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A Decolonial Approach to Private International Law

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L'essentiel

This article presents the decolonial approach to private international law, which has recently entered the list of pressing topics for the discipline, not only in colonised countries but also in Europe. In France, the subject may not yet be addressed as such, but it at least appeared in a Ph. D. thesis defended at the Sciences Po Paris Law School in May 2022, entitled "The Conflict of Laws and Non-secular Worldviews: A Proposal for Inclusion". This thesis argues for an alternative theorisation of the notions of party autonomy, recognition, and international jurisdiction to make them more inclusive of non-Western worldviews. After having offered a description of the decolonial approach and the current international decolonisation of private international law, this contribution summarises the essential points of the Ph. D. thesis in this respect and identifies the broader questions that it raises for private international law, especially as regards the notions of "law", "foreign" and "conflict".

Introduction

Most of the postcolonial research carried out over the last century has been dedicated to providing a version of the history of colonisation freed from European ethnocentrism and the claim of Western superiority that has been associated thereto.(1) Decolonial theory, which is close to this literature(2) but deliberately different from it,(3) proposes to rethink the production of knowledge along the same lines, not only in postcolonial contexts but at a more global level, in all states, colonised or not,(4) and in all disciplines, including law. From this perspective, we can speak of "decolonial thought" or "decolonial approach", as constituting an intellectual movement that invites us to take non-Western, colonised worldviews seriously. Decolonial thinking thus calls for more knowledge to be produced using non-Western sources and processes, and for non-Western ways of living and seeing the world to be (re-)empowered. In this article, the term "worldview" is synonymous with "cosmology", "ontology"(5), or "mode of existence" (to retake a Latourian expression). It is to be understood as covering the values, concepts and norms of social organisation and behaviour that enable us to orient ourselves in the world and give meaning to life, which have a variable source, form, and mode of transmission. This definition is intended to encompass "knowledge "and the resulting conception of "the good life"(6).

Decolonial thinking thus invites us to rethink state law insofar as it reflects a certain vision of the world associated with the enterprise of colonisation (which is certainly still ongoing, even if its forms are changing) and the resulting Western hegemony. It has given rise to so-called "decolonial legal studies"(7), which are intended to consider all branches of law, whether they have a strong or weak international character, and therefore - *a fortiori* - private international law. In this respect, one may welcome the fact that the discipline has recently become associated with decolonial thinking. In this context, private international law is notably seen as having a key role to play in the recognition of otherness in law.(8) This probably makes it a particularly promising legal tool for opening the way to the decolonisation of law as a whole, including in European countries. This article will focus on the role that French studies could play in the decolonisation of private international law, to make this role essential. To this end, a few lines of thought will be suggested, based on a thesis

defended in France in May 2022.(9)

With a view to achieving this objective, this contribution will first describe the decolonial approach to private international law, which may have taken its first official European form at the University of Edinburgh, in the context of a conference organised in May 2022. To this end, the decolonial approach itself will first be defined, in a way that highlights the need to "pluriversalise" law (i.e., to detach law from a single vision of universal values) and to compensate for the "power differential" between colonial and colonised modes of existence. In addition, the article will briefly outline the decolonial work that has been undertaken in branches of law other than private international law, especially in comparative law, thus showing that the decolonial approach to private international law is part of a broader doctrinal movement (I).

Secondly, this article will present a few avenues for French research into the decolonisation of private international law. To do this, the article will take as its starting point the above-mentioned Ph. D. thesis. As will be further explained later, this thesis revisits various pillars of the conventional theorisation of private international law, based on cases brought before Western courts in which the principle of secularism underlying state law is undermined by indigenous or religious claims. More specifically, in these cases studied, the principle of secularism, which separates law, religion, economics, politics and ecology into distinct "social spheres",(10) does not allow the judge to consider concepts that are essential to understanding what is at stake in the dispute, but which do not reflect this separation - namely religious arbitration in commercial matters, indigenous sacred land and transnational faith-based politics. Therefore, the judgments appear disconnected from the dispute, and more broadly from the social issue at stake: management of cultural diversity, recognition of indigenous voices, and governance of transnational players. Based on the premise that private international law could enable state law to reconnect with these issues by taking into account the indigenous and religious worldviews concerned, the Ph. D. proposes an alternative theorisation of the principle of party autonomy (insofar as it justifies the choice of forum and the choice of applicable law), of the recognition of foreign judgments and situations (and its limitation by public policy), and of international jurisdiction (and the associated practice of forum shopping).

After having summarised the Ph. D., the article will suggest some ways to go beyond it in French literature, given its limitations. In particular, it will argue that it is not only the theorisation of some concepts of private international law that needs to be revised in order to decolonise private international law, but that, more broadly, the notions of "law", "foreign" and "conflict" need to be rethought, as does the method of studying, teaching and developing private international law (II).

I - The decolonial approach to private international law

The developments that follow are intended to define the decolonial approach to private international law by showing the broader context in which it fits, characterised by a transdisciplinary intellectual movement that has already reached the legal world in various ways.

Thus, before presenting the decolonial approach to private international law today (B), this section describes the decolonial approach, as well as its implications for law (A).

A - The decolonial approach to law

Decolonial thinking has both substantive and methodological dimensions and is addressed to all the humanities and social sciences, as well as law (if at least it is to be separated from social sciences). After having identified the said dimensions

(1), this section will point at their implications as far as state law is concerned (2).

1. The decolonial approach: substantive and methodological aspects

Decolonial thought certainly cannot be summed up in this article. We can, however, identify some of its key authors and concepts, and distinguish several substantial and methodological implications.

At present, decolonial thought is probably represented mainly by South American authors such as Walter Mignolo, Boaventura Sousa de Santos, Aníbal Quijano, Enrique Dussel, and Ramón Grosfoguel.(11) The description offered below is largely based on the writings of Walter Mignolo, who has highlighted the work of several other authors in recent English-language publications.

From a substantive point of view, decolonial thinking firstly reflects adherence to the concept of pluriversality, the invention of which is attributed by Mignolo to the Zapatistas.(12) This concept consists of assuming that several visions of the world, and not only the Western vision, aspire to be universal. The idea is to move away from the modern episteme of the unified totality attached to the concept of universalism, which notably underpins state law, towards an exploration of "interconnected diversity",(13) and "relationality".(14) The notion of pluriversality also requires taking seriously and considering as equally valid various worldviews, whether modern (based on Reason), indigenous or religious - whether colonial or colonised.(15)

Secondly, decolonial studies demand the recognition of '*the entanglement of several cosmologies connected today in a power differential [, which is part of] the logic of coloniality covered up by the rhetorical narrative of modernity*'.(16) Thus, decolonial theory calls for considering the vulnerable position of non-Western modes of existence and the way in which they have been influenced, distorted or simply suppressed by the Western colonial enterprise, and for seeking to compensate for this situation.(17)

From a methodological point of view, as decolonial thinking demands to think beyond Western (hegemonic) worldviews at the global level, it notably requires taking into account the interstices nestling between Western and non-Western modes of existence - a methodology that Walter Mignolo calls "border thinking"(18). This requires researchers to be familiar with several worldviews (Western and non-Western) or to carry out collective research that brings together researchers familiar with distinct cosmologies.

