

Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society*

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I. GlobalSantaFe¹

In September 2001, Global Marine Inc. and Santa Fe International Corp. announced their merger. The new enterprise would operate under the name "GlobalSantaFe Corp.". Immediately after the announcement was made, Park, a Korean citizen, registered the domain name "globalsantafe.com" with the Korea-based domain name registrar Hangang. Following the registration, Park did not make active use of the website. It only said "under construction".

In October 2001, GlobalSantaFe Corp. asked the United States District Court, Eastern District of Virginia, Alexandria Division, to compel Hangang and the Virginia-based domain name registry VeriSign, which was responsible for the administration of the top level domain ".com", to transfer the domain name "globalsantafe.com" to it. GlobalSantaFe Corp., referring to the Anticybersquatting Consumer Protection Act (ACPA)², claimed that Park had violated its trademark rights. On April 1, 2002, the court entered judgment in favour of GlobalSantaFe Corp.

On April 9, 2002, Park filed an application for an injunction in the District Court of Seoul, requesting the court to prohibit Hangang from transferring the domain name as ordered by the U.S. court. The District Court of Seoul granted this injunction, finding that the U.S. court lacked jurisdiction over the matter. Hangang accordingly refused to transfer the domain name to GlobalSantaFe Corp.

But GlobalSantaFe Corp. did not give up. It asked the U.S. court to direct VeriSign to cancel the domain name until transferred. On February 5, 2003, the court gave judgement in the plaintiff's favour. The court found that ACPA's jurisdictional requirements were met because VeriSign was located in Virginia. Further, concerns of "international comity" did not dictate deference to the injunction issued by the Korean court. On the contrary, the "Princess Lida doctrine", according to which the first court that asserts jurisdiction in a case requiring control over property may exercise that jurisdiction to the exclusion of any other court, would militate for its jurisdiction.³

II. Neem tree

True miracles are ascribed to the Neem Tree (*Azadirachta indica*), particularly in India, where the tree is worshipped as being holy. Extracts from its leaves are used

¹* We wish to thank Andreas Fischer-Lescano for his valuable contributions.
250 F. Supp. 2d 610 (E.D. Va. 2003).

² 15 U.S.C. § 1125(d).

³ Cf. *Princess Lida of Thurn and Taxis et al. v. Thompson et al.*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939).

to fight against fourteen different types of fungus and against bacteria found in burn tissue, as well as against typhoid pathogens. The extract is used to prevent viral infections, and is implemented against small pox, chicken pox, hepatitis B and herpes. All parts of the tree are used in ayurvedic medicine.

The natural product has become an object of commercial exploitation by transnational companies. U.S. American company W.R. Grace & Co. acquired a whole series of patents in the U.S. and Europe in connection with the production of a stabilizing Azadirachta solution for fighting fungi.⁴

This attempt by transnational companies to obtain exclusive rights on "natural" knowledge prompted considerable resistance by indigenous peoples. Activists of various NGOs filed legal remedies against these patents – successfully in Europe. European patent nr. 0436257, which had been granted by the European Patent Office (EPO), was revoked following the activists' objection because it did not meet the novelty of invention standard, as laid down in article 52 (1) and article 54 (1) and (2) of the European Patent Convention (EPC)^{5,6}

III. Two kinds of legal pluralism

What is it that connects these two *causes célèbres*? They are examples of situations in which new kinds of collisions of legal norms are at issue forcing the law to develop new conflict rules.

Both cases are of relevance for conflict law. This is evident at first sight in GlobalSantaFe. Here the issue was clearly the collision of U.S. American law with Korean law, for which the respective national conflict of law rules would have to choose between two national legal orders – hopefully driven by the goal to achieve international legal harmony. However, analysed more carefully, GlobalSantaFe is not only about the collision of two national legal orders. Instead, taking into account that the case transcends both national legal orders, that it can be "localised" in the world wide web, the question whether GlobalSantaFe should be governed by the autonomous laws of the internet, by the rules agreed on by the Internet Corporation for Assigned Names and Numbers (ICANN) on assigning domain names, becomes central. According to these rules, the principle of priority applies unless the domain name has been registered in bad faith.⁷ Or should the case alternatively be decided

⁴ Literature on the Neem tree patent is extensive; especially instructive: *Shalini Randeria*, Rechtspluralismus und überlappende Souveränitäten: Globalisierung und the "listige Staat" in Indien, *Soziale Welt* 57 (2006), p. 229, 237 pp.; *Vandana Shiva/Radha Holla-Bhar*, Piracy by Patent: The Case of the Neem Tree, in: Jerry Mander/Edward Goldsmith (ed.), *The Case Against the Global Economy and For a Turn Toward the Local*, 1996, p. 146, 148 pp. Cf. further: *Murray Lee Eiland*, Patenting Traditional Medicine, *Journal of the Patent and Trademark Office Society* 89 (2007), p. 45; *Anja v. Hahn*, Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der public domain, 2004, p. 279 pp.

⁵ Agreement on the Issue of European Patents of October 5, 1973, revised version of article 63 EPC December 17, 1991 and the decisions of the European Patent Office's Administrative Council of December 21, 1978, December 13, 1994, October 20, 1995, December 5, 1996, December 10, 1998 and October 27, 2005 as well as the preliminary applicable clauses of the file of revisions of the EPC of November 29, 2000.

⁶ EPO, rescission, February 13, 2001, bill nr. 90250319.2-2117, patent nr. 0436257; petition against this ruling has been rejected by the EPO on March 8, 2005 (file nr. T 0416/01 - 3.3.2).

⁷ The "bad faith" exception follows from section 4 lit a. of the Rules for Uniform Domain Name Dispute Resolution Policy, accessible at (April 21, 2008): <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

on the basis of a hybrid mixture of the participating national legal orders and the ICANN policies?

But what is the collision in the Neem tree case? At first glance, the case only raises substantive law issues, namely the question whether the European patent nr. 0436257 has been rightfully issued under the EPC, more precisely whether the invention registered by W.R. Grace & Co. passes the novelty test of article 54 of the EPC. However, is it not more adequate to describe the material problem of the Neem tree case as a conflict between norms which govern the modern globalised world and habitual rules rooted in a local culture? The patent protection which was granted excludes indigenous groups from an important and, up to this point, free use of the Neem tree's healing medicinal powers. Hence, the question is whether the patent protection regime collides in a legally relevant sense with a right of indigenous groups to use their traditional knowledge freely.

In relation to the traditional understanding according to which only national legal orders can be in conflict with each other, the two cases clearly pose new problems for the law. So how can their characteristics be more precisely described? One aspect of GlobalSantaFe is the clash between rules claiming global reach with norms limited to a territory. At the same time it seems to be relevant that national legal rules, which emerge from political processes of legislation and are, therefore, – at least idealistically - aimed at promoting the public interest, meet with rules which are exclusively oriented towards the particular interests of the internet. And the novelty of the collision in the Neem tree case may lie just in the fact that intellectual property rights, which are essential for the functioning of modern societies' "knowledge economies", clash with traditional rules for the protection of ancient medicinal cultures.

But do the two cases really represent a problem for the law of conflicts which exclusively deals with collisions of *legal* norms? Social norms, i.e. expectations of behaviour which emerge from processes of spontaneous interactions, are in principle not relevant for the law of conflicts. They only gain legal significance when legal norms, if only implicitly, incorporate them into the system of law, for example by making reference to them. ICANN policies and rules for the protection of indigenous cultures are, therefore, only relevant to the law of conflicts if they actually possess legal quality.

This short description of problems has already shown that the conflict rules of private and public international law are not suited to dealing with the new types of norm collisions. The policies enacted by the board of directors of the private law corporation ICANN - incorporated under the California Nonprofit Public Benefit Corporation Law - which, pursuant to section four of the Registrar Accreditation Agreement⁸, are to be observed by the domain name registrars - private law corporations responsible for the worldwide allocation of domain names - are not on their radar. And exploring rules of indigenous cultures has mostly been left to law anthropologists doing fieldwork in Western Sumatra and other places.

Five theses are to be developed:

⁸ The Registrar Accreditation Agreement as of Mai 17, 2001 is accessible at (April 21, 2008): <http://www.icann.org/registrars/ra-agreement-17may01.htm>.

