The Post-Modern Normative Anxiety of Transnational Legal Studies and The Challenge of Legal Re-Materialization Beyond The Nation State.

I. Introduction.

What lies at the heart of the normative anxiety – or "constitutional itch"[1] – plaguing transnational legal studies? Is there any way forward to fill the normative and political vacuum of transnational legal theory? This chapter endeavours to answer these questions, exploring the normative dilemma of transnational legal studies.[2]

Section II sets the stage for the following analysis, providing a brief overview of the shift from inter-governmental processes to trans-governmental networks and the rise of the transnational dimension. Against this overall background, this section specifically focuses on Transnational Legal Pluralism and the notion of Transnational Legal Orders, casting light on the deconstructive enterprise of these theories and yet pointing to their normative conundrum.

Section III puts forward an alternative understanding of "transnational law" and "transnational legal analysis", explaining how this different perspective opens up opportunities for the reconstruction of a normative discourse on law's legitimacy at times of globalization. Section IV provides a concise insight into Conflicts Law theory, analysing its attempt to safeguard law's legitimacy by recoupling law and politics beyond the nation state level. The Conflicts Law approach endeavours to address the issue of ubiquitous regulatory conflicts in the "post-national constellation";[3] this may offer a way forward to solve the normative conundrum of transnational legal studies. Nonetheless, the prospects of success of Conflicts Law theory fade in an increasingly complex social and legal reality.

After an assessment of the merits of Conflicts Law, and upon acknowledging the important lessons taught by this approach, section V highlights the limits to its successful application. The weakness of the framework lies in its strong reliance on legal procedural categories and the notion of deliberation, which are in turn rooted in *modern*, rationalist and constructivist paradigms of legal and political theory. Against this backdrop, the chapter concludes that a *post-modern* normative theory, advocating the re-materialization of law beyond the nation state, may in fact be the only way forward to address the *post-modern* normative anxiety of transnational legal studies.

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[1] Peer Zumbansen, "The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy", in *Negotiating State and Non-State Law. The Challenge of Global and Local Legal Pluralism*, ed. Michael Helfand (Cambridge: Cambridge University Press, 2015), 83-111.

[2] The terms "transnational legal studies" and "transnational legal theory" are used interchangeably in this chapter. "Transnational legal analysis" is used in a more circumscribed sense, as explained in section III. Specific theoretical strands – e.g. Transnational Legal Pluralism and Transnational Legal Ordering theory – are analysed in greater detail in section II.

[3] For the original use of this terminology, see Jürgen Habermas, *The Postnational Constellation. Political Essays* (Cambridge MA/London: MIT Press, 2001). For its transposition to legal theory, see inter alia Christian Joerges, "Constitutionalism in Post-National Constellations: Contrasting Social Regulations in the EU and in the WTO", in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, eds. Christian Joerges and Ernst-Ulrich Petersmann (Oxford/Portland OR: Hart Publishing, 2006), 491-527; Christian Joerges, "A New Type of Conflicts Law as the Legal Paradigm of The Post-National Constellation", in *Karl Polanyi, Globalisation and The Potential of Law in the Transnational Markets*, eds. Christian Joerges and Joseph Falke (Oxford/Portland OR: Hart Publishing, 2011), 465-501; Christian Joerges, Poul F. Kjaer and Tommi Ralli, "Conflicts Law as Constitutional Form in the Post-National Constellation", *Transnational Legal Theory* 2, no. 2 (2011): 153-165.

II. From inter-governmental processes to trans-governmental networks and law's transnationalization: Transnational Legal Pluralism and Transnational Legal Orders.

More than sixty years have elapsed since Jessup deplored the lack of a comprehensive framework and of adequate terminology to encompass the "law applicable to the complex interrelated world community".[4] If Jessup's notion of transnational law strove to bridge the gap between Public and Private International Law,[5] decades of research since then have documented the methodological and theoretical attempt to capture the unfolding of globalization, its impact on law and the emergence of norm-making beyond state-to-state interactions.

The notion of "transnational law" is nowadays as contested as ever. The same applies to any specific definitions of the scope, boundaries and focus of "transnational legal theory". For this reason, reconstructing the legal theoretical evolution underlying the shift to the transnational paradigm is all the more important to fully grasp the many challenges that transnational legal studies seek to address.

The end of the equation between law, on the one hand, and state law, on the other, has been defined as "globalization's gift to law".[6] It is indeed the crisis of the notion and paradigm of state sovereignty, as further magnified by the centrifugal tendencies of globalization, which has led to increasing challenges to the traditional notion of law as state-made and enforced at state level. National law has nowadays ceased to be the sole anchor for legal analysis; this underlines the contingency of the association between the notions of "law" and "nation state", or "society" and "politically structured national society". In this perspective, increasing scholarly attention to law's transnationalization has first and foremost marked a shift away from the traditional focus on inter-governmental processes.[7]

The inter-governmental dimension, or methodological nationalism,[8] postulates the utter centrality of the nation state in respect of questions of agency in legal norm-making. Inter-governmental processes are driven by heads of state or national officials, who negotiate international agreements on behalf of their nation states and pursuing their national interests. They do so in their role as ministerial leads or heads of department, relying on authority that is derived from their domestic legal order.[9] Public International Law, binding on nation state units, is the field of law traditionally associated to the inter-governmental level, whereas International Relations theory is the corresponding field of analysis within

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[4] Philip C. Jessup, *Transnational Law. Storrs Lectures in Jurisprudence at Yale Law School* (New Haven CT/London: Yale University Press, 1956), 1.

[5] Ibid., 2. See also Wolfgang Friedmann, Louis Henkin and Oliver Lisstzyn, eds., *Transnational Law in A Changing Society: Essays in Honor of Philip C. Jessup* (New York NY: Columbia University Press, 1972); Christian Tietje, Alan Brouder and Karsten Nowrot, eds., *Philip C. Jessup's Transnational Law Revisited*, Beiträge zum Transnationalen Wirtschaftsrecht no. 50 (Halle-Wittenberg: Martin-Luther-Universität, 2006); Peer Zumbansen, ed., *The Many Lives of Transnational Law. Critical Engagement with Jessup's Bold Proposal* (Cambridge: Cambridge University Press, forthcoming 2020).

[6] Roger Cotterell, "Transnational Communities and the Concept of Law", *Ratio Juris* 21, no. 1 (2008): 1-18, at 9.

[7] See Peer Zumbansen, "Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism", in *Oxford Handbook of Global Legal Pluralism*, ed. Paul Schiff Berman (Oxford: Oxford University Press, forthcoming 2019) for an analysis of the way transnational legal studies, along with contemporaries such as Law and Globalization and Global Law, is associated with varying degrees of deconstructing commonly held perceptions of nation state-based law, together with its attending legitimacy associations.

[8] Cotterell, "Transnational Communities and the Concept of Law", 4.