Moreover, from the point of view of the use of sources, it is important to understand that decolonial thought is not defined by its representatives as a tradition of thought that would draw on Western critical studies such as French Theory, as postcolonial authors have done.(19) On the contrary, decolonial thinkers trace the origins of their intellectual movement to the Global South, from the very beginning of colonisation - which includes authors such as Franz Fanon.(20) However, they can certainly also be associated with the intellectual movements initiated by indigenous populations located in the so-called settler states, which belong to the Global North.(21) What is important is to realise that decolonial thinking is intended to be non-Western and autonomous - not to be developed in reaction to or following Western thinkers.

2. The decolonial approach: implications for law(22)

It will probably not have escaped the reader's attention that decolonial thinking questions the modern theorisation of law (which largely underpins the law in force in European states), starting with the concept of law itself. It makes it appear as

a Western product,(23) as well as a tool for imposing Western worldviews, associated with the figure of the state and with the legitimate authority of state law to order the society,(24) in a manner superior to other norms, and in all legitimacy because founded on Reason - an abstract and deemed universal concept.(25)

From a substantive point of view, decolonial thinking firstly requires moving away from the paradigm of legal monism, according to which states are invested with exclusive normative authority, so that any alternative, non-state form of prescriptivity is presumed to be subordinate to state law, from which it would derive any authority.(26) It thus demands endorsing the paradigm of legal pluralism, according to which state law is only one source of normativity among others, and the state interacts with other normative authorities.(27) From this starting point pint, one can consider that the individuals and social groups...['s] everyday life crosses or is interpenetrated by different and often contrasting legal orders and legal cultures' - a phenomenon that Boaventura de Sousa Santos has called "interlegality".(28) The paradigms of legal pluralism and interlegality call for a rethink of the function of state law and its legitimacy, and for a pluralisation of the characteristics of law, which cannot be limited to the fixity and generality of the state legal rule.(29)

Secondly, decolonial thinking leads to "disenchant Reason(30) " by de-universalising (or denaturalising) it, i.e. to consider that it is a Western product that coexists with other universals(31) - that is, with other worldviews that claim to be universal, according to the paradigm of pluriversalism. This change of intellectual perspective involves recognising that, through the assumption of universalism,(32) state law imposes a Western vision of the world as superior and, moreover, as the only existing global vision. State law certainly recognises that there are several modes of existence, but considers that it has a monopoly on recognising, defining, and ranking these modes of existence (and that the Western mode of existence is superior). In so doing, it can appear discriminatory, illegitimate and/or oppressive in the eyes of those who do not share the Western vision of the world reflected by state law, from the point of view of their identity (which some would say is 'cultural'). Consequently, if the law claims to be egalitarian, as is the case in Western democracies, it must strive to include non-Western cosmologies, while relinquishing the monopoly of their definition.(33)

Thirdly, decolonial thinking calls for the inclusion of colonised worldviews while seeking to compensate for the power differential between these ontologies and Western perspectives, which implies the need to discriminate positively between the former and the latter. In this respect, state law must reflect a political will that should result, not just in a pluralisation of the definition of law and its characteristics, but in differentiated substantive rules in favour of colonised cosmologies.

From a methodological point of view, decolonial thinking certainly demands reviewing the teaching of law, in terms of both subject matter and pedagogy, as well as the methods of legal research and the production of law. In other words, it not only demands the teaching and study of non-Western worldviews but also the devising of teaching methods, research methods and the methods of production of the law in force, which include non-Western worldviews. (34)

B - The emergence of a decolonial approach to private international law: recent developments

Decolonial thinking, several fundamental elements of which have just been described, has been applied to specific branches of law, not only in colonised countries but also in Europe. The general theory of international law,(35) human rights(36) and constitutional law,(37) for example, have been the subject of several decolonial legal studies in Western and non-Western universities, both by authors who identify largely with colonised worldviews and by Western authors wishing to include decolonial thinking in the conventional approaches to law. This is particularly the case for the members of the project led by the Max Planck Institute in Hamburg, in collaboration with Oxford University, entitled "Decolonial Comparative Law".(38) The aim of this project is to decolonise comparative law - a discipline closely

related to private international law - based on discussions of various topics in thematic workshops, bringing together scholars from different geographical and linguistic backgrounds who adopt decolonial thinking. The topics discussed, which will give rise to an edited volume, cover the right to property (envisaged as a Western legal concept) as well as the comparative history of law and the use of pre-colonial normative sources.

In private international law, the theme of the decolonisation of the discipline has recently made its way into European conferences and colloquia,(39) as well as into European literature.(40) The idea here is not simply to adapt private international law to indigenous ontologies or religious worldviews in post-colonial countries and settler states(41) - which has already been done, though sometimes to a limited extent, in positive law,(42) given that a generalisation of this adaptation would not be desirable, according to some authors.(43) Instead, the endorsement of decolonial theory in private international law that is discussed here demands revisiting the conventional theory of private international law at the global level, to make it more inclusive of non-Western modes of existence. In this respect, at a conference organised in Edinburgh in May 2022,(44) Roxana Banu, who is a Lecturer at Queen Mary University (London), gave a presentation entitled "Reflections on private international law's colonial history", in which she argued in favour of expanding the intellectual history of private international law both geographically and in terms of actors while situating the theories and techniques of private international law in a colonial context.(45) At the same conference, Nicole Štýbnarová (who has just joined Leiden University as an Assistant Professor in International Law) presented an article (46) in which she demonstrates, on the one hand, that the private international law of international marriages was based on relativist arguments until the 19th century, when universalist language was adopted, and, on the other hand, that this transition was triggered by the evolution of the imperial economy.(47) We also contributed to this discussion by presenting a method for decolonising private international law based on a pragmatic approach, aimed at developing theoretical elements outside the doctrinal framework of private international law, on the basis of the study of particular cases involving various branches of law.(48) This presentation reflected the doctoral work carried out at Sciences Po Paris, to which we will return below.

In view of this, one can probably consider that the decolonisation of private international law at the global level is only taking its first steps. But these steps have been taken indeed and are part of a wider doctrinal movement involving other branches of law, in particular comparative law. This is the reason why we found it sound to study the way in which French private internationalists could contribute to this movement in an innovative way. This question is addressed in the next section.

II - Decolonising private international law in France

This section presents the main arguments of a Ph. D. thesis defended in May 2022(49) to take it as a starting point to set out possible lines of thought for the development of a decolonial approach to private international law "*à la française*". In this respect, it should of course be pointed out that the existing French international private literature that could usefully contribute to this current of thought is not limited to the above-mentioned thesis.(50) Moreover, the thesis itself is largely based on foreign international-private literature (English, German, American, Canadian, and Belgian, in particular) and is interdisciplinary, as it involves branches of law other than private international law, and borrows several reflections from social sciences. All this literature could of course prove extremely valuable in decolonising private international law in France. Finally, insofar as the thesis focuses on the principle of secularism, it constitutes a limited starting point because it considers only one element of the Western worldviews reflected by state law, among many others.

Thus, after a summary of the Ph. D. dissertation focusing on its decolonial aspect (A), this section identifies its lessons for the French decolonisation of private international law (B).

