

Recibido: 7 agosto 2023
Aceptado: 25 septiembre 2023

‘Conflicts Revolution’ or Revolution through Conflicts? Promoting Change or Preserving the *Status Quo* via Private International Law

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SUMARIO: I. Introduction. II. What tools to change the world? Key features of Private International Law. III. Changing the world through Private International Law: 1. Environmental protection. 2. Human and fundamental rights. IV. Private International Law’s potential to reshape the world 1. Exploring the private dimension of Private International Law. 2. Making use of the public side of Private International Law. 3. The limits of European Private International Law. V. A conclusion? Changing Private International Law to change the world.

“Conflicts Revolution” or Revolution through Conflicts? Fomentar el cambio o preservar el *statu quo* a través del Derecho Internacional Privado

RESUMEN: Mucho se ha escrito sobre la *conflicts revolution*, el movimiento intelectual que cuestionó los fundamentos del Derecho Internacional Privado (DIP). Menos atención se había dado al potencial revolucionario del DIP, su capacidad para generar cambio en el mundo. En los últimos años, cada vez más autores proponen afrontar las crisis de nuestros tiempos – desde la crisis ambiental hasta violaciones de DDHH – a través del DIP o con su ayuda. Sin embargo, el DIP existe con una serie de características: es técnico, lidia con diferencias, trata asuntos privados y está relacionado, al menos en Europa, con el funcionamiento del mercado interior; ¿puede un DIP así producir cambios significativos en el mundo? En este artículo, exploro propuestas recientes que proponen el DIP como herramienta de cambio y analizo su compatibilidad con los rasgos centrales de la disciplina. Concluyo que algunas de estas propuestas no sólo chocan con el DIP europeo actual, sino que, además, todas ven su potencial transformador limitado por las características de la disciplina. Si buscamos el cambio, no basta con adaptar las normas de DIP: los fundamentos mismos de la disciplina deben ser reconsiderados.

PALABRAS CLAVE: TÉCNICAS DE LAS NORMAS – NEUTRALIDAD – DERECHO PRIVADO – REGLAMENTACIÓN DEL DERECHO INTERNACIONAL PRIVADO – REVOLUCIÓN – PROTECCIÓN DE LAS PARTES MÁS DÉBILES

ABSTRACT: *Much has been discussed about Private International Law’s (PIL) conflict revolution, the intellectual movement that challenged some of the fundamental principles of the discipline. Far less attention had been paid to PIL’s revolutionary potential: its ability to bring about change in the*

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world. In recent times, scholars have increasingly been exploring how PIL can contribute to addressing pressing issues of our times, from environmental crisis to human rights violations. Yet, a crucial question remains unanswered: can PIL truly drive change? In this article, I aim to answer this question. I summarize some of the most recent 'crisis-solving' proposals within PIL and identify their common features. I assess how these proposals interact with PIL's key features: technical language, focus on differences, private nature, and market orientation. I show that these proposals not only come into direct conflict with PIL's key features but also that their potential to produce change is inherently limited by them. I conclude that no meaningful change (or 'revolution') can be achieved through PIL until PIL's fundamental assumptions are revisited too.

KEYWORDS: TECHNICAL CONFLICT RULES – NEUTRALITY – PRIVATE LAW – REGULATORY PRIVATE INTERNATIONAL LAW – REVOLUTION – PROTECTION OF WEAKER PARTIES.

I. INTRODUCTION

Much has been discussed about Private International Law's conflict revolution, the intellectual movement that, in the mid-twentieth century, radically challenged (and changed) some of the most fundamental structures in the discipline.² Much less has been discussed about the potential that Private International Law itself has to induce change –some revolution, as slim as it may be– in the world surrounding it.

The topic is most relevant today, when environmental concerns and natural disasters threaten our very existence, and inequality has reached unprecedented levels. Many branches of the law, from Human Rights to Competition Law, have begun to offer their contributions to tackling these crises – thus unravelling their potential to make the world a better place. Private International Law scholars have sought to do their share, too. The growing literature on the interactions between Private International Law and Regulatory Theory, Human and Fundamental Rights, and, more recently, Environmental Law, reflects a growing concern over issues of transnational injustice and a sincere wish to help.

Yet, the equilibrium between the key features of Private International Law – its technicality, its focus on the private, its handling of difference – and the transnational, substantive, and regulatory nature of the issues raise appears as uneasy as ever. Private International Law, once described as the law of the *status quo*,³ appears inadequate to prompt a revolution. The features that once allowed it to navigate complicated political issues

² See generally S.C. Symeonides, *The American choice-of-law revolution: past, present and future*, Martinus Nijhoff Publishers, 2006.

³ For Katherina Pistor, private law and Private International Law are 'coded' in a way that they serve the existing system – but also further it, K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 134; *ibid* 6.

smoothly now become instruments of oppression when they force the discipline to remain blind to injustices.

In this article, I analyse the current approach to transnational ‘crises’ by Private International Law. I explore this in the light of recent proposals that infuse a political aim into a discipline once praised as neutral. I assess the compatibility of these proposals with Private International Law’s key features. Finally, I evaluate their potential to bring about change in the real world. Ultimately, I aim to answer to the question: *to which extent is Private International Law a fit tool for change in the global sphere?*

Before getting into the main subject, some concepts need clarification. What do I mean by “recent proposals that infuse a political aim into Private International Law”? What are the key features of Private International Law whose respect should be ensured or measured? And are these proposals, after all, anything different from how Private International Law scholarship evolved in the past?

Let’s start by the political. The starting point of the analysis is one that has become a commonplace in literature: from environmental disasters to raising inequality and poverty, ours is a world *in crisis*. Private International Law scholars, as scholars in other fields, have reacted to these crises.⁴ They have suggested proposals to seek to reform or reinterpret Private International Law in order to achieve a concrete goal, and change, more or less radically, the way in which things are.⁵ All proposals start by identifying negative or threatening situations, and they all aim to steer the world into a different direction through Private International Law. It is in this sense that I use the label ‘political.’

Secondly, there is the question of the ‘key features’ of Private International Law. Assessing the compatibility of new approaches with the key features of the discipline implies claiming is that some features of Private International Law are central to it and, if not immutable, stable enough to require new approaches to be assessed against them. The claim is (almost entirely) descriptive: I do not speak of values that the discipline should further or protect, but of characteristics of the field upon which scholars can agree.

