Gunther Teubner: A Generative Scholar for a Plural World

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There are many scholars in the world whose works are provocative, smart, thoughtful, well-researched, logical, insightful, and so on. But only the work of a very few scholars can truly be called generative. Gunther Teubner is one of those scholars.

What do I mean by generative? Well, a generative work is one that not only reflects the thinking of the author; it actually generates new ideas in the reader. It calls forth creativity and becomes a fount for the future. Like a koan that inspires even as it perplexes, generative scholarship pulls us out of our usual paradigms and suggests an entirely new set of inquiries.

Here’s an example. In his 1993 book, *Law as an Autopoietic System*, Teubner called for the creation of an “inter-systemic conflicts law,” derived not just from collisions between the distinct nations of private international law, but from what he described as “collisions between distinct global social sectors.” 1 It’s actually not entirely clear what Teubner means here. By using the words “inter-systemic conflicts law,” he may well be invoking the systems theory of Niklas Luhmann. But I am literal-minded, and after reading that passage, I was moved to wonder what it would mean, in practical – and even doctrinal – terms to think of systemic conflicts as being like a conflict of laws regime? I confess I don’t know, and I’ll bet Teubner doesn’t know either. It is the same with Teubner’s invocation of global law without a state. What does he mean precisely by the phrase? Surprisingly, it doesn’t matter. What matters instead are the thousands of inquiries that the phrase has generated.

Thus, the real value of these tropes lies in what their imagery inspires. What if, after all, we broadened our notion of conflict of laws to think about it not only as conflicts among legal regimes but as conflicts among communities? And what if, instead of simply trying to construct fixed rules and draw clear lines as to what law should apply to any given transaction, we instead considered something more sociological and therefore thought about

conflicts rules as a way of managing pluralism? These are the sorts of inquiries that Teubner’s generative work calls forth.

So, I feel that it would be fundamentally counterproductive for me to try to explicate Teubner’s large body of work (or even a small part of it). Instead, in this very brief appreciation, I want to celebrate the supreme creativity his scholarship both represents and inspires. And the only way I know of to celebrate this generative work is to recount some of the thoughts his work has generated in me.

Following Teubner, we would immediately recognize that for too long conflict of laws doctrine has been overly focused on trying to come up with formulas for “solving” conflicts among legal regimes. These formulas tend to involve a series of unsatisfying rules purporting to draw clear lines demarcating separate spheres of authority. But when human activity touches multiple communities, as it inevitably does, there is truly no good answer to the spheres of authority question. Thus, we need a conflicts regime that focuses less on “solving” legal problems and more on managing the inevitable pluralism created by multiple legal and quasi-legal systems.

What would a conflicts regime built on pluralist principles look like? What if, instead of approaching problems of jurisdictional overlap by insisting on separate sovereign spheres among, say, state, federal, and international authority, we sought to maximize pluralist interaction among various communities, both state and non-state? What impact might such a change of lens have on the way we approach questions of jurisdictional overlap?

By way of example of how this might work in practical application, I will briefly discuss the dispute over the role of the Vienna Convention on Consular Relations in state capital cases, as addressed by the U.S. Supreme Court most recently in Medellín v. Texas. Essentially, this contentious line of cases has arisen because for years various state authorities around the United States, in processing suspects in their respective criminal justice systems, ignored (or were unaware of) their obligations under the Vienna Convention on Consular Relations, which the federal government signed in 1963. The Convention, among other things, requires that foreign nationals arrested in a signatory country be able to contact their consulate in order to coordinate their defense or otherwise help in negotiating a foreign legal system. In each of the cases so far, a foreign national was arrested in the United States, the relevant consulate was not notified, and the suspect was subsequently found guilty at trial and sentenced to death.