A - starting point: the French Ph. D. thesis entitled "The Conflict of Laws and Non-secular Worldviews: A Proposal for Inclusion".

To best summarise the thesis while focusing on the objective of decolonising private international law, it seems appropriate to distinguish the theoretical and methodological framework that underpins it (1) from the research results to which it has led (2).

1. Theoretical and methodological framework: a revision of private international law in favour of non-Western worldviews, via a case study

The thesis presented here aimed to revisit the conventional theory of private international law to make it more inclusive of non-Western worldviews which appear vulnerable because they reflect, or on the contrary are subject to, non-secular normativities (indigenous or religious) which Wester state law has difficulty in making sense of. These non-secular normativities cannot be understood based on one of the modern premises on which the law of contemporary Western democracies is largely based, that is the principle of secularism. This principle not only asserts that law is separate from religion, but also that law and religion constitute independent social spheres in relation to other social spheres such as politics, economics, ecology or medicine, for example.(51) It also reflects a Western way of seeing the world(52) and more specifically what Paul Valadier has called the "Christian anomaly", i.e. the distinction in Christianity between the State and the Church, between politics and religion - a distinction which, apart from being hypocritical according to the author,(53) does not suit other religions, such as Islam.(54)

The thesis uses a pragmatic approach, in reference to the Brussels School's approach to law,(55) which is close to the New Legal Realism movement.(56) According to the pragmatic approach, legal theory should be rethought by working backwards from case studies. Its aim is to "give these cases a chance" to be understood and then theorised beyond the theoretical structures and narratives that already exist. The pragmatic approach makes it possible to look at theory afresh, or in a different light, and to adapt it accordingly. To do this, cases need to be examined through a critical and interdisciplinary prism, to take account of the specific complexities of each dispute. In this respect, it should be emphasised that the cases studied in the thesis have intentionally been chosen to cover distinct instances in which the non-secular normativity involved includes a definition of religion that is like that of the law. Moreover, these cases mobilise branches of law beyond the classic issues of private international law, such as arbitration law and equality law, or the constitutional principle of freedom of religion.

Thus, the thesis comprises two main stages; the first consists of an analysis of three cases brought before the Western courts,(57) to show that the latter, confined to secular legal reasoning, make a decision based on a reasoning that seems disconnected from the case, in view of the failure to take into account or the inadequate apprehension of the non-secular concepts at the heart of the dispute - namely religious arbitration, sacred land and faith-based politics. In line with the requirements of decolonial legal theory, this stage involves moving away from the paradigms of legal monism and universalism, to consider the conflict from the point of view of legal pluralism (in the radical sense of the term(58)) and adopting what can be described as a "culturalist" approach to law. This implies that, on the one hand, the state law applicable to the case in question is placed on an equal footing with the non-secular normativity concerned, as if two state laws were involved. On the other hand, the state and non-state norms concerned are related to the worldviews in which they take on their meaning.(59) In this way, state law is "de-universalised" and the underlying conflict between concerned worldviews, reflected by state law and the non-state normativity at stake, becomes visible (whereas it is not in the legal reasoning followed by the courts).(60)

The second stage of the research consists in identifying and revisiting the theorisation of a pillar of private international law for which the case study concerned appears relevant. The aim of this revision is to better represent non-Western modes of existence in the discipline, in line with the decolonial objective explained in the previous section. Although its intellectual style makes it a legal tool enabling state law to recognise otherness, i.e., to recognise another law as its equal while granting it a presumption of difference, the fact remains that, in the Western context of modernity, private international law is only associated with the "foreign", representing otherness, to the extent that it refers to elements of the dispute belonging to another state. It also presupposes that the 'foreigner' has a cultural framework that is to some extent similar to that of the forum. This is certainly a vestige of the nineteenth-century conception of the legal world at large as composed of a concert of European nations, supported by a community of Christian and Roman laws - illustrated in the great work of the founding father of the discipline, Carl von Savigny. Thus, while the tools of private international law undoubtedly allow for a broadening of national perspectives and an extension of legal categories, they leave little room for an adequate treatment of the conflicts of worldviews at work in the cases studied in the thesis. It, therefore, seems appropriate to use these conflicts to review the conventional theorisation of private international law.

2. Research Findings: rethinking party autonomy, recognition and international jurisdiction

To carry out the first stage of the research described above, the thesis presents and analyses the three cases, to identify the conflict of worldviews at play in them - a conflict which cannot be dealt with through conventional legal categories. In this respect, it should be emphasised that it is not so much the decision taken by the judge in these cases, in favour of one party or the other, that is analysed, but the reasoning followed to reach it. Indeed, it is primarily in this respect that the decision itself appears disconnected from the primary issue in the dispute.

We can summarise the three cases, and the conflicting worldviews they contain, as follows:

(i) First, *Jivraj v Hashwani* ([2011] UKSC 40 - hereinafter, *Jivraj*) concerns religious arbitration in the UK, and more specifically Ismaili arbitration, where the relevant national law is applied in priority to, and supplemented by, Islam. (61) The case involved two powerful Ismaili businessmen, domiciled in the UK, who disagreed over the validity of an Ismaili arbitration clause. One of the parties, Mr Hashwani, challenged the validity of the requirement that all the arbitrators be Ismailis, in order to be able to impose on the other party a mixed tribunal, made up of Ismaili arbitrators and non-Ismaili lawyers, specialised in UK law but familiar with the "Ismaili ethos" of dispute resolution, which aims not only to satisfy the personal interests of the parties, but also to guarantee peace within the religious community as a whole. In this respect, although it was not part of the facts considered by the UK courts, it should be noted that Mr Hashwani, in view of the previous Ismaili mediation proceedings between the parties, apparently n° longer had confidence in the impartiality of a "pure" Ismaili arbitral tribunal, as far as the case in question was concerned. (62) He, therefore, proposed a renowned English lawyer of Jewish faith (it being understood that the Jewish ethos and the Ismaili ethos are similar) to make up the tribunal with two Ismaili. This was refused by Mr Jivraj, without any reaction from the Ismaili authorities overseeing the Ismaili arbitration system (and determining, in particular, the identity of the possible arbitrators). As a result, Mr Hashwani (probably angry with the Ismaili authorities and his opponent) sought to have religious arbitration prohibited before the state courts, based on the prohibition of religious discrimination at hiring. The UK Supreme Court rejected the claim by stating arbitrators are not employees and by restricting the scope of UK employment-equality law to employment contracts (thus excluding self-employed persons) - a view criticised by the employment-equality literature. (63) However, the Court would not have had to take this step if it had limited itself to excluding Ismaili arbitrators from the protection provided by employment-equality law, given that the latter, unlike "secular" arbitrators, are not remunerated. In fact, their office reflects a way of expressing their faith and not of placing themselves solely at the service of the private interests of the parties.

As the analysis proposed in the thesis shows, this case confronts state law with a non-secular form of arbitration in which collective interests and the religious ethos are central, which is at odds with the Western legal conception of arbitration, reflecting materialistic and individualistic interests. This prevents the court from making sense of the specific features of Ismaili arbitration, which nevertheless explain Mr Hashwani's claim.

