

A SYMMETRY OF ASYMMETRIES? A PRIVATE-INTERNATIONAL-LAW RECONSTRUCTION OF LINDAHL'S WORK ON BOUNDARIES

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I. INTRODUCTION

Lindahl's new book¹ is erudite, detailed, comprehensive, and long. Almost every page contains a new bit of information, a new argument, and the materials, theories and doctrines on which Lindahl draws are almost comprehensive. It is remarkable, therefore, that in a book dedicated in no small part to conflicts between legal orders, Lindahl explicitly rejects the relevance of that field of law that deals with such conflicts: namely private international law. He juxtaposes private international law with other techniques of boundary-setting that he does find relevant:

This set of techniques [margin of appreciation, subsidiarity, reciprocal recognition, limited autonomy regimes, safe harbor agreements, the recognition and enforcement of foreign judgments] is by no means exhaustive, but its elements share a common denominator: they are institutional arrangements designed to frame encounters between collective self and other in ways that attempt to preserve both collective identity and difference. On the face of it, they are vehicles for an authoritative politics of boundaries arising from conflict between legal

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1. HANS LINDAHL, *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION* (2018).

orders. This feature differentiates them from traditional conflict of law rules, which generally are oriented to helping courts establish which of two or more competing legal orders should determine a dispute as to the applicable law and the jurisdiction for the case at hand. While there is nothing ‘mechanical’ about the application of traditional conflict of law rules, and while these rules certainly play an important role in a globalising context, they contribute little to an enquiry into the give and take deployed by an authoritative politics of boundaries in a global context.²

Why is private international law not considered as part of these techniques? Lindahl’s view of conflict of laws mirrors that of many other critics; he mentions “its extraordinarily complex and uncertain jurisdictional rules”³ and suggests early in the book that “conflict of laws is a reductive approach to the problem of conflict.”⁴ Conflict-of-laws rules are, for him, “generally [] oriented to helping courts establish which of two or more competing legal orders should determine a dispute as to the applicable law and the jurisdiction for the case at hand” and thus are not “vehicles for an authoritative politics of boundaries arising from conflict between legal orders.”⁵

I think Lindahl has an erroneous concept of private international law (or conflict of laws), as I will explain. But I think his omission of that field of law is not accidental. There is a reason, I think, for why Lindahl excludes conflict-of-laws rules from his analysis. It is indeed correct that private international law does not fit easily in his current theory: Lindahl’s theory is a *political* theory of unilateral self-assertion and restraint; private international law, by contrast, is a *technical* doctrine of bilateral determination of the applicable law. But the distinction between politics and technicity itself is problematic, as I demonstrate later, and private international law provides elements that can benefit Lindahl’s theory. In particular, the bilateralism of private international law is a helpful tool to overcome a solipsism that mars his theory. And the technical character becomes a promising response to the problems of a purely agonistic politics.

In order to demonstrate this, I develop my argument in three stages. In the next section (II) I summarize Lindahl’s own conception of asymmetry, recognition, and ethical implications. I then demonstrate, in section III, how all these aspects can be found also in the conflict of laws. In the following section, I demonstrate two ways in which conflict of laws is actually more than what Lindahl argues. This enables me, in section V, to run the argument a third time, this time including a conflict-of-laws approach within Lindahl’s

2. *Id.* at 350.

3. *Id.* at 289.

4. *Id.* at 73.

5. *Id.* at 350.

concept. In section VI, I point out an aspect that the conflict-of-laws approach cannot capture, namely the aspect of power.

II. LINDAHL'S THEORY OF COLLECTIVE SELF-RESTRAINT: DUAL ASYMMETRY AND RECOGNITION

Lindahl's argument is complex and long, but I think a core thesis can be formulated in a simple way without being too misleading: all legal orders necessarily exclude.⁶ Legal orders have limits—although they can change and develop, there is a limit to how far they can do so—and they therefore have not only boundaries—that which they do not currently regulate—but also fault lines—that which they could not even regulate. Boundaries are determined in part in response to the collective's inside, and in part in response to demands from the outside, which force a legal order to define, and redefine, its own boundaries. In this sense, legal orders exercise what Lindahl calls “restrained collective self-assertion.”

Such restraint has always appeared obvious for state law: the law of states is territorial and therefore, it appears, limited to what happens with the state's territory: what lies outside it is excluded. It is less clear, however, for legal orders that we think of as global and therefore universal: human rights law, world trade law, etc. We may be tempted to think that a deterritorialized law, a law that covers the entire territory, could indeed be universal and non-exclusive. Lindahl shows, empirically, that this is not true for existing legal orders (of which he discusses a good number). And he shows, theoretically, that it is not, in fact, possible. Legal orders have a point, which means: they are necessarily about something. This means that there is something that they necessarily are not about, that stands outside of them. The point of a legal order—what it is about—may change over time; what it is not about now may be something that it will be about later. But there are limits to this malleability, and these limits are not contingent. A legal order that could potentially be about anything at all is therefore not actually about anything; it is not a legal order. Legal orders, therefore, have boundaries; in order to have an inside, they must have an outside.