⁴ Even if only to “maintain its relevance,” M. Lehmann, “Regulation, global governance and private international law: squaring the triangle”, *J. Pr. Int’l L.*, 2020, 16, 1, p. 10.

⁵ One could argue that all law is political, but that is not the use of the word I take here. As Ralf Michaels points out, “the distinction between politics and technicity itself is problematic,” R. Michaels, “A Symmetry of Asymmetries: A Private–International–Law Reconstruction of Lindahl’s Work on Boundaries”, *Duke Journal of Comparative and International Law*, 2018, 29, 3, p. 406.

Finally, one could ask: are explicitly political approaches to Private International Law truly a recent development something new? Did they not exist before? The question remains outside the scope of the article. The aim here is to identify the most recent trends in the discipline and assess how they interact with existing Private International Law.

II. WHAT TOOLS TO CHANGE THE WORLD? KEY FEATURES OF PRIVATE INTERNATIONAL LAW

Scholars are increasingly turning to Private International Law as a means to addressing the pressing issues of our time. Yet, Private International Law works within an established structure and has certain key features; making use of Private International Law entails operating within this pre-existing framework. The structure and key features of Private International Law are shaped by its role, aims, and principles,⁶ the exact content of which has long divided scholarship.⁷

Despite all debates⁸ over the existence and content of universal principles,⁹ methods,¹⁰ or aims,¹¹ three features of European Private International Law can be outlined: Private International Law (a) employs technique in order to (b) deal with difference in (c) private interactions. All three features – technicity, difference-focus, private nature – are essential

⁶ See generally H.E. Yntema, "The Objectives of Private International Law", *Canadian Bar Review*, 1957, 35, 6, p. 721-742 ; K. Lipstein, "The General Principles of Private International Law (Volume 135)", *Collected Courses of the Hague Academy of International Law*, 1972 ; H. Batiffol, "Actualité des intérêts du droit international privé" en H. Bernstein *et al.* (eds.), *Festschrift für Konrad Zweigert zum 70. Geburtstag*, Mohr, 1981, p. 23-35 ; S.C. Symeonides, "Material justice and conflicts justice in choice of law" en P. J. Borchers y J. Zekoll (eds.), *International conflict of laws for the third millennium: essays in honor of Friedrich K. Juenger*, Transnational Publishers, 2001.

⁷ And it may not need one: "PIL scholarship has long abandoned any serious attempt at constructing its discipline on the basis of a logically ordained system of abstract concepts," T. Marzal y G. Pavlakos, "A Relations-First Approach to Choice of Law", en R. Banu, M. Green y R. Michaels (eds.), *Philosophical Foundations of Private International Law*, Oxford University Press, Oxford University Press, Forthcoming, p. 9.

⁸ "Paradoxically perhaps, the very intensity and scope of disagreement on each of these issues affirms their accepted centrality and thus, indirectly, the cohesiveness of the discipline of private international law," J. Bomhoff, "The Reach of Rights: The Foreign and the Private in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements Transdisciplinary Conflict of Laws", *Law and Contemporary Problems*, 2008, 71, 3, p. 60.

⁹ See generally S. Leible *et al.*, *General principles of European private international law*, Wolters Kluwer : Kluwer Law International B.V., 2016 ; S. Marinai, *I valori comuni nel diritto internazionale privato e processuale comunitario*, Giappichelli, 2007.

¹⁰ For a useful historical summary, see K. Lipstein, "The General Principles of Private International Law (vol. 135)", *loc. cit.*

¹¹ See, among others, H.E. Yntema, "The Objectives of Private International Law", *loc. cit.*

to Private International Law and, as such, they are always picked up in Private International Law scholarship.

First, Private International Law, at its core, revolves around private cross-border interactions. Private International Law is the discipline that deals with the activities of private actors, as Jürgen Basedow put it.¹² This is true whether we agree that “the quest of private actors for a frame of reference for their growing transnational activities” should be central to the analysis of the discipline¹³ or think, instead, that the field simply serves to allocate regulatory authority between states.¹⁴ Interactions between private actors are the starting¹⁵ and endpoint of Private International Law:¹⁶ Private International Law intervenes because a cross-border interaction has taken place¹⁷ and, when it does, it shapes the lives of those private actors: whether one law or another is applied modifies the results of a case – and thus its effects on the world and on the lives of the parties.¹⁸ This is, when turning to Private International Law, it is crucial not to overlook its private dimension¹⁹.

¹² J. Basedow, “The Law of Open Societies – Private Ordering and Public Regulation of International Relations General Course on Private International Law (Volume 360)”, *Collected Courses of the Hague Academy of International Law*, 2013, p. 55.

¹³ J. Basedow, “The Law of Open Societies – Private Ordering and Public Regulation of International Relations General Course on Private International Law (Volume 360)”, *loc. cit.*, p. 35.

¹⁴ A. Mills (ed.), “The confluence of public and private international law” en Alex Mills (ed.), *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge, Cambridge University Press, 2009, p. 106.

¹⁵ “Private international law has therefore become a question about the allocation of public power between states, which is also the fundamental question of public international law. However, this still leaves a distinction between their legal subjects to be worked out,” K. Knop, “Lorimer’s Private Citizens of the World The European Tradition in International Law: James Lorimer”, *European Journal of International Law*, 2016, 27, 2, p. 474.

¹⁶ Some authors see Private International Law as “an indispensable element of private law, R. Michaels, V. Ruiz Abou-Nigm, “Towards Private International Law for Everyone”, Max Planck Private Law Research Paper No. 23/14, 2023, p. 5, disponible en: <https://ssrn.com/abstract=4507586>

¹⁷ V. Garin, “An Account of Private International Law in terms of Relativism”, Mohr Siebeck, Forthcoming.

¹⁸ H. Kupelyants, “Just pick one? Reasons for a lamentable divergence” en Horatia Muir Watt *et al.* (eds.), *Global Private International Law: Adjudication without Frontiers*, Edward Elgar Publishing, 2019, p. 333-342 ; S. Bollée, “Thoughts on the Dallah Case: The hypothesis of the indeterminacy of the legal system” en H. Muir Watt *et al.* (eds.), *Global Private International Law: Adjudication without Frontiers*, Edward Elgar Publishing, 2019, p. 342-349.