(ii) Secondly, *Ktunaxa v. British Columbia* (2017 SCC 54 - hereinafter, *Ktunaxa*) concerns the concept of indigenous sacred land. This Canadian case finds its origins in a public-private partnership project between the Province of British Columbia and the company Glacier to build an enormous ski resort on sacred Ktunaxa land, owned by British Columbia since the site was settled by the British Crown in the seventeenth century. The Ktunaxa opposed the project before Canadian courts, based on the constitutional protection of freedom of religion under Canadian law. However, the Supreme Court ruled that the Canadian constitutional protection of freedom of religion did not cover object of worship (i.e., here, the land), but only the belief and practice associated with it.

This case brings state law face to face with indigenous ontologies, which are based on a conception of the earth as a living being and a source of meaning for human life. This conception is difficult for state law to grasp, including under freedom of religion. The latter is based on a material understanding of the land, according to which the claim to a relationship with the land depends either on state sovereignty or on private property - an understanding which, moreover, unsurprisingly suits the colonial (Christian) religion, which worships a dematerialised God and was offered numerous sites in Canada to establish its institutions, during the first phase of colonisation.(64)

(iii) Finally, *SMUG v. Scott Lively* (254 F. Supp. 3d 262 (D. Mass. 2017); no. 17-1593 (1st Cir. 2018) - hereinafter, *SMUG*), concerns today's missionaries, i.e., American evangelists exporting their mission of conversion to the post-colonial states of the so-called *Global South*, in particular by lobbying state authorities. It is also an example of what is generally referred to as "transnational human rights litigation"(65) - a type of litigation that covers cases brought by human rights NGOs in one (often Western) state for offences committed in another (often non-Western) state where the relevant human rights standards are less protective or less applied in practice. This case is the result of a complaint brought before US courts by an American NGO and a Ugandan NGO, against the American evangelist Scott Lively, for having encouraged the persecution of homosexuality in Uganda, notably by promoting a new national law. The complaint was based on the famous *Alien Tort Statute* (28 U.S.C. § 1350), which allows US courts to try serious international crimes committed abroad, in certain limited circumstances. In this case, the US courts dismissed the NGOs' complaint based on the principle of the territorial jurisdiction of states and international comity. However, these concepts cannot account for evangelical "anti-gay" propaganda from the North to the South, such as that promoted by Scott Lively. In this kind of situation, the Westphalian idea of the division of the world between sovereign states, which underpins the rules of international jurisdiction, appears to be a fertile ground for the development of a series of unbalanced power relations, including between the Evangelicals of the North and the LGBT communities of the South, where states and their law are used by the former, to the detriment of the latter.

Here, unlike in the *Ktunaxa* case, the religious cosmology is not vulnerable, but makes the LGBT community in colonised countries, which are already fragile, vulnerable. State law, however, cannot consider this *tour de force*, as it separates the religious from the political (in line with the principle of secularism), whereas the evangelical perspective, which is essentially missionary,(66) combines the two.

To carry out the second stage of research, each of the conflicts of worldviews at play in the cases studied is related to the elements of the conventional theory of private international law that it particularly challenges. Thus, the thesis shows

that:

(i) The conflict of worldviews at stake in the *Jivraj* case relates to a plurality of meanings of the "choice" of arbitration, notably distinct in UK law and in the Ismaili religion. However, the legal concept of choice of arbitration, like that of choice of court and choice of law, is based on the principle of party autonomy, which appears to be ill-equipped to account for more collective visions of arbitration (such as that of Ismaili arbitration). Indeed, the principle of party autonomy reflects the view that, in the context of each contract concluded, the parties ask themselves whether arbitration should be chosen instead of state courts because it would better serve their interests. On the contrary, as a matter of principle (although there may be exceptions), Ismailis are, by virtue of their faith, members of the Ismaili community, which advocates the settlement of disputes between Ismailis in accordance with the Ismaili ethos of safeguarding peace in the community as a whole, by arbitrators who are also members of the community and who also have an interest in safeguarding it;

(ii) The claim at the origin of the *Ktunaxa* case reflects a general demand for recognition of indigenous ontologies, which cannot be limited to the granting of special (indigenous) rights but requires a hybridisation of state law as a whole, including the definition of religion, so as to include indigenous ontologies, and in particular their relationship to land, which is alien to the right of private property. In this regard, the thesis considers that private property is a concept dear to Western law and certainly included in its conception of public order. On that basis, it argues that the *Ktunaxa* case provides an opportunity to take a new, de-universalising look at the private international law concept of recognition of foreign judgments and situations, including the concept of public order that may limit it;

(iii) The issue brought before the US courts in the *SMUG* case involves unbalanced power relations between non-state actors in a transnational context, which are based on the map of state jurisdictions: transnational actors located in Western states such as multinationals and religious missionaries develop strategies around this map, while vulnerable post-colonial communities are subject to it - a situation that human rights NGOs try to counterbalance, in particular through transnational human rights litigation. In this context, the re-theorisation of international jurisdiction law appears crucial, particularly regarding the practice of forum shopping, which can be used by illiberal or economically over-powerful transnational actors as well as by human rights NGOs.

After identifying the relevant issues in private international law, the Ph. D. dissertation advocates for an alternative theorisation that is more inclusive of non-Western cosmologies. To this end, the thesis examines existing alternative conceptualisations, either in the literature or in the case law, which could be placed at the service of the decolonisation of private international law. On this basis, it proposes ways of hybridising the discipline. Thus:

(i) based on a combination of H. Dagan and S. Peari's theory of party autonomy as self-determination (67) and T. Fisher's multiculturalist conception of normative affiliation. (68)It argues that further research should be directed towards a more politically engaged approach to party autonomy as a ground for choice of court and law, which would require considering the reasons for this choice;

(ii) following C. Gonzalo Sozzo's argument regarding the "ecological rule of law" ("*Etat de droit écologique*"), (69) as well as N. Belaidi's conceptualisation of an "ecological public order" ("*ordre public écologique*") (70) in public international law, it argues that the widespread legal recognition of indigenous ontologies may be possible, including in European states, through a re-conceptualisation of the notion of public order;

(iii) and finally, the thesis argues for the development of a theory of international jurisdiction that considers global well-

being(71) and intersectional discrimination,(72) opening the door to a case-by-case approach to forum shopping, which would aim for the political recognition(73) of vulnerable communities in post-colonial states.

B - For a decolonial approach to private international law "*à la française*"

Having regard to the doctoral work presented in the previous section, the article here proposes avenues for the decolonial study of private international law in France.

In this respect, it should first be reiterated that the proposals for re-theorising party autonomy, recognition and international jurisdiction, briefly mentioned above, are entirely preliminary, inviting researchers to study these proposals further.

