

11 A French Private International Law Perspective on ‘Alterity’

Horatia Muir Watt’s *Discours sur les méthodes du droit international privé (Des formes juridiques de l’inter-altérité)*¹

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11.1 Introduction

What makes *Discours sur les méthodes du droit international privé (des formes juridiques de l’inter-altérité)* a (potential) leading work in law and anthropology is its ability to show that private international law (PIL) – also called the conflict of laws (CoL) – could intensify and enrich the dialogue between legal studies and the field of anthropology on the concept of alterity. According to its mainstream understanding, PIL is a branch of private law that applies when a legal relationship involves elements (e.g., the nationality or residence of one of the parties, the place of performance of a contract, or the place where a marriage was celebrated) attached to more than one state. From the perspective of the forum (i.e. the state in which the legal relationship is considered), it is said that if this relationship involves at least one foreign element, PIL rules must be applied. This does not necessarily lead to the forum having jurisdiction over the relationship, nor to the law of that forum being applied thereto. It is precisely the *raison d’être* of each state’s PIL rules to guide the forum in deciding which state has jurisdiction over this relationship and which state’s law is applicable. Thus, PIL is used by states to recognise the existence of a foreign state law, jurisdiction, judgment, or situation and to choose whether it should function as a substitute for the domestic equivalent. In short, it is the branch of state law that considers and deals with foreignness (*extranéité*).

In a ground-breaking move, Muir Watt’s work associates the PIL concept of foreignness with the notion of alterity (*altérité*).² It presents PIL as a ‘receptacle of ideas – formulated in legal terms in the form of theories, concepts, definitions, or tools – relating to foreignness, and consequently, metaphorically,

1 I would like to thank Ralf Michaels for his comments on a previous version of this chapter.

2 I translate ‘*altérité*’ as ‘alterity’ and not ‘otherness’ to avoid confusion between Muir Watt’s and the critical anthropological understandings of ‘alterity’, for in the latter case, ‘otherness’ has the same terminology as ‘othering’. But Muir Watt herself has sometimes translated ‘*altérité*’ as ‘otherness’ (see e.g., Muir Watt, 2020a).

to alterity' (Muir Watt, 2019: 33).³ What is foreign to the forum is thus considered as 'the other' (as opposed to 'the self', 'us', or 'we'). Muir Watt does not define alterity, but her use of the concept is inspired by its philosophical and psychoanalytical understandings. These posit, on the one hand, that 'the presence of the other requires the self to respond' (Begrich, 2018) and, on the other hand, that the other is present both within and beyond the self, especially to the extent that the self's view of the other shapes individual and collective identities (as they are claimed) – that is, self and other are relational (Winnicott, 1990; Taylor, 1994; Ricoeur, 2004 as cited in Muir Watt, 2019: 352). On that basis, Muir Watt first demonstrates the aesthetic, political, and ethical dimensions of various PIL methods, ranging from the most exclusive to the most open attitude towards alterity. Then, she advocates for the use of the most open method of PIL to address 'cultural identity claims'⁴ in contemporary Western societies and thus to pursue a better *vivre ensemble*. In this regard, Muir Watt argues that PIL methodology⁵ enables the recognition of the non-state normativities attached to cultural identity claims, and the fact that state law and non-state normativities (only) make sense in reference to a distinct cultural (here meaning epistemological) system (Muir Watt, 2019: 318 et seq.).⁶ Thus, PIL could become the interface of state law through which cultural identity claims are addressed. In this capacity, it could apply cultural values that, while remaining distinct from the corresponding values of domestic law, would coexist and hybridise with them.

The reader may note that this book dates back only to 2019, that it is a doctrinal legal work addressed to an audience of legal scholars (and even more specifically of PIL specialists), and that it does not especially rely on anthropological sources (but rather on sources from various disciplines). For these reasons, one could argue that the work does not chiefly belong to the law and anthropology literature. Yet it is argued here that this literature would benefit greatly from including it. The chapter shows that the technical legal meaning of 'alterity' provided by Muir Watt can be fruitfully compared with its anthropological counterpart, generally associated with 'othering'. Indeed, both notions have their own potentialities, which reflect their disciplines' distinct rationalities. It is therefore argued that their encounter could renew the dialogue between law and anthropology about alterity and its legal recognition.

In what follows, I will first present the leading work concerned (Section 11.2). I will then propose a description of the context from which this work

3 Free translation of '*réceptacle d'idées – formulées en termes juridiques sous la forme de théories, de concepts, de définitions ou d'outils – relatives à l'extranéité, et par voie de conséquence, métaphoriquement, à l'altérité*'.