(1) In their differences the two types of collisions at issue in GlobalSantaFe and the Neem tree case reflect the *double fragmentation* of world society and its law. The fragmentation is a double one because, firstly, the functional differentiation of modern society causes collisions between different social functional systems and the legal norms coupled to them. Secondly, differences between social organisational principles cause clashes between the formal law of modern society and the socially embedded legal systems of indigenous societies.⁹

(2) Both cases are about the conflict of *legal* norms – albeit of a very different kind. In GlobalSantaFe, national legal orders collide with the transnational regime law of the *lex digitalis*. In the Neem tree case, international intellectual property law collides with legal norms of indigenous cultures.

(3) Until now, the rules on the conflict of laws of neither public nor private international law offer an adequate solution for these new types of collisions. They have been constructed for coping with collisions of national legal orders and not for solving conflicts between national laws and transnational law or the law of indigenous cultures, respectively.

(4) With regard to transnational regimes, collision rules have to be developed which take their character as "self-contained regimes" into account. Here, the *substantive law approach* which has been developed in private international law seems to be most suitable.

(5) With regard to indigenous cultures, the collision rules to be developed must respect the social embeddedness of the legal norms. In this case, the *model of the institutionalised and proceduralised protection of basic rights* seems to be the most promising.

IV. Collisions of transnational regimes: Cybersquatting

1. Collisions of rationalities in the functionally differentiated global society

GlobalSantaFe is exemplary for a new type of conflict of legal norms – for the conflict between the law of transnational regimes and the law of nation states. The law of the private internet regulation authority ICANN collides with both U.S. American and Korean law, respectively. What is new about this type of collision is that one of the colliding entities is not a national legal order, as the traditional doctrine would require, but instead a transnational regime law. This collision reflects the first fragmentation of global society: its fragmentation into autonomous global functional systems.

To gain a more precise understanding of this, one must proceed from the assumption that law, following the logic of functional differentiation, has established itself globally as a unitary social system beyond national laws. A unitary global law reproduces itself through legal acts which are guided by different programs but are in the end

⁹ To avoid misunderstandings: the description of a social sector as "indigenous" does not refer to a formation of society as penned by a nation state (in our example the state of India) but to segments of indigenous forms of society. These can be found almost everywhere in world society regardless of national borders.

oriented towards the binary code legal/illegal. The unity of global law is just not, as in the nation state, based on the consistency of legal norms structurally secured by the hierarchy of courts; rather, it is process-based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders.¹⁰ The operative unity of law is also achieved on the global level. This unity is not a normative unity of law but is characterised by a multitude of fundamental contradictions of legal norms. Legal unity within global law is redirected away from normative consistency towards operative "interlegality".¹¹ Interlegality does not only mean the existence of a static variety of normative systems which are strictly separated from each other, as described in the classic legal sociology of *Eugen Ehrlich*, *Santi Romano*, *Maurice Hauriou*, *Georges Scelle* and *Georges Gurvitch*¹² but also of a dynamic variety of normative operations, in which "parallel norm systems of different origin stimulate each other, interlock and permeate, without coalescing into united super-systems that absorb their parts, but permanently coexist as heterarchical formations"¹³.

In other words, what is characteristic for post-modern interlegality is not only the collision of grown local customary laws with legal acts of parliamentary provenance, but also a new confusiveness in the legal in-between-worlds of global society that has to live with contradictory individual case decisions, with colliding settings of rules governing the same social field, with masses of laws that do not give rise to a single "ultimate rule of recognition".¹⁴ Instead of a generalisation of expectations by means of an authoritative final decision, unity of legal texts and homogeneity of methods of cognition, the post-national constellation is characterized by the juxtaposition of a number of structurally closed legal systems, all of which principally claim to be applied pre-eminently within their respective realms. Neither a hierarchical construction of the law nor a *Grundnorm* nor a common point of final reference can hold these heterarchical systems together.

¹⁰ For the system-theoretical concept of a world legal system *Niklas Luhmann*, *Das Recht der Gesellschaft*, 1993, p. 571 pp.; see also *Gunther Teubner*, *Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus*, *Rechtshistorisches Journal* (1996), p. 255; *Andreas Fischer-Lescano*, *Die Emergenz der Globalverfassung*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003), p. 717; *Anthony D'Amato*, *International Law as an Autopoietic System*, in: *Rüdiger Wolfrum/Volker Roeben* (ed.), *Developments of International Law in Treaty Making*, 2005, p. 335; *Klaus A. Ziegert*, *Globalisierung des Rechts aus der Sicht der Rechtssoziologie*, in: *Rüdiger Voigt* (ed.), *Globalisierung des Rechts*, 2000, p. 69; *Mathias Albert*, *Zur Politik der Weltgesellschaft: Identität und Recht im Kontext internationaler Vergesellschaftung*, 2002, p. 203 pp.; *Graff-Peter Calliess*, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, *Zeitschrift für Rechtssoziologie* 24 (2002), p. 185.

¹¹ *Boaventura de Sousa Santos*, *State Transformation, Legal Pluralism and Community Justice: An Introduction*, *Social and Legal Studies* 1 (1992), p. 131; *Marc Amstutz*, *Vertragskollisionen: Fragmente für eine Lehre von der Vertragsverbindung*, in: *Marc Amstutz* (ed.), *Festschrift für Heinz Rey*, 2003, p. 161.

¹² *Eugen Ehrlich*, *Grundlegung der Soziologie des Rechts*, 1913, p. 81 pp.; *Santi Romano*, *L'ordinamento giuridico*, 2nd ed. 1918, §§ 12 pp.; *Maurice E. Hauriou*, *Aux sources du droit: le pouvoir, l'ordre et la liberté*, 1933, p. 11 pp.; *Georges Gurvitch*, *The Sociology of Law*, 1947, p. 181 pp.; *Georges Scelle*, *Précis de droit des gens*, Band 1: *Principes et systématique*, 1932, p. 6 pp.

¹³ *Marc Amstutz*, *Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in: *Christian Joerges/Gunther Teubner* (ed.), *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, 2003, p. 213.

¹⁴ *Andreas Fischer-Lescano/Ralph Christensen*, *Auctoritatis interpositio. Die Dekonstruktion des Dezisionismus durch die Systemtheorie*, *Der Staat* 44 (2005), p. 213.

Here, a new kind of internal differentiation of law is noticeable. For centuries its internal differentiation had followed the political logic of nation states and was manifest in the multitude of national legal orders, each with their own territorial jurisdiction. Even public international law, which regarded itself as the contract law of the nation states, did not break with this form of internal differentiation of the law. The final break with such conceptions was only signaled in the last century with the rapidly accelerating expansion of international organizations and politically initiated regulatory regimes¹⁵, which, in sharp contrast to their genesis within international treaties, established themselves as autonomous legal orders. The internal differentiation of law along national boundaries is now overlain by sectoral fragmentation.

In contrast to constantly reiterated claims, the appearance of global regimes does not entail the integration, harmonization or, at the very least, the convergence of legal orders; rather, it transforms the internal differentiation of law thereby not producing unity but a new fragmentation of law. The fragmentation of society affects the law in such a way that success-oriented political regulation of differentiated societal spheres causes a parcelling of issue-specific policy-arenas, which, for their part, juridify themselves. The traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.¹⁶ It is important to emphasise that this does not mean that the old differentiation along national legal orders disappears. It is not argued that the nation state will be disposed of in the course of globalisation. One kind of internal differentiation is not replaced with the other, rather two different principles overlap: territorial-segmental and thematic-functional differentiation.¹⁷ This overlap creates a new type of collision of norms which can be observed in GlobalSantaFe – the conflict between the national laws of Korea and the U.S. on the one hand, and the rules of the internet governance ICANN on the other.

However, GlobalSantaFe also illustrates that in order to understand the new types of norm collisions, it is not sufficient to consider only the global regulatory, i.e. politically

¹⁵ For the concept "regime" in public international law: *Nele Matz*, Wege zur Koordinierung völkerrechtlicher Verträge: Völkervertragsrechtliche und institutionelle Ansätze, 2005, p. 358 pp.; *Christian Walter*, (Inter)national Governance in verfassungsrechtlicher Perspektive: Überlegungen zu Möglichkeiten und Grenzen der Entwicklung eines 'Internationalen Verfassungsrechts', in: Adrienne Héritier/Michael Stolleis/Fritz Scharpf (ed.), European and International Regulation after the Nation State. Different Scopes and Multiple Levels, 2004, p. 31, 38 pp.; *Christian Tietje*, The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture, German Yearbook of International Law 42 (1999), p. 26.