Secondly, we argue that the doctoral research envisaged in this article is grounding because it shows the limits of the exercise of which it is the fruit. On the one hand, from an epistemological point of view, it generalises the conclusions of a few specific cases, faithful to the needs of modern law, which may conceptually clash with the decolonisation of law. The latter invites us to pluralise the production of legal knowledge so as to reflect several modes of existence, which probably calls for a case-by-case approach, connected to the specificities of each case. On the other hand, the objective of decolonising private international law seems to require not just the hybridisation of a few concepts, but a re-conception of 'foreign law' - that is to say, of "law" and "the foreign", as well as of the idea of "conflict" of laws. We propose here a few avenues for reflection in this respect but must add that pursuing these avenues would not be sufficient to decolonise private international law. This would require that it be associated with at least two other undertakings. Firstly, as already mentioned, it would have to be accompanied by substantive rules differentiated in favour of non-Western cosmologies - to compensate for the "power differential".(74) Secondly, decolonising private international law involves a methodological dimension,(75) i.e., the need to combine legal and non-legal (and perhaps especially anthropological (76)), Western and non-Western, knowledge. In this respect, collective interdisciplinary and intercontinental research can become the source of incomparable intellectual wealth. Furthermore, the decolonial study of private international law in the future could certainly develop better if it were taught in private international law courses at university. This would not mean abandoning the conventional teaching of the discipline but adding to it the teaching of additional perspectives critical of conventional private international law, and of the ways in which the field might evolve to meet those criticisms.

Having said that, we can now focus on the notions of "law", "foreign" and "conflict" and state how they should be revisited to decolonise private international law. With regard first to the notion of "law", it is our contention that the doctoral work described earlier calls for a conception of it that is both broader and more plural, in cases where the French judge must apply the law of post-colonial states.(77) In such states, state law coexists with non-Western normativities, which are also sources of law, in accordance with the paradigm of legal pluralism (though often only in the weak sense of the term).(78) Thus, the French judge may apply these normativities as foreign law because the postcolonial legal system dictates it. In this respect, we argue that the inclusion of non-Western normativities in Western state law requires questioning the characteristics of law that are traditionally considered fundamental by Western jurists, and in particular the fixity of legal rules in time and space, as well as their abstract, general, and written character. Otherwise, even in cases where the French judge recognises colonised normativities as applicable, the French judge largely adapts these colonised normativities to the state, Western, definition of law, which may appear to be a form of reproduction of colonisation - at least if it is not thought of as such, since it is undoubtedly, to a certain extent, inevitable.(79)

For example, if we take the cases studied in the Ph. D. dissertation, it may be difficult for a Western legal mind to think that the law could move away from the idea of having rules and exceptions and instead follow a case-by-case approach,

where the subjectivities of the parties would be granted a high level of legality. Yet, this is what the inclusion of minority identities of post-colonial states might require, not least because it would demand a casuistic assessment of the merits of transnational strategic disputes. Moreover, it may seem impossible for a Western jurist to accept that certain plural and evolving "rules" must remain oral to remain what they are, so that they could not be fixed once and for all by written law or written judgement. However, this is probably necessary to recognise indigenous ontologies without fundamentally distorting them.(80)

Turning now to the notion of "the foreign", we contend that the decolonial approach to private international law suggests using private international law not only in transnational disputes(81) but also in contexts where the French judge is faced with a claim, by at least one of the parties, to belong to a "normative community"(82) other than the state, in accordance with the paradigm of legal pluralism. In this respect, the work of authors such as P. S. Berman(83) G. Teubner(84) and H. Muir Watt(85) provides a solid foundation for future research, which should undoubtedly aim to identify the concrete legislative changes needed to implement the models conceptualised by these authors(86). This type of literature may seem dizzying, particularly as it involves rethinking the function of state law.(87) Indeed, it may be complicated for a French jurist to imagine that a society could function without a firm centralisation of normative power. However, this possibility must be left open to accept that certain normative communities, such as the Ismailis for example, choose to include their national legal identities in their religious system, which would be their normative community by default - and not the other way round. This type of assertion can certainly be driven by the political conviction that, in contemporary Western societies, which are in fact multicultural (largely under the historical influence of the colonisation process!), the best way of *vivre ensemble* is not to fight against difference but rather to allow it to exist, in the hope that the intention is or becomes reciprocal. In any case, this is also a way of adopting the decolonial concept of pluriversalism. It may also be a wonderful opportunity for human society, which could find itself more influenced by non-Western cosmologies, sometimes more conducive to living in symbiosis with nature (as is the case with indigenous ontologies), which is undoubtedly what the fight against climate change requires.

Finally, with regard to the notion of "conflict" - which is less visible in the term "private international law" than in that of "conflict of laws", although just as valid(88) - it seems to us that a step needs to be added to the legal reasoning, which would reflect a questioning of the modern legal definition of conflict, according to which state law would be a neutral instrument for resolving conflicts between various actors. Indeed, the doctoral case study presented in this article shows that state law can constitute an element participating in the conflict, depending in particular on the more or less conflictual relationship between the state and non-state normativities at work. Thus :

(i) The dispute in the *Jivraj* case arose because one of the parties dissociated herself from the Ismaili community in a given case, by seeking the constitution of a hybrid and not purely Ismaili arbitral tribunal. In this context, state law is placed in the position of arbitrating a conflict that belongs to a non-state normative community, but which is part of the society that state law claims to regulate, and which, on its side, is committed to respect the relevant national rules. This constitutes a situation of harmonious coexistence between the state and non-state normativities concerned, where state law shares the function of social normativity with the Ismailis on an equal footing with the Ismaili religion.

(ii) In the *Ktunaxa* case, the relationship between state law and non-state normativity, i.e., indigenous ontologies, is more conflictual. Many indigenous peoples do not recognise the primacy of state law (or are in any case forced to do so, against their will), while the state authorities largely consider that state law prevails over indigenous ontologies (although less and less so, under the influence of the United Nations Declaration on the Rights of Indigenous Peoples(89)). At the same time, the particularity of this case is that it concerned the relationship between indigenous peoples and state authorities. In this respect, state law appears as a participant in the conflict, i.e., as an element on the side of one of the parties to the

conflict, namely the state authorities.

(iii) Finally, in the *SMUG* case, the state courts were asked to consider and act on the power relationships established between non-state normative authorities (i.e., Evangelicals, Western NGOs, and non-Western LGBT NGOs and communities), in relation to which state law appears as a backdrop more or less instrumentalised by the various protagonists, depending on their possibilities. The US courts were also asked to consider the fact that these balances of power are articulated in a post-colonial transnational context of North-South relations, characterised precisely not by equality between Western and African states (as is assumed under international law), but (notably financial) dependence of the latter on the former.

In view of these different positions of state law in relation to the dispute, we argue for the decolonisation of legal reasoning in general, which might require that, in each situation under consideration, the courts (and, outside the litigation context, the lawmakers, researchers and lecturers) identify the position of state law in relation to the parties involved and to the state and non-state normativities concerned. On that basis, a distinct role should be assigned to state law, and the attitude of the courts in applying this law (as well as that of the legislator in drafting it and that of the lecturer in dispensing it) should be adapted accordingly.

Conclusion

We have attempted here to describe the broad outlines of what could be the decolonisation movement of private international law in France - hoping, of course, that it will be much more varied than what has been proposed here and that it will generate contestation and dialogue.

As we wish to end this article by returning to its main points, we must insist on the interest for French international private scholars to engage in the decolonial study of private international law: on the one hand, this would enable the French academic world to participate in a wider intellectual phenomenon, which affects not only other branches of law but also other social sciences. On the other hand, France could be a pioneer in the field, since the decolonisation of private international law, at international level and in Europe, is still in its infancy.