4 Free translation of '*revendications d'identité culturelle*' (see below, Section 11.2.2).

5 Or 'intellectual style': see Knop et al., 2012.

6 In this respect, she notably builds on critical philosophical (about language) and comparative law works, including Derrida and Dufourmantelle, 1997; Legrand, 1997; and Frankenberg, 2019.

emerged, namely a large movement to re-politicise private international law (Section 11.3). After that, I will make an argument concerning the significance of the book for law and anthropology (Section 11.4), before offering some concluding thoughts (Section 11.5). I should make clear that I will be doing so as a European francophone legal scholar, interested but not trained in anthropology.

11.2 The work: private international law for a better *vivre ensemble*

Discours sur les méthodes offers a ground-breaking theorisation of PIL that was first taught as the general course of the Hague Academy of Private International Law's 2017 summer programme. One could say that the book does two main things. On the one hand, it shows the aesthetic, political, and ethical dimensions of the methods of PIL,⁷ ranging from the most exclusive to the most open attitude towards foreign (i.e. non-domestic) state legalities, understood as a form of alterity (11.2.1).⁸ On the other hand, *Discours sur les méthodes* advocates for state authorities' use of the most open methods of PIL to deal not only with conflicts between state laws, jurisdictions, and authority but also with conflicts between domestic state law (understood as a cultural product)⁹ and cultural identity claims (11.2.2).

11.2.1 PIL methods as aesthetic-political-ethical attitudes of the state towards alterity

Discours sur les méthodes categorises the methods of CoL depending on how hospitably they treat foreign state legal forms. Muir Watt draws a distinction between three categories of PIL methods. The first and last categories respectively concern closed and open versions of the unilateralist method of private international law, while the second category covers the bilateralist method.¹⁰ The unilateralist method, more widespread in the United States, requires the determination of both the jurisdiction of domestic courts and the scope of application of domestic law to cross-border situations. It can be closed, generally leading the courts of the forum to deny jurisdiction and to apply domestic

7 In her latest book, Muir Watt associates additional, non-legal dimensions with PIL methods and techniques, including epistemological, ontological, and economic aspects, to show the field's ability to change the way law addresses ecology (see Muir Watt, 2023).

8 This part of the book is touched upon in an English-language article called 'Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference' (Muir Watt, 2017; see also Muir Watt, 2020a).

9 In this regard, Muir Watt follows the argument of Riles (2008) that conflicts of law are first and foremost cultural conflicts.

10 For a description of these methods in the francophone literature, see Bureau and Muir Watt, 2021.

law when they grant jurisdiction, or open, in which case domestic courts will more easily grant jurisdiction and apply the relevant foreign standards. The bilateralist or multilateralist method, dominant in Europe, requires states to have PIL rules that identify a connecting factor (such as the nationality of the defendant or the place of performance of the contract) depending on which domestic or foreign courts will have jurisdiction and domestic or foreign law will apply.

As she envisages foreign state legal forms as metaphors of alterity, Muir Watt's account consists in saying that these three categories of methods respectively manifest an exclusion of alterity (closed version of unilateralism), a toleration of alterity (bilateralism), or hospitality towards alterity (open version of unilateralism). More precisely, Muir Watt associates a certain aesthetic dimension, a certain political standpoint, and a certain ethical position with each category, building on multidisciplinary sources.¹¹ To illustrate these standpoints, the author goes through in-depth case analyses. There is no space here to account for the case analyses, but it is possible to describe each standpoint a little further and illustrate them with a few PIL techniques.

According to Muir Watt's model, the first category, which concerns the closed versions of the unilateralist method, involves: (i) a hypertrophy of PIL techniques (aesthetic dimension), i.e. a proliferation of technical distinctions between legal concepts and an extreme formalism, which place the legal questions away from the issue at stake and make it appear very simple (even mathematical) when it is not; (ii) political isolationism; and (iii) an ethical attitude of mistrust vis-à-vis the foreign. Local interests of both the whole nation and national individuals and companies systematically prevail (Muir Watt, 2019: 69). With regard to that category, Muir Watt points to the recent generalisation of the presumption against extraterritoriality in US courts' interpretations of US statutes, and to the courts' tendency to propagate technical distinctions in their reading of the statutes that block any attempt to overcome this presumption.¹² According to this presumption, US law can only be applied to conduct that occurred on US territory, unless expressly and clearly stated otherwise by Congress.¹³

The second category, which reflects the bilateralist method: (i) mobilises the aesthetics of coherence and totality, which requires taming differences to better coordinate them; (ii) corresponds to the liberal political paradigm,

11 The construction of the grid, for instance, is inspired by Kennedy, 1976; Schlag, 2002; and Boden, 2005.

12 This is what the Supreme Court did in the famous *Kiobel* case, where it interpreted the Alien Tort Claim Act (28 USC. § 1350) in a restrictive way to deny jurisdiction for injuries committed abroad by defendants with strong links to the USA (including their seat or residence) (*Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013)).