¹⁶ *Martti Koskeniemi*, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, 2005, <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf>. Especially in regards of ICANN as "Global Regulatory Regime" see *Dirk Lehmkuhl*, The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on Regulation Beyond the Nation State, and Related Problems, Zeitschrift für Rechtssoziologie 23 (2002), p. 61, 71 pp.; *Milton Mueller*, Rooling the Root: Internet Governance and the Taming of Cyberspace, 2002, p. 211 pp.; *Christian Walter*, Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law, German Yearbook of International Law 44 (2001), p. 170, 186 f.

¹⁷ See also *Michael Stolleis*, Was kommt nach dem souveränen Nationalstaat? Und was kann die Rechtsgeschichte dazu sagen? in: Adrienne Héritier/Michael Stolleis/Fritz Scharpf (ed.), European and International Regulation after the Nation State. Different Scopes and Multiple Levels, 2004, p. 17.

initiated, regimes. Global regulatory regimes certainly give us a picture of the fundamental transformation of global law from territorial to a sectoral differentiation, but only to the degree that it is induced by those forms of legal regimes which derive from international agreements. No light whatsoever is shed upon the equally rapid growth in the numbers of non-statal “private” legal regimes. It is these regimes that give birth to “global law without the state”¹⁸, which is primarily responsible for the multi-dimensionality of global legal pluralism.¹⁹

2. Legal quality of ICANN policies

How the law should deal with conflicts between national laws and legal pluralistic systems of norms, such as the transnational regimes, is a largely unanswered question.²⁰ Controversially discussed is specifically the problem whether norms of sectorial private regimes possess legal quality at all. In GlobalSantaFe it is hence questionable whether there really is a tripolar collision of *legal* norms, that is, whether not only the national legal orders of the U.S. and Korea collide but whether the transnational regime law of the ICANN policies has any claim to be considered as the legal order on which the decision should be based. Are the ICANN policies part of a *lex digitalis*, understood as an autonomous legal order on one level with the *lex mercatoria*,²¹ the *lex sportiva*²² or the *lex constructionis*²³?

In opposition to contrary positions²⁴, it is of great importance how this question is answered. The law is dependent upon criteria by which it can determine its own boundaries. Not all of the normative behavioural expectations produced within society – those of moral²⁵, for instance – can be relevant as legal norms for the law, since the law’s societal boundaries would otherwise be blurred. The law would lose its ability to fulfil its societal function of providing a way to decide conflicts by transforming them into an answerable *quaestio iuris*. If the ICANN policies were

¹⁸ Gunther Teubner (ed.), *Global Law Without A State*, 1997.

¹⁹ Topical discussion in *Emmanuel Melissaris*, *The More the Merrier: A New Take on Legal Pluralism*, *Social & Legal Studies* 13 (2004), p. 57; *Paul Schiff Berman*, *The Globalization of Jurisdiction*, *University of Pennsylvania Law Review* 151 (2002), p. 311, 325 pp.; *Carol Weisbrod*, *Emblems of Pluralism: Cultural Differences and the State*, 2002, p. 5 f. und 68 f.; *Surya P. Sinha*, *Legal Polycentricity*, in: Hanne Petersen/Henrik Zahle (ed.), *Legal Polycentricity: Consequences of Pluralism in Law*, 1995, p. 31.

²⁰ To that the discussion between *Ralf Michaels*, *The Re-State-ment of Non-State-Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, *Wayne Law Review* 51 (2005), p. 1209, *Andreas Fischer-Lescano/Gunther Teubner*, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, 2006, and *Paul Schiff Berman*, *Global Legal Pluralism*, *Southern California Law Review* 80 (2007), p. 1155.

²¹ Cf. only *Alec Stone Sweet*, *The New Lex Mercatoria and transnational governance*, *Journal of European Public Policy* 13 (2006), p. 627.

²² Cf. for *lex sportiva* *Florian Becker/Dirk Lehmkuhl*, *Multiple Strukturen der Regulierung: Ursachen, Konflikte und Lösungen am Fall des Leichtathleten Baumann*, in: *Adrienne Héritier/Michael Stolleis/Fritz Scharpf* (ed.), *European and International Regulation after the Nation State. Different Scopes and Multiple Levels*, 2004, p. 225.

²³ See also generally *Milos Vec*, *Das selbstgeschaffene Recht der Ingenieure. Internationalisierung und Dezentralisierung am Beginn der Industriegesellschaft*, in: *Adrienne Héritier/Michael Stolleis/Fritz Scharpf* (ed.), *European and International Regulation after the Nation State. Different Scopes and Multiple Levels*, 2004, p. 93.

²⁴ Cf. e.g. *Paul Schiff Berman*, (Fn. 21), p. 1179.

²⁵ Cf. for the relationship between law and moral *Niklas Luhmann*, (Fn. 10), p. 78 f.

simply social norms, there would be no real conflict of laws necessitating the development of a new collision rules whose starting point must be the assumption that all legal norms colliding are in principle equally valid.

If there is a "collision" of legal norms with mere social norms, the legal norms have absolute priority. Social norms are only of relevance for the law when the law opens itself towards them, for example by making reference to societal conventions.²⁶ This is also true for the transnational arena, in which social norms are factored in by techniques of reference established in law. *Ralf Michaels* mentions in this context three methods of private international law: incorporation, deference and delegation.²⁷ In the absence of such referring rules, social norms become only subcutaneously relevant in the process of interpreting legal norms. This does not mean to deny the substantial influence which social norms exert on the law. However, if there is a true conflict between legal and social norms, the legal norms prevail.²⁸

If, on the other hand, the ICANN policies possess legal quality, then their claim to be applied is of equal force to that of the U.S. American and the Korean legal system. In this case, a collision of legal norms exists and the rules on the conflict of laws have to be rethought from conflicts between national legal orders to conflicts between transnational sectorial regimes themselves and – as in our case – with national legal orders. Such an adjustment from territoriality to "affiliation to a functional regime" means that the legal parameters cannot simply be taken from the particular territorial legal system.²⁹ A decision cannot be reached by mechanically subsuming the rules of whichever forum state happens to be addressed, but is at the same time dependent on the particularities of the respective functional regime.

What is the criterion by which the law decides whether a norm possesses legal quality?

This question, too, is highly controversial. It should be clear by now that the sought-after criterion cannot be found in whatever connection between a nation state and the norm. It is necessary to give up the popular assumption that global law exclusively derives its validity from processes of state law-making and from state sanctions, be these derived from state internal sources of law, or from officially sanctioned

²⁶ Cf. for many *Jan Busche*, in: Franz Jürgen Säcker/Roland Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 1: Allgemeiner Teil, 1. Halbband: §§ 1-240, ProStG, 5. Aufl. 2006, § 157 Rn. 16.

²⁷ Ralf Michaels (Fn. 21).

²⁸ For the priority of legal rules over social rules Cf. BGHZ 10, 228 (232), to § 138 para. 1 BGB: "Es sind (...) die besonderen Umstände des einzelnen Falles darauf zu prüfen, ob der Vertrag mit dem Anstandsgefühl aller billig und gerecht Denkenden übereinstimmt. Dabei sind vor allem die Anschauungen der in Betracht kommenden beteiligten Kreise, hier der ehrbaren Kaufmannschaft, zu berücksichtigen, wobei das Durchschnittsmaß von Redlichkeit und Anstand zugrunde zu legen ist. *Etwaige Missbräuche, die sich in bestimmten Kreisen gebildet haben, sind nicht zu beachten (...)*". (own emphasis). See also *Christian B. Armbrüster*, in: Franz Jürgen Säcker/Roland Rixecker (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 1: Allgemeiner Teil, 1. Halbband: §§ 1-240, ProStG, 5. Aufl. 2006, § 138 Rn. 14.

²⁹ Following this argument *Graeme B. Dinwoodie*, *A New Copyright Order: Why National Courts Should Create Global Norms*, *University of Pennsylvania Law Review* 149 (2000), p. 469, and *Paul Schiff Berman*, (Fn. 20).

international sources of law.³⁰ The fragmentation of society requires us to extend the concept of law to encompass norms lying beyond the legal sources of nation state and international law. As *Paul Schiff Berman's* formulation indicates, one of the central and as yet unsolved future tasks of international law will be:

"recognizing and evaluating non-state jurisdictional assertions that bind sub-, supra-, or transnational communities. Such non-state jurisdictional assertions include a wide range of entities, from official transnational and international regulatory and adjudicative bodies, to non-governmental quasi-legal tribunals, to private standard-setting or regulatory organizations."³¹

"Transnational communities", or autonomous fragments of society, such as the globalized economy, science, technology, the mass media, medicine, education and transport, are developing an enormous demand for regulating norms, which cannot, however, be satisfied by national or inter-national institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse to law.