The decolonisation of private international law certainly requires a certain amount of political will, as well as an intellectual effort that is as exciting as it is daunting because it is not based on familiar foundations. It demands rethinking such fundamental concepts as "law", "the foreign" and "conflict". Yet, this decolonial enterprise could appear necessary even to those who are not focused on the issue of decolonisation: as the voices of the colonised would n° longer be (so) silenced, everyone could listen to them and realise that they need them to escape from the legal and economic certainties associated with modernity - an undertaking that may be necessary to enable future generations to live (well).

Mots clés :
GENERALITES * Version anglaise * Théorie * Décolonisation

(1) See, for example: E.W. Said, *Orientalism*, Routledge & Kegan Paul Ltd, 1978; G. C. Spivak, *Can the Subaltern Speak?*, Macmillan, 1988.

(2) For a description of the differences and commonalities between postcolonial and decolonial approaches, see e.g. G. K. Bamhbra, 'Postcolonial and decolonial dialogue', 17 Postcolonial Studies 2014. 115.

(3) W. Mignolo, "Delinking", 21 Cultural Studies 2007. 449. See also below (I.A.1).

(4) This expression covers situations where the European colonial authorities have recognised the independence of the indigenous authorities (i.e., post-colonial states in the strict sense); Western states in which the European colonial authorities have settled permanently (i.e., settler states such as Canada, the USA, Australia and New Zealand); and European states associated with the colonial enterprise, typically France, Belgium, Germany, the United Kingdom, Portugal and Spain.

(5) The term "indigenous ontologies" is generally used because it is the name chosen by most Indigenous Peoples to convey the idea that their worldview gives meaning to their existence - and that when these ontologies are not respected, their lives lose meaning; they "cease to be" (see J. Lear, *Radical Hope: Ethics in the Face of Cultural Devastation*, Harvard University Press, 2006).

(6) R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl*, Edward Elgar, 2018.

(7) It should be noted that the studies to which we refer here are limited to English and French sources, although many additional sources exist, especially in Spanish and Portuguese.

(8) V. H. Muir-Watt, Discourse on the Methods of Private International Law (Legal Forms of Inter-Alterity), *RCADI*, t. 389, 2018. See also K. Knop, R. Michaels and A. Riles, "From Multiculturalism to Technique: Feminism, Culture and the Conflict of Law Style", 64 Stanford Law Review 2012. 589.

(9) S. Brachotte, *The Conflict of Laws and Non-secular Worldviews: A Proposal for Inclusion,* dir. H. Muir Watt, Ecole de droit de Sciences Po Paris, 2022.

(10) C. Taylor, *A Secular Age*, Harvard University Press, 2007.

(11) The reader might note that all these authors are male and that some of them (and particularly one of them, at present) may be in the throes of accusations of violence of various kinds, particularly against women. Their intellectual thinking can only be recognised as valid if we separate "the intellectual from the man", which is a controversial approach. In this respect, this thinking is used here, not because we agree with this separation, but because it is accessible in the international academic world, in English or French. In the future, we will devote ourselves to researching and studying authors whose personal lives reflect not only a decolonial approach, but also a feminist approach that is generally respectful and inclusive of vulnerable identities.

(12) W. Mignolo, "Foreword, On Pluriversality and Multipolarity*", in* B. Reiter, *Constructing the Pluriverse. The*

Geopolitics of Knowledge, Duke University Press 2018, p. ix.

(13) W. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking*, Princeton University Press, 2012.

(14) W. Mignolo and C. Walsh, *On Decoloniality: Concepts, Analytics, Praxis*, Duke University Press, 2018 (see introduction).

(15) See e.g. B. De Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide*, Routledge, 2014; E. Dussel, "Pour un dialogue mondial entre traditions philosophiques", 62 Cahiers des Amériques latines 2009. 111; Z. Ali and S. Daran-Herzbrun, "Présentation", 48 Tumultes 2017. 5, spec. p. 6-7; R. Grosfoguel, "The Epistemic Decolonial Turn", 21 Cultural Studies 2007. 211, spec. p. 212.

(16) W. Mignolo, "Foreword. On Pluriversality and Multipolarity", op. cit., p. x.

(17) A phenomenon sometimes referred to as "epistemic oppression" - see e.g. L. Posholi, "Epistemic Decolonization as Overcoming the Hermeneutical Injustice of Eurocentrism", 49 Philosophical Papers 2020. 279.

(18) Expression inspired by G. Anzaldùa, *Borderlands/La Frontera: The New Mestiza*, Spinsters/Aunt Lute, 1987.

(19) See note no. 2.

(20) V. Walter MIGNOLO, "Delinking", op. cit.

(21) See note no. 4.

(22) For a general overview, see e.g. B. De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press 2012; see also R. Dunford, "Toward a Decolonial Global Ethics", 13 Journal of Global Ethics 2017. 380.

(23) A. Schiavone, *The Invention of Law in the West*, Belknap Press, 2012.

(24) L. Fuller, *The Morality of Law*, Yale University Press, 1964.

(25) See in this respect the work of the great figures of natural law, such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

(26) See R. Michaels, "The Restatement of Non-state Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism", 51 The Wayne Law Review 2007. 1209.

(27) See e.g. P. S. Berman (ed), *The Oxford Handbook of Global Legal Pluralism*, Oxford University Press 2020; see also N. Roughan and A. Halpin (eds), *In pursuit of pluralist jurisprudence,* Cambridge University Press 2017.

(28) B. De Sousa Santos, "Law: A Map of Misreading, toward a Postmodern Conception of Law", 14 Journal of Law and Society 1987. 279, spec. p. 298.

(29) For an overview of the characteristics of state law according to the modern theorisation, see e.g. L. Fuller, *The Morality of Law*, op. cit.

(30) P. Schlag, *The Enchantment of Reason*, Duke University Press, 1998.

(31) E. Balibar, *Des Universels. Essays and Lectures*, Editions Galilée, 2016.

(32) Universalism is more precisely described by I. Berlin, as follows: 'the central core of the intellectual tradition in the West has, since Plato (or it may be Pythagoras), rested upon three unquestioned dogmas: (a) that to all genuine questions there is one true answer and one only, all others being deviations from the truth and therefore false ... (b) that the true answers to such questions are in principle knowable; (c) that these true answers cannot clash with one another, for one true proposition cannot be incompatible with another; that together these answers must form a harmonious whole' (I. Berlin, *The Apotheosis of the Romantic Will: The Revolt against the Myth of an Ideal World*, Princeton University Press, 2013).

(33) As far as possible - cf. E.W. Said, *Orientalism*, op. cit.; see also T. Ruskola, *Legal Orientalism. China, the United States, and Modern Law*, Harvard University Press, 2013.

(34) About teaching, see e.g. K. B. Motshabi, "Decolonising the University: A Law Perspective", 40 Strategic Review for Southern Africa 2018. 10; about research, see e.g. T. B. Mosaka, "A decolonial legal method", 138 South African Law Journal 2021. 761. As far as the production of state law is concerned, it seems necessary at the very least to ensure the representation of non-Western cosmologies in decision-making processes.