[9] For a similar reconstruction of inter-governmental, trans-governmental and transnational paradigms see Mark Pollack and Gregory Shaffer, "Transatlantic Governance in Historical and Theoretical Perspective", in *Transatlantic Governance in the Global Economy*, eds. Mark Pollack and Gregory Shaffer (Lanham MD: Rowman and Littlefield Publishers, 2001), 3-42.

political sciences. "Input" legitimacy,[10] grounded on representative – majoritarian – democracy in the nation state, is the overarching normative paradigm of the Westphalian order. For this reason, the question of law's normative legitimacy is uncontroversial in the inter-governmental landscape. The logics of legal ordering are state-driven; the legitimacy of law beyond the nation state level thus flows from the same sources which legitimize the nation state itself, i.e. representative democracy.

By contrast, trans-governmental processes designate a range of negotiations and agreements against the background of the progressive "disaggregation" of the nation state.[11] In its stead, we have been witnessing the rise and increasing specialization, insulation and entrenchment of trans-governmental networks of technical experts, regulators and standard-setters.[12] The trans-governmental paradigm signals a shift away from the traditional notion of state sovereignty and from the creation of binding legal rules between sovereign nation states. It emphasises the key role played by networks of governmental experts who, quite removed from parliamentary oversight and the inter-governmental treaty-making process, coordinate national or regional policy-making with a view to harmonizing regulatory standards. Out of the ruins of methodological nationalism arose a complex set of expert and sector-driven regulatory processes, which has since then eroded traditional modes of democratic agency and "input" legitimacy. Allegedly neutral and objective technical expertise, or "output" legitimacy,[13] thus became the overarching normative yardstick.

Unsurprisingly, this paradigm entrenched in the face of increasing economic interdependency and interconnectedness. Narratives around the proliferation of trans-governmental networks and expert committees, handling and mobilising a vast amount of sector-specific data, came to be associated with the take-off of technology, finance and knowledge-transfer that characterised the "roaring" Nineties.[14] Perhaps more importantly, technocratic standard-setting has also facilitated transnational regulatory convergence through the elimination of non-tariff barriers to trade, thus paving the way for further trade liberalization and the increasing "dis-embedding" of transnational markets.[15] Yet again, for the purpose of the analysis in this section, issues of normative legitimacy do not arise under the trans-governmental model of legal ordering. Technical expertise, including majority scientific opinion and cost-benefit effectiveness,[16] is the uncontroversial normative yardstick.

At the end of this analytical journey from inter-governmental to trans-governmental processes, how has transnational legal theory re-framed the notion of law and the mission of legal analysis? In what sense

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[10] For the terminology of "input" and "output" legitimacy see first and foremost Fritz W. Scharpf, *Governing Europe. Effective and Democratic?* (Oxford: Oxford University Press, 1999), and Fritz W. Scharpf, "Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability", in *Politics in The Age of Austerity*, eds. Wolfgang Streeck and Armin Schäfer (Cambridge: Polity Press, 2013), 108-142. For a similar perspective on the advent of the "regulatory state" and "non-majoritarian institutions" see Giandomenico Majone, ed., *Regulating Europe* (London/New York NY: Routledge, 1996).

[11] Anne-Marie Slaughter "Breaking Out: The Proliferation of Actors in the International System", in *Global Prescriptions. The Production, Exportation and Importation a New Legal Orthodoxy*, eds. Yves Dezalay and Bryant G. Garth (Ann Arbour MI: University of Michigan Press, 2002), 12-36; Anne-Marie Slaughter, *A New World Order* (Princeton NJ/Oxford: Princeton University Press, 2004), at 1-31 and 131-166; Anne-Marie Slaughter, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks", *Government and Opposition* 39, no. 2 (2004): 159-190.

[12] Slaughter, *A New World Order*, 166-213.

[13] Scharpf, *Governing Europe. Effective and Democratic?*; Scharpf, "Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability".

[14] This terminology was firstly used in Joseph Stiglitz, *The Roaring Nineties* (New York NY/London: W.W. Norton, 2003).

[15] For an in-depth analysis of the inter-connections between technical expertise and "technocratic" models of regulatory governance, transnational regulatory convergence and the neo-liberal agenda see Giulia Claudia Leonelli, *The Transnational Law and Governance of GMO Risks* (forthcoming, on file with author). On the dis-embedding of transnational markets and Polanyi's double movement theory see infra, sections IV and V.

[16] Leonelli, *The Transnational Law and Governance of GMO Risks.*

do transnational legal studies lack any normative underpinnings? This section endeavours to answer these questions through a concise analysis of two prominent theories, Transnational Legal Pluralism (hereafter, "TLP")[17] and Transnational Legal Ordering ("TLO") theory.[18]

The thread in TLP and TLO theory is the acknowledgment of the limits of methodological nationalism. In a world which is not yet post-national, but where a Westphalian perspective on law is increasingly inadequate to grasp the logics of societal ordering and self-ordering, the first challenge lies in rethinking the traditional methodological and theoretical underpinnings of legal analysis. Further, both theories deploy the terminology of "transnational".[19] This choice is not arbitrary: the notion of "global" law is understood as misleading in that the processes leading to law's increasing transnationalization have both a variable spatial reach and diverging degrees of normative settlement.[20] Finally, and importantly, both theories have marked a "societal" turn in the analysis of law at times of globalization. TLP is rooted in systems theory, while the theorization of Transnational Legal Orders ("TLOs") draws on socio-legal approaches; nonetheless, both theories endeavour to shed some light on the social embeddedness and social construction of law. Firstly, they have shed light on the changing distribution of power and authority at times of globalization, describing how national law and state-to-state interactions have been complemented by the rise of societal regulation and self-regulation; this has resulted in a new focus on societal norm-making beyond the nation state level. Secondly, they have both analysed the evolution and increasing hybridization of law, beyond the traditional dichotomy of "law" and "non-law".

Under TLP's systems theoretical model, law's transnationalization is understood as a legal reflection of the restructuring and reordering of societal activities beyond the nation state; in other words, it mirrors the increasing complexity, functional differentiation and fragmentation of the "World Society".[21] The transformations of law in an era of globalization reflect the nature of the nation state as a constituent part of society and, more specifically, a historically, geographically and politically contingent emanation of societal ordering.[22] In this light, TLP explores the evolving relationship between law and society against a more encompassing, cross-territorial background. The transnational realm does not designate a territorially demarcated level; rather, it encompasses a socially structured

[17] For an overview, see first and foremost Peer Zumbansen, "Transnational Legal Pluralism", *Transnational Legal Theory* 10, no. 2 (2010): 141-189.

[18] For an overview, see first and foremost Terence C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015).

[19] See for instance Zumbansen, "Transnational Legal Pluralism"; Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code. A Theory of Transnational Private Law* (Oxford/Portland OR: Hart Publishing, 2012); Peer Zumbansen, "Neither Public Nor Private, National Nor International: Transnational Corporate Governance From a Legal Pluralist Perspective", *Journal of Law and Society* 38, no. 1 (2011): 50-75; Peer Zumbansen, "Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power", *Law and Contemporary Problems* 76, no. 2 (2013): 117-138; Zumbansen, "The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy"; Halliday and Shaffer, *Transnational Legal Orders*.