As extensively argued elsewhere, the norms enacted by these "transnational communities" do not already possess legal quality simply because they adhere to the binary code of legal/illegal in judging behaviour.³² Rather, what is decisive is the institutionalisation of processes of secondary rule-making. Autonomous law (with or without a state) only exists when institutions have been established which systematically assess all first order observations that use the code legal/illegal by means of second order observations on the basis of the code of law. Transnational law detached from state law should, accordingly, be defined as follows:

"*Transnational law* identifies a third category of autonomous legal orders beyond the traditional categories of national and international law. Transnational law is created and developed by the law creating powers of global civil society, it is based on general principles of law and their concretisation in social practice, its application, interpretation and development are – at least primarily – the responsibility of private dispute resolution providers, and it is codified – if at all – in general catalogues of principles and rules, standardised contract forms or codes of conducts which are set up by private rule-making bodies."³³

Judged against the criterion of the establishment of processes of secondary rule-making, the *lex digitalis* and with it the ICANN policies are genuine legal norms.³⁴

³⁰ As still proposed by *Dieter Reuter*, *Das selbstgeschaffene Recht des internationalen Sports im Konflikt mit dem Geltungsanspruch des nationalen Rechts*, *Deutsche Zeitschrift für Wirtschaftsrecht* (1996), p. 1, even though he asks for new solutions when it comes to international law.

³¹ *Paul Schiff Berman*, (Fn. 20), p. 325; See also *T. Alexander Aleinikoff*, *Sovereignty Studies in Constitutional Law: A Comment*, *Constitutional Commentary* 17 (2000), p. 197, 201 f.

³² *Gunther Teubner*, (Fn. 10); *Andreas Fischer-Lescano*, *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, 2005, p. 129 pp.

³³ *Graf-Peter Calliess*, *Transnationales Verbrauchervertragsrecht*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 68 (2004), p. 244, 254 f.

³⁴ Cf. for *lex digitalis* *Henry H. Perritt*, *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, *Ohio State Journal on Dispute Resolution* 15 (2000), p. 675, 691 f. Explicitly stating the lawful substance: *Graf-Peter Calliess*, *Globale Kommunikation - staatenloses Recht: Zur (Selbst-)Regulierung des Internet durch prozedurales Recht*, in: *Michael Anderheiden/Stefan Huster/Stephan*

Their sources are the secondary rules governing the private autonomous acts of internet users, the Rules for Uniform Domain Name Dispute Resolution Policy (UDRP)³⁵, the respective supplemental rules of the dispute resolution providers accredited by ICANN³⁶ and, finally, the rulings of the provider panels.

Consequently, there is a tripolar collision of laws in GlobalSantaFe. There are no rules as yet for deciding conflicts of legal orders involving transnational laws. Such rules need to be created.

3. New collision rules

On what principles are the new collision rules to be based?

The principle of territoriality which was regarded as decisive by the U.S. court in GlobalSantaFe and pursuant to which the decision to apply U.S. American law was made on the ground that the domain name registry VeriSign was located in the U.S. is not satisfactory. Its application is not convincing on a theoretical level because of the genuine aterritorial character of the internet and its rules. And on a practical level it is not convincing to regard the principle of territoriality as decisive because its application not only leads to a fragmentation of the law of the internet but may also cause conflicting rulings should other courts – as in our case the Korean court – find that the territorial basis of the case lies in their jurisdiction.

A better solution would be achieved if the development of the collision rules was oriented on the rules of referral established in private international law. Then, the question would not be to which national territory the case has its closest link but in which of the competing national and functional legal orders the "location of the legal relationship" – aterritorially understood - lies. The primary question for collision law would be on which regime of law (local, national or transnational) the legal relationship is mainly based. It would have to be answered by making use of the criterion of "primary coverage", which *Trachtman* has developed from the perspective of the economics of institutions in order to solve the problem of overlapping jurisdictions.³⁷ The determination of the applicable national or transnational legal order would depend on the answer to the question in which social sector the legal relationship is located, and the case would have to be decided pursuant to the substantive rules of the legal order which has the strongest structural connection to that social sector and which, therefore, can claim to have the strongest "interests" in being applied.³⁸

Kirste (ed.), *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts*, ARSP-Beiheft Nr. 79, 2001, p. 61; *Gunther Teubner/Vaios Karavas*, <http://www.CompanyNameSucks.com>: Drittwirkung der Grundrechte gegenüber "Privaten" im autonomen Recht des Internet, in: Wolfgang Hoffmann-Riem/Karl-Heinz Ladeur (ed.), *Innovationsoffene Regulierung des Internet*, 2003, p. 249, 265 pp.; *Karl-Heinz Ladeur/Lars Viellechner*, Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globales Privatrechtsregimes, *Archiv des Völkerrechts* 46 (2008), p. 42, 64.

³⁵ See especially Section 4 lit a. UDRP.

³⁶ A list of accredited Dispute Resolution Providers as well as their supplement rules are accessible at (April 21, 2008): www.icann.org/udrp/approved-providers.htm.

³⁷ *Joel P. Trachtman*, Institutional Linkage: Transcending "Trade and ...", *American Journal of International Law* 96 (2002), p. 77, 90 f.

³⁸ Similar thoughts can be found in the "governmental interest approach", developed by *Brainerd Currie*, which formulates rules for the solution of interlocal collisions in U.S. American law, Cf. *Brainerd Currie*

If the "primary coverage" lay in the transnational regime even the national courts would have to apply the legal norms of that transnational regime. If, on the other hand, it lay in the national legal order even the transnational regime's panels would have to apply the respective national law. This clear cut solution reached by making use of rules of referral would offer two advantages: it would reduce the danger of conflicting court rulings in one and the same case and it would, by using the criterion of "primary coverage", consider material, i.e. case-adequate, aspects instead of basing the decision on the existence or non-existence of an arbitrary link between the legal relationship and a specific territory.

If this collision rule was used in GlobalSantaFe it would, due to the inescapable transnationality of the world wide web, be most plausible to regard its "primary coverage" as resting with ICANN's policies for the assignment of domain names. The collision rule would point to the global *lex digitalis*, the rules of which would have to be applied by the national courts. Pursuant to the ICANN policies, in a first step, the principle of priority would be applied – hence Korean citizen Park would prevail. However, in a second step, GlobalSantaFe Corp. would, according to § 4 lit. a UDRP, be granted the opportunity to establish that (1) the domain name Park registered was identical or confusingly similar to its company trademark, (2) Park did not have a right or legitimate interest in respect of the domain name "globalsantafe.com" and (3) Park had registered and used the domain name in bad faith.

However, the question is whether a simple analogy to the rules of referral of private international law adequately grasps the particularities of a collision between national law and transnational regime law. Is there not a major difference between national legal orders, with which private international law has traditionally dealt, and transnational regimes that demand a more complex solution?

The main difference is probably that national legal orders are comprehensive legal systems in the sense that even highly specialised regulations are embedded in a tight web of legal norms. Consequently, in national law, an "inner balance" is achieved between the various legal norms, principles and policies applicable in the respective nation state. Contrarily, transnational legal orders, as specialised "self-contained regimes"³⁹ only set rules for those functional sectors of society to which they are structurally coupled. Their legal norms reflect exclusively the rationality criterion of a particular social sector. They are not oriented towards achieving the "public welfare" of a comprehensive polity as are the contextualised norms of a nation state's legal order.

This difference needs to be taken account of when developing a new collision law. If the "primary coverage" of the case at hand is found to lie with an issue-specific

Currie, Selected Essays on the Conflict of Laws, 1963, p. 183 f.; *Brainerd Currie*, Comment on *Babcock v. Jackson*, Columbia Law Review 63 (1963), p. 1233, 1242 f.