13 See notably *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991), *Morrison v National Australian Bank Ltd*, 130 S Ct 2869, 2881 (2010), *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

which relies on the principle of universalism; and (iii) is associated with an ethical position of tolerance vis-à-vis the foreign. In this regard, European PIL exemplifies the idea, based on the work of Savigny (von Savigny, 1880), that all national laws shall be considered as equal to one another, and as sharing some common values that justify reciprocal recognition. In cases where the respective laws deviate drastically, the forum can use the technique of the public policy exception (Muir Watt, 2019: 192–195), according to which the provisions that are to apply based on the relevant PIL rules can be set aside only if their legal effects would be contrary to the forum's most fundamental values.¹⁴

The third category, visibly preferred by the author, covers the open versions of unilateralism, which: (i) aesthetically mirror a perspectivist approach as well as an accommodating attitude; (ii) correspond, from a political point of view, to the valuing of pluralism and the concept of interculturalism; and (iii) ethically speaking, display hospitable behaviour. In this respect, one technique stands out, i.e. the recognition of foreign situations (Muir Watt, 2019: 290 et seq.). Lately, in the European Union, the usual bilateral PIL reasoning has sometimes been replaced by recognition in the forum of situations acquired under foreign norms, as a way to respect human rights law¹⁵ as well as the EU freedom of circulation of people (Article 21 of the Treaty on the Functioning of the European Union). The most famous example thereof is probably the *Wagner* case,¹⁶ where the European Court of Human Rights (ECtHR) ruled that, according to the applicable PIL rules, the non-recognition in Luxembourg of a Peruvian judgment establishing a full adoption violated the adopted person's right to private life (Article 8 of the European Convention of Human Rights (ECHR)) and the principle of non-discrimination associated therewith (Article 14 ECHR), because it deprived this person of the benefit of the family ties created by such adoption.

11.2.2 PIL to deal with 'cultural identity claims' in Western states

Discours sur les méthodes ends with a proposal to use the most open methods of PIL (third category) for the management of cultural diversity in Western states, beyond conflicts of state laws – that is, to address what Muir Watt

14 See e.g., Article 26 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (EU Regulation Rome II), according to which 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum'. The reader may note that, paradoxically, the public policy exception is part of the bilateralist method but reflects its unilateralist dimension.

15 Especially Article 8 of the European Convention of Human Rights (which protects private life).

16 ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, 28 September 2007, no 76240/01.

calls ‘cultural identity claims’,¹⁷ while respecting their hybrid and fluid character.¹⁸ In doing so, Muir Watt proposes to consider that while cultural identity claims and domestic law may reflect conflicting epistemological assumptions, they still can coexist and hybridise with each other, just as national laws do – or rather as they should: it is hard to argue that Western national laws have truly incorporated non-Western standards since the colonial period; only the reverse has taken place. Adopting PIL reasoning, then, demands that state authorities consciously and explicitly link domestic legal rules to specific cultural preferences in their decision-making, so that state law no longer presents itself as objective and neutral towards all citizens.¹⁹ From this starting point, it becomes possible for these authorities to grant priority to other cultural preferences attached to cultural identity claims. In any case, PIL reasoning requires state authorities to justify their decision to stick to formal state law or to accommodate other cultural preferences. This way, the authority concerned can better clarify its decision to a wide range of citizens, since it must at least explain why state law or alternative cultural norms are applied to this or that dispute (Berman, 2012: 292).²⁰

In Muir Watt’s view, this is the way forward for contemporary Western democracies to deal with cultural diversity. In this regard, Muir Watt envisages the philosophical and psychoanalytic dimensions of alterity (mentioned in the introduction to this article) in a prescriptive way; they require the forum to take claims of cultural difference seriously, including for the purposes of peaceful coexistence and social cohesion.

11.3 The context: a movement to re-politicise private international law

Muir Watt’s *Discours sur les méthodes* reflects what can be identified as a movement to re-politicise PIL, which has been growing over the last decades. This movement can certainly be framed in various manners. Here, it is conceived broadly as covering both a methodological and a substantive dimension.

17 Free translation of ‘*revendications d’identité culturelle*’.

18 In this respect, Muir Watt argues in a Rilesian fashion (Riles, 2008) for the legal recognition of the complexity of cultural identities – as hybrid, fluid, and omnipresent. Her work reflects the assumptions that, first, people may claim multiple and various affiliations in an idiosyncratic way, adding this or that element to an imagined existing value scheme (or cultural referent); second, people may claim distinct affiliations and describe these affiliations differently over space, time, and situations; and third, cultural claims can be made in every domain, and are certainly carried out by state law itself.

19 This positioning reflects an identity-related vision of law (free translation of ‘*une vision identitaire du droit*’) (Muir Watt, 2019: 321 et seq.).

20 See below, no. 23. This is what Ralf Michaels has called PIL’s ‘ethics of responsivity’. Responsivity does not merely equate to deference, but it makes rejection justifiable (Michaels, 2019).