¹⁹ Since the results of a dispute (and thus the effects in the world) will change depending on the applicable law (which may in turn be affected by the competent judge), Private International Law is also key for parties to plan their lives in a predictable manner. The importance of private law in “help[ing] write the stories of our lives” (H. Dagan y M. Heller, *The choice theory of contracts*, Cambridge University Press, 2017, p. 1.) has been well studied in private law scholarship. For

A second key feature of Private International Law is its *technicity*. Private International Law has a language of its own, which includes specific vocabulary and complex constructs. Such technicity has either been lamented for the opacity it can generate,²⁰ either praised for its capacity to deal with complex, political situations *as if* they were not political,²¹ but it has rarely been denied.²² Having resort to Private International Law means taking advantage of – or being limited by – its technicity.

Finally, all scholars can agree that Private International Law deals with *difference*. The ‘diversity of systems of private law’ has been used to explain the mere existence of Private International Law:²³ Private international law’s “whole *raison d’être* is to resolve conflicts between different non-universal values without merely superimposing one set of substantive values.”²⁴ As Sabine Corneloup sums it up,

“Although the general assumption of neutrality is no longer valid in modern private international law, it still correctly expresses the idea that divergence between national laws is an accepted fact.”²⁵

Once again, Private International Law’s entanglement with difference – however constructed – is central to its operation.

example, Seana Shiffrin argued that “An autonomous life requires the opportunity to engage in meaningful, moral relations with others,” S.V. Shiffrin, “Promising, Intimate Relationships, and Conventionalism”, *The Philosophical Review*, 2008, 117, 4, p. 502. Although I do not dig into the importance of private interactions and private (international) law for human flourishing, I do come back to the question of foreseeability later in the article.

²⁰ G.R. Shreve, “Every Conflicts Decision is a Promise Broken Conflict of Laws, Comparative Law and Civil Law: A Tribute to Symeon C. Symeonides”, *Louisiana L. Rev.*, 1999, 60, 4, p. 1346.

²¹ R. Michaels, “Post-critical Private International Law: From Politics to Technique” en *Private International Law and Global Governance*, Oxford, Oxford University Press, 2014, p. 66.

²² Despite Private International Law having lost its ‘innocence,’ F. Ragno, “Certainty versus flexibility in the EU choice of law system” en *Private International Law*, Edward Elgar Publishing, 2019, p. 56.

²³ A. V. M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement General Course on Private International Law (Volume 311)*, Brill, 2004, p. 27, 28.

²⁴ R. Michaels, “Private international law and the question of universal values” en F. Ferrari y D. P. Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance*, Edward Elgar Publishing, 2019, p. 176. Similarly, for Henri Batiffol, “Le problème indiscutablement propre à notre discipline est celui des relations entre ordres,” H. Batiffol, “Actualité des intérêts du droit international privé”, *loc. cit.*, p. 34.

²⁵ S. Corneloup, “Can Private International Law Contribute to Global Migration Governance?” en H. Muir Watt y D. P. Fernández Arroyo (eds.), *Private International Law and Global Governance*, Oxford University Press, 2014, p. 309.

European Private International Law is a technical branch of the law that deals with difference in cases involving private parties. In what follows, I explore how these three features (technicity, difference-focus, and private nature), key characteristics of Private International Law, shape, encourage, or limit the potential for change through Private International Law – this is, whether the help promote change or end up, in fact, preserving the *status quo*.

III. CHANGING THE WORLD THROUGH PRIVATE INTERNATIONAL LAW

The past decades have seen a surge in literature connecting Private International Law to crisis resolution. From climate change to migration, from interconnected financial markets to cyber torts, scholars of Private International Law have attempted to address the urgent issues of our time. They have identified areas that are in need of urgent help and they have explored the ways in which Private International Law can contribute to finding a solution.

Here, I present two areas in which this took place: environmental concerns and human and fundamental rights violations.²⁶ Both areas have experimented great growth in recent decades. Both involve matters widely considered global, or at least larger than any state. And both have been approached by Private International Law scholars with a crisis-solving attitude: recognizing environmental and human right issues as urgent matters requiring immediate action, scholars have embarked on the task of revisiting Private International Law to find in its rules some solution to the challenges they pose.²⁷

All proposals treat Private International Law in similar fashion. They either rely on the *private* dimension of Private International Law interactions and delegate the implementation of public policies to private parties; or they employ the public potential of the discipline to enact public policies across borders. In the next Section, I show how this shapes – and limits – the transformative potential of Private International Law.

²⁶ I address both areas separately, even if they may overlap. Human and fundamental rights, for instance, can be called to intervene in cases of climate emergencies if these involve displacements of population or pose a risk to basic living conditions such as access to water.

²⁷ As a result, proposals on both sides have moved away from neutral conflict rules. This is not to say that rules of Private International Law that are technical are not political. But the proposals to which I refer here are more explicitly policy-oriented. See for example R. Michaels, V. Ruiz Abou-Nigm y H. van Loon (eds.), *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*, Intersentia, 2022.

1. *Environmental protection*

Recent works explore the links between Private International Law and the environment. The basic intuition is that Private International Law's ability to select the competent jurisdiction and the applicable law can be used to slow down – or reverse – climate change and to prevent future environmental damage.²⁸²⁹ Two paths have been followed to achieve this. On the one hand, making use of the *private* side of Private International Law controversies, some scholars have proposed to use its techniques to achieve some sort of strategic litigation:

“When exploring how private international law may help ‘[t]ake urgent action to combat climate change and its impacts’³⁰ a first possibility that immediately comes to mind is private international climate change litigation (PICCL).”³¹

Here, the aim is twofold. First, these proposals seek to assist parties who have suffered environmental harm by making it easier for them to bring to court whoever caused them damage. Second, they strive to encourage behaviour that is respectful to our environment and deter that which is not – what is often called the ‘principle of prevention.’³² In Europe, the latter aim seems to be more prominent: Art.7 of Rome II Regulation, which allows the ‘person seeking compensation for damage’ to choose the law applicable to the non-contractual obligations “arising out of environmental damage or damage sustained by persons or property as a result of such damage,”³³ has been justified by the European legislator as a means of “raising the general level of environmental protection”³⁴. In other words, Private International Law rules are tailored in a way that, through *private* litigation, they contribute to the *public* goal of avoiding environmental damage and fighting climate change.