(35) See e.g. M. Al Attar and S. Abdelkarim, "Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought", 34 Law Critique 2023. 41; V. Nesiah, "Placing International Law: White Spaces on a Map" 16 Leiden Journal of International Law 2003. 1; T. C. Squeff, "Overcoming the 'Coloniality of Doing' in International Law: Soft Law as a Decolonial Tool" 17 Revista Dereito GV 2021. 1. In France, see A. Geslin et E. Tourme-Jouannet (eds.), *Le droit international de la reconnaissance, un instrument de décolonisation et de refondation du droit international ?*, DICE, 2019.

(36) See e.g. R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl*, op. cit.; J-M. Barreto, "Decolonial Thinking and the Quest for Decolonising Human Rights", 46 Asian Journal of Social Science 2018. 484; A. Becker, 'Decolonial human rights education: changing the terms and content of conversations on human rights', Human Rights Education Review 2021; T. C. Squeff, "Decolonialism as Theoretical Matrix for the Human Rights Foundation", 1 Latin American Human Rights Studies 2021. 1.

(37) See e.g. G. Parola, L. Ribeiro Fernandes Moreira da Costa, and M. P. Poto, "Is a decolonial law possible? Epistemologies of the South and constitutional law", 69 Curitiba 2022. 655; R. Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America', 31 Leiden Journal of International Law 2018. 773; C. A. Baldi, 'From Modern Constitutionalism to New Latin American Decolonial Constitutionalism' 23 The CLR James Journal 2017. 307.

(38) See the official website (https://www.mpipriv.de/decolonial), and the publication explaining the project (R. Michaels and L. Salaymeh, "Decolonial Comparative Law: A Conceptual Beginning", 86 RabelsZ 2022. 166). See also, among others, R. Merino, *Comparative Law from Below: The construction of a critical project in Comparative Legal Studies*, Lambert, 2012; S. Munshi, 'Comparative Law and Decolonizing Critique' 65 The American Journal of Comparative Law 2017. 207.

(39) For example, the "Private International Law Festival" organised in May 2022 at the University of Edinburgh by Veronica Ruiz Abu-Nigm, with the collaboration of the Max Planck Institute for Comparative and Private International Law (Hamburg), included a panel entitled "Decolonising Private International Law", integrated into a wide range of presentations offering both traditional and new approaches to the discipline (see the conference report by M. Cremer and S. Zeh on the "Conflict of Laws" website: https://conflictoflaws.net/2022/conference -report-private-international-law-festival-2022-edinburgh/).

(40) See, for example, H. Muir Watt, *Law's Ultimate Frontier: Towards an Ecological Jurisprudence. A Global Horizon in Private International Law*, Hart Publishing 2023; see also R. Banu, "Teaching by historicising private international law", 18 International Journal of Law in Context 2022, 383.

(41) For the distinction between *settler states* and post-colonial states in the strict sense, see note 4.

(42) See, for example, a description of Egyptian private international law, which is partly based on religious affiliation: M.

S. Berger, "Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor", 50 The American Journal of Comparative Law 2002. 555. See also the differentiated application of private international law to Indigenous Peoples or indigenous individuals in Canada (*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani Utenam)* 2020 SCC 4) and Australia (*Love v. Commonwealth* [2020] HCA 3).

(43) See mainly N. Roughan, "Plurality of Laws and Conflict of Laws", *in* R. Michaels, R. Banu, and M. Green, (eds), *Philosophical Foundations of Conflict of Laws*, Oxford University Press, 2023 (forthcoming). Comp. M. J. Ochoa Jimenèz, "Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character, and Its Potentialities", 8 Critical Analysis of Law 2012. 87.

(44) See note 39.

(45) Pending a forthcoming article, part of this discussion is detailed in R. Banu, "Teaching by historicising private international law", op. cit.

(46) Forthcoming.

(47) More specifically, the author studies the evolution of private international marriage law in three stages: nineteenth-century laws between metropolises and colonies; the drafting of the 1902 Hague Convention on Marriage; and the drafting of the 1962 United Nations Convention on Marriage. She shows that the drafting of the 1962 Convention represents a transition to a universalist international intervention aimed at modifying the norms of marriage in the colonies, whereas the two previous instruments respected the legal duality of the metropolis and the colony in this respect. She also shows how this transition is linked to changes in colonial economic relations.

(48) See also the "interculturalist" paradigm of private international law envisaged by V. Ruiz Abou-Nigm (V. Ruiz Abou-Nigm, "Bridging and Balancing: Diversity and Integration in Private International Law", *in* V. Ruiz Abou-Nigm and M. B. Noodt Taquela (eds), *Diversity and Integration in Private International Law*, Edinburgh University Press, 2019. 362 ; see also V. Ruiz Abou-Nigm and R. Michaels, "Private International Law for Everyone", *in* L. Carballo and X. Kramer (eds), *Research Methodologies in Private International Law*, Edward Elgar, 2023 (forthcoming). This paradigm combines the decolonial approach with the critical work of Horatia Muir Watt, Paul Schiff Berman, Karen Knop, Ralf Michaels, and Annelise Riles.

(49) S. Brachotte, *The Conflict of Laws and Non-secular Worldviews: A Proposal for Inclusion,* op. cit. Although written in English, this thesis was defended in French and English at Sciences Po Law School (Paris) and therefore belongs to French research in private international law. As noted earlier, it is also identified in the English-speaking academic world of private international law as reflecting a decolonial approach to the discipline.

(50) Horatia Muir Watt's latest book, which links private international law to ecology, should probably be the founding text (see H. Muir Watt, *Law's Ultimate Frontier: Towards an Ecological Jurisprudence*, op. cit.). In addition, among the theses recently defended in France which seem to reflect the same effort to decentre modern legal theory by offering an alternative perspective on secularism, one may consider: L. Varaine. *La religion du contractant*, LGDJ, Paris, 2019, pref. J.-B. Seube; S. Ramaciotti, *Laïcité et droit privé*, LGDJ, Paris, 2022, pref. L. Gannagé. Moreover, the question of the decolonisation of law from an epistemological point of view has been addressed in a French work that seems promising (even if it refers to postcolonial studies, and not decolonial theory): A. Geslin, C. M. Herrera, et M.-C. Ponthoreau, *Postcolonisalisme et droit; perspectives épistémologiques*, Kimé, 2020.

(51) C. Taylor, *A Secular Age*, op. cit. p. 2.

(52) T. Asad, *Geneaologies of Religion. Discipline and Reasons of Power in Christianity and Islam*, John Hopkins University Press, 1993, spec. p. 27.

(53) P. Valadier, *Détresse du politique, force du religieux*. Seuil, 2007, spec. p. 162-163.

(54) Ibid, spec. p. 132.

(55) For a recent general description, see B. Frydman and G. Lewkowicz (eds), *Le droit selon l'Ecole de Bruxelles*, EUB, 2021.

(56) For a recent overview of this movement, see S. Talesh, E. Mertzand and H. Klug (eds), *Research Handbook on Modern Legal Realism*, Edward Elgar Publishing, 2021.

(57) Furthermore, the Western national courts involved in the cases studied are common law courts. This choice is justified by the official role of state courts within these systems in the production of state law (see D. Fennelly, 'Thinking by Case: A Common Law Perspective', 73 Revue interdisciplinaire d'études juridiques 2014. 155).