From a methodological point of view, *Discours sur les méthodes* insists on the potential not only of the PIL techniques that reflect the open version of unilateralism (such as the method of recognition), but also of the methodology of PIL more generally, to deal with cultural identity claims. In this respect, Muir Watt's account reflects the re-politicising work of Knop, Michaels and Riles (2012), who have shown (although not in these terms) that PIL's mode of reasoning can make better sense of cultural alterity than other branches of state law.²¹ They argue that PIL's lateral thinking requires acknowledging that each state law has its own cultural system referent within which this state's rules make sense and take their meaning. The PIL reasoning takes as its starting point that domestic and foreign system referents are relative: the system referent of the forum appears as one system referent among others, and the same applies to foreign norms (be they state or non-state norms) (Muir Watt, 2019: 376–379). Hence, the idea largely underlying state law that there could be any all-encompassing, neutral, and objective perspective from which to view the conflict is abandoned. Cultural identity claims can thus be seen as forms of alterity, which reflect a certain understanding of the world in the same way that domestic state law does. These claims can further be granted the status of sources of normativity to some citizens, which should sometimes be given priority over conflicting state legal rules.

From a substantive point of view, *Discours sur les méthodes* is part of the movement to re-politicise PIL insofar as it is based on the observation that the traditional theorisation of the field (largely dating back to the nineteenth century) has led to its disengagement from 'public' issues (see Muir Watt, 2011). Many authors want to re-engage the discipline with concerns of substantive justice (and sometimes of social justice). They seek to reconnect the field to other, 'public' branches of law with which it has repeatedly come into conflict in practice, typically human rights and development law (see e.g., Michaels, Ruiz Abou-Nigm, and van Loon 2021). They also want to make PIL evolve towards a better recognition of the cultural diversity of our contemporary world (Ruiz Abou-Nigm and Noodt Taquela, 2019). In this respect, it must be highlighted that while most PIL scholars argue for the reform of certain conflict rules – typically concerning the determination of the connecting factor (see e.g., John et al., 2020) – *Discours sur les méthodes* proposes a re-politicisation of PIL that requires a deep rethinking of legal theory. Not only does Muir Watt's model demand that state law recognise its cultural situatedness, but also that it depart from the classic paradigm of legal monism to embrace the paradigm of legal pluralism instead (understood from

21 This article has become part of another, broader movement, which consists of studying legal techniques in interdisciplinary ways. For an overview of this movement, with a focus on system theory and science and technology studies (STS), see Michaels and Riles, 2022; see also, notably, Pottage, 2014; Valverde, 2009. In the French literature, see Audren, 2022.

the perspective of state law²²).²³ According to the paradigm of legal monism, the world is divided among states that are invested with exclusive normative authority. Therefore, any alternative, non-state forms of prescriptivity are presumed to be subordinate to state law. They do not autonomously count as forms of legality. The foundation of their potential authority and enforceability before state courts lies in state law (including state-endorsed law²⁴). These forms of normative recognition are sometimes dubbed ‘weak’ versions of legal pluralism (Griffiths, 1986). Distinctively, Muir Watt’s *Discours sur les méthodes* involves a normative claim for legal pluralism in its ‘radical’ (Krisch, 2010) or ‘strong’ (Griffiths, 1986) versions. This claim relies on the argument that states must think of ways to acknowledge that they share their regulatory powers with other, non-state ‘normative communities’ (Berman, 2012) to which their citizens may claim to belong. This must include a reflection on the social-ordering function of state law.²⁵

Muir Watt’s proposal for the re-politicisation of private international law can therefore be seen (and largely is seen, in the PIL world) as critical and interdisciplinary. Among the other publications that explain this reputation, one can list the article ‘Private International Law beyond the Schism’ (Muir Watt, 2011).²⁶ Muir Watt’s critical and interdisciplinary identity is further reflected in her teachings at Sciences Po²⁷ as well as in her collective research activities, including the direction of Sciences Po’s *Globina*²⁸ and her position as a core faculty member of Harvard University’s Institute of Global Law and

22 This perspective corresponds to a legal conception of legal pluralism, which is narrower than the anthropological conception of the same (see von Benda-Beckmann and Turner, 2020).

23 In this respect, Muir Watt’s work resonates with that of Paul Shiff Berman, who has imagined an advanced model of governance at the global level, focusing on the role of state courts in this regard. Berman’s model grants a large role to remastered PIL methods and techniques, which would be used by state courts as instruments of legal reasoning, enabling judges to consider that citizens have multiple normative affiliations and that this can generate choice-of-law problems (Berman, 2012).

24 As explained by Ralf Michaels, under the paradigm of legal monism, non-state norms can become law by integration, delegation, or deference (Michaels, 2005: 1227–1235).