²⁸ See generally E. Álvarez-Armas, “SDG 13: Climate action” en R. Michaels, V. Ruiz Abou-Nigm y H. van Loon (eds.), *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*, Intersentia, 2022.

²⁹ See for example A. Fernández Pérez (ed.), *El Derecho internacional privado ante la(s) crisis de la globalización*, Aranzadi, 2023, cap. 2.

³⁰ UN Sustainable Development Goals 2030, Goal 13.

³¹ E. Álvarez-Armas, “SDG 13: Climate action”, *loc. cit.* 18/01/2024 19:08:00

³² P. Huber, *Rome II Regulation: pocket commentary*, Sellier European Law Pub, 2011, p. 207.

³³ 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 (Rome II) 2009 (L 199/40) art. 7.

³⁴ Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) 2003 (COM(2003) 427 final) 19.

On the other hand, other scholars have focused on the *public* dimension of these issues more explicitly. For many, the relevance and urgency climate change and environmental damage justify the use of public policy exceptions or overriding mandatory provisions in transnational settings.³⁵ As Mathias Lehmann puts it:

“The essence of private international law in the classic sense has been to apply the rules of private law of the most closely connected state to individual relationships. It must now be broadened to also include the application of the foreign regulatory rules that further global governance.”³⁶

This is, when environmental concerns justify it, the terms of a private relationship may be modified in order to achieve a policy aim: the *private* must yield to the *public* if environmental global governance demands it.

2. Human and fundamental rights

A growing body of literature deals with interactions between Private International Law and human and fundamental rights, too.³⁷ From cross-border labour relations³⁸ to environmental litigation,³⁹ or cross-border surrogacy⁴⁰,

³⁵ In a similar vein, although without express reference to the climate crisis, see R. Wai, “Transnational liftoff and juridical touchdown: The regulatory function of private international law in an era of globalization”, *Columbia Journal of Transnational Law*, 2002, 40, 2, p. 209.

³⁶ M. Lehmann, “Regulation, global governance and private international law”, *loc. cit.*, p. 30. This includes rules ‘preserving global goods,’ such as “the stability of the climate, the supply of water or the diversity of the fauna” and avoiding global dangers (terrorism, infectious diseases or financial crises that “do not stop at the national border”), *ibid.*, p. 8.

³⁷ Scholars of Human and Fundamental Rights have also increasingly found comfort in Private International Law as a way to implement their ideas. The most notable examples appear in family law, protection of minors, and migration, see for example B. Manby, “‘Legal Identity for All’ and Statelessness”, *The Statelessness & Citizenship Review*, 2020, 2, 2, p. 248-271.

³⁸ M. del P. Diago Diago, “Violación de Derechos Humanos en las cadenas de suministro en tiempos de pandemia: reacciones de Derecho Internacional Privado y diligencia debida”, *Revista Española de Derecho Internacional*, 2021, 73, 1, p. 337-344 ; F.J. Zamora Cabot y M.C. Marullo, “Empresas y Derecho Humanos bajo la pandemia: enfoque desde el Derecho Internacional Privado, general y sectores escogidos”, *REDCI*, 2021, 73, 1, p. 345-352.

³⁹ M. Weller y A. Pato, “Local parents as ‘anchor defendants’ in European courts for claims against their foreign subsidiaries in human rights and environmental damages litigation: recent case law and legislative trends”, *Uniform L. Rev.* 2018, 23, 2, p. 397-417.

⁴⁰ In particular, focused on the protection of the human rights of the child. See R. Blauwhoff y L. Frohn, “International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law” en Christophe Paulussen *et al.* (eds.), *Fundamental Rights in International and European Law: Public and Private Law Perspectives*, The Hague, T.M.C. Asser Press, 2016, p. 211-241.

Private International Law scholarship has made its appearance to try and fight human and fundamental rights violations.⁴¹

Human and fundamental rights interact with Private International Law in the same two ways as environmental protection norms.⁴² On the one hand, they may appear as *private* obligations: for some scholars, human rights should produce ‘horizontal effects:’ private parties – instead of public powers – are expected to comply with human rights obligations.⁴³ Along these lines, a report by European Parliament proposes that cross-border human rights violations committed in supply chains during the Covid-19 pandemic should be awarded extended jurisdiction, and that the injured parties should be given the possibility to choose the applicable law.⁴⁴ Just as in the case of environmental protection, private parties are here both protected as injured parties *and* tasked with enforcing public policies.

On the other hand, human and fundamental rights may enter Private International Law in the form of a public policy exception or constituting an overriding mandatory provision. Since human rights are universal – ‘a right that belongs to every human being merely by virtue of being human’⁴⁵ –, they may modify any cross-border interaction, regardless of the law designated as applicable, in order to ensure their own application⁴⁶.

⁴¹ See generally J.J. Fawcett, M. (Máire T. Ní Shúilleabháin y S. Shah, *Human rights and private international law*, First edition., Oxford University Press, 2016 ; C. Paulussen *et al.*, *Fundamental Rights in International and European Law Public and Private Law Perspectives*, 1st ed. 2016., T.M.C. Asser Press: Imprint: T.M.C. Asser Press, 2016 ; P. Kinsch, “Human rights and private international law” en J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, p. 881-886.

⁴² M. Hirschboeck, “Conceptualizing the Relationship between International Human Rights Law and Private International Law Note”, *Harvard International Law Journal*, 2019, 60, 1, p. 181-200.

⁴³ See for example E. Frantziou, “The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality”, *European Law Journal*, 2015, 21, 5, p. 657-679.

⁴⁴ European Parliament, *Report with recommendations to the Commission on corporate due diligence and corporate accountability*, 2021.

⁴⁵ L.G. Binderup, “Universalism and (Cultural) Relativism” en Christina Binder *et al.* (eds.), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishing.

⁴⁶ See generally M.-P. Weller y A. Schulz, “Political Private International Law: How European are Overriding Mandatory Provisions and Public Policy Exceptions?” en E.-M. Kieninger, G. Rühl y J. von Hein (eds.), *How European is European Private International Law: Sources, Court Practice, Academic Discourse*, Intersentia, 2019, p. 285-304. See also G. Comparato, “Public Policy through Private Law: Introduction to a debate on European Regulatory Private Law”, *European Law Journal*, 2016, 22, 5, p. 621.