The consequence is that there is an outside for every legal order, and an ensuing relation between a legal order and its outside. This relation is, for Lindahl, an asymmetric one.⁷ Lindahl's main example, which runs through the book, is that of the relation between the WTO on the one hand and the KRRS, an Indian farmers' movement, on the other. The WTO is not

6. For earlier variations of this thesis, see Hans Lindahl, *A-Legality: Postnationalism and the Question of Legal Borders*, 73 *MOD. L. REV.* 30 (2010); HANS LINDAHL, *FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY* (2013).

7. LINDAHL, *supra* note 1, at 278.

universal and the KRRS stands on its outside. The asymmetry between both that Lindahl focuses on is not, interestingly, one of power between a giant organization on the one hand and a small NGO that opposes it. Instead, the asymmetry exists between inside and outside. And although Lindahl's sympathy with the little guy is palpable throughout the book, the perspective he adopts is the inside perspective of the powerful actor among the two, namely the WTO

From the WTO's own perspective, the asymmetry has two aspects, which Lindahl calls asymmetry 1 and asymmetry 2. Asymmetry 1 is, for him, "the asymmetry of a demand for recognition that is prior to the response of the collective to that demand."⁸ The KRRS' demand for recognition is surprising for the WTO because, so I understand it, it does not fit into its existing pattern of legality and illegality. The KRRS does not (or at least not only) ask the WTO to play by its own rules. Instead, the KRRS proposes an alternative set of rules for the WTO and asks the WTO to adapt its rules to those proposed by the KRRS. The collective—the WTO—can and must respond to this demand for recognition.

This response is what is explained as asymmetry 2, and it is, essentially, the asymmetry between the one who gives the response and the one who receives it. Asymmetry 2 has three aspects. The first is *normative*: "the whole point of collective closure is to prefer inside to outside."⁹ The WTO, due to its own conception (its "point"), prefers its own free-trade regime to the KRRS challenge for local protections.¹⁰ The second aspect is *institutional*: "the prerogative claimed by authorities to unilaterally close down a dialogue about boundaries if they deem demands for recognition to be out of bounds."¹¹ The collective, in other words, remains in charge. The third aspect, finally, goes to *identity*: it concerns the authority's ability to remain indifferent to the demand. The authority may respond to the demand by amending its own point, but it will not do so indefinitely: to some extent, the claim will remain unanswered.

This dual asymmetry—a demand that is prior to a response, a response that retains superiority over the demand—is crucial for Lindahl's theory. Without asymmetry, he suggests, we would fall back on a universalism that would necessarily be false. The asymmetry expresses, ultimately, the fact that an authority treats those belonging to the collective differently from those who do not.

8. *Id.* at 281.

9. *Id.* at 276.

10. *Id.* at 297–98.

11. *Id.* at 280.

Lindahl's main opponent here is a theory of reciprocity. Reciprocity—of rights and duties, of recognition—is definitional, for him, for relations within a collective: it “is built into the very notion of joint action.”¹² This means that in the absence of joint action—across the boundaries of the collective—reciprocity must be ruled out. And indeed, Lindahl argues in this way when he rejects communitarianism as having to presume a prior essentialized cultural identity, Rawlsian conceptions of justice as having to presume a prior essentialized polity, and Habermasian universalism as having to presume a (real or hypothetical) all-encompassing collective.¹³

If universalism is avoided through asymmetry, the opposite evil, namely relativism, is avoided through a legal order's relatedness with its outside, and its response to the latter's demand for recognition. How does a legal order deal with demands for recognition? Lindahl distinguishes two techniques: reciprocal and asymmetric recognition. Reciprocal recognition is, for him, equivalent to universalism, and therefore to be rejected: through mutual recognition, we recognize each other as members of the same collectivity. This, he suggests, is inadequate to the understanding of the inside/outside relation inherent in his concept. When the KRRS demands recognition from the WTO, Lindahl suggests, it does not merely demand inclusion.¹⁴ It does not merely ask the WTO to comply with its own rules; it challenges these rules themselves, in the awareness that such challenges can only be accommodated up to a point. On the other hand, when the WTO deals with the demands by the KRRS, it does not need to recognize the KRRS and its demands by including them. The WTO can change its own point, but it need not, and indeed often will not, include the KRRS through recognition.