³⁹ Cf. for the concept of "self contained regimes" *Martti Koskenniemi*, Outline of the Chairman of the ILC Study Group on Fragmentation of International Law. The Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes', 2003, http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf, p. 9: "A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a 'self-contained regime', a special case of *lex specialis*."

transnational regime, collision law must compensate the regime's "tunnel vision" by incorporating contextualizing elements which allow for the consideration of competing or opposing principles. Especially the following come to mind:

- Adherence to the "ordre public transnational": as in private international law, a referral to the respective legal order to be applied is not unconditional. Any result which would be obtained by exclusively applying the law of the regime would have to be measured against an "ordre public transnational" as to its acceptability. It is important to notice that the "ordre public transnational" would not be a uniform and globally valid *ius non dispositivum*. Instead, different regimes have different concepts of what constitutes the indispensable fundament of a normative order. Consequently, a regime specific "ordre public transnational" would have to be considered.
- *Comitas* towards other global regimes and their eigen-rationality: as a second contextualising mechanism one would have to demand that when producing their legal norms the transnational regimes must consider the eigen-rationalities of other regimes and their legal orders.

But even if mechanisms which compensate for the one-sidedness of "self-contained regimes" were successfully incorporated in collision law, the question remains whether an analogy to techniques of referral established in private international law takes sufficient account of the particularities of the new collision types. The challenge of these does not only lie in the fact that they are "trans-national" but also that they are "trans-institutional" in character. This means that both national legal orders and transnational legal regimes can claim with equal force that their respective laws be applied. Faced with the double challenge of a simultaneous and equally valid claim for application, private international law seems to fail because it only refers to one of the participating legal orders.

In modern society, many parts of social life are indeed already subject to multiple and partly inconsistent rules of behaviour, simultaneously dictated by numerous different legal orders. It does not seem very adequate, then, to address this situation by simply favouring one legal order over the others. Instead of artificially separating the colliding legal orders, a solution which aims to achieve a balance, a compromise, a synthesis between the competing regimes should be found.

For this, it seems plausible to make use of the *substantive law approach*, which has mainly been developed by *Arthur Taylor von Mehren* and which has been influential in U.S. American private international and inter-local collision law.⁴⁰ In order to decide a case characterized by the new types of collision of laws it would, accordingly, be necessary to create a new rule of substantive law which integrates elements of all

⁴⁰ Cf. *Arthur Taylor von Mehren*, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, *Harvard Law Review* 88 (1974), p. 347, 356 f.; *Arthur Taylor von Mehren*, Choice of Law and the Problem of Justice, *Law and Contemporary Problems* 41 (1977), p. 27, 38 f. Cf. recently for substantive law approach as well *Luther L. McDougal III*, "Private" International Law: *Ius Gentium* Versus Choice of Law Rules or Approaches, *American Journal of Comparative Law* 38 (1990), p. 521, 536 f. See also *Friedrich K. Juenger*, Choice of Law and Multistate Justice, 1993, p. 236 f.

competing legal orders.⁴¹ Considering the “material law solution” of the “adjustment” or “adaptation problem”,⁴² German private international law is – despite the differences to the proposed *substantive law approach*⁴³ – no stranger to the development of special and independent substantive law rules.

The main advantage of this approach as opposed to the referral technique of classic private international law is that it compensates for the “self-contained regimes”’s “tunnel vision” whilst at the same time recognising the inevitable trans-institutionality of the new collisions.⁴⁴

Thus, GlobalSantaFe would require the creation and application of a legal norm which combines elements of the U.S. American law, the Korean law and the ICANN policies. This rule would be identical to the above mentioned rule of the *lex digitalis*. The decision would not be in favour of the cybersquatter.

V. Collisions of organizational principles of society: biopiracy

1. Functional differentiation v. segmental/stratificatory differentiation

In the Neem tree case the collision problem presents itself differently.⁴⁵ It is true that, here, as in GlobalSantaFe, regime collisions representing conflicts between social systems are at work.⁴⁶ They express themselves in the numerous attempts to address the problem of the granting of exclusive rights to use traditional knowledge on the global level.⁴⁷ Partial rationalities of global society collide with each other: economic, scientific, medical, cultural and religious principles are in conflict about

⁴¹ Graeme B. Dinwoodie, (Fn. 30.), p. 543 f., also argues for a substantive law approach regarding problems of international intellectual property law. Cf. for a substantive law approach as a method of dealing with collisions of legal norms also Paul Schiff Berman, (Fn. 21), p. 1218.

⁴² Cf. for “adjustment” resp. “adaptation” Gerhard Kegel/Klaus Schurig, Internationales Privatrecht, 9. Aufl. 2004, S: 357 pp.; Jan Kropholler, Internationales Privatrecht, 6. Aufl. 2006, p. 234 pp. Siehe auch Ernst Steindorff, Sachnormen im internationalen Privatrecht, 1958, p. 17 f. und 26 pp.

⁴³ Differences are, firstly, that the “adjustment” resp. “adaptation problem” only arises in the case of a “contradiction of norms” (accumulation of norms or lack of norms) and, secondly, that the substantive law rule to be created pursuant to its “material law solution” is primarily based on the referred to legal order, thus does not represent a true synthesis of the rules of the colliding legal systems.

⁴⁴ A similar approach for collision of rules in a European multi-layer context Marc Amstutz, (Fn. 13), p. 216 f.; Christian Joerges, The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective, European Law Journal 3 (1997), p. 378; Christian Joerges/Christine Godt, Free Trade: The Erosion of National, and the Birth of Transnational Governance, European Review 13 (2005), p. 93.

⁴⁵ Detailed elaboration of the collision problems and their possible solutions Andreas Fischer-Lescano/Gunther Teubner, Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions? in: Christoph Beat Graber/Mira Burri-Nenova (ed.), Intellectual Property and Traditional Cultural Expressions: Legal Protection in a Digital Environment, 2008, (publication pending).

⁴⁶ Cf. Saskia Sassen, Territory-Authority-Rights - From Medieval to Global Assemblages, 2006.

⁴⁷ Cf. Para. 8(j) and Para. 10(c) of the Convention on Biological Diversity, accessible at (April 21, 2008): <http://www.cbd.int/convention/convention.shtml>. See also Section 19 of the Doha Ministerial Declaration of November 14, 2001, WT/MIN(01)/DEC/1, accessible at (April 21, 2008): http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. Cf. as well the drafts compiled and discussed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the protection of traditional knowledge, WIPO Publication WIPO/GRTKF/INF/1, accessible at (April 21, 2008): http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf.

access to traditional knowledge and its restriction. Greatly simplified, this means: when using traditional knowledge, economic, scientific and medical utilization interests collide with claims of integrity and diversity of cultures, religions and ways of life. As a consequence, related regulatory projects react to these conflicts in very different ways.

Seen from this perspective, traditional knowledge rightly qualifies as a problem of colliding rationalities in modern society. However, it is necessary to go a considerable step further, beyond the current discussions on legal fragmentation. Colliding rationalities do not adequately describe the problem of traditional knowledge, as it only does justice to the simple rather than to the *double fragmentation* of global society. Although it makes clear how stocks of traditional knowledge are subjected to diverging demands from functional regimes worldwide, it does not take into account the second level of fragmentation – the cultural polycentrism, the conflict between various world cultures.⁴⁸ However, the traditional knowledge conflict arose precisely from this double fragmentation of functional global systems on the one side and regional cultures in global society on the other.⁴⁹ By re-rooting the conflicts alone, it becomes possible to give the search for legal norms sociological directions that deal with the conflict more adequately.

The decisive factor is the distinction between global and regional cultural principles of society: functional differentiation of “modern” knowledge stocks versus the social embedding of traditional knowledge. This distinction gives the conflicts of traditional knowledge their idiosyncratic colouring. Not the modern society as such, as a capitalist society, as an organizational society or as a knowledge society is involved, but individual, highly specialized action centres, emerged from internal differentiation – functional systems, formal organizations, networks, epistemic communities – each of which is participating in the disintegration of knowledge production in regional cultures in their own special way. If these modern institutions, that are specialized in one function each, meet with diffuse structures in segmented or stratified societies, they have no choice but to tear traditional knowledge generation out of its context in which it has been embedded and transform it into their own metabolisms.

"To divorce 'science' from 'religion' and to tear away the 'cosmological' or spiritual gloss from an allegedly 'practical' core will undermine many forms of traditional knowledge."⁵⁰

Monocontextural “self-contained” regimes utilize “integrated” traditional cultural connections for their specialized goals by detaching them from the reproductional connection on which traditional knowledge relies for its further development. In short: the multi-directional traditional institutions are undermined by the uni-directionality of modern hyperstructures.

⁴⁸ See *Surya P. Sinha*, (Fn. 20).

⁴⁹ Cf. *Rudolf Stichweh*, *Strukturbildung in der Weltgesellschaft – Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt*, in: Thomas Schwinn (ed.), *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen*, 2006, p. 239.