[20] Terence C. Halliday and Gregory Shaffer, "Transnational Legal Orders", in Terence C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015), 3-74, at 5.

[21] Niklas Luhmann, "The World Society as A Social System", *International Journal of General Systems* 8, no. 3 (1982): 131-138; Niklas Luhmann, "Globalization or World Society: How to Conceive a Modern Society?", *International Review of Sociology* 7, no. 1 (1997): 67-79. See also Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society", in *Global Law Without a State*, ed. Gunther Teubner (Dartmouth: Aldershot, 1997), 3-28; and Gunther Teubner, "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?", in *Transnational Governance and Constitutionalism*, eds. Christian Joerges, Inger-Johanne Sand and Gunther Teubner, (Oxford/Portland OR: Hart Publishing, 2004), 3-28.

[22] Niklas Luhmann, *Law as A Social System* (Oxford: Oxford University Press, 2002).

space of interactions, which the traditional "national" and "international" legal heuristics struggle to embrace.[23]

On these grounds TLP theory, whose goal is to combine a sociological perspective on legal pluralism[24] with an analysis of law's migration away from the nation state level,[25] has placed law's "outside" at the centre of its analysis;[26] this is understood as the institutional context and societal environment where norms are created, applied and enforced. A closely related concern arises with regard to the sociology of transnational law-making; namely, a focus on who regulates, with which means and in whose interests.[27] The deconstruction of law's social embeddedness has thus gone hand in hand with a strong emphasis on questions of agency, which are indeed salient under TLP theory. To this end, TLP has deployed the Actors, Norms and Processes ("ANPs") toolbox to uncover the social construction of norm-making.[28] Yet, the normative dimension of law's legitimacy has remained completely unexplored. This lies at the heart of the "constitutional itch" of TLP theory.

If due regard is paid to TLP's systems theoretical roots, it is ultimately unsurprising that normative dilemmas shall remain unaddressed under this theory. From the self-contained vantage point of systems theoretical models, the legal system's evolution and autopoietic self-reproduction implies that legal developments do not "allow a larger societal discourse to set, shape and further define [the] meaning and distinction of legal-illegal – against the tides of domestic and international conflict".[29] In other words, law – understood as a self-referential system – can neither offer any normative model for the structuring of social order,[30] nor determine the outcome of any political and socio-economic conflicts.

Reflexive law, as a transposition of systems theory to legal analysis, has endeavoured to overcome the 20th century dichotomisation of law as ancillary to the "public" or the "private" realm, the "state" or the "market".[31] Indeed, *post-modern* reflexive law has reformulated the challenges of law in *sociological* terms, shifting its focus away from the *political* – "public" versus "private" – debates underlying *modern* legal analysis. Reflexive law was theorized as an alternative to legal formalization, but it

[23] Zumbansen, "Neither Public Nor Private, National Nor International: Transnational Corporate Governance From a Legal Pluralist Perspective".

[24] In this respect, TLP re-engages the traditional legal pluralist challenge to legal positivism, legal formalism and any monistic understanding of law's unity and hierarchy. Indeed, TLP testifies to the 20th century legal pluralist deconstruction of national law and today's shift to the demarcation of national and transnational forms of legal ordering. See Zumbansen, "Transnational Legal Pluralism", at 187; and Zumbansen, "Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism".

[25] Zumbansen, "Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power".

[26] Zumbansen, "The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy". See also Peer Zumbansen, "Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back", *TLI Think! Paper no. 2016/07*.

[27] Zumbansen, "The Incurable Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy", at 106; Zumbansen, "Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back", at 28 and 41.

[28] Peer Zumbansen, "Lochner Dis-Embedded: The Anxieties of Law in a Global Context", Indiana Journal of Global Studies 20, no. 1 (2013): 29-69; Peer Zumbansen, "Theorizing as Activity: Transnational Legal Theory in Context", in *Law's Ethical, Global and Theoretical Contexts. Essays in Honor of William Twining*, eds. Christopher McCrudden, Upendra Baxi and Abdul Paliwala (Cambridge: Cambridge University Press, 2015), 280-302; Zumbansen, "Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back", at 43.

[29] Peer Zumbansen, "Book Review: Niklas Luhmann's Law as a Social System" *Social and Legal Studies* 15, no. 3 (2006): 453-468, at 455.

[30] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", *Law and Society Review* 17, no. 2 (1983): 239-285, at 275; Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", *Cardozo Law Review* 13, no. 5 (1992): 1443-1462.

[31] Peer Zumbansen, "Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", *American Journal of Comparative Law* 56, no. 3 (2008): 769-805, at 789-790.

deliberately retreated "from taking responsibility for substantive outcomes";[32] in other words, it endeavoured to overcome the Welfare State's paradigm of legal materialization and purposive law[33] by opening up to society through its own reflexive orientation.[34] Accordingly, reflexive law has bypassed both political and normative analysis, leaving them behind. Legal re-materialization, i.e. the re-politicization of law beyond the nation state level, has been famously alleged to "remove law even further away from other social discourses, instead of bringing it closer to them".[35] On these grounds, reflexive law has rather endeavoured to structure the underlying processes of a range of autonomous societal systems, facilitating the development and legal expression of these societal rationalities.[36]

To draw some preliminary conclusions, systems theoretical – post-modern – paradigms of legal analysis have focused on making law "receptive to the full spectrum of societal rationalities".[37] Against this background, the normative chaos of law in the globalization era cannot be possibly tackled by value-neutral reflexive law. In the face of increasingly complex regulatory conflicts and ubiquitous normative contestation, any normative sense appears to be lost in the transnational realm; all legal claims to validity and legitimacy are open to challenge. "A view from everywhere" ultimately turns out to be "a view from nowhere":[38] TLP can neither offer any normative answers, nor point to any normative yardsticks. This is, indeed, the post-modern normative dilemma of TLP theory.

Different considerations apply to TLO theory; yet, they lead to similar conclusions. The starting point for the theorization of TLO has been the search for a perspective to accommodate "processes of local, national, international and transnational public and private law-making and practice in dynamic tension within a single analytical frame".[39] TLOs are defined as "a collection of formalised legal norms and associated organisations and actors that authoritatively order the understanding and practice of law across national jurisdictions". As in the socio-legal tradition, the notion of "legal" ordering encompasses a plurality of more or less hybrid, public and private patterns of norm-making. The "ordering" element refers to the ability of transnational norms to alter the normative orientations of those applying the law, shaping social behaviour.[40] Research on TLOs has thus investigated the development of transnational norm-making in different regulatory fields, deconstructing its reach, contestation and entrenchment across different territorial scales and levels of societal organisation.[41] The "normative settlement" of a TLO measures the extent to which transnational norms structure and alter social behaviour.[42] The "alignment" element, importantly, addresses the issue of whether the regulatory scope and boundaries

[32] Teubner, "Substantive and Reflexive Elements in Modern Law", at 254.