Lindahl's alternative is asymmetric recognition, which he defines as “the core of a politics of boundary-setting that is authoritative by dint of recognising the other (in ourselves) as one of us and as other than us.”¹⁵ This combines, and thereby transcends, elements of both universalism (recognition as one of us) and relativism (recognition as other than us):¹⁶ “The former aspect of asymmetrical recognition speaks to collective self-assertion; the latter, to collective self-restraint. A theory of asymmetrical recognition interprets an authoritative politics of boundary-setting as restrained collective self-assertion.”¹⁷ Recognition of the other appears, in a

12. LINDAHL, *FAULT LINES OF GLOBALIZATION*, *supra* note 6, at 228.

13. *Id.* at 228–34.

14. LINDAHL, *supra* note 1, at 279–80.

15. *Id.* at 287.

16. *Id.* at 335–36.

17. *Id.* at 327 (emphasis removed)

dialectic way as “*recognition of the other (in ourselves)*” The other is thus integrated into the collective, but its otherness is not denied.

III. A PRIVATE-INTERNATIONAL-LAW RECONSTRUCTION

This theory is not anathema to private international law. It can in fact be reconstructed on the basis of private international law. Such a reconstruction will prove fruitful (in the next section) because it helps to add, from private international law, elements that can help Lindahl’s theory.

Private international law is, broadly understood, the legal discipline that deals with situations that have connections to more than one legal order. Private international law, at least in its narrow sense, does not lay out substantive rules for such situations, but merely resolves conflicts between the legal orders themselves. Typically, we distinguish three subdisciplines of private international law. Jurisdiction determines the extent to which a state’s courts have the competence to regulate transboundary cases; in a broader sense, jurisdiction also concerns the territorial limits up to which a state can legislate. Choice of law determines the question which law is applied—especially between the forum’s own law (*lex fori*) and another state’s law (*lex causae*). The recognition and enforcement of foreign judgments, finally, deals with the question of giving domestic force to judicial decisions of foreign States.

Lindahl allows for some space to two of these subdisciplines. He considers the recognition of foreign judgments as relevant (presumably because it appears to fit in his model of recognition), though he does not discuss it in detail.¹⁸ Likewise, jurisdiction, which he defines as “the legal manifestation of collective self-assertion: we* can regulate ourselves”¹⁹ Choice of law, by contrast, is absent from his analysis. The reason may be that the discipline is too static for him:

“while conflict can be presented as a conflict between legal norms, we should not forget that it is never only – and in any case never primarily – a conflict between norms within a legal system nor between legal systems. As the KRRS’ interference with the realisation of the WTO’s point makes clear, conflict is conflict between (emergent) pragmatic orders, that is, conflict about different ways of ordering who ought to do what, where and when.”²⁰

This is apt insofar as private international law does take legal orders as given; it does not conceptualize a dialogue or even a compromise through which

18. *Id.* at 350 n.2.

19. *Id.* at 314.

20. *Id.* at 73.

the respective legal orders would alter their content.²¹ But this technical character should not conceal that private international law is, contrary to what Lindahl suggests, a vehicle of boundary-setting. Indeed, private international law expressly adopts Lindahl's idea of "restrained collective self-assertion," as two examples should make clear. A first example can be found in a 1953 decision of the U.S. Supreme Court, *Lauritzen v. Larsen*, clarifying a term of the Jones Act pertaining to compensation for "any seaman who shall suffer personal injury in the course of his employment." The question was whether the words "any seaman" included a Danish sailor who had been hired in the United States and injured on a Danish ship in Cuban waters. A literal interpretation of the term would have suggested that the answer must clearly be yes: the words "any seaman" clearly seem to suggest a semantic universalist aspiration. The U.S. Supreme Court did not take this avenue. Instead, the Court followed a doctrine in U.S. law called the presumption against extraterritoriality. According to this doctrine, the legislator is presumed to legislate only with domestic interests in mind, and so absent a clearly different legislative intent, a statute will not be read so as to cover extraterritorial issues. We find, therefore, a deliberate self-constraint.²²

A second example concerns a method of conflict of laws called interest analysis and developed especially by Brainerd Currie—effectively an extreme form of what Lindahl would likely call relativism. A Court will, according to the theory, always apply its own domestic law whenever its own legislator has an interest in this application. This can lead to conflicts with the laws of other interested states, and the application of the forum's own law can seem unwarranted where the forum's own interest is slight and the other state's interest is clearly greater. Michael Traynor, a judge in California (and friend of Currie) proposed, in order to deal with such cases, that the judge should reassess the forum's own interest with what he called "restraint and moderation," an idea that resembles Lindahl's concept of 'restrained collective self-assertion' even in terminology.²³ The idea was accepted not only by Currie but also by the courts.²⁴

Private international law today, just like Lindahl's own theory, is neither universalist nor relativist. This was not always so. An older conception of private international law was universalist: it attempted to

21. See Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 648 (2012).

22. The parallel is not perfect. According to U.S. Supreme Court jurisprudence, the self-restraint occurs even absent a concrete demand from a foreign legal order.

23. Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 59 CAL. L. REV. 845 (1961).

24. Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1 (1963).

derive rules on applicable law from public international law, with binding force for all states. Another conception was relativist: it essentially left to each legal order to determine the scope of its laws as a quality of these laws themselves, with no regard for interaction with other legal systems. Both approaches have been overcome in the name of what is sometimes called a “third school of private international law.”²⁵ In this school, private international law remains situated within domestic law: each state has its own private international law rules. But these private international law rules are separate from the state’s own domestic rules, and they are formed, specifically, with a view to the international situation.

As a consequence, private international law encompasses an asymmetry between inside and outside like the one Lindahl conceptualizes. And it is compatible with his two types of asymmetry. Asymmetry 1 described the demand for recognition, which triggers a response from a legal order. In private international law, this can be a concrete judicial decision given by another legal order, for which recognition is sought. It can also be a foreign law that is, potentially, applicable. Some theorists of private international law indeed explain this latter situation also as one of a demand for recognition: the foreign law, it is said, “wants” to be applied; the foreign government has a (“governmental”) interest in its application. Others suggest that the foreign legal order’s own “wants” are irrelevant. In each case, however, a situation with multistate connections raises a potential of an applicable foreign law that is, in Lindahl’s sense, prior to the legal order’s response.

Thus for asymmetry 1. What about asymmetry 2? Recall that it has three aspects: a normative one, an institutional one, and one of identity. The normative preference of the inside over the outside easily translates into private international law, where domestic law is normatively preferred over foreign law. For traditional interest analysis, as we have seen, this is the end of the analysis: where domestic law demands application, it is applied even in face of a foreign governmental interest. Most others, however, do not decide so automatically. “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home,” as Justice Cardozo once famously formulated.²⁶ Instead of a simple prioritization of domestic over foreign law, a complicated technical analysis determines which of the different laws is applied.

Second, the institutional aspect of asymmetry 2 is also present in private international law. Because private international law is domestic law, it is up

25. See Ralf Michaels, *Beyond Universalism and Particularism in International Law—Insights from Comparative Law and Private International Law*, B.U. L. REV. ONLINE 18 (2019).

26. *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 111 (1918).

to each domestic legal order to draw boundaries, to decide how to deal with the demand from the foreign legal order. Each legal order has its own private international law, and its conflicts with foreign legal orders are decided by its own courts and judges.

Thirdly, a legal order can decide to remain indifferent vis-à-vis the foreign demand, says Lindahl. This is the case also in private international law, although indifference suggests a lack of interest that is not really mirrored. The public policy exception, a tool available in every conflict-of-laws system anywhere, allows a legal order to ignore a foreign law, or a foreign court judgment, if to do otherwise would run counter to the legal order's own strongly held convictions—its core policies and conceptions of justice. We have here, in a doctrinal form, nothing less than Lindahl's fault lines—the limits of a legal order's ability to adapt to foreign demands.

Asymmetry is thus maintained in private international law. A legal order decides how to deal with foreign legal orders on its own terms, in response to demands from other legal orders, but is not bound to follow those demands. Reciprocity is thus not necessary, nor is the assumption of an overarching universal system of law. How does private international law deal with demands for recognition?

To some extent, recognition is a part of private international law too: private international law recognizes foreign court decisions, and its willingness to apply foreign law presumes a recognition of the foreign law as valid. Lindahl rightly distinguishes recognition within one legal system from recognition between legal systems.²⁷ There is a type of recognition that happens within one collective. This is the recognition that much of political philosophy has in mind (e.g. Nancy Fraser's work). And it is also what underlies, for example, H.L.A. Hart's rule of recognition, which establishes a legal relation between a population and a group of officials in charge of making and administering laws. But that is not the only type of recognition. In addition to such internal recognition, there can also be an external recognition—the recognition of others as others.²⁸ The KRRS' demand for recognition, Lindahl rightly remarks, is not merely a demand for inclusion within the WTO. The same is true in private international law: a foreign legal order's demand for recognition is not a demand for inclusion; it is a demand

27. LINDAHL, *supra* note 1, at 274. I think the distinction Lindahl draws between recognition of individuals and recognition of legal orders is derivative of the more fundamental distinction between recognition within one legal system and recognition between legal systems.