25 Muir Watt herself has stated that the study of law in the context of globalisation calls for ‘a reconsideration of the values that constitute law’s normative horizon’; ‘an adjustment of methodological and epistemological tools with which to understand social complexity’; and ‘a renewal of the terms of the debate about the legitimacy of political authority’ (Muir Watt, 2016: 389; see also Xifaras, 2016).

26 In this work, Muir Watt innovatively challenged PIL’s support for, and lack of effort to regulate, the transnational exercise of private power by a variety of market actors who contribute to the increasingly unequal distribution of wealth and authority in the world. In this regard, she urged scholars to de-closet PIL, which has traditionally been presented as politically neutral, technical, and separated from other – conventionally called ‘public’ – branches of law, and to quarry the new potential of human rights in the transnational sphere.

27 See Sciences Po’s webpage: <https://www.sciencespo.fr/ecole-droit/en/muir-watt-horatia/> (Accessed: 17 April 2024).

28 See the official website: <https://globinar.pubpub.org/> (Accessed: 24 January 2023).

Policy²⁹ – two research groups that largely embrace critical legal studies³⁰ and the French theory.³¹

11.4 The potential significance of the work in law and anthropology: adding the technical legal conception of 'alterity'

Having described the work as well as its context, here I argue that *Discours sur les méthodes* is not only important for private international law but could also become significant for law and anthropology, as it provides a technical legal definition of alterity (that is thus part of PIL). This definition could indeed enrich and complexify the discussion about alterity and its legal recognition in law and anthropology, by being set side by side with the anthropological notion of othering.

To make this argument, I shall first summarise what the technical legal – i.e. PIL – definition of alterity is (11.4.1) and then confront it with the anthropological notion of othering (11.4.2), to show the respective potentialities of these conceptions to conceive and recognise alterity in law (11.4.3).

11.4.1 The technical legal definition of alterity

As explained earlier, in *Discours sur les méthodes*, Muir Watt associates the PIL concept of foreignness with an interdisciplinary, prescriptive concept of alterity, or '*altérité*' in French. The contention made here is that, in doing so, she refashions alterity into a technical legal concept. This means that this definition of alterity does not come before the devices of PIL, 'as a normative foundation to inform them'. Nor does it come after them, 'as an ex-post tool to evaluate their quality'. Instead, this definition of alterity 'is within [PIL] devices themselves' (Michaels, 2019). In other words, the definition is to be found in PIL, which is the branch of law whose *raison d'être* is to recognise the existence of and deal with foreignness. In providing this definition, Muir Watt shows the 'agency' of PIL methodology.³² She presents PIL's methodology as enabling state law to acknowledge the existence of and welcome the other. In this regard, Muir Watt's contribution shows that state law's mode of reasoning itself can be about including the other.

What then is this PIL concept of alterity? It can certainly be defined in various ways, but the following aspects appear particularly relevant to engage with anthropological perspectives. Firstly, it can be said that 'us' and the 'other' are both needed for PIL to have meaning. Therefore, there is nothing exceptional

29 See the official website: <https://iglp.law.harvard.edu/> (Accessed: 24 January 2023).

30 For a comprehensive overview of this movement, see Kennedy, 2012; Mangabeira Unger, 2015.

31 For a comprehensive overview of the movement, see Cusset, 2003.

32 For a description of the agency of legal technique, see Michaels and Riles, 2022.

(as in exotic) in being the other – it is as ‘normal’ as we are. The intellectual style of the discipline consists, for the forum, in seeing the other as something that imposes itself on the former. The reason for this is that the consideration of the other comes from the other’s demand: the other asks the forum to be recognised as other in its own terms. Secondly, PIL takes a horizontal approach to the self and the other, who are placed on equal footing as a starting point of the reasoning. They are considered of equal (normative and cultural) worth within their own world – each is as important and as relative as its counterpart. Then, later in the reasoning, since the only perspective available is that of the forum, the perspective of ‘us’ is inevitably given precedence over the perspective of the other. Yet, as a point of departure, the other is recognised by ‘us’ as having its own specificities and its own terms, which are assumed to be different than the forum’s terms (‘us’). Thirdly, the study of PIL methodologies shows that, while the discipline always acknowledges the existence of the other, the forum can be more or less welcoming to the other. In this respect, in Muir Watt’s view, the PIL techniques that are to be retained for the greatest possible inclusion of alterity in law reflect the open version of the unilateralist method. This method, according to Muir Watt’s analysis: (i) aesthetically mirrors a perspectivist approach as well as an accommodating attitude; (ii) corresponds, from a political point of view, to value pluralism and the associated concept of interculturalism; and (iii) ethically speaking, shows hospitable behaviour.

11.4.2 PIL’s ‘*altérité*’ and anthropology’s ‘othering’: distinct meanings

Once the technical legal (i.e. the PIL) definition of alterity is included in law and anthropology’s discussion of this term, I argue that a dialogue between PIL’s ‘*altérité*’ and anthropology’s ‘othering’ becomes possible, which could refresh the discussion of the legal recognition of alterity.