[33] For a detailed analysis of the shift from legal formalization, to legal materialization and the rise of substantive/purposive normativity under the Welfare State era, to law's reflexive turn, see Zumbansen, "Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law".

[34] Teubner, "Substantive and Reflexive Elements in Modern Law", at 254-266; Gunther Teubner, "Autopoiesis in Law and Society: A Rejoinder to Blankenburg", *Law and Society Review* 18, no. 2 (1984): 291-301; Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism".

[35] Teubner, "Substantive and Reflexive Elements in Modern Law", at 239.

[36] Teubner, "Substantive and Reflexive Elements in Modern Law", at 255 and 275-277; Teubner, "Autopoiesis in Law and Society: A Rejoinder to Blankenburg".

[37] Zumbansen, "Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", at 789-790.

[38] Zumbansen, "Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism", at 101.

[39] Halliday and Shaffer, "Transnational Legal Orders", at 3.

[40] Ibid., at 7-9.

[41] "Recursivity" at transnational level is understood by Halliday and Shaffer as the creation, modification, interaction and entrenchment of regulation across and "between different levels of social organisation through which legal norms become institutionalized"; see Halliday and Shaffer, "Transnational Legal Orders", at 16.

[42] Halliday and Shaffer, "Transnational Legal Orders", at 47.

of a TLO are univocally framed.[43] Finally, the "institutionalization" of a TLO results from a combination of its normative settlement and alignment.[44]

Turning back to the question of law's legitimacy, what we witness is still a normative vacuum. TLO theory inquires into the gradual and contested social construction of legal ordering in the transnational sphere; yet, normative considerations on the legitimacy of TLOs are beyond its socio-legal focus. Borrowing a famous definition, no distinction exists between law's *facticity* and law's *validity* or *legitimacy* in transnational legal ordering.[45] The normative legitimacy of transnational legal ordering, as such, is not even contemplated; any normative analysis, in fact, is absorbed into legal realism.[46]

Against this overall backdrop, the "societal" turn of TLP and TLO theory has clearly brought them further and further away from any normative inquiry into the dynamics informing law's transnationalization. Transnational legal studies have marked a shift from the prior focus on inter-governmental and trans-governmental processes; yet, no normative yardsticks have been identified to replace the paradigms of "input" and "output" legitimacy, state democracy and technical expertise.[47] The reconstruction of a normative discourse on law's legitimacy is beyond the radar of both systems theoretical and socio-legal approaches to transnational law, and a *post-modern* normative anxiety lingers in these *post-modern* accounts of law in the globalization era. The next section puts forward an alternative understanding of "transnational law" and "transnational legal analysis". Upon a brief overview of the rationale, boundaries and scope of "transnational legal analysis" as a methodological framework, the section explores how this different approach, through the identification of transnational conflict constellations, opens up opportunities for a normative inquiry into the legitimacy of law beyond the nation state. This paves the way for the following account of Conflicts Law theory.

III. Transnational law as a social reality and transnational legal analysis as a methodological framework: deconstructing transnational legal narratives.

The transnationalization of law is driven by and results from increasingly complex dynamics of legal de-territorialization,[48] pluralization[49] and hybridization:[50] transnational law may then be understood as

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[43] Ibid., at 8.

[44] Ibid., at 7 and 46.

[45] On this dichotomy see inter alia Christian Joerges, "Constitutionalism and Transnational Governance: Exploring a Magic Triangle", in *Transnational Governance and Constitutionalism*, eds. Christian Joerges, Inger-Johanne Sand and Gunther Teubner (Oxford/Portland OR: Hart Publishing, 2004), 339-375, at 351-353 and 372; and Joerges, "Constitutionalism in Post-National Constellations: Contrasting Social Regulation in the EU and in the WTO", at 521 ff.

[46] Substantiating this argument, albeit indirectly, see Gregory Shaffer, "International Legal Theory, International Law and Its Methodology: The New Legal Realist Approach to International Law", *Leiden Journal of International Law* 28, no. 2 (2015): 189-210; Gregory Shaffer, "Legal Realism and International Law", in *International Legal Theory: Foundations and Frontiers*, eds. Jeffrey L. Dunoff and Mark Pollack (Cambridge: Cambridge University Press, forthcoming 2019).

[47] As directly associated to inter-governmental and trans-governmental processes – see supra.

[48] See for instance the analysis of law's migration away from the nation state level in Gunther Handl, Joachim Zekoll and Peer Zumbansen, *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Martinus Nijhoff, 2012), as well as the inquiry into the dynamics of recursivity in Halliday and Shaffer, "Transnational Legal Orders". The de-territorialisation of law also encompasses the different dimension of law's extra-territoriality, i.e. the increasing extra-territorial spill-overs of national or regional legal systems. For an insight into the different dynamics of law's extra-territorialisation see Leonelli, *The Transnational Law and Governance of GMO Risks.* In a similar perspective, see Marise Cremona and Joanne Scott, eds., *EU Law Beyond EU Borders: The Extra-Territorial Reach of EU Law* (Oxford: Oxford University Press, 2019).

[49] See supra, section II, for an overview of how transnational legal studies are indebted to legal pluralist thought.

[50] See supra, section II, on the focus in transnational legal studies on the fading boundaries of "law" and "non-law".

a *social reality* and a *social product* of global interdependencies and interconnectedness. From this perspective, "transnational law" might be defined as the *regulatory infrastructure* underpinning asymmetric globalization processes in different spheres of social action; a regulatory infrastructure which all traditional legal categories fail to capture.[51]

"Transnational law", understood as a regulatory infrastructure, is shaped and informed by a plurality of *transnational legal narratives*.[52] The coexistence, overlap, interaction and conflict of these different legal narratives determines the features and spatial reach of the transnational regulatory infrastructure.[53] Transnational legal narratives, however, do not exist in a social vacuum; nor do they appear out of thin air. They originate from different regulatory sites and are socially constructed *from within*, *across* and *beyond* the nation state.[54]

From this perspective, the origins of legal narratives feeding into the transnational regulatory infrastructure may lie in national jurisdictions and national legal systems. In other words, transnational narratives may be rooted in specific legal categories originating from national law.[55] Positive legal regimes such as WTO law or European Union law, or legal instruments such as free trade agreements or investment treaties, might also play a key role in creating, reinforcing, challenging or settling transnational discourses, thus informing transnational legal narratives.[56] In this light, law *within* the nation state as well as positive, formalised legal regimes unfolding *across* the national level are both integral to the social construction of transnational legal narratives.

The implications of this alternative framing of "transnational law" are twofold. Firstly, the focus shifts away from the traditional object of inquiry of transnational legal studies, i.e. standards and norms enacted by societal actors operating *beyond* the nation state level,[57] to encompass regulatory frameworks, legal categories and case law *within* and *across* the nation state level. This might involve a close analysis of national legal systems or positive, formalised legal regimes.[58] In this perspective, the analysis of regulatory governance beyond the nation state is understood as a necessary and yet not sufficient condition to grasp the operation of the transnational regulatory infrastructure; different legal systems must also be assessed.