Under the terms of the Vienna Convention, the International Court of Justice (ICJ) is the legal entity with jurisdiction to adjudicate claims con-

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cerning alleged violations of the Convention. In early 2003 Mexico initiated proceedings against the United States in the ICJ, claiming that among those sentenced to death in violation of their Vienna Convention rights were 52 Mexican nationals. The United States participated in the proceedings before the ICJ, which ultimately ruled, in the *Avena* case, that the United States had breached several articles of the Vienna Convention. Significantly, however, the ICJ denied Mexico’s request for complete annulment of the convictions and sentences. Instead, the ICJ required only that United States courts provide review and reconsideration of the convictions and sentences to determine whether the violations of the Vienna Convention prejudiced the various defendants’ ability to obtain a fair trial. All that was required, according to the ICJ, was that this review be conducted as part of a “judicial process” and could not be barred by any procedural default doctrines that might otherwise thwart such review.

The case of Jose Ernesto Medellín was one of those covered by the *Avena* ruling. However, instead of following the ICJ directive by at least ordering a hearing to determine prejudice, the Texas Court of Criminal Appeals ruled that Medellín’s *habeas corpus* petition was barred by a Texas Criminal Procedure law that regulates applications of petitioners who have previously sought post-conviction relief. In issuing this ruling, the court determined that neither the ICJ order itself, nor a subsequent presidential statement urging state compliance with the ICJ order pre-empted or superceded local law. The U.S. Supreme Court ultimately agreed. The six-member majority sought to draw clear lines between the spheres of authority at issue in the case. In this vein, the Court first held that while an international treaty may create an international commitment of sorts, it is not binding domestic law unless the treaty is explicitly implemented through domestic regulation or ratified by Congress as a “self-executing” treaty. Second, with regard to the Presidential Order, the Court similarly sought to define clear lines of authority, ruling that neither the President’s power under the Treaty itself, nor his power to conduct foreign affairs, nor his power to “take care” that laws are faithfully executed authorized the President to turn a non-self-executing treaty into a self-executing treaty, absent congressional action. Thus, given the lack of international or presidential authority in the matter the Court held that Texas was free to ignore both the ICJ ruling and the presidential directive. The Court’s approach envisions no interaction among multiple sources of law, no interplay among multiple pronouncers of law, and no accommodation to the multiple interests at stake.

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3 Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17, 23 (Mar. 31).
4 Id. at 60–61.
5 Ex parte Medellín, 223 S.W.3d at 351–52.
In contrast, a pluralist approach would, first of all, seek to preserve spaces for interaction among the various communities involved. Thus, a pluralist approach would eschew the positions put forth by hardline international law triumphalists, who argue that the violations of the Vienna Convention necessarily invalidate all the various convictions, regardless of Texas law on the matter. But, a pluralist would also reject the hardline sov-ereignist idea that Texas should focus only on its own law and pay no at-
tention to the Vienna Convention or the pronouncements of the ICJ. And finally, the Bush administration’s efforts simply to take the issue away from the states by ordering adherence to the ICJ decision also would be rejected.

So, what are we left with? Let us start with the ICJ. In a pluralist account, the ICJ does not necessarily trump all other decisionmakers simply because it is an international body enforcing universalist treaty-based norms. Instead, the Court should take seriously the prerogatives and interests of other relevant communities and only squelch those other communities if it justifies why it needs to act “jurispathically” by attempting to kill off competing views.

To its credit, the ICJ in Medellín did indeed attempt explicitly to justify its universalist position, discussing at great length the need for an interlocking and reciprocal system of consular rights. In addition, the Tribunal took seriously the competing claim of local autonomy. Indeed, the ICJ attempted to be restrained in imposing its international norm, thereby trying to leave as much space as possible for local variation. Accordingly, the ICJ denied Mexico’s request to invalidate the convictions altogether. Instead, the ICJ decision asked only for a serious judicial consideration of possible preju-
dice. Finally, using a pluralist analysis, the ICJ decision is more justifiable if it is giving voice to the norms of communities that are not necessarily rep-re sented adequately in other fora, either because they are not parties to the suit or because they have no centralized voice. Here, for example, the com-munities who might care about reciprocal consular rights (U.S. citizens who travel abