (that is, constituted contrary to locally applicable formal law), which are cases for which courts have had in the past to use various expedients such as the public policy exception, escape clauses, or substantive exceptions such as the unpredictability defence or « la théorie de l'apparence »¹¹² in order to give effect to an unfamiliar foreign relationship within the constraints of the official methodology. As illustrated by the case put to the Court of Appeals of Paris in 1994, this difficulty is illustrated in an instance where a foreign citizen asks for the acceptance of her social gender or biological sex-change, where it is not recognized by her personal status¹¹³. This is precisely where human rights step in. To a large extent they absorb all these methodological devices, of which the use has always served to express, variously, the fundamental values or the sense of fairness of the court in a particular case.

30. These links between unilateralism and an approach in terms of rights will not come as a surprise. There is a significant precedent in the « vested rights » doctrine, which – actually using the vocabulary of « recognition » – reflects this connection. The vested rights doctrine first grew up as a means to find a way to circumvent the (formal) sovereignty, or monism, of the forum in order to apply foreign law : the only way to do so was to focus on the right rather than the law under which it was created. The multilateralist critique was quick to come : the right could not exist independently from its governing law, which was implicitly designated by a choice of law rule of the forum. In the

preface Ph. Francescakis, (Dalloz, 1975).

¹¹²This could be likened to a form of promissory estoppel. On this theory in the conflict of laws see M.N. Jobard-Bachelier, *L'apparence en droit international privé. Essai sur le rôle des représentations individuelles en droit international privé*, LGDJ, Vol. 178.

¹¹³Thus, the Court of Appeals of Paris, 14 juin 1994, cited above, enjoins the registrar (or rather, declares admissible the applicant's action to the registrar) to modify the French civil registers to take account of the sex change, despite the fact that such a change was not conform to the applicant's Argentinian personal status, because not to do would be in itself a violation of a fundamental right : *"L'application de la loi nationale de l'appelant, qui paraît ignorer le syndrome du transsexualisme, conduirait à une décision constituant, en elle-même, la violation d'un droit de l'homme protégé tant par la convention que par le droit positif interne dans son état le plus récent"*.

recognition paradigm, this formal rationality goes by the board. As the *Wagner* case shows, an effective relationship must be recognized, unless there is a (proportionate) reason not to. However, this renewed methodology raises further issues, and even revives a few old ones.

31. Indeed, like all the progeny of pluralism¹¹⁴, unilateralist methodology in the conflict of laws has always been criticized as *not* solving conflicts. American neo-statutism was discredited by reason of its inability to decide « true » conflicts, while its earlier European proponents were similarly disqualified by the objection that it left unsolved negative conflicts (where no national rule or legal system includes a given relationship in its scope) and their mirror image, positive conflicts or overlap¹¹⁵. Similar objections are levelled at methods based on « vested rights ». If two conflicting rights are claimed to have been acquired under two different legal systems, according to what criteria should either one prevail over the other? For instance, in a cross-border surrogacy situation, the surrogate might decide to keep the child, while the biological parent might claim it¹¹⁶. The response of unilateralism is that the more effective right prevails – with all the uncertainties of assessing effectiveness in such a context.

32. The same case could, however, be framed in terms of human rights law, and once again give rise to a conflict, not between different national legal systems each claiming to provide, or claimed to be providing, an answer, but between different codified rights. The surrogate and the biological parent might then each invoke a different right (article 8, right to a family life, versus article 2, right to life) - or, less improbably, two conflicting expressions of the same right (article 8 : each parent claims the child under the same right to a normal family life). Although the instances of conflicting fundamental rights are perhaps less frequent in reality than is often made out, the response of human rights law lies in

¹¹⁴ For a scathing critique of pluralism in the field of public international law, see M. Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011) 359.

¹¹⁵ On this critique, and the subsequent « lack of positivity » of statist methodology, see Pierre Gothot, « Le renouveau de la méthode unilatéraliste en droit international privé », *Revue critique de droit international privé* 1971.1, p.1.

¹¹⁶ In functionalist terms, this would most probably be an “unprovided-for case” of the type identified (in a very different type of dispute) in *Neumeier v Kuehner*, 43 A.D.2d 109, 349 N.Y.S.2d 866 Dec. 6, 1973., in which the surrogate’s claim would be based on the personal law of the biological parent, while the latter’s claims would invoke the surrogate’s more liberal personal status.

the balancing process. An inaccurate account of the latter tends to portray all instances of balancing as conflicts of rights, whereas the balancing process primarily addresses the necessity for a fundamental right to override national legislation. Balancing, therefore, is part of the ordinary process of implementation of human rights. However, in the case of conflicting rights, the same reasoning remains relevant. In a domestic context, this is apparent in a case such as *von Hannover v. Germany*, where privacy encounters the freedom of the press¹¹⁷. Adding a cross-border dimension (but outside the law of persons), the ECJ's *Viking/Laval* case-law¹¹⁸ shows the conflict between the right to take industrial action and the economic right (or freedom) to provide crossborder services or establishment¹¹⁹. The ECJ deals with the conflict in the familiar terms of balancing under the proportionality test¹²⁰, without addressing the underlying conflict of laws issue¹²¹. The methodology is framed in terms similar to the idea of « comparative impairment » familiar within the American functionalist approach¹²².

33. The existence of a conflict of laws may provide heightened risk of a conflict of fundamental rights, to the extent that the content of each of the conflicting laws might be reframed in terms of different and

¹¹⁷ ECtHR Grand Chamber, case of *von Hannover v. Germany* (no. 2), n° 40660/08 and 60641/08.

¹¹⁸ European Court of Justice, 11 et 18 December 2007 (aff C-341/05 and C-438/05).

¹¹⁹ For the needs of the demonstration, it is no matter here the two conflicting rights (the right to take industrial action and freedom of establishment) do not derive from a homogeneous source.

¹²⁰ Thus, for example, in the *Viking* case, the restriction to the freedom of establishment constituted by the industrial action “may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective”

¹²¹ In terms of the conflict of laws, in the *Laval* case, Letton law, the law of the country of origin of the employer and less protective of the worker, remains applicable to the employment relationship for the duration of the cross-border provision of services. In the *Viking* case, Estonian law governing the new establishment, less protective of the worker, becomes applicable to the individual employment relationship (see our analysis in *Revue critique de droit international privé* 2008. 356).

¹²² W. Baxter, « Choice of law and the federal system », 16 *Stanford Law Review* 1 (1963).

contradictory rights¹²³ (or divergent expressions of one right). In such a case, to a large extent, the method of the conflict of laws is inevitably absorbed by the balancing process. A simple example is provided by the publication by a newspaper established in a country which protects freedom of expression of unauthorised pictures of a celebrity who invokes the stricter privacy rules of her place of residence¹²⁴. In such a case, the conflict of laws would be absorbed, inevitably, by the conflict of rights, so that the applicable law provides no more than the starting point for the balancing process - which remains identical whether or not there is a cross-border element¹²⁵. In either case, as *von Hannover* mandates, the court will « *carefully balance(d) the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life* »¹²⁶. Whatever the applicable rules, the only real arbiter of outcomes is the duty of the court to carry out a proportionality test in context. Given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy¹²⁷ - is

¹²³ This was the case in *Viking /Laval* even if the ECJ does not frame the conflict in these terms (see above FN 120).

¹²⁴ Or the reverse ! See the 2012 (Kate Middleton) *Windsor v. Closer pictures* case and the debate to which it gave rise on *conflictoflaws.net* (online symposium organised by Gilles Cuniberti under the title « Cachez ce sein »). Here, French law of the place of the tortious conduct is certainly less protective of the freedom of the press than the law of the claimant's domicile.

¹²⁵ The idea here is that once a fundamental right is invoked, the fact that it is so on the basis of a foreign law does not make the problematic specific. Therefore, the conflict would arise the same terms in Charles Taylor's multicultural society, where the life experience would perhaps be on the infra-legal social norms in a given community.

¹²⁶ In the case of unauthorized pictures of Caroline of Hannover (see *von Hannover v. Germany* cited above FN 117), which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed :« §124. ... *the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken...* §126. *In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision* ". Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome.

¹²⁷ The public policy exception itself would have to mirror the balance of fundamental rights to which the European States are ultimately held under the ECHR (or, within the EU, if Regulation « Rome II » is extended to cover such issues, under the Charter).

for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

34. At this point, then, there seem to be two remaining functions for the conflict of laws to fulfill. The first, once the right or the situation is recognized, is to spell out its legal regime. If the parent-child link (in the case of *Wagner*) must be recognized - the question remains as to the legal effects which best ensure the adaptation of the child's status to its environment. It is probable that recognition does not dictate method once the need to which it responds is satisfied, and it is up to the courts to determine, in context, where that need stops. Here, the delicate adjustments which are part of the toolkit of private international can help. The *Harroudj* case provides an apposite example¹²⁸. The second point takes us back to the proportionality test itself. A fundamental right may be invoked in a context in which it is opposed to the application of a foreign law of a non-Convention state, very much in the same terms as the exception of public policy, which it largely absorbs. And just as public policy now clearly varies its demands according to the density of the links between the forum and the personal and factual circumstances of the case, it may well be that these elements weigh similarly into the balancing process¹²⁹. It is somewhat as if balancing

¹²⁸ Cited above, FN 43. The Court notes that through the conflict-of-laws rule, by providing for an exception for children born and residing in France, and giving children taken into care in France by a French national rapid access to French nationality, the authorities had made an effort to encourage the integration of such children without immediately severing the ties with the laws of their country of origin, thereby respecting cultural pluralism. A fair balance had therefore been struck between the public interest and that of the applicant, without interfering with her right to respect for her private and family life.

¹²⁹ And it is probably time for private international law to revisit the way in which it understands such links. On the idea of « milieu de vie, see M. Hunter-Héinin, *supra* FN 70. For a further proposal, concerning the economic sphere, see H. Muir Watt, « Private International Law Beyond the Schism », *op cit*, p. 420, proposing to these revisit links in order to ensure the double correlation of affectedness and voice, on the one hand, and responsibility and sphere of influence, on the other.

must absorb the tools and devices of private international law, while the axiological direction of this discipline is reciprocally determined by recognition.

Conclusion

35. Recognition through human rights in private international law may, therefore, be doing two things. The first is drawing attention to the links between the methods, which has always occupied a highly significant part of this field, and the values they carry with them. The absorption of the conflicts of laws relating to personal status by human rights, has not only had a radical effect on the existing legal tools, but has also served to highlight the convergence between the axiological project of recognition and the pre-modern statist ideal. The second is suggesting that the schism between public and private international law may be in the (incremental) process of being bridged. In this latter perspective, it is remarkable that recognition is now associated with a refoundation of international law on both sides of the looking glass.