Secondly, the aim is no longer to investigate the changing distribution of power in the globalization era, the rise of societal governance and self-governance and the increasing hybridization of law.[59] Rather, "transnational legal analysis" deconstructs the political, socio-economic and distributional implications

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[51] Leonelli, *The Transnational Law and Governance of GMO Risks.* For an argument that the transnational realm is a space of societal interaction that "national" and "international" legal heuristics struggle to embrace see Zumbansen, "Neither Public Nor Private, National Nor International: Transnational Corporate Governance From a Legal Pluralist Perspective".

[52] Leonelli, *The Transnational Law and Governance of GMO Risks.*

[53] Ibid.

[54] Ibid. For the use of similar terminology, albeit against the different backdrop of TLO theory, see Terence C. Halliday and Gregory Shaffer, "With, Within and Beyond The State: The Promise and Limits of Transnational Legal Ordering", *UC Irvine School of Law Research Paper no. 59/2016*.

[55] Leonelli, *The Transnational Law and Governance of GMO Risks.* Sassen also highlighted how the driving logics of globalization are constructed *from within*, as well as beyond, the nation state. See Saskia Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages* (Princeton NY/Oxford: Princeton University Press, 2006); Saskia Sassen, *A Sociology of Globalization* (New York NY/London: WW Norton, 2007).

[56] Ibid.

[57] Many accounts in transnational legal studies, starting from TLO theory, encompass state law within their analytical focus; however, the starting point of their inquiry is traditionally the enactment of standards and norms by societal actors operating *beyond* the nation state. In this sense, national law or positive, formalised legal regimes are only relevant in so far as they incorporate these standards or interact with them. See for instance Halliday and Shaffer, "With, Within and Beyond The State: The Promise and Limits of Transnational Legal Ordering".

[58] Leonelli, *The Transnational Law and Governance of GMO Risks.*

[59] See supra, section II.

of different legal narratives informing the transnational regulatory infrastructure, taking into consideration specific and circumscribed issue areas.[60]

On these grounds, "transnational legal analysis" becomes a *methodological framework* to uncover the social construction of transnational legal narratives. Whilst indebted to TLP's notion of transnational law as a "methodological lens",[61] this alternative understanding of "transnational legal analysis" puts the accent on structural – legal and regulatory – questions rather than on agency.[62] At its heart lies the legal deconstruction of transnational narratives against the backdrop of discrete legal regimes and regulatory systems, rather than a socio-legal focus on Actors, Norms and Processes ("ANPs").[63] For the purposes of the analysis of this chapter, this has one important implication: it opens up opportunities for a normative inquiry into the legitimacy of the transnational regulatory infrastructure, as resulting from the interaction of different or opposed legal discourses.

The deconstruction of transnational narratives from within, across and beyond the nation state level casts light on a plurality of regulatory conflicts. Indeed, the existence of clashing transnational narratives is nothing but a reflection of regulatory conflicts between national legal systems, between national legal systems and international or "supra-national" legal regimes, and between societal governance and different legal orders. These conflicts need to be solved, in order to safeguard law's normative legitimacy. This is the point where Conflicts Law theory comes into play.

"Conflict constellations" have been mapped and assessed by Conflicts Law theory, whose goal is the reconstruction of a normative discourse on the legitimacy of law in the face of its increasing transnationalization.[64] The next section provides an overview of Conflicts Law theory, explaining how this framework endeavours to safeguard law's validity and legitimacy through the resolution of regulatory conflicts. Does this mark the end of the analysis, and a solution to the normative dilemma of transnational legal studies?

IV. Recoupling law and politics beyond the nation state: Conflicts Law theory.

[60] Leonelli, *The Transnational Law and Governance of GMO Risks*, focuses on competing transnational legal narratives on the governance of the uncertain public health and environmental risks posed by GMOs. The analysis cuts across national jurisdictions, positive systems of "supra-national" and international law and societal standard-setting. In a similar perspective, even though from a Public International Law perspective, see Anne Saab, *Narratives of Hunger in International Law* (Cambridge: Cambridge University Press, 2019) – analysing the fields of international climate change law, intellectual property law and human rights.

[61] Zumbansen, "Neither Public Nor Private, National Nor International: Transnational Corporate Governance From a Legal Pluralist Perspective".

[62] For the rich – and much broader – sociological debate on the dichotomy of "structure" and "agency", see inter alia Pierre Bourdieu, *Outline of A Theory of Practice* (Cambridge: Cambridge University Press, transl. 2013) and Anthony Giddens, *The Constitution of Society* (Cambridge: Polity Press, 1984).

[63] See supra, section II.

[64] See inter alia Joerges, "Constitutionalism in Post-National Constellations: Contrasting Social Regulations in the EU and in the WTO; Joerges, "A New Type of Conflicts Law as the Legal Paradigm of The Post-National Constellation"; Joerges, Kjaer and Ralli, "Conflicts Law as Constitutional Form in the Post-National Constellation". For a specific application of Conflicts Law theory to European Union law, see inter alia Christian Joerges, "Deliberative Supra-Nationalism: Two Defences", *European Law Journal* 8, no. 1 (2002): 133-151; Christian Joerges, "Integration Through Conflicts Law. On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation", in *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification*, ed. Rainer Nickel (Antwerp: Intersentia, 2010), 377-400; Christian Joerges, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", in *After Globalisation. New Patterns of Conflict and Their Sociological and Legal Re-Constructions*, ed. Christian Joerges (Oslo: ARENA/RECON, 2011), 65-124; Christian Joerges and Michelle Everson, "Reconfiguring the Politics-Law Relationship in The Integration Project Through Conflicts Law Constitutionalism", *European Law Journal* 18, no. 5 (2012): 644-666.

Conflicts Law is located halfway through the shift from *modern* to *post-modern* paradigms of legal analysis. As these sections will explain, it endeavours to face legal challenges which are typical of the post-modern era; nonetheless, its roots lie in modern paradigms of legal and political theory.

The Conflicts Law approach is first and foremost influenced by Jürgen Habermas's theory of communicative action. Whilst acknowledging the crisis of the Welfare State, purposive normativity and legal materialization,[65] Habermas famously advocated the reconstruction of a normative discourse on the legitimacy of law through the *re-politicization* and *re-democratization* of the post-national constellation.[66] In the face of law's migration away from the nation state, Habermas theorized the necessity to *recouple* law and politics beyond the nation state level and beyond the underlying paradigm of national representative democracy. This marks a considerable turn away from systems theoretical or socio-legal accounts; politics, as the only way forward to safeguard law's normative legitimacy, lies at the heart of Habermas's theorization.