28. For these two types of recognition, see Ralf Michaels, *Law and Recognition—Towards a Relational Concept of Law*, in IN PURSUIT OF PLURALIST JURISPRUDENCE 90 (Nicole Roughan & Andrew Halpin eds., 2017).

for recognition or application in the specific case. Such a recognition is not necessarily reciprocal.

Lindahl's very question—whether a demand for recognition is a demand for inclusion—finds its close parallel in private international law discussions. In the area of the recognition of foreign judgments, an old doctrine required that foreign judgments be turned into domestic judgments before they can be applied. A similar discussion exists in choice of law. According to the “local law theory,” which was once prevalent especially in the United States and in Italy, a court never actually applies foreign law. What the court does instead, in response to a foreign law's demand for recognition that the court deems justified, is to develop, ad hoc, a rule of domestic law that mirrors the foreign law.²⁹ The foreign law is, therefore, included in the domestic legal order.

But, notably, such processes of domestication are no longer prominent. In the area of judgment recognition, it is no longer thought necessary to domesticate the foreign judgment. The recognition of a foreign judgment is indeed a process that is necessary for its enforcement. But the recognition does not make the foreign judgment a domestic judgment. All it does is enable its enforcement, despite its foreignness. Similarly, the local law theory has been discarded.³⁰ The private international law response to a foreign demand for recognition is not to change its own law.³¹ It is, instead, the application of foreign law.

IV. THE ADDED VALUE OF PRIVATE INTERNATIONAL LAW: FOREIGN LAW AND TECHNIQUE

The latter points have, I hope, already begun to demonstrate something that has, so far, been somewhat hidden. So far, I have suggested that, contrary to what Lindahl suggests in his book,³² private international law is one of the “vehicles for an authoritative politics of boundaries arising from conflict between legal orders.” Insofar as private international law does draw a legal order's borders, it is in accordance with the other techniques that Lindahl discusses.³³ This border-drawing is, however, only one function of private international law. Private international law has a second function, which

29. For the United States, see David Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822 (1950).

30. *Id.*; Hessel Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 316–17 (1953).

31. That would, instead, be Teubner's theory of legal irritants, which is not related to private international law. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

32. LINDAHL, *supra* note 2, at 350.

33. *Id.* at 349–50.

none of the other vehicles have: namely to create a space for foreign law as foreign law. Private international law not only limits the space of application of a forum's own law. It also opens up space for the application of foreign law in the forum. It can lead not only to the nonapplication of the law of the forum (what Lindahl calls collective self-restraint), but also to the application of foreign law.

This process is central to private international law and yet remains the aspect most widely misunderstood outside of the discipline. Indeed, it is a process more complex and seemingly paradoxical than most others in the law. For, in the process, foreign law does not lose its character as other through the process of application. It remains foreign law, and yet it becomes applicable. The local law theory, discussed above, is an example of a theory that was developed in response to this complexity and paradoxical character—but precisely because it ignored the paradoxical character inherent in the process, it has been discarded.

It should be obvious that Lindahl's own theorization of the paradoxical relation between self and others could actually be made fruitful. Lindahl conceptualizes the relation as a dialectic, the "recognition of the other (in ourselves)." This comes close, I think, to the process of application of foreign law: the foreign law is enforced in ourselves, but it does not thereby lose its foreign character. The application of foreign law is a dialectical process, one that operationalizes the difference between self and other, without resolving it. It fits Sally Merry's description of "the dialectic between legal systems, each of which both constitutes and reconstitutes the other in some way."³⁴

Think back to Lindahl's asymmetry 1—the idea that the Other's demand for recognition comes "too early," predating the legal system's own self-definition. One is reminded here of Levinas' writings on the Face: The Other, through his mere existence and presence (the concrete presence of the face), puts an ethical demand on us that is prior to ontology. Indeed, although Lindahl does not draw on Levinas except once in a different context, he does channel Bernhard Waldenfels, who in turn relies to no small extent on Levinas.³⁵ Levinas' and Waldenfels' point is, as far as I understand it, that the Self has to respond to the demand of the Other—it can reject it or accept it, but it cannot ignore it. Waldenfels calls this responsiveness, and this responsiveness has, I suggest, a place also in private international law. The ethic of private international law is not confined to tolerance or recognition. It is responsiveness, taking foreign law (the Other) seriously as foreign law, by

34. Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 889 (1988).

35. See Bernhard Waldenfels, *Levinas and the face of the other*, in THE CAMBRIDGE COMPANION TO LEVINAS (Simon Critchley & Robert Bernasconi eds., 2011).

engaging with it in its concreteness.³⁶ But this means more than asymmetric recognition and principled willingness to respond internally, the responses that Lindahl discusses. It also means a principled willingness to actually offer hospitality, by applying the foreign law.³⁷ This aspect, I argue, should make private international law especially attractive to Lindahl's own legal philosophy. The other instruments that he lists do part of the job he is interested in—namely, to draw and define a legal order's boundaries in view of challenges from the outside. But they do not adequately represent what he is really interested in, namely the paradoxical relation between a collective and its environment, between a legal order and a challenger.

Lindahl, as was discussed earlier, rejects private international law because he feels that the discipline's technical character that makes it inadequate for his own essentially political project. This type of critique of private international law—as overly technical, and therefore inadequate to resolve conflicts that are actually political—is widespread. But it rests, I think, on a double error.

The first error is to view the discipline's technical character as a shortcoming, instead of a quality. It is true that private international law is very technical, and sometimes scholars and judges can, in applying private international law, get lost in its technicalities. But the huge benefit of this technicity is that it enables private international law to resolve problems that would otherwise be unsolvable.³⁸ Lindahl rightly emphasizes that the problem of relations between legal orders is a particularly difficult one, because it must be resolved without resort to a higher legal order within which the difference is transcended. Where such a higher order cannot be established, the only resort seems to be to a politics of conflict, as Nico Krisch has suggested in his book on constitutional pluralism, and as Lindahl suggests in his theory of a-legality and political agonism.³⁹ Indeed, for Lindahl, the demand for recognition creates the politically dynamic element for a legal order—the one that challenges the existing distinction between

36. Ralf Michaels, *Private International Law as an Ethic of Responsivity*, in *DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW* (Maria Blanca Noodt Taquela & Veronica Ruiz Abou-Nigm eds, Edinburgh University Press, forthcoming).

37. On hospitality in this context, see Haratia Muir Watt, *Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference*, 70 *CURRENT LEGAL PROBS.* 111, 111–47 (2017).

38. See Ralf Michaels, *Post-Critical Private International Law: From Politics to Technique*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 54–67 (Diego Fernández Arroyo & Horatia Muir Watts eds., 2014).

39. NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010); Hans Lindahl, *The Opening: Alegality and Political Agonism*, in *LAW AND AGONISTIC POLITICS* 57 (Andrew Schaap ed., 2008).

legal and illegal and thereby, through its demand for a response, enables a change.

Private international law suggests a different response to such a challenge, namely that of technique. Technique enables the law to reduce a conflict to its concrete aspects, and thereby to make it soluble. It does not resort to a change of its own distinction between legal and illegal. Instead, it resorts to a reconsideration of its own distinction between itself and the other, between *lex fori* and *lex causae*.

But does not technicity mean that the underlying politics are ignored, pretended to be nonexistent? This widespread critique represents the second mistake in the critique of private international law. Private international law as technique is not an alternative to a political understanding of conflicts; instead, it becomes the language with which these political conflicts are not only expressed but also made soluble, if only for the concrete case, and if only in an always preliminary, incomplete manner.⁴⁰ Private international law does not deny the political, and ultimately insoluble, nature of the conflicts it deals with. (An insolubility, Lindahl would add, that emerges from the absence of an overarching legal order that brings together the Self and the Other.) But private international law operates in an ‘as if’ mode—it operates *as if* the politics could be ignored, as if insoluble conflicts were soluble.⁴¹ This is a fiction. And a fiction is not the denial of reality—the fiction is a tool formulated in full awareness of its incompatibility with reality, a tool in order to reach results despite that reality.

V. GENERALIZING LINDAHL: A SYMMETRY OF ASYMMETRIES

On this basis, I suggest private international law cannot only be fruitfully integrated into Lindahl’s theory. Moreover, private international law enables us to generalize his theory, and therefore to move beyond where he stands.

Recall, first, Lindahl’s dual asymmetry, in which an outside challenge is prior to the response of the collective, and in which the collective’s response prioritizes the inside over the outside. I find this argument to be entirely convincing, as far as it goes.⁴² But note that underlying this dual

40. Michaels, *supra* note 38, at 63–67.

41. Knop, Michaels & Riles, *supra* note 21, at 638–40.

42. I think there is a different way of presenting this idea in which legal orders necessarily exclude: because they are made of a number of individuals (a collective we), there will always be an individual who disagrees with collective decisions. Within the legal order, there are two actions that this individual can draw from her disagreement: she can put up, or she can shut up; she can try to make the collective adapt to her own preferences, or she can adapt her own actions to the preferences of the collective. But although these two actions—voice and loyalty—are the only two actions that are available *within* the legal order, they are not the only possible responses to disagreement that exists altogether. See ALBERT

asymmetry is a third asymmetry: an *epistemological* asymmetry. On its face, Lindahl assigns positions of agency to both the KRRS and the WTO: the KRRS puts out a demand (asymmetry 1), the WTO responds (asymmetry 2). The perspective, however, is almost throughout that not of the KRRS but from that of the WTO. Thus, the demand for recognition matters only insofar as it is registered by the WTO. And the response by the WTO matters only insofar as it affects the WTO itself: its impact on the KRRS is of only secondary value. Or, put differently: it is of importance only insofar as the WTO, from its inside perspective, deems it important.