When trying to address a crisis, scholars of Private International Law adopt one of two approaches: they either harness the private side of Private International Law and entrust private parties with the implementation of public policies; or they emphasize the discipline's public side and enforce public policies globally. These responses are shaped by the structure of Private International Law – but, as I show in the next Section, they are not always consistent with its key features.

IV. PRIVATE INTERNATIONAL LAW'S POTENTIAL TO RESHAPE THE WORLD

Recent scholarship has sought to produce change through Private International Law. Yet, Private International Law exists in a specific configuration: it deals with private cross-border interactions, it has a technical language and it is tasked handling difference. Scholars must make sure that their proposals are workable within this configuration and compatible with these key features.

Here, I identify two approaches found in literature: on the one hand, some scholars propose to pass the burden of policy enforcement onto private parties, by modifying conflict rules to favour given policy goals. On the other hand, other scholars focus on the public policies and seek to expand their implementation beyond borders, regardless of the competent judge or governing law. I point at the tensions between each of these approaches and the key features of Private International Law listed above. Finally, I explore how these features limit its capacity to induce change.

1. Exploring the private dimension of Private International Law

Some scholars have sought to tackle environmental damage or human rights violations by proposing modifications Private International Law rules on jurisdiction or applicable law. The idea is that improving access to litigation would facilitate victims' reparation and act as a deterrent against potential future offenders. In other words, private interactions across borders would serve as the platform for implementing public policies: the dynamics within a relationship can be adjusted for the sake of public policy, and private parties take on the role of promoting the public values. This carries a risk: that of neglecting the private dimension of the interaction – and of Private International Law.

This can happen in several ways. First of all, the legislator may be exerting undue pressure – or placing excessive trust – on the parties to

make the “correct” choices. Implementing public policies through the action of private parties presupposes that all private parties have access to well-suited legal counsel – which, in certain contexts and for international litigation, may be particularly unlikely. It also presupposes that all parties can discern (and, in fact, that there *is*) a better alternative when they are given a choice amongst different courts or laws, something that critics of the Better Law conflict method in the United States⁴⁷ have strongly called into question⁴⁸.

Secondly, the balance within the relationship can be affected. It is possible to imagine a scenario where the breaching party is, in economic or other respects, weaker than the claimant, particularly considering the transnational nature of these matters. Private International Law rules may give rise to strategic litigation that causes disproportionate harm to a party given their wrongdoing.

More importantly, tasking private parties with public functions may have the effect of *de-privatising* the relationship. On the one hand, some public functions become *privatised*, for their execution is assigned to private parties.⁴⁹ On the other hand, the relationship between the parties becomes *de-privatised*: their interaction ceases, to some extent, to revolve around the parties. Besides the practical implications just listed, one question arises: should private parties be tasked with advancing public aims in their private dealings?⁵⁰ And should they do so even when it affects the balance of their private interactions?⁵¹ Giving precedence to the greater – public – good over

⁴⁷ R.A. Leflar, “Choice-Influencing Considerations in Conflicts Law”, *New York University Law Review*, 1966, 41, 2, p. 267-327.

⁴⁸ “Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law Notes”, *Harvard Law Review*, 2015, 129, 2, p. 544-565.

⁴⁹ What Alex Mills calls the privatisation of governmental functions, A. Mills, “The Privatisation of Private (and) International Law”, *Current Legal Problems*, 2023.

⁵⁰ This is similar to, but different from, the question that I address later, namely: should a law that is made to address the problems between the parties be used for purposes other than serving the parties?

⁵¹ Modifying rules on jurisdiction or applicable law can have significant consequences on the result of a case, which in turn affects the lives of the parties involved. As Martina Mantovani summarized: “jurisdiction is particularly important as it indirectly determines the applicable procedural law, governing fundamental issues such as the admissibility of the action or the justiciability of the claim. (...) other procedural issues such as the burden of proof, the means and the standard of evidence will play a pivotal role in determining the chances of failure or of success of the action. This means that the choice of forum remains a cornerstone in the litigation strategy of climate change cross-border cases.”

M. Mantovani, *Private International Law and Climate Change: the “Four Islanders of Pari” Case*, <https://eapil.org/2023/01/10/private-international-law-and-climate-change-the-four-islanders-of-pari-case/>, 10 janvier 2023, consulté le 27 juillet 2023. Mantovani was commenting on the *Lliuya* case, an environmental case confronting a Peruvian farmer and German electricity

the fairness of private interactions or the interest of private parties is a key feature of utilitarian thought, often accused of failing to fulfil the Kantian imperative of treating persons as ends on themselves⁵² and of neglecting the “separateness of persons”⁵³. The debate on the matter is extensive, and I do not take a stance here; suffice it to note that scholars who seek to implement public aims through Private International Law should be ready to address these challenges.⁵⁴

2. Making use of the public side of Private International Law

Scholars of Private International Law have also proposed to promote environmental protection and human rights by ensuring that the norms that safeguard them are applied – even in cases with foreign elements or when the governing law does not include such safeguards. The idea is that the reach of certain norms can be expanded beyond national borders through the use of Private International Law rules such as the public policy exception or rules on (overriding) mandatory provisions.

Here again, the private side of Private International Law is weakened. When a public policy exception or an overriding mandatory provision enters a dispute, they change the terms of the interaction and shape the result of the case. The more we favour their application, the greater the risk that legal certainty and foreseeability are compromised.⁵⁵ If parties cannot predict what legal provisions will apply to their private dealings, not only “the basic need for international uniformity” – “the supreme objective of the whole discipline”⁵⁶ – is undermined; parties are also likely to see their interests downplayed for the greater good⁵⁷.

company over the damage caused by the company’s gas emissions in Peru, *Luciano Lliuya v. RWE AG*. Available at <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/>.

⁵² I. Kant, *Groundwork of the metaphysics of morals*, tr. fr. de M.J. Gregor y J. Timmermann, Revised edition., Cambridge, Cambridge University Press, 2012, p. 4:430.

⁵³ J. Rawls, *A theory of justice*, Revised edition., Belknap Press of Harvard University Press, 1999, p. 27-29.

⁵⁴ For other criticism, from the impossibility to measure utility to its plain arbitrariness, see M.W. Hesselink, *Justifying contract in Europe: political philosophies of European contract law*, Oxford University Press, 2021, p. 26-29.