Before entering any comparative exercise, I shall clarify how I understand the anthropological notion of othering. The anthropological notions of ‘otherness’ and ‘othering’ have been defined in various ways, and the literature on the subject is far too rich to be thoroughly outlined here. But it seems to me that one emblematic definition has been provided by Lila Abu-Lughod. Building on the work of anthropological scholars like Geertz, Asad, and Fabian,³³ she argues that the foundational distinction between the self and the other leads to discrimination against the latter, because this separation ‘inevitably carr[ies] out a sense of hierarchy’ (Abu-Lughod, 1991: 466). In addition, in the way that the discipline of anthropology is historically constructed, the self is the West and the other is the rest, so the West decides and defines who ‘the self’ and ‘the other’ are, a decision which maintains (and perhaps reinforces) colonial hegemony (Abu-Lughod, 1991: 467). From this

33 See also in the French literature, Kilani, 2000.

point of view, state law as a Western product (Schiafone, 2012) can hardly avoid the appearance of deceptiveness. Indeed, through the work of both the legislator and the judge, state law determines what counts as law among non-state norms. As state law reflects a Western understanding of the world, this definition of what is law, and most importantly of what does not qualify as law, appears as a way to maintain and reinforce the colonial hegemony.

The contention made here is that Muir Watt's work brings nuance to this perspective, as she shows the potential of PIL's alterity to partly overcome this epistemological limitation – although, as will be further argued below, the PIL notion of alterity should be enriched by the anthropological insights of othering. For now, I shall highlight the fact that the notions of '*altérité*' and 'othering' differ from each other in ways that can be easily understood in light of the PIL or anthropological context in which they are constructed.

In anthropology, 'othering' has generally been used to describe the academic and political construction of 'otherness', a historically rooted and ongoing process that enables the West to subordinate the non-West. In the context of colonial expansion and particularly in the disciplinary origins of anthropology, othering takes place when imagining, encountering, exploring, or conquering the other in places far away from one's own home. The notion of othering thus finds its initiative in the self, and thereby constitutes an identification and an exclusion of the other by the self. This conception originates in the study of Indigenous populations in the colonies, where the other is attached to the idea of exotism, of the exception to 'us'. Whether the other generates fascination, fear, or contempt, it is in any case seen as something distant and distinct from 'us'. And perhaps most interestingly, it is not there because it exists and imposes itself on 'us' at home by demanding recognition in the Western state legal forum; rather, it is taken into account to the extent that it is invented as the other by the self.³⁴

Distinctively, the PIL conception of the other relates to the notion of foreign law in the broad sense of the term (covering foreign laws, jurisdictions, judgments, and situations acquired under foreign laws). It finds its origin³⁵ in the search for a solution to cases where several laws could apply, several states have jurisdiction, or several judgments have authority over one single dispute. In this context, the other (at least indirectly) claims to exist, to have normative power equal to that of domestic law, and to have its own rules, or at least its own distinct conception of these rules, when the latter are the same as domestic rules. In other words, PIL applies when the other demands to be recognised as such, and on equal terms with domestic law, as far normative authority is concerned. Hence, contrary to anthropology, the application of

³⁴ See, most famously, Said, 1978.

³⁵ Irrespective of whether one considers its origin to date back to the Middle Ages or to the modern era, when it was created as an instrument of state law (although it was first part of public international law; see Mills, 2009). About this controversy, see e.g., Hatzimihail, 2021.

PIL does not result from the forum's decision to study and qualify the other. Instead, PIL applies when the forum must resolve a conflict generated by the fact that it recognises the normative authority of the other and assumes that the other can be different from us, according to the other's self-definition. Of course, the forum will be limited in understanding this definition and will inevitably distort it (and anthropology can help PIL there – see below). But the definition retained by the forum will be generated by the other's demand to be recognised on its own terms, as opposed to the anthropological definition of the other that foregrounds the self's decision to conceptualise the other as such.

11.4.3 *'Altérité' and 'othering' to recognise the other in law*

This brings me to the question of how both the PIL notion of '*altérité*' and the anthropological concept of 'othering' could be engaged in a renewed discussion in law and anthropology about the legal recognition of alterity. In this regard, I believe that two steps can be envisaged: the first – and major – one concerns the enrichment of the technical legal notion of alterity (in PIL) by the lessons learnt from the anthropological notion of 'othering';³⁶ the second pertains to the debates in law and anthropology around legal pluralism.