(58) J. Griffiths, "What is legal pluralism?", 88 Journal of Legal Pluralism and Unofficial Law 1986. 1. Whereas "weak" legal pluralism means that non-state norms become law only because the state so decides (see above, note 27), in its radical version it assumes the existence of a plurality of autonomous state and non-state normativities, which are "law", whether the state so decides or not.

(59) Beyond decolonial studies, this postulate is based on the following literature: W. Connolly, *Why I Am Not a Secularist*, University of Minnesota Press, 2000; B. Latour, *Enquête sur les modes d'existence : Une anthropologie des Modernes*, La Découverte, 2012 ; I. Stengers, *Reactivating Common Sense. Lecture de Whitehead en temps de débâcle*, La Découverte, 2020; P. Descola, *La composition des mondes. Entretiens avec Pierre Charbonnier*, Flammarion, 2014;

R. Cover, 'The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative', Harvard Law Review 1983-1984. 4; M. Foucault, *Les mots et les choses*, Editions Gallimard, 1966.

(60) In this respect, one may note that the analysis proposed here consists of applying the "intellectual style" (K. Knop, R. Michaels and A. Riles, "From Multiculturalism to Technique: Feminism, Culture and the Conflict of Law Style", op. cit.) of private international law to the cases studied, thus demonstrating the ability of this branch of law to make sense of certain "claims of otherness" better than other branches of law (including human rights). The private international law approach invariably recognises, as a starting point to the reasoning, foreign law as the equal of national law, while acknowledging that the definitions and categories of foreign law may differ from those of national law and that the rules of foreign law must therefore be interpreted in the light of the foreign legal framework. Therefore, the intellectual style of private international law has been envisaged as the methodological counterpart not only of legal pluralism (D. Boden, "Le pluralisme juridique en droit international privé", 49 Arch. phil. droit 2005. 275) but also of cultural legal studies (A. Riles, "Cultural Conflicts", 71 Law and Contemporary Problems 2008. 273).

(61) More specifically, in family matters, according to Article 15 of the Ismaili Constitution (drafted by the Aga Khan, who acts as the living Imam - see "The Ismaili Constitution", 1986, available on the online database of Ismaili norms: http://ismaili.net/Source/extra1.html), Islam applies only insofar as it does not conflict with the relevant national law. In commercial matters (like in the *Jivraj* case), only the relevant national law applies, but it is accompanied by consideration of the Ismaili ethos.

(62) As explained by his lawyer in an article (S. Zaiwalla, "Are Arbitrators Not Human? Are They from Mars? Why Should Arbitrators be a Separate Species?", 28 Journal of International Arbitration 2011. 273, spec. p. 276).

(63) See e.g., M. Connolly, "Jivraj v Hashwani" 113 Emp. L.B. 2013. 3; M. Freedland and N. Kountouris, "Employment equality and personal work relations - a critique of Jivraj v. Hashwani", 41 I.L.J. 2012. 56.

(64) See H. Kislowicz and S. Luk, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom", 88 The Supreme Court Law Review 2019. 205.

(65) B. Frydman and L. Hennebel, "Le contentieux transnational des droits de l'Homme : une analyse stratégique", 77 Rev. trim. dr. h. 2009. 73.

(66) See e.g., J. Fletcher, *Preaching to Convert: Evangelical Outreach and Performance Activism in a Secular Age,* The University of Michigan Press, 2013.

(67) H. Dagan et S. Peari, "Choice of Law Meets Private Law Theory", Oxford Legal Studies 2024 (forthcoming).

(68) T. Fisher, "Nomos Without Narrative", 9 Theoretical Inquiries in Law 2008. 473.

(69) C. Gonzalo Sozzo, "Towards an 'ecological state of law'? Les modèles de *buen vivir* et de *développement perdurable* des pays d'Amérique du Sud", 18 Revue Juridique de l'Environnement 2019. 8.

(70) N. Belaïdi, "Identité et perspectives d'un ordre public écologique", 68 Droit et Culture 201. 15.

(71) A. Guzman, "Choice of Law: New Foundations", 90 Georgetown Law Journal 2002. 883.

(72) K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", 1 University of Chicago Legal Forum 1989. 139.

(73) I. Isailovic, "La reconnaissance politique en droit transnational : les identités, les marginalisations et le droit international privé", *in* O. De Frouville, J. Matringe, H. Muir Watt, and E. Tourme-Jouannet, *Droit International et Reconnaissance*, Pédone, 2016.

(74) See above, I.A.1.

(75) See above, I.A.1.

(76) See our forthcoming contribution: S. Brachotte, "A French Private International Law Perspective on "Alterity": Horatia Muir Watt's *Discours sur les Méthodes du Droit International Privé*", *in* A. Margaria and L. Vetters (eds), *Leading Work in Law and Anthropology*, Routledge, 2023.

(77) Among the few existing and published cases, see Cass. civ. 1re, 4 november 2020, nº 19-18.281 (recognising the legality of the customs of Dahomey, until a state law was passed for the whole Benin in 2004, which replaced them in Beninese law). In neighbouring countries, see in Belgium, Trib. fam. Liège (div. Liège) (10th ch.) no. 18/522/B, 25 May 2018 (recognising the legality of a custom in force in Somalia, which is unwritten but validly celebrates marriages), and in the United Kingdom, *X v Secretary of State for the Home Department* [2021] EWHC 355 (Fam) (recognising the legality of Nigerian customary laws).

(78) See above, note 58. On configurations of legal pluralism in African countries, see e.g. B. A. Gebeye, "Legal pluralism in Africa", 49 The Journal of Legal Pluralism and Unofficial Law 2017. 228; O. Zenker and M. V. Hoenhe (eds), *The State and the Paradox of Customary Law in Africa*, Routledge, 2018.

(79) See A. Diala, "Legal Pluralism and the Future of Personal Family Laws in Africa", International Journal of Law, Policy and The Family 2021. 1, where the concept of "adaptive legal pluralism" is developed.

(80) Indigenous knowledge, which is indigenous 'law', relies heavily on narrative, personal experience, revelation and oral transmission from generation to generation (see e.g. M. Waters, *Indigenous Knowledge Production: Navigating Humanity Within a Western World,* Taylor and Francis, 2018).

(81) Disputes which involve elements linking them to several states (for example, when a commercial dispute arises concerning the performance in France of a contract between a Belgian company and a German company).

(82) P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, Cambridge University Press, 2012.

(83) P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, op. cit.

(84) G. Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalisation,* Oxford University Press, 2012.

(85) H. Muir Watt, *Discours sur les Méthodes de Droit International Privé (Des Formes Juridiques de l'Inter-Altérité)*, op. cit, Part III, p. 269 et seq.

(86) See also the work of Ralf Michaels (e.g. R. Michaels, "Global Legal Pluralism and Conflict of Laws", *in* P. S. Berman (ed.), *Oxford Handbook of Global Legal Pluralism*, Oxford University Press. 629).

(87) See F. Ost, *A quoi sert le droit ? Usages, fonctions, finalités*, Bruylant, 2016.

(88) And, some might think, just as unsatisfactory (see D. Boden, "Erga-": Contribution sémantique et lexicale à une étude unifiée des relations entre ordres juridiques, Rev. crit. DIP 2021. 5).

(89) UN Doc. A/RES/61/295, 13 september 2007.