⁵⁵ K. Roosevelt III, “Certainty versus flexibility in the conflict of laws” en *Private International Law*, Edward Elgar Publishing, 2019, p. 6-26.

⁵⁶ J. Basedow, “The Law of Open Societies – Private Ordering and Public Regulation of International Relations General Course on Private International Law (Volume 360)”, *loc. cit.*, p. 42.

⁵⁷ And, as Jürgen Basedow argues, the “claim to legal certainty can in fact be interpreted as flowing from a number of human rights.” *Ibid.*, p. 205.

Additionally, using Private International Law as a means to achieve a specific policy goal entails a certain instrumentalization of the discipline. Instrumentalization is common in other fields of the law; in torts, private law and private parties have repeatedly been employed to achieve policy goals.⁵⁸ In Private International Law, a ‘functionalist approach’⁵⁹ to the discipline has received mixed reviews from scholars; while some authors refer to it as the true “European conflict revolution,”⁶⁰ others decry it as unfair to the parties.⁶¹

Even if we believe Private International Law’s aim is to pursue some objective (whether we believe it serves to coordinate legal systems,⁶² to facilitate private dealings,⁶³ or anything in between),⁶⁴ using conflict rules to further a particular policy goal clashes with its private dimension and its technicality. On the one hand, the private dimension of the discipline is overlooked, for the private interaction becomes subordinated to the implementation of a policy goal. On the other hand, its technical language turns substantive: the choice of law hinges on the law’s content, and the selection of a court depends on its practice.

Finally, some proposals aimed at making the world a better place pose a direct challenge to Private International Law’s treatment of difference. Most scholars would agree that “the particularity of private international law is that it provides coordination methods in order to resolve conflicting legal

⁵⁸ For most authors, all fields of the law are set to fulfil a values, principles, and aims that may contradict each other – including the balancing of both private and public interests. For example, Wilhelmsson lists ‘five dichotomies’ that can be found in private law, amongst which he identifies the dichotomy *protection of parties* versus *protection of other values*, T. Wilhelmsson, “Varieties of Welfarism in European Contract Law”, *European Law Journal*, 2004, 10, 6, p. 712. ‘Other values,’ in fact, include the examples listed here: environmental protection or the protection of human rights.

⁵⁹ “Multilateral choice-of-law rules may, instead of being policy-blind (as in the ‘neutral’ paradigm described in the introduction), follow a functionalist approach.” E. Álvarez-Armas, “SDG 13: Climate action”, *loc. cit.*

⁶⁰ J. Meeusen, “Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution”, *European Journal of Migration and Law*, 2007, 9, 3, p. 287.

⁶¹ S. Peari, “The Choice-Based Perspective of Choice-of-Law Symposium: What Is Private International Law”, *Duke Journal of Comparative and International Law*, 2012, 23, 3, p. 477-502.

⁶² A. V. M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement General Course on Private International Law (Volume 311)*, *op. cit.*

⁶³ S.C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis*, New York, Oxford University Press, 2014, p. 110.

⁶⁴ In fact, one “may hesitate whether to classify [certain rules] into the category of ‘public law’ or ‘private law’.” M. Lehmann, “Regulation, global governance and private international law”, *loc. cit.*, p. 5.

pluralism.”⁶⁵ Many would also agree that Private International Law’s *prime element* is the respect to the foreign.⁶⁶ Yet, some tools of Private International Law, such as overriding mandatory rules, are used to safeguard national interests or values beyond national borders – thus imposing national conceptions of what is right abroad, undermining difference and plurality. This can carry a series of problems. Applying foreign law to people who did not have the possibility to shape it raises questions about the legitimacy of doing this;⁶⁷ imposing one’s law over another’s causes problems of comity – in particular given that foreign overriding mandatory provisions are given the same treatment.⁶⁸ The exceptional nature of the public policy exception and overriding mandatory rules may attest to their problematic character.⁶⁹

Things get even trickier when scholars speak of ‘international public policy’ or other forms of public policies that go beyond borders.⁷⁰ This is the case of Hanoch Dagan and Avihay Dorfman’s proposal for interpersonal human rights,⁷¹ where they propose to use Private International Law’s public policy exception to ensure “a floor of just relationships.”⁷² Even though they rely on a *jus gentium privatum* or ‘private law of mankind’⁷³ rather than on a national idea of justice, their proposal would have to face the challenges presented above.⁷⁴ All these approaches should be mindful

⁶⁵ S. Corneloup, “Can Private International Law Contribute to Global Migration Governance?”, *loc. cit.*, p. 308.

⁶⁶ “[R]espect de l’étranger, élément premier de la justice en droit international privé,” H. Batiffol, “Actualité des intérêts du droit international privé”, *loc. cit.*, p. 25.

⁶⁷ And probably a theory of ‘voluntary submission’ is just not enough to cover it, S. Peari, “Savigny’s Theory of Choice-of-Law as a Principle of Voluntary Submission”, *University of Toronto Law Journal*, 2014, 64, 1, p. 106-151.

⁶⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) 2008 (L 177/6) art. 9(3).

⁶⁹ See generally E.G. Lorenzen, “Territoriality, Public Policy and the Conflict of Laws”, *The Yale Law Journal*, 1924, 33, 7, p. 736 ; I. Thoma, “Public policy (ordre public)” en Jürgen Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, p. 1454-1460.

⁷⁰ This is not to say that global problems should not look for global solutions. But scholars who do should be ready to face the challenges here presented – and many more raised by critical literature, see for example L. Salaymeh, “Decolonial Comparative Law: A Conceptual Beginning”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 2022, 86, 1, p. 166-188.

⁷¹ H. Dagan y A. Dorfman, “Interpersonal Human Rights”, *Cornell International Law Journal*, 2018, 51, 2, p. 361-390.

⁷² *Ibid.*, p. 373.

⁷³ The content of which is to be found through judicial practice or ‘dialogue between courts’, *Ibid.*, p. 377.

⁷⁴ Arguing that human rights are “hardly suitable for the direct regulation of relationships between private parties,” M. Jagielska y M. Jagielski, “Are consumer rights human rights?” en

of falling back into the conception that “uniform substantive law is to be promoted as a solution for the eternal Private International Law problem of diversity of systems of national substantive law”⁷⁵ without having an appropriate answer to valid concerns of imperialism or neocolonialism.⁷⁶ After all, the tension created by diversity itself may be inherent to Private International Law. As Mark Hirschboeck puts it,

“These questions may ultimately stem from a fundamental point of tension between private international law and international human rights law. Private international law is premised on the existence of diversity; it provides a set of tools for navigating differences (such as comity) and permits national parochialism only in rare cases (such as the public policy exception). Human rights law, in contrast, holds out hopes for global normative convergence, likewise with limited exceptions”⁷⁷.