Concerning the first step, I would argue that the notion of 'othering' pushes for an epistemological decolonisation of PIL in Western democracies. It can help Western PIL enhance its ability to include the other in law, in the other's own terms, either when 'the other' is a postcolonial state law (which can involve a reference to customary or religious law and authorities)³⁷ or, as suggested by Muir Watt, when the other is associated with cultural identity claims (where the claimants often refer to religious laws). Even if the forum will always distort the self-definition of the other, there are ways to make PIL evolve in a way that makes it more inclusive of non-state legal epistemologies and values. In this regard, over the last years, a few PIL scholars have pointed out the colonial aspects of PIL.³⁸ In my previous work (Brachotte, 2022), for example, I showed the epistemological limits of PIL to include alterity, as far as several Indigenous and religious views are concerned, simply because PIL is state law. Therefore, it reflects the characteristics of law that Western jurists traditionally consider basic and fundamental, such as generality and publicity,³⁹ and rely on to grant legal recognition to foreign normativities. These characteristics, I argue, may preclude state authorities from making

36 Muir Watt herself addresses this question in her last book, Muir Watt, 2023.

37 See e.g., in Belgium, Trib. fam. Liège (div. Liège) (10e ch.) n° 18/522/B, 25 May 2018; in the UK, *X v Secretary of State for the Home Department* [2021] EWHC 355 (Fam); in France, Cour de cassation, Première Chambre civile, Arrêt n° 643 du 4 novembre 2020, Pourvoi n° 19-18.281; in Quebec (Canada), Droit de la famille – 142311, 2014 QCCS 4425 (CanLII).

38 See e.g., Ochoa Jimenez, 2021; Banu, 2022.

39 About these characteristics, see e.g., Fuller, 1964.

sense of some non-state and postcolonial state normativities.⁴⁰ Therefore, PIL scholars must further study the possibility of adapting the theorisation of PIL to be more epistemologically inclusive of alterity. For instance, in this context, Maria Ochoa has proposed to conceptualise non-state law as facts (Ochoa Jimenez 2021). In this respect, a bottom-up approach that builds theory on concrete cases,⁴¹ including by using anthropological research more largely, seems like a fruitful way to escape from the conventional approach to PIL.⁴²

In addition, I would contend that the notion of 'othering' demands PIL to consider 'the entanglement of several cosmologies connected today in a power differential[, i.e.] the logic of coloniality covered up by the rhetorical narrative of modernity' (Mignolo, 2018: x). Consequently, not only should other epistemologies be included in state law, but state law must also acknowledge their vulnerable position as well as the way in which they have been influenced, distorted, or simply suppressed by hegemonic legal epistemologies⁴³ in the process of colonisation. In this respect, I have previously argued that PIL rules, even when only applied to consider state laws (and not non-state laws, as is the case in Muir Watt's model), should be substantively adapted to defend the interests of the vulnerable stakeholders of society, from a global point of view, including Indigenous groups (Brachotte, 2022).⁴⁴

Finally, the anthropological concept of 'othering' invites PIL to acknowledge its inevitable limitations – and thereby the limitation of state law in general. Indeed, the discipline is about identifying what is domestic and what is foreign, what is included and what is excluded, what is 'us' and what is 'the other'. And all these identifications are done from the perspective not only of the forum, but more broadly from a state legal perspective – an originally Western (European) perspective that has spread throughout the world via colonisation. Yet, anthropology can prompt PIL to acknowledge how its ability to include alterity is limited by its status as a state legal instrument. This probably requires the forum to acknowledge that, when the forum wants to recognise and grant normative authority to the other, it inevitably distorts the other's views – that is, it shapes the other. This in turn calls for a more modest definition of the function of state law and/or for a pluriversal (and not only

40 More broadly, Nicole Roughan has cast doubt on the ability of PIL to recognise the diversity of laws, both formally and substantively, even if it recognises the plurality of laws (Roughan, 2024). In law and anthropology, Tomas Ledvinka and James M. Donovan have come to the same conclusion (Ledvinka and Donovan, 2021).

41 Notably, this is typical of the pragmatic approach of the Brussels School (see e.g., Frydman and Lewkowicz, 2021), which is close to the movement of New Legal Realism (for a recent and comprehensive overview, see Talesh et al., 2021).

42 In addition, seeing law as an activity and not a theory may help one embrace the assumption that there cannot be a single conception of law (see e.g., Twining, 2020).

43 A phenomenon that can be called 'epistemic oppression' (see e.g., Posholi, 2020).

44 This is something that has also been proposed as far as other branches of law are concerned, including public international law (see e.g., in the field of law and anthropology, in French, Belaidi, 2014).

plural) definition of law (Mignolo, 2018: ix). In this respect, I believe that the use of PIL to ‘respond’ to claims of alterity can only be meaningful in contexts where the state authority is seen as legitimate from a decolonial perspective, which may not be the case in settler and postcolonial states, when Indigenous claims are concerned. In such a configuration, it seems to me that state authorities should have equal power with Indigenous authorities to address alterity claims. Typically, if state judges are to use PIL reasoning to hear Indigenous claims, this should require conversely that Indigenous people be entitled to hear non-Indigenous claims, and to do so without having to apply PIL reasoning, but one that suits their own epistemologies instead.⁴⁵