⁵⁰ *Rosemary J. Coombe*, *Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policy-Making Posed by the Recognition of Traditional Knowledge*, in: Keith Maskus/Reichman (ed.), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, 2005, p. 559, 606.

It is about the maximization of the inherent rationality of hyperstructures inside global society in its enhanced need for information – of functional systems, formal organizations, of networks and epistemic communities – tearing stocks of knowledge of regional cultures out of their vital context and inexorably drawing them into their wake. This becomes particularly evident by the way in which globalized science treats traditional knowledge.⁵¹ The scientifically legitimate claim that knowledge belongs in the public domain necessarily destroys structures of communal ownership of knowledge in regional cultures. The principle of general access to knowledge violates spheres of confidentiality motivated by religion. Scientifically specialized methods of controlled verifiability necessitate the deletion of dependence on religion, culture and habitat, which, however, are necessary for traditional knowledge to survive in the first place.

2. Basic rights as models for rules on the collision of laws

These particular conflicts cannot adequately be met by conventional rules on the collision of laws, as they were developed for conflicts between "Western and Non-Western Law".⁵² Rules of collision which are suitable for the clash of constitutive principles of society have to be designed to restrict the expansion of global society's hyperstructures into regional cultures, to ensure the best possible compatibility with the integrity of traditional knowledge. It is necessary to start with the individual expansive institutions of modernity and demand that they regulate themselves by exerting pressure on them from the outside. The formula is: externally enforced self-restriction of the destructive expansion into socially embedded stocks of knowledge. The hyperstructures of globalized, modern society need to be coerced into respecting the indisposability of regional cultures.⁵³

The sociological theory of basic rights developed by Niklas Luhmann will be categorically useful in regard to issue framing. It has shown that destructive aspects of functional differentiation have been successfully counteracted by social countermovements in other contexts, in which those counter-movements coerced expansive social systems to self-restriction. Additionally, however, the theory needs to be adjusted to apply to different types of conflict between functionally differentiated "globalness" and knowledge embedded in regional cultures.

Seen from a sociological perspective, basic rights are not just the judicially protected rights of individuals against State power that lawyers usually see. They are the social counter-institutions that exist inside individual sub-systems and restrict their expansion from within. From the point of view of systems theory, the historic role of basic rights is not exhausted by protecting individual legal positions, but primarily consists in securing the autonomy of social spheres against tendencies to usurp

⁵¹ Cf. e.g. Para. 1.1. and 12.3 of the International Treaty on Plant Genetic Resources for Food and Agriculture, accessible at (April 21, 2008): <http://www.fao.org/AG/cgrfa/itpgr.htm>. Regarding Daes' criticism of well-meaning projects protecting traditional knowledge by a global database and thus subdue it to the principles of modern sciences, see Erica-Irene Daes, Intellectual Property and Indigenous Peoples, *American Society of International Law Proceedings* 95 (2001), p. 143, 144 p.

⁵² *Roeland Duco Kollewijn*, *Conflicts of Western and Non-Western Law*, *International Law Quarterly* 4 (1951), p. 307.

⁵³ With regard to the difficulties, subsuming traditional self-conceptions in modern categories, especially in judicial categories, see Rosemary J. Coombe, (Fn. 51), p. 611 pp.

them.⁵⁴ In reaction to the emergence of autonomous spheres of action in modern society, basic rights have historically emerged, especially in response to the matrix of autonomized politics. As soon as expansionist tendencies became evident in the political system that threatened the integrity of other autonomous areas of society, turbulent social conflict ensued. The positions attained in the course of these conflicts have been formulated as basic rights and institutionalised in politics as counter-institutions. Such expansionist tendencies have manifested themselves historically in very different constellations; in the past, mainly in politics; today, mainly in economics, science, technology and other sectors of society.

Such collision rules which are created by using the model of institutional basic rights protection are structurally different from the collision rules of private and public international law in that they do not regulate the collision of national legal orders but collisions of social spheres. Initially it was about the collision of politics with autonomous social spheres, later about the collision among autonomous social spheres themselves and finally, as in our context, about the collision of constitutive principles of society. Strengthening the autonomy of spheres of action as a countermovement against usurping tendencies constitutes the general, reactive mechanism that works in the conventional, vertical dimension of political basic rights as well as in the contemporary horizontal dimension in which basic rights are deemed to have a "third-party effect" on other expansive subsystems. If the core task of political basic rights was to protect the autonomy of spheres of action from political instrumentalization, then securing the chance for the so-called non-rational action logic to articulate against the matrix of the dominant social trends towards rationalization has become the central task of "social basic rights".⁵⁵

Biopiracy is a good example of today's expansionist tendencies in diverse subsystems elsewhere, namely on the problematic border between globalized modern-day society and traditional regional culture. The primary issue is actually a problem of the horizontal effect of basic rights:

"In the fields of cultural protection and biopiracy, however, the key actors are not states but private entities, such as universities, museums, and business corporations."⁵⁶

Thus, a further generalization with regard to the basic rights theory becomes necessary; this time in the other direction. If the matrix of functional differentiation not only threatens the integrity of areas of autonomy within modern society, but also the integrity of traditional knowledge in regional cultures, then it would correlate with the

⁵⁴ Regarding the system theoretical approach to basic rights as institution, see *Niklas Luhmann*, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, 1965. See also *Gert Verschraegen*, *Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*, *Journal of Law and Society* 29 (2002), p. 258. Regarding its elaborations in various societal contexts, see *Gunther Teubner*, *Die anonyme Matrix: Menschenrechtsverletzungen durch "private" transnationale Akteure*, *Der Staat* 45 (2006), p. 161; *Karl-Heinz Ladeur*, *Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie*, *Kritische Justiz* 32 (1999), p. 281; *Christoph Graber/Gunther Teubner*, *Art and Money: Constitutional Rights in the Private Sphere*, *Oxford Journal of Legal Studies* 18 (1998), p. 61.

⁵⁵ For continuative analyses, see *Gralf-Peter Calliess*, (Fn. 10); *Ralph Christensen/Andreas Fischer-Lescano*, *Das Ganze des Rechts. Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte*, 2007; *Karl-Heinz Ladeur/Lars Viellechner*, (Fn. 35).

⁵⁶ *Erica-Irene Daes*, (Fn. 52), p. 148.

institutionalized logic explained here to expect that external conflicts, protests, organized resistance and social movements of modern-day hyperstructures all coerce the institutionalisation of basic rights so as to internally restrict their inherent urge to expand. And institutional imagination is required to realize the coerced self-restriction of functional systems, organizations, networks and epistemic communities in effective policies and legal norms.

Consequently, rules on the collision of laws that are to be unfolded in the context of a modified theory of basic rights, need to aim at the development of hybrid legal forms within modern law that represent a peculiar compromise between regional cultural identities and modern-day legal mechanisms of protection. The compromise has to find a way past modern institutions' sensitivity to regional-cultural specialities on the one side and the operativity of modern law on the other since only by using the language of modern law is it possible to effectively protect the particularities of regional cultures.

3. Re-entry of the "Extrinsic" into the "Intrinsic"

This would imply that institutions of the modern age ought to be encouraged with the aid of collision rules to reconstruct the interests of indigenous cultures within modern law. Does this then mean that protecting traditional knowledge has to be facilitated using modern law that refers to "customary law"? In the past, policy-makers influenced by anthropology have actually supported this option.⁵⁷ But that confronts the attempt to express the relation between global modernity and regional cultures as a question of basic rights with the fundamental problem of whether the extrinsic can authentically be reconstructed to be intrinsic.

If the goal is to limit the expansion of modern-day institutions, there is no way around reconstructing extrinsic factors using intrinsic concepts, in order to erect internal barriers in the appropriate positions. Otherwise, external protest and resistance in the name of regional cultures will rebound off them without any effect at all. But there are more and less responsive, more and less environmentally sensitive types of reconstructions, which is all that counts. These are always "reconstructions", since "indigenous law" does not "actually" exist as formal law as which one would have to construct it in the modern age. It is a sheer construct of its modern inventors. Modern law picks out the elements of factual usages and customs of the regional cultures that it needs, drawing them together into a collage that it presents as "customary law", that is, as normative ownership positions and obligations to act, that are supposed to be created by the regional culture. Modern law's reading of regional cultures is thus based on a single huge misunderstanding – possibly a creative misunderstanding. It is only creative, however, where it does not project new discoveries out of the blue and where it succeeds to trace and transform actually existing foreign cultural material into modern law. As the Portuguese legal sociologist *Boaventura de Sousa Santos*, who is staging a post-modern theory of legal pluralism, says: "Law. A Map of Misreading".⁵⁸

⁵⁷ *Erica-Irene Daes*, (Fn. 52); *Anthony Taubman*, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge*, in: Keith Maskus/Jerome Reichman (ed.), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, 2005, p. 521; *Rosemary. J. Coombe*, (Fn. 51).