After leaving all nation state categories behind, Habermas's struggle to safeguard both political democracy and law's legitimacy relies on the notion of deliberation. The paradigms of communicative action and discursive ethics postulate inclusion and rational deliberative processes, wherein all political actors involved agree over the result of deliberation.[67] The successful construction of the deliberative democratic process does, in and by itself, legitimate the outcome of deliberation: in other words, it ensures that the relevant decisions will be regarded as being normatively legitimate by all participants to the process. In this light, law's normative legitimacy relies on *procedural* deliberation; in the face of ubiquitous political and socio-economic contestation, law's legitimacy in the post-national constellation can only be grounded on law's own *procedural* ability to mediate between all interests at stake, solve legal conflicts and generate agreement.[68] This sheds some light on the modern, rationalist and constructivist foundations of both deliberative democracy and legal proceduralization[69] as a bridge "between facts and norms".[70]

The Conflicts Law framework is also indebted to Polanyi's theorization of the double movement,[71] whereby market dis-embedding – i.e. unconstrained trade liberalization and market de-regulation – is

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[65] Jürgen Habermas, *Legitimation Crisis* (Cambridge: Polity Press, 1988); Jürgen Habermas, "The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies", in *The New Conservatism. Cultural Criticism and the Historians' Debate*, ed. Jürgen Habermas (Cambridge MA/London: MIT Press, 1989).

[66] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.* (Cambridge MA/London: MIT Press, 1996); Habermas, *The Postnational Constellation. Political Essays.*

[67] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, particularly at 118 ff., 132 ff. and 287 ff.

[68] Jürgen Habermas, *Communication and the Evolution of Society* (Boston MA: Beacon Press, 1979), at 184 ff.; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.*

[69] Habermas, "The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies"; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, at 287 ff. and 427 ff. For an overview of legal proceduralization within legal theory, see Rudolf Wiethölter, "Proceduralization of the Category of Law", in *Critical Legal Thought: an American-German Debate*, eds. Christian Joerges and David Trubek (Baden-Baden: Nomos, 1985), 501-510; Rudolf Wiethölter, "Materialization and Proceduralization in Modern Law", in *Dilemmas of Law in the Welfare State*, ed. Gunther Teubner, (Berlin/New York NY: Walter de Gruyter, 1986), 221-249; Rudolf Wiethölter, "Just-ifications of a Law of Society", in *Paradoxes and Inconsistencies in the Law*, eds. Oren Perez and Gunther Teubner (Oxford/Portland OR: Hart Publishing, 2006), 65-76; Rudolf Wiethölter, "Proceduralization of the Category of Law", in "Critical Legal Thought: an American-German Debate. An Introduction at the Occasion of Its Republication in the German Law Journal 25 Years Later", eds. Christian Joerges, David Trubek and Peer Zumbansen, *German Law Journal* 12, no. 1 (2011): 466-473.

[70] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, 287 ff. and 427 ff.

[71] Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Boston MA: Beacon Press, 1944). See also Christian Joerges and Poul F. Kjaer, eds., *Transnational Standards of Social Protection.*

eventually bound to trigger societal reactions and market re-regulation. Polanyi famously theorized the intertwined nature of market dis-embedding movements and re-embedding counter-movements, commodification and de-commodification, trade liberalization and social re-regulation. In the face of law's migration away from the nation state level, legal analysis shall then endeavour to conceptualize how transnational markets may be re-embedded through law;[72] this is the point where the notion of legal proceduralization and the deconstruction of the "economy as a polity"[73] intersect. Under Conflicts Law theory, legal proceduralization is the way forward to solve regulatory conflicts and safeguard law's normative legitimacy as well as a toolbox to explore how, and in which forms, the law of the post-national constellation may succeed in re-embedding transnational markets, complementing market-building with the market-correcting logics of re-regulation.[74]

Against this overall background, Conflicts Law has deployed the Private International Law – Conflict of Laws – apparatus to structure a comprehensive *procedural* framework for the management and solution of legal conflicts in the post-national landscape. Conflicts Law theory pursues a threefold aim: *recoupling law and politics* beyond the nation state and beyond technocracy, *balancing transnational integration* with the need to preserve *diversity and pluralism*, and *re-embedding* the increasingly dis-embedded *transnational markets* through re-regulation. Symmetrically, three different kinds of conflict constellations are tackled through three specific types of law-mediated frameworks.

In the first, *vertical* conflict constellations, the law-mediated solution of any conflicts between national and international or supra-national legal regimes is at stake.[75] The solution can neither consist in the selection of one legal order, to the detriment of the other, nor in the imposition of a uniform, homogenous legal regime. Rather, the challenge lies in the identification of a meta-norm for the procedural management of the relevant legal conflicts. Searching for an agreeable meta-norm implies a shift away from the identification of any substantive criteria for decision-making, and a direct focus on the *procedural* elements which shall discursively mediate and facilitate the resolution of the relevant legal conflicts.[76] The overarching aim is the one of balancing *transnational integration* and *legal and value pluralism*.

Secondly, *horizontal* conflict constellations involve a clash between same-level legal systems. Although horizontal conflicts call for a substantive response, Conflicts Law theory focuses on the *procedural* aspects of decision-making. *Political deliberation*, whereby technical, political, socio-economic and cultural factors are fruitfully weighed and balanced against each other, is understood as the only way forward to ensure recognition from all participants to the process, safeguarding law's normative legitimacy.[77]

Contrasting European and International Governance (Oslo: ARENA/RECON, 2008), at 13 ff.; Joerges and Falke, *Karl Polanyi, Globalisation and the Potential of Law in the Transnational Markets.*

[72] Joerges and Kjaer, *Transnational Standards of Social Protection. Contrasting European and International Governance*, at 13 ff.

[73] Christian Joerges, Bo Stråth and Peter Wagner, eds., *The Economy as Polity: The Political Constitution of Contemporary Capitalism* (London: UCL Press, 2005).

[74] Joerges, "A New Type of Conflicts Law as the Legal Paradigm of the Post-National Constellation", at 470 ff. In this sense, Conflicts Law indirectly identifies market re-embedding as a further condition to safeguard law's legitimacy.

[75] For a more detailed overview of the framework set out to solve vertical, horizontal and diagonal conflicts, see Joerges, "A New Type of Conflicts Law as the Legal Paradigm of The Post-National Constellation".

[76] The famous *Cassis de Dijon* case has been used to exemplify a successful solution of vertical conflicts, with specific reference to European Union law; see Joerges, "Constitutionalism in Post-National Constellations: Contrasting Social Regulation in the EU and in the WTO", at 501 ff.

[77] The solution of horizontal conflicts has been exemplified, with specific reference to European Union law, by the dynamics of Comitology; see Christian Joerges and Jürgen Neyer, "Transforming Strategic Interaction Into Deliberative Problem-Solving: European Comitology in the Foodstuff Sector", *Journal of European Public Policy* 4, no. 4 (1997): 609-625; Christian Joerges and Jürgen Neyer, "From Inter-Governmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", European Law Journal 3, no. 3 (1997):

Finally, *diagonal* conflict constellations lie at the heart of the relationship between legal ordering and societal regulation and self-regulation; the solution of such conflicts requires the development of *procedural* criteria to incorporate and embed private norm-making within the regulatory process. The aim is to give recognition to "private transnationalism", *re-embedding* it within the regulatory process.[78] On these grounds, by providing a coherent legal theoretical framework for the solution of different dimensions of regulatory conflict, Conflicts Law has achieved its aim to reconstruct a discourse on law's normative legitimacy in the post-national constellation. The next section highlights the merits and strengths of this theoretical construct; nonetheless, it also points to its main weakness. This paves the way for a different argument in favour of legal re-materialization beyond the nation state.