3. *The limits of European Private International Law*

The tensions that I just listed pose a challenge to the idea of achieving change through Private International Law: since Private International is currently technical, difference-focused, and inevitably private, it can only bring about change within the limits imposed by these features.⁷⁸ In Europe, in addition, there is one more limit that derives not from the nature of Private International Law but from its legal configuration in the European Union: it is market-oriented.

European Private International Law Regulations have their legal basis in Art.65 of the Treaty establishing the European Community (TEC)⁷⁹ – now Art.81 of the Treaty on the Functioning of the European Union (TFEU)⁸⁰ –, whereby “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, *particularly*

James Devenney y Mel Kenny (eds.), *European Consumer Protection: Theory and Practice*, Cambridge, Cambridge University Press, 2012, p. 345.

⁷⁵ A. V. M. Struycken, *Co-ordination and Co-operation in Respectful Disagreement General Course on Private International Law (Volume 311)*, *loc. cit.*, p. 27, 28.

⁷⁶ L. Salaymeh, “Decolonial Comparative Law”, *loc. cit.*

⁷⁷ M. Hirschboeck, “Conceptualizing the Relationship between International Human Rights Law and Private International Law Note”, *loc. cit.*, p. 199.

⁷⁸ The question *can technical language lead to any revolution at all?* has been central to much of Private International Law scholarship. The “conflict revolution”, often interpreted as a rejection of ‘blind,’ technical conflict rules, has dealt with it extensively, see S.C. Symeonides, *The American choice-of-law revolution*, *op. cit.* Here, it is enough to say that, if we take technicality to be a key feature of Private International Law, we should take this challenge seriously.

⁷⁹ Consolidated Version of the Treaty Establishing the European Community, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997E/TXT&rid=1>

⁸⁰ Recital 2 Rome I Regulation.

when necessary for the proper functioning of the internal market.” [emphasis added]. Private International Law’s ‘broader aim’ has been described to be “the facilitation of trade in the international level and the international harmony of decisions.”⁸¹ As a result, Private International Law in Europe has become populated by what Marija Bartl labels the ‘neo-liberal rationality’ of the European Union:⁸² for her, concepts such as ‘internal market’ or ‘free movement’ set “a linguistic framework in which the EU political rationality could develop over time” – a linguistic framework which “justif[ies] the existence of the functionalist entity itself”⁸³ and that shapes everything, from the way in which the European Court of Justice interprets European law⁸⁴ to the way we see the world.⁸⁵ If Private International Law is to work within this market rationality, its revolutionary potential is significantly weakened.⁸⁶

Private International Law is technical, difference-oriented, private-focused, and, in Europe, it follows a market rationality. Any attempts to achieve change through Private International Law must take these limitations into account, and merely adapting existing rules to new

⁸¹ J.-J. Kuipers, *EU law and private international law: the interrelationship in contractual obligations*, Martinus Nijhoff Publishers, 2011, p. 11. There are many manifestations of this. The most evident is party autonomy, the possibility to choose the applicable law to a cross-border situation, which feeds from, and into, the neo-liberal discourse of freedom of choice and serves to contribute maintaining and strengthening a market society, H. Muir Watt, “Conclusion: Empire through contract: A private international law perspective” en *The Politics of Private Transnational Governance by Contract*, Routledge, 2017, p. 278. The centrality of party autonomy in European Private International Law, in what it puts great focus on the individual, is also a strong argument against this kind of regulation through PIL.

⁸² M. Bartl, “Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political”, *European Law Journal*, 2015, 21, 5, p. 573 ; M. Bartl, “Internal market rationality: In the way of Re-Imagining the future”, *European Law Journal*, 2018, 24, 1, p. 100-103. Bartl builds her account on literature of political rationalities, that she traces back to Foucault, and institutionalism; further references in *Ibid.*, p. 103-104.

⁸³ M. Bartl, “Internal Market Rationality, Private Law and the Direction of the Union”, *loc. cit.*, p. 576.

⁸⁴ As argued by Scharpf, F.W. Scharpf, “The asymmetry of European integration, or why the EU cannot be a ‘social market economy’”, *Socio-Economic Review*, 2010, 8, 2, p. 211-250.

⁸⁵ M. Bartl, “Internal market rationality”, *loc. cit.*, p. 105. Or, as Katherina Pistor puts it, Pistor: “capital is coded in law,” K. Pistor, *The Code of Capital: How the Law Creates Wealth and inequality*, *op. cit.*, p. 21.

⁸⁶ Muir Watt refers to an “overly technical, market-driven, or dogmatic private international law,” H. Muir Watt, “The Relevance of Private International Law to the Global Governance Debate” en H. Muir Watt y D.P. Fernández Arroyo (eds.), *Private International Law and Global Governance*, Oxford University Press, 2014, p. 2.

situations may not be enough to bring about real change. Here, the enquire broadens: rather than focusing solely on the compatibility of new proposals with existing rules or principles, we should also inquire whether the current system of Private International Law can effectively tackle transnational crises at all. Do conflict rules have the capacity to produce meaningful change? In other words: can Private International Law produce a revolution?.

V. A CONCLUSION? CHANGING PRIVATE INTERNATIONAL LAW TO CHANGE THE WORLD

Matthias Lehmann prompts us to go back to the most basic aim of Private International Law: to solve day-to-day problems created by the existence of different national laws. “In this more modest ambition” – he adds – “private international law has been tremendously successful.”⁸⁷ Whether we share this conclusion,⁸⁸ we must acknowledge the intuition behind it: the ontological commitments of a discipline shape what that discipline can do. If we stick to a version of Private International Law as the one we currently have in Europe – private, technical, diverse, based on a market rationality – , then it is hard to imagine that its tools would lead to a great revolution. Any change would have to be done within the limits of what market-oriented, private, and technical discipline allows.⁸⁹ As a result, the work of many scholars consists in examining how existing techniques of Private International Law can encompass novel situations and new technologies,⁹⁰

⁸⁷ M. Lehmann, “Regulation, global governance and private international law”, *loc. cit.*, p. 2.