⁵⁸ *Boaventura de Sousa Santos*, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2003, p. 417 pp.

When the collision law of global modernity refers to the “customary law” of indigenous cultures, it systematically misunderstands certain communications within regional cultures as legal acts, capable of creating legal norms, and indeed has to misunderstand them if they are to become effective barriers to the expansion of modernity. Notably not only as legal acts through which law judges with the help of norms produced elsewhere, but as legal acts that produce norms themselves. Using this real fiction, law creates a new legal production mechanism in the institution of “indigenous law” that is capable of counteracting modern expansionist tendencies by implementing prohibitions and other legal sanctions. This is where the opportunities lie for a global system to protect basic rights for indigenous peoples to develop responsiveness. The attempt at understanding how these cultures see themselves appears to be a promising chance, in order to reconstruct this understanding as restrictions in the respective language of the fragmented systems of the modern age. The way in which the bearers of traditional knowledge perceive themselves – “the principle of indigenous self-determination” – should be the normative centre of gravitation.⁵⁹ It is therefore not about an abstract protection of traditional knowledge as such, but about protecting the cultural conditions in which traditional knowledge is produced.

4. Recourse to "customary law"

Instead of a substantive global approach, it appears to be more appropriate to link up with and recognize existing cultural practices, and acknowledge in the context of a conflict-of-law approach, "that traditional knowledge must be acquired and used in conformity with the customary laws of the peoples concerned".⁶⁰

As part of the United Nations Human Rights Framework, articles 19 and 27 of the International Covenant on Civil Political Rights apply. Furthermore, General Comment no. 17 of the Committee on Economic, Social and Cultural Rights notes for article 15 1(c) of the International Covenant on Economic, Social and Cultural Rights:

"With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or

⁵⁹ Rosemary. J. Coombe, (Fn. 51); Anthony Taubmann, (Fn. 58), p. 46; Erica-Irene Daes, (Fn. 52), p. 146.

⁶⁰ Four Directions Council, *Forests, Indigenous Peoples and Biodiversity: Contribution of the Four Directions Council*. Submission to the Secretariat for the Convention on Biological Diversity, 1996.

artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions."⁶¹

These considerations suggest the development of rules on conflict of laws between specialized modern law and holistic institutions in traditional society. At this point, the usual suggestions for a law of collision demand recourse to "the acquisitions and use of indigenous people's heritage according to the customary laws of the indigenous people concerned".⁶² As we said above, direct recourse to customary law is, however, impossible, because making reference to local customary law already means looking at holistically organized forms of society through the lens of functional differentiation and functional coding. The law of collision in this sense presupposes a modern counterpart for autonomous law. As this does not exist here, it is necessary to follow the approach described above as "productive misunderstanding": the modern, transnational institutions will each have to develop their own norms of referral and simultaneously create substantive law rules of self-restraint. This duplication - recourse to the extrinsic and restriction of the intrinsic - forms the main difference in comparison to the referral technique of private international law.

If we follow this institutionalist point of view, it becomes apparent that it is not enough, as the referral technique of private international law would suggest, to make reference to "indigenous law" and to protect traditional knowledge as a mere store of knowledge, such as some authors suggest for digital evaluation, documentation and securing of traditional knowledge.⁶³ Of course, this may serve better the use by modern economy and science. It may also help to prevent illegitimate patenting practices, as the qualification of a discovery as being a novelty becomes impossible due to its prior digitalization. However, it fails to protect and to facilitate the necessary conditions for traditional knowledge production, because the development of such knowledge depends mainly on the context in which it is produced, i.e. the preservation of the regional cultures' general conditions. At this point, the conflict between the highly specialized modern-day concept of knowledge and holistic traditional knowledge becomes apparent again, equally the conflict between the specialized law of the modern age and the socially embedded law of regional cultures. Can modern law do justice to this conflict? "Globalize diversity holistically" – this is one suggested paradoxical response.⁶⁴ It is not only the result, but the entire process of knowledge production, which has to be included in the basic rights' protection. Basic rights' protection must include both the knowledge as such and its social embedding.⁶⁵

⁶¹ *Committee on Economic, Social and Cultural Rights*, General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (para. 15 (1) (c)), ###, Januar 12, 2006, para. 32.

⁶² *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, *World Intellectual Property Organization*, Composite Study on the Protection of Traditional Knowledge, WIPO/GRTKF/IC/5/8, 28. April 2003, Rn. 105, accessible at (April 21, 2008): http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_8.pdf.

⁶³ Justified criticism in *Erica-Irene Daes*, (Fn. 52).

⁶⁴ *Anthony Taubman*, (Fn. 58), p. 525.

⁶⁵ *Anthony Taubman*, (Fn. 58), p. 540.

5. Proceduralised rules of collision

It becomes apparent that such a concept of autonomy should not merely aim at preserving existing culture reservations in their existing form. Solely introducing a species' protection policy is insufficient, as it targets structural rather than procedural autonomy. The protection of basic rights needs to create a framework in which indigenous cultures can develop independently and in conflict with modernity, either by restricting specific invasions through modernity or, in compensation, stipulating a resource transfer to indigenous segments of society. There are a number of useful approaches with regard to the realization of this aim, to which the law of collision protecting traditional knowledge can connect and which provide first indications for further advancement of global basic law protection.

This applies for the attribution of communal-collective rights. Who is the beneficiary of such procedural rights? As discourse rights, these rights serve trans-subjective goals. Identifying the range of beneficiaries is not an ontological problem. Rather, it is about the question: who is to be entrusted with the legal enforcement of discourse rights? This does not necessarily have to be a personified collective. Instead, a whole series of techniques can be used to attribute rights to an entity who can help to implement these rights. This is important not only for the rights themselves, but also for the procedural standing. For instance, the Australian Court stated in *Onus v. Alcoa of Australia Ltd.* that,

"the members of the [Gournditichjmara] community are the guardians of the relics according to their laws and customs and they use the relics. I agree [...] that in these circumstances the applicants have a special interest in the preservation of these relics, sufficient to support locus standi."⁶⁶

A broad definition of the term "community" that reflects the contingencies in the formation of epistemic groups is required,⁶⁷ but simultaneously enables the protection of the discourse rights and the effective determination of the circle of addressees. As an example, a Brazilian law which has been enacted to implement the Convention on Biological Diversity (CBD) describes a local community in article 7(3) as being a

"human group, including descendants of Quilombo communities, differentiated by its cultural conditions, which is, traditionally, organized along successive generations and with its own customs, and preserves its social and economic institutions."⁶⁸

Enabling these groups to participate in the decision to access traditional knowledge is the central challenge of the process of making the legal norms compatible. To the extent that authors criticize this challenge as a desideratum of the bureaucratization of traditional knowledge,⁶⁹ they tend to ignore that the logic of *altera pars* requires

⁶⁶ *Onus v. Alcoa of Australia Ltd.*, C.L.R. 27 (1981), 149, Mason, J.

⁶⁷ *Benedict Anderson*, *Imagined communities: reflections on the origin and spread of nationalism*, 1991.

⁶⁸ PROVISIONAL ACT NO 2,186-16, 23. August 2001, English translation accessible at (April 21, 2008): <https://www.biodiv.org/doc/measures/abs/msr-abs-br-en.pdf>.

⁶⁹ *Hanns Ullrich*, *Traditional Knowledge, Biodiversity, Benefit-Sharing and the Patent System: Romantics v. Economics?*, 2005, <http://ssrn.com/paper=838107>.

reciprocity. Doing without it ultimately means to accept fatalistically the mono-directional usurpation of global society, and to give in to global de-regulation instead of striving for constitutionalization. It also means misjudging the various legal obligations, which particularly urge parties to observe the concept of "prior informed consent" (PIC) and "benefit sharing".⁷⁰ Developing both mechanisms further is the condition of the possibility to effectively protect traditional knowledge.

Via PIC⁷¹ it has to be ensured that communal groups participate in the decision-making processes that affect them,⁷² and in relation to which they should be given the right to deny access to their resources and knowledge, if necessary.⁷³ Article 5 of the "African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources" endeavours to put this concept into words:

"1) Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of: (i) the National Competent Authority; as well as that of (ii) the concerned local communities, ensuring that women are also involved in decision making.