V. The perils of legal proceduralization and the amorphous World Society.

The first merit of Conflicts Law lies in that it has brought normative and political theory back to the post-modern landscape of transnational legal studies, endeavouring to safeguard law's legitimacy through deliberative forms of political democracy. This strikes a stark contrast with systems theoretical and socio-legal accounts of transnational law. Secondly, Conflicts Law resorts to legal proceduralization as a means to pursue three specific goals; in this sense, it has identified new normative yardsticks beyond both "input" and "output" legitimacy. By recoupling law and politics beyond the nation state level and national representative democracy, Conflicts Law breaks with methodological nationalism and "input" legitimacy. Further, by advocating post-national political deliberation and by rejecting technocracy, it has left the logics of "output" legitimacy behind. To conclude, and at a more general level, Conflicts Law theory has powerfully argued that political re-democratization, a pluralistic model of transnational integration and market re-regulation are the only way forward to achieve authentic transnational integration through law; deliberation and agreement over political and socio-economic values are thus key to safeguard law's normative legitimacy in the post-national constellation. Symmetrically, technocracy, top-down regulatory convergence and unconstrained market dis-embedding will not underpin any long-lasting forms of transnational legalisation or societal integration beyond the nation state. Indeed, they are bound to eventually trigger political and socio-economic counter-movements.

The limits of Conflicts Law theory surface as soon as the framework is applied to the practice of – post-modern – legal and regulatory conflicts. As concisely explained in section IV, Conflicts Law theory faces the challenges of law's transnationalization through a radically *procedural* perspective on law's ability to tackle highly complex conflict constellations. By resorting to procedural categories and deliberative notions of democracy Conflicts Law takes a rationalist and constructivist stance, drawing on the modernist tradition. In this sense, an unresolved inner tension exists between Conflicts Law theory's *modernist* foundations and its application to the *post-modern* legal landscape.

Conflicts Law has been the object of some criticism on the grounds that it overlooks the irreducible complexity of social reality and social conflicts.[79] Its radical *procedural* focus may thus end up disregarding the *substantive* values at stake in transnational conflict constellations and the *substantive*

273-299; Christian Joerges, "Good Governance Through Comitology?", in *EU Committees: Social Regulation, Law and Politics*, eds. Christian Joerges and Ellen Vos (Oxford/Portland OR: Hart Publishing, 1999), 311-338.

[78] The solution of diagonal conflicts has been exemplified, with specific reference to European Union law, by the New Approach to Harmonisation and Standards. See inter alia Christian Joerges, Harm Schepel and Ellen Vos, "The Law's Problem with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation Under the New Approach", *EUI Working Paper no. 09/1999*.

[79] Michelle Everson, "The Limits to the Conflicts Law Approach: Law in Times of Political Turmoil", *Transnational Legal Theory* 2, no. 2 (2011): 271-285, at 279.

reasons and implications of legal conflict.[80] Conflicts Law has laid out a procedural framework which should facilitate the rational solution of legal conflicts, underpinning agreement over substantive values; however, in the lack of any pre-existing shared values, can conflicts be successfully solved by resorting to procedural categories? This question goes back to the traditional debate on the dialectical relationship of material versus procedural factors. Are deliberative *processes* the way forward to construct shared *substantive* identities, principles and values, which will in turn underpin genuine societal integration and ensure that law is normatively legitimate? Or is the existence of shared *substantive* identities, principles and values the precondition to achieve successful *procedural* deliberation? Can consciousness and communication underpin societal integration,[81] or does social existence determine consciousness and communication? Are substantive identities, principles and values generated through – rational – communicative processes, or are they the outcome and the reflection of material – socio-economic and political – structures? Ultimately, does the existence of a "life-world"[82] rely on material or procedural, objective or inter-subjective factors? What are the driving forces of societal integration? The dialectics of material – socio-economic and political – factors translate into societal complexity, differentiation and fragmentation. This erodes law's procedural ability to solve conflicts and generate agreement. Indeed, this challenge is magnified in the post-modern landscape; the restructuring of societal activities beyond the traditional political, socio-economic and cultural anchor of the nation state has resulted in an ambivalent model of societal integration. The World Society might as well be defined as an *amorphous* World Society:[83] whilst increasingly homogenized by top-down pressures for transnational regulatory convergence and trade liberalization, it is inherently fragmented in political, socio-economic and cultural terms.

Against this overall backdrop, the prospects for Conflicts Law to *procedurally* reconstruct shared principles and values, solve ubiquitous conflicts and re-democratize the post-national constellation appear rather bleak. If transnational regulatory convergence is ultimately regarded as a goal, in so far as the harmonization of standards and the progressive elimination of non-tariff barriers to trade foster transnational market access, are there any chances to identify a procedural meta-norm to reconcile "unity" and "diversity" in *vertical* conflicts? Arguably, there are very few such chances; the externalities of neo-liberalism are before our eyes, and societal counter-movements have soon followed. Increasing nationalism and protectionism, Brexit, Trumpism and the gradual collapse of the WTO all testify to law's inability to fruitfully balance and reconcile transnational integration and legal and value pluralism over the past decades.

Further, focusing on *horizontal* conflict constellations, what are the margins for procedural models of deliberative democracy to generate consensus and social integration? The boundaries between mere *technical* agreement and genuine *political* deliberation are inherently blurred in the post-national constellation; indeed, allegedly neutral technical – scientific and economic – expertise has played a pivotal role in facilitating transnational regulatory convergence.[84] The flipside, in the lack of any shared identities, is ubiquitous conflict over political, socio-economic and cultural values. This has produced and reinforced narratives against globalization and Europeanization, driven by technocrats and allegedly serving the interests of transnational élites to the detriment of national constituencies. As

[80] Ibid., 278.
[81] Jürgen Habermas, *Communication and the Evolution of Society*, 106 ff. and 142-143.
[82] Ibid., 111 ff.
[83] Leonelli, *The Transnational Law and Governance of GMO Risks.* This terminology is inspired by Bauman's most famous account of the "liquid society". See Zygmunt Bauman, *Liquid Modernity* (Cambridge: Polity Press, 2000).
[84] Leonelli, *The Transnational Law and Governance of GMO Risks.*