There is nothing intrinsically wrong about a particular epistemological perspective. It is a great quality of Lindahl's theory that it avoids, mostly, a universalist position from which conflicts are assessed, given that such a position does not exist (except of course in the mind of the theorist who describes this conflict from his meta-position). But what is mostly missing from his account of pluralism is a pluralization of these epistemological positions. The conflict between WTO and KRRS is a conflict between an inside and an outside not only from the perspective from the WTO, but also, importantly, from the position of the KRRS. Notably, from that latter position, inside and outside reverse course. Now the WTO is the outsider demanding recognition (prior to the response of the KRRS, asymmetry 1), and the KRRS gets to respond on its own terms and by prioritizing itself over the WTO (asymmetry 2).

O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

A third possible action is exit—the decision to no longer take part in the collective endeavor altogether. This creates a conundrum. If exit is possible, the legal order is not inclusive: it does not include the person who exited. But if exit is impossible, the legal order is not inclusive either: now it excludes exit, and exit is outside of it.

It is characteristic of processes of contestation that they do not have a clear place between inside and outside, between contestation within the legal order and contestation of the legal order itself. Neo-Nazis will sometimes invoke the Constitution in their favor, and sometimes contest the constitutional order as illegitimate. When German Neo-Nazis say they want to fight for a “different Germany,” this can mean that they want to change Germany, but it can also mean that they want to replace it. When Martin Luther challenged the Pope, his interest was at first in reform of the Church—indeed, his argument was that the Church had to return to the point, to use Lindahl's terminology, that had originally defined its endeavor. When that did not happen, however, he left the Church—inside contestation turned into outside contestation. From the perspective of the contestator, voice and exit are different strategies, not different ontological positions.

I think Lindahl should be sympathetic to this ambivalence in no small part because it goes well with his own interest in dynamics and change. His example of a-legality in his earlier book demonstrates such a shift: the protesters are at first in violation of existing law, but then they manage to change that law. A-legality is situated on an ambivalent place between inside and outside the legal order. When the KRR contests the WTO, is this internal or external contestation? Is the KRR within the WTO, trying to change its rules and strategies for a more inclusive policy? Or is it outside of the WTO, trying to fend off claims by the WTO for comprehensive regulation?

This has an impact also on the issue of boundaries. Lindahl is correct that the WTO is in charge of drawing its own borders, and thereby defines what is inside and what is outside. “[B]oundaries do more than include and exclude; they include what they exclude and they exclude what they include.”⁴³ But a border not only has two sides—inside and outside; it is also viewed from two perspectives. And what Lindahl neglects is that the boundary between WTO and KRRS as drawn by the WTO is not the boundary between WTO and KRRS as drawn by KRRS. In a world of plural legal systems, KRRS, just like the WTO, also is in charge of drawing its own borders, and thereby defines what is inside and what is outside. The border between WTO and KRRS is not one border but two. And, importantly, these two borders—the one drawn by the WTO and the one drawn by the KRRS—need not match each other: there may be overlaps between the space that each of them claims, or there may be gaps that are indifferent to both of them.

The result is what I want to call *a symmetry of asymmetries*. It is not a situation of universalism: the respective boundary-drawing is not resolved on some higher level. Nor is it a situation of reciprocal recognition: each legal order remains free to determine how to respond to the other’s demand (asymmetry 2). Although a legal order may hope that its own recognition will cause the other to respond in kind, such a response is not automatic. Reciprocity occasionally exists: for example, some countries recognize the court decisions of a foreign sovereign only if and to the extent that foreign sovereign recognizes their own countries. But such a reciprocity then remains the choice of each legal system. And indeed, it sometimes fails. When Californian courts began to recognize German court decisions in the hope that Germany, under its own reciprocity regime, would in turn recognize Californian court decisions, the German courts remained stubborn and refused such recognition.⁴⁴

A symmetry of asymmetries means that the dual asymmetry between inside and outside from the perspective of the WTO is mirrored by the dual asymmetry between inside and outside from the perspective of the KRRS. It is not resolved in a universalist way. Neither legal order has normative force over the other; neither can decide about the dual border with binding force for both of them. At best, what can take place is a mutual arrangement, in which legal orders align their respective borders to the borders drawn by the other side, to minimize situations of overlap and of gaps. Such arrangements are necessarily unstable, given that no universalist position exists to unite the two sides, and given that each side’s asymmetric take may incentivize it to

43. LINDAHL, *supra* note 2, at 230.

44. See John Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109 (2014).

draw the boundary more according to its own preferences than those of the other side (asymmetry 2). In this sense, arrangements should be unlikely, and indeed, for outside observers they often are. The question is not why we see conflict at all—this is a consequence of asymmetries—but rather why we do not see more conflict? Why is it possible for legal orders to arrange their relations with each other in many situations, despite each side's preference for itself?