(2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid and shall be subject to the penalties provided in this legislation or any other legislation that deals with access to biological resources.

(3) The National Competent Authority shall consult with the local community or communities in order to ascertain that its/their consent is sought and granted. Any access granted without consultation with the concerned community or communities shall be deemed to be invalid and in violation of the principle and requirement for prior informed consent as required under this Article."⁷⁴

⁷⁰ See also *Commission on Human Rights, Sub-Commission of Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, Whakatane, 12.-18. June 1993, Aotearoa, New Zealand, para. 2.5., accessible at (April 21, 2008): http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf: "Develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following: collective (as well as individual) ownership and origin, retroactive coverage of historical as well as contemporary works, protection against debasement of culturally significant items, cooperative rather than competitive framework, first beneficiaries to be the direct descendants of the traditional guardians of that knowledge, multi-generational coverage span."

⁷¹ See *Marc-Antoine Camp, Wer darf das Lied singen? Musikethnologische Anmerkungen zum rechtlichen Status traditioneller Musikkulturen, sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht* 9 (2005), p. 307, accessible at (April 21, 2008): <http://musicandcopyright.beyondthecommons.com/Camp2005Deutsch.pdf>.

⁷² *Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations*, session 22, July 13-19, 2004, p. 5: "Free, prior and informed consent recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent."

⁷³ See *Ulrich Brand/Christoph Görg, Postfordistische Naturverhältnisse. Konflikte um genetische Ressourcen und die Internationalisierung des Staates*, 2003, p. 75.

⁷⁴ *OAU MODEL LAW, Rights of Communities, Farmers, Breeders, and Access to Biological Resources*, Algerien 2000, accessible at (April 21, 2008): http://www.wipo.int/tk/en/laws/pdf/oau_modellaw.pdf.

The various legal consequences that are available in response to a usage of traditional knowledge without valid agreement are addressed here. As such, they are hardly noticeable in the proposed European Commission's Directive of April 26, 2006 on Criminal Measures to Enforce Rights of Intellectual Property, aimed at tightening the Commission's Directive 2004/48/EC,⁷⁵ which restricted itself to product piracy. Questions of biopiracy remain unaddressed. The reference to the creation of consensus according to the customs of the respective epistemic community is particularly relevant with regard to the question of PIC and secondary liabilities in cases of omission, and the resulting penalization or restitutionary obligations.⁷⁶ Work on certifying origins in order to secure prior consent and ensure that usage is allocated effectively is decisive.⁷⁷ The obligation to disclose the origin of knowledge helps not only to guarantee "that only really new discoveries are patented",⁷⁸ but also opens up a contact point for communication on controlling established rights of procedure.

To the extent that norms regulating profit distribution to indigenous groups are designed to facilitate usage of traditional knowledge for economic purposes by the usufructuary, contractual agreements regulating usage seem to be least suitable. By integrating the culture into western exchange-economies and destroying cultural-religious content contracts would do the opposite of protecting cultural autonomy. From an intercultural point of view, a solution using funds may therefore be more suitable and less difficult to implement than other regulatory norms, and therefore possibly most promising. The fund solution offers the option of diffuse monetary compensation, which could compensate for the lack of direction in these highly specialized intrusions. UNCED Agenda 21⁷⁹ of the World Summit for Sustainable Development in South Africa in September 2002 has offered recently strong support for this regulatory technique. It has led to the call to "negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources".⁸⁰ In response to this demand, the Eighth Conference of the Parties to the CBD of March 2006 in Curitiba has preliminarily systematized these efforts in its Decision VIII/4.⁸¹ It seems to be a promising start for making the contradictory logic described above compatible, to the

⁷⁵ KOM(2006) 168 final, April 26, 2006.

⁷⁶ Hence liability regimes regularly refer at the same time to customary law. See *Tracy Lewis/J. H. Reichman*, Using Liability Rules to Stimulate Local Innovation in Developing Countries: A Law and Economics Primer, 2004, <http://www.earthinstitute.columbia.edu/cgsd/documents/lewisreichman.pdf>; *Carlos Correa*, Protection and Promotion of Traditional Medicine: Implications for Public Health in Development Countries, 2002.

⁷⁷ See lately *CBD*, Report of the Meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance, UNEP/CBD/WG-ABS/5/2, 20 February 2007..

⁷⁸ *Gregor Kaiser*, Biopiraterie: Der neue Kolonialismus, *Blätter für deutsche und internationale Politik* 51 (2006), p. 1172, 1175.

⁷⁹ *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3.-14. Juni 1992, A/CONF.151/26 (Vol. I), accessible at (April 21, 2008): <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

⁸⁰ *UN*, Report of the World Summit on Sustainable Development, New York 2002, A/CONF.199/20, section 44 (o).

⁸¹ *Eighth Ordinary Meeting of the Conference of the Parties CBD*, decision VIII/4, Access and Benefit Sharing, accessible at (April 21, 2008): <http://www.cbd.int/decisions/?m=COP-08&id=11016&lg=0>.

extent that it culminates in the establishment of an international regime under the umbrella of the CBD that will introduce the concepts of PIC and “benefit sharing” as effective regulations.

VI. Conclusions

The preceding considerations have led to the following conclusions:

1. When national law is in conflict with the laws of transnational regimes and the norms of indigenous cultures, respectively, the question is whether a collision with genuine legal norms or rather with social norms is at issue. Contrary to divergent legal pluralistic positions, it is important not to ascribe legal quality to all social norms. If a legal norm clashes with a social norm, an "asymmetric collision rule" applies: the legal norm always prevails.

By contrast, in the case of a conflict between genuine legal norms, collision law has to start from the assumption that the clashing entities claim equal priority. Both cases presented above, cybersquatting and biopiracy, are about collisions of genuine legal norms. Cybersquatting represents an example of a conflict between national legal orders and transnational private regimes. In cases of biopiracy, norms of national or international intellectual property law collide with real-fictive indigenous legal norms on the protection of traditional knowledge.

2. Despite their equality as laws, all three colliding legal orders – transnational regime law, national law and indigenous law – are different from the point of view of collision law. They, of course, firstly differ in their scope (global, national, local). However, for our purposes, it is more important that they also differ in the degree to which they are socially embedded. It is this difference that has to be taken into account when developing new collision rules:
 - The social embedding is the weakest in transnational regime law. Transnational regimes produce their own autonomous law. Coupled to only one functional sector of global society, they occur as "self-contained regimes", their highly specialized legal norms only reflect the eigen-rationality of a single social sector. Transnational regime law is disconnected from processes which relate to society as a whole, from processes that aim at achieving the "common welfare".
 - Modern national law is autonomous, formally enacted law and as such not embedded in social contexts any more, either. However, as opposed to transnational regime law national law is characterized by processes of "internal contextualisation" in the sense that its legal norms, no matter how specialised, are always forced to interact. The legal norms of national law are caught in a relationship of permanent mutual (self-)restriction.
 - Contrary to formal-autonomous national and transnational law, indigenous law is comprehensively socially embedded. The reason for this is to be found in the segmental/stratificatory differentiation as the organizational principle of society that dominates in traditional cultures and which stands in harsh contrast to the principle of functional differentiation. Their legal norms are genetically and structurally inseparably interwoven with religious, political, economical and traditional knowledge-based systems of interaction.

3. These differences have consequences for the solution of norm collisions. If a transnational legal regime claims its law to be applied, collision law must ensure that the "tunnel vision" of the "self-contained regime" is broadened and made receptive for opposing principles. Since these collisions are not only trans-national but also trans-institutional in character, making use of the referral techniques of private international law is generally not the adequate method. For most cases, the *substantive law approach* seems to be the most promising as elements of each of the colliding legal orders are taken into account and reflected in the substantive law rule newly to be created. This leads to a hybrid law in the sense that, seen from the perspective of the deciding panel, the new substantive law rule absorbs extrinsic elements into its law while at the same time leaving the autonomy of the extrinsic intact.
4. If the collision is characterised by the participation of an indigenous legal order it should be dealt with pursuant to the *model of the institutionalised and proceduralised protection of basic rights*. Self-restrictions need to be imposed upon the legal norms of modern society. In the interest of a (path-dependent) further development of the indigenous culture this collision method has to be shaped not in a static-absolutist but rather in a procedural-dynamic way.

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