"sovereignty-enhancing" movements[85] and populism thrive by reclaiming national sovereignty and national political democracy, legal proceduralization and rational deliberative processes appear increasingly inadequate to govern legal and political conflict within and beyond the national level.
Finally, how are we to procedurally address the structural social deficit of law beyond the nation state? How are we to envisage any possibility to procedurally re-embed transnational markets, when trade liberalization has so far been the main driver of transnational integration? How are we to solve any *diagonal* conflicts, when societal regulation and self-regulation cannot possibly be re-embedded within any legal system?
The overarching aim of "transnational law", understood as the regulatory infrastructure underpinning asymmetric globalization processes,[86] has been the achievement of transnational regulatory convergence and trade liberalization. Symmetrically, integration beyond the nation state has been informed by little more than technical expertise.[87] On these grounds, we may as well conclude that Conflicts Law theory finds itself between a rock and a hard place. It advocates re-democratization, "unity" in "diversity" and market re-regulation in the post-national constellation; nonetheless, it faces the challenges posed by technocracy, transnational regulatory convergence and trade liberalization.[88] Further, in the wake of ubiquitous contestation over *substantive* values, it fails in its attempt to provide a *procedural* solution to legal and regulatory conflicts.[89] In the era of the amorphous World Society, the margins for procedural deliberation to re-couple law and politics beyond the nation state and reconstruct a normative legal discourse appear – at best – limited.[90]
In the face of increasingly complex conflict constellations, *modern* paradigms of legal proceduralization and deliberative democracy can no longer control the tensions of the *post-modern* era. The time is ripe for legal theory to develop a *post-modern* discourse on law's normative legitimacy, advocating a turn back to substantive normativity and the re-materialization of law beyond the nation state.

VI. The challenge of post-modern normative analysis: the re-materialization of law beyond the nation state.

The failure of *modern* rationalism and constructivism in its attempt to *procedurally* safeguard law's normative legitimacy paves the way for a *post-modern* analysis of the transnational evolution of

[85] For use of this terminology see Giulia Claudia Leonelli, "The Glyphosate Saga and The Fading Democratic Legitimacy of European Union Risk Regulation", *Maastricht Journal of European and Comparative Law* 25, no. 5 (2018): 582-606.
[86] See supra, section III.
[87] Leonelli, *The Transnational Law and Governance of GMO Risks.*
[88] Ibid.
[89] As acknowledged in Joerges, "Constitutionalism in Post-National Constellations: Contrasting Social Regulations in the EU and in the WTO", 495-496, the procedural criteria to re-democratize and re-legitimize law are not pre-existent and must be generated throughout the deliberative process; nonetheless, there is no assurance that any such criteria will be successfully identified. See also Everson, "The Limits to the Conflicts Law Approach: Law in Times of Political Turmoil", highlighting that the deliberative quality of political processes, the adjustment of unity and diversity and the construction of a concerted social vision do not exist in a political and socio-economic vacuum.
[90] For an acknowledgment of the challenges faced by Conflicts Law theory, with reference to the specific case of European Union law, see Christian Joerges,"Three Transformations of Europe and the Search for a Way Out of Its Crisis", in *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance*, eds. Christian Joerges and Carola Glinski (Oxford/Portland OR: Hart Publishing, 2014), 25-47; and Christian Joerges and Maria Weimer, "A Crisis of Executive Managerialism in the EU: No Alternative?", in *Critical Legal Perspectives on Global Governance. Liber Amicorum David M. Trubek*, eds. Gráinne de Búrca, Claire Kilpatrick and Joanne Scott (Oxford/Portland OR: Hart Publishing, 2014), 295-322.

substantive political and socio-economic identities. Transnational legal theory must then face the challenge of re-politicizing law and fostering transnational forms of societal integration through the reconstruction of substantive – political and socio-economic – identities, principles and values.

This marks a turn back to legal materialization and purposive forms of normativity.[91] Post-modern normative analysis thus leaves behind any claims to universality or universalisation, acknowledging law's inability to reconstruct a universally legitimate discourse.[92] Yet again, just like at the times of Welfare State debates on "public" and "private" law, "state" and "market", "left" and "right", the legitimacy of law is assessed against the normative yardstick of *substantive* values. Nonetheless, the relevant debates, values at stake and implications have significantly changed. The central question thus becomes "how, and under which forms, the formerly nation state based normative and political debates are likely to re-emerge at the transnational level";[93] this question lies at the heart of legal re-materialization beyond the nation state.

An increasing number of transnational constituencies, cutting across territorial, sectoral and societal barriers, have gradually emerged and entrenched throughout the last decade. Whether made up of consumers and stakeholders, environmentalists, political activists, NGOs, feminist groups, governmental officers, epistemic communities, transnational corporations or market actors, these fluid constituencies cut across developed, developing and less developed countries; transnational demographic, economic and information flows as well as new forms of communication and social media have all contributed to their development.

These transnational communities are cemented by the defence of substantive principles and values; these range from transnational trade liberalization and market-led models for global development to enhanced public health and consumer protection, environmental sustainability, climate change mitigation, fair trade or food sovereignty. Whether transnational campaigners fight for the defence of women's rights, in favour or against the conclusion of free trade agreements and investment treaties or with the goal of banning hazardous chemicals, pesticides or GMOs, their struggle still epitomizes the construction of new transnational identities and a battle for the defence of transnational values. What is at stake is in fact the fight for different models of globalization and global integration.

These transnational political and socio-economic debates need to be identified and thoroughly explored. If the social construction of transnational legal narratives from within, across and beyond the nation state has gone hand in hand with the emergence of new transnational constituencies, the time has come for transnational legal studies to inquire into transnational *substantive* identities, principles and values and reconstruct *substantive* normative arguments. Deconstructing competing transnational legal narratives against the backdrop of discrete regulatory layers can then pave the way for an analysis of the *principles* which should inform the solution of conflict constellations, the *values* that should be defended and the *aims* that law should pursue from within, across and beyond the national level.

If the time is not ripe for a global constitutional framework, and if legal proceduralization has failed in its attempt to recouple law and politics beyond the nation state, legal analysis can still inquire on the political and socio-economic stakes of globalization and structure substantive normative arguments. This would make transnational legal studies the site of a genuine debate between different or opposed visions for globalization; it would also open legal analysis up to the energies of new political

[91] See supra, section II, for a concise overview of legal formalization, legal materialization and law's reflexive turn.

[92] The search for *universal* criteria to safeguard law's normative legitimation (such as universal agreement through political deliberation) is typical of modern paradigms – see supra, section IV. The discourse on legal re-materialization beyond the nation state, in contrast, takes the irreducible complexity of the World Society as a starting point.

[93] Peer Zumbansen, "The State as Black Box and the Market as Regulator", 165(1) *Journal of Institutional and Theoretical Economics* 165, no. 1 (2009): 62-70, at 67.

communities and new forms of social dynamism. If transnational legal studies embrace the reconstruction of a post-modern normative discourse, transnational legal analysis will have the opportunity to breathe new life into politics, beyond the nation state paradigm of "input" legitimacy and "output" legitimacy in trans-governmental networks. Indeed, the fluid dynamics of transnational re-democratization testify that a third option is available, beyond the dichotomous choice of national sovereignty versus expert and market-led globalization: legal analysis can in fact help identifying bottom-up opportunities for transnational – post-constitutional – re-democratization, and foster their development. This is the post-modern normative challenge of legal re-materialization beyond the nation state.