The answer, I suggest, lies in the technicalization of the way in which such conflicts are administered. The technicity of private international law, its ability to formulate conflicts as concrete and situation-focused, and as technical as if they were not political, makes such arrangements possible. Take the example of the relations between East and West Germany. This was a situation of asymmetric recognition: East Germany recognized West Germany as a separate state (and demanded to be recognized as such), whereas West Germany refused to recognize East Germany. Now, in many ways, this conflict was insoluble without the defeat of one side (as indeed ultimately happened, effectively, with the breakdown in 1989). Until then, however the ultimate conflict could be deferred through a complex technique. Ingenious scholarship made it possible for lawyers on both sides to bracket this overarching conflict and instead focus on concrete questions emerging from the separation. These questions were conceptualized differently from both sides. But this difference in conceptualization did not stand in the way of resolving the concrete problems that emerged.

This technique is an important addition to Lindahl's focus on agonistic politics of a-legality. Legal orders can respond to demands for recognition through renewed self-assertion: they can accept or reject the demand and therefore change their own distinctions between legal and illegal or not. The WTO, in Lindahl's example, can accept and include the alternative norms proposed by the KRRS, or not. But such changes are only one possible response. They are costly—they require a change of the internal laws. And they are problematic—they do not take the foreign law seriously on its own terms. By deciding whether to accept or reject the foreign demand, a legal order remains focused on itself in a solipsistic way: the other is relevant only insofar as it matters for the self.

The technique of private international law enables an additional dynamic between the self and the other: that of providing space for the other as other. The WTO, for example, can assign a space for the KRRS (an exception) in which it holds the KRRS rules applicable. This makes it possible for the WTO to maintain its own rules, and yet at the same time to accept the rules of the KRRS, in so far as they go. By doing so, a legal order

manages to respond to the foreign demand for recognition without changing its own distinction between legal and illegal.

VI. EPILOGUE: THE ASYMMETRY OF POWER

I have suggested that a private international law reconstruction of Lindahl's theory yields three benefits towards a generalization of that theory: it provides for a fuller account of the relation between the collective and the other (the application of foreign law), it allows for a multitude of perspectives (the symmetry of asymmetries), and it creates a case in favor of more, not less, technicality—not to avoid politics, but to the contrary to enable political conflict to not stall the possibility of resolution, at least of particular and concrete conflicts.

This is not a perfect solution, however. That it cannot convince the universalist should be obvious: its solutions are always preliminary, always partial, always context-specific, always asymmetric. But it must also leave the committed pluralist unsatisfied. The reason is that the solution fails to address a further asymmetry, one that I want to call asymmetry 4: the asymmetry of *power*. I mentioned earlier that Lindahl does not appear particularly concerned with the asymmetry of power that exists between the WTO on the one hand and the KRRS on the other. Maybe, his theoretical-analytical perspective can seem to make this focus dispensable. But I suspect that the asymmetry creeps back into his perspective: the asymmetry of power is the likely reason why Lindahl mostly assumes, for his argument, the position of the WTO and not that of the KRRS. And indeed, the asymmetry of power has important theoretical implications. In an abstract way, the KRRS has as much discretion about whether to recognize the WTO, as the WTO has discretion about whether to recognize the KRRS. In the concrete reality, of course, this is very different. The discretion of the KRRS is, effectively, severely hampered. The KRRS can, of course, try to generate a global outrage in order to put pressure on the WTO; it can build networks with likeminded other small groups and thereby enhance its power and reduce the power imbalance. As long as the power imbalance exists, however, such steps will always be partial. To the extent that the WTO prioritizes itself over the KRRS, it will prevail over the KRRS due to this power imbalance, because the WTO prioritization of itself is more powerful than the KRRS prioritization of itself.

It is not clear that this power imbalance can be overcome in a world that is, as Lindahl powerfully demonstrates, necessarily pluralistic. Any ethically defensible responses to this power imbalance must come from within legal orders, especially the powerful ones. The more powerful a legal order is, the stronger the ethical claim on it to take into account its negative impact on its

outside, its risk of hegemony. This remains a problem for Lindahl and private international law alike. Maybe they can try to solve it together.