⁸⁸ Lehmann himself opposes his view to that of scholars of global governance, in particular H. Muir Watt, “Private International Law beyond the Schism”, *Transnational Legal Theory*, 2011, 2, 3, p. 347-428; L. Carballo Piñero y X. Kramer, “The Role of Private International Law in Contemporary Society: Global Governance as a Challenge”, *Erasmus Law Review*, 2014.

⁸⁹ With all the issues that this may entail listed above, namely privatisation of public policies, instrumentalization of private law, harmonisation of substantive policies, and marketization.

⁹⁰ Including exception situations as was the covid-129 pandemic, where these articles proliferated quickly. Scholars explored, for example, how covid-19 restrictions could be considered overriding mandatory rules in the terms of Europe’s Rome I Regulation (“Rome I Regulation”, *loc. cit.*), P. de Miguel Asensio, “Medidas de emergencia y contratos internacionales”, 2020. For a list of relevant publications of a similar type, see R. Michaels y J. Olbing, *Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and Developments*, 2020, disponible en <https://conflictoflaws.net/2020/corona/>

The fact that this is was found to be doable may go against my analysis that there is a change of paradigm – but not really, for I argue that what really changes is the way in which, the intention with which, these tools and PIL in general are used. Come back to this later.

that are “no more than a specific application to a given context of general principles of private international litigation.”⁹¹

Despite the importance of these studies, the analysis that precedes makes it evident that, in order for Private International Law to play a significant role in the transnational crises, it must undergo a much more substantial transformation. The change that is provoking a change in Private International Law – this is, the reason why scholars attempt to reshape the discipline in order to address significant contemporary issues – is a change that is greater than Private International Law itself. It relates to matters of global political economy, and the questions it raises are closely connected to the role of the law in a capitalist, global society.⁹² The only way to address this sort of changes is to engage in deeper political and philosophical discussions, even when dealing with Private International Law and transnational litigation. As Horatia Muir Watt has argued, since “the whole concept of law, norm and subjectivity is undergoing radical change,”⁹³ then Private International Law may need great change too:

“At best, when framed as issues of conflict of laws, the legal tools made available are inadequate. Some may argue that this is merely a question of technical adjustment. However, it could also be the result of a more radical failure to fathom the depth of the social and political changes afoot.”⁹⁴

Some scholars are working in that direction. Muir Watt declares on her latest book that one of her goals in it is to challenge “humanity’s ‘ontological privilege’ over nature.”⁹⁵ Daniel Bonilla Maldonado challenges the fundamental assumptions behind comparative law and the idea of ‘legal hybrids’ by focusing on the rights of nature.⁹⁶ Verónica Ruiz Abou-Nigm address similar questions in matters of migration.⁹⁷ Ralf Michaels, on the

⁹¹ E. Álvarez-Armas, “SDG 13: Climate action”, *loc. cit.*

⁹² See discussions on transnational law – which, however, remain outside of the scope of this article.

⁹³ H. Muir Watt, “Globalization and private international law” en J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, p. 851.

⁹⁴ *Ibid.*, p. 848.

⁹⁵ H. Muir Watt, *The Law’s Ultimate Frontier: Towards an Ecological Jurisprudence* (Hart 2023) 6.

⁹⁶ This is of course part of a larger trend in the Law, See for example D. Bonilla Maldonado, “Global Legal Pluralism and the Rights of Nature”, *Max Planck Private Law Research Paper No. 23/15*, 2023, disponible en: Bonilla Maldonado, Daniel, Global Legal Pluralism and the Rights of Nature. The Rights of Nature and Global Legal Pluralism, Daniel Bonilla Maldonado, Ralf Michaels, eds., Forthcoming, Max Planck Private Law Research Paper No. 23/15, Available at SSRN: <https://ssrn.com/abstract=4510374>.

⁹⁷ V. Ruiz Abou-Nigm, “Unlocking private international law’s potential in global (migration) governance”, en *Private International Law: Contemporary Challenges and Continuing Relevance*, Edward Elgar Publishing, 2019, p. 196-213.

other hand, argues that it is possible to remodel the discipline while keeping some of its key features – in particular, technique.⁹⁸ Yet, he still argues, as other scholars do, in favour of modifying the way in which difference is handled: difference for them be guided by specific “ethic of responsivity, cultural humility, and intercultural competence,”⁹⁹ or one of hospitality.¹⁰⁰ Whether this rethinking of the discipline is enough – or even workable at all¹⁰¹ – remains to be seen. For now, the first step to change is becoming aware of the limits of the tools employed to bring about change. Unless there is a deeper revision of the discipline, it will be hard to speak of revolution *through* conflicts.

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⁹⁸ R. Michaels, “Post–critical Private International Law”, *loc. cit.*; R. Michaels, “Global Legal Pluralism and Conflict of Laws” en P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*, Oxford University Press, 2020, p. 628–648. Michaels argues we can use technique for critical purposes: : “Technicality, counterintuitively, becomes a tool in the hand of the critical analyst,” *Ibid.*, p. 644. Paul Schiff Berman argues that “when deference is impossible (because substantive agreement about norms is impossible), we may at least be able to develop a legal language in which the negotiation of difference can take place” – the technical language of Private International Law, P.S. Berman, “Conflict of Laws and the Legal Negotiation of Difference” en A. Sarat, L. Douglas y M.M. Umphrey (eds.), *Law and the Stranger*, Stanford University Press, 2010, p. 170. Others argue that technicity is needed due to the complexity of the subject with which Private International Law deals, G.R. Shreve, “Every Conflicts Decision is a Promise Broken Conflict of Laws, Comparative Law and Civil Law”, *loc. cit.*, p. 1348.

⁹⁹ R. Michaels, V. Ruiz Abou–Nigm, *op. cit.* See also R. Michaels, “Private International Law as an Ethic of Responsivity” en V. Ruiz Abou–Nigm y M.B. Noodt Taquela (eds.), *Diversity and integration in private international law*, Edinburgh University Press, 2019.

¹⁰⁰ H. Muir Watt, “Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference”, *Current Legal Problems*, 2017, 70, 1, p. 111–147.

¹⁰¹ *Contra* M. Lehmann, “Regulation, global governance and private international law”, *loc. cit.*, p. 2.

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