Turning now to the second step, I would argue that, once the PIL notion of alterity has been enriched with the insights of othering, as suggested above, it can greatly contribute to the scholarship that seeks to transform PIL into a legal tool for shifting from the paradigm of legal monism to that of legal pluralism (be it at the state or at the global level) (see Boden, 2005; Berman, 2012; Teubner, 2012; Michaels, 2020; Muir Watt, 2020b). As I have just argued, the notion of othering requires that PIL push the identification, consideration, and recognition of the normative authority of cultural identity claims (and alterity in general, including foreign postcolonial state laws) further in a decolonial direction. If PIL is able to embrace these challenges, I am tempted to hope that it could become a meeting ground where the usual points of anthropological obstinacy, especially those involving the question of what law is (see also Donovan and Ledvinka, this volume), could be seen in a new way, at least as far the context of contemporary Western democracies is concerned – a context that has not attracted much of anthropologists’ attention.⁴⁶ This could be part of an answer to the question Ralf Michaels posed a few years ago: ‘[I] egal pluralism begins to influence conflict of laws; whether conflict of laws will inspire theories of legal pluralism remains to be seen’ (Michaels, 2009: 248).

11.5 Conclusive thoughts for law and anthropology: taking Muir Watt’s proposal to expand PIL methodology seriously

That Muir Watt’s contribution to the field of PIL has been ground-breaking and innovative both in France and abroad can certainly be affirmed. Furthermore, in this chapter, I have attempted to demonstrate that Muir

45 Here, I am following up on the arguments made both in Teubner, 2012 and in Roughan, 2024.

46 Even though anthropological legal pluralism research moved from a classical phase concerned with colonial and postcolonial settings to a phase of ‘new’ legal pluralism research in Western societies and a broader interest in the interplay between official and unofficial law (Merry, 1988), the enduring effects of colonialism on legal relations among and between majority and minority groups and the (non-)recognition of non-state normative orders in the contemporary nation-states of the Global North have received much less attention.

Watt's *Discours sur les méthodes* (and her latest book)⁴⁷ could also become ground-breaking in law and anthropology, in particular the book's handling of the notion of alterity and its legal recognition.

To start with, Muir Watt's *Discours sur les méthodes* shows that the technical legal definition of alterity, as contained in PIL, is about recognising the existence of the other when the other demands such recognition. The other is then considered to have the same worth as 'us' (the self) while being different – and this difference, though ultimately defined by us, is based on the other's definition of itself. Private international law thus appears as a potential state legal tool through which alterity – not only other state laws, but also non-state normativities or merely claims that demand accommodation from state law based on other epistemologies – could be recognised as a normative authority within state law (which could in turn lead to hybridisation with the latter). However, Muir Watt's *Discours sur les méthodes* shows that, depending on the PIL methods concerned, this normative authority, although always considered, will be recognised to varying degrees. In this regard, Muir Watt advocates for the expansion of the use of the unilateralist methods of PIL (and the specific techniques associated therewith)⁴⁸ beyond the response to claims of application of foreign state law (in the broad sense of the term), to address cultural identity claims in Western democracies – assuming that culture is here understood in a Rilesian sense, as something omnipresent, hybrid, and fluid.⁴⁹ For these are the methods that recognise the normativity of the greatest variety of non-state norms (both in terms of form and substance), and assign the greatest power of self-definition to those who claim a culture different from that underlying the law of the forum – and this, according to Muir Watt, is what is needed for the best possible *vivre ensemble* in multicultural Western states.

In this article, I have argued that to achieve the goal of recognising the cultural other, the technical legal (PIL) understanding of alterity highlighted by Muir Watt's work could be usefully paired with the anthropological notion of othering, not only when considering the non-state normative other but also when envisaging postcolonial state legalities. More specifically, I have suggested that the notion of othering invites PIL to decolonise itself in three main ways, by considering: (i) the need to pluralise legal epistemologies to enable the recognition of some forms of normativity that do not resemble state law, (ii) the power differential to be offset in favour of non-state legal and non-Western epistemologies, and finally (iii) the inevitable limit of PIL to recognise the other, since the recognition of the other always involves a redefinition of the other from 'our' perspective (here a state legal, originally European perspective), which distorts and thus shapes the other. This in turn calls for a

47 See above Nos. 6 and 35.

48 See above, Section 11.1.1.

49 See above No. 17.

more modest definition of the function of state law, which still proclaims itself the supreme tool for maintaining social order.

I have further suggested that, as far as cultural diversity in Western states is concerned, the question of the definition of law – a question which seems to haunt anthropologists, and one that is generally based on the consideration of postcolonial contexts – could be addressed in new terms, i.e. in terms of response to the other. This is the moment where the PIL notion of alterity, having been enriched by the anthropological notion of othering, could contribute to rethinking the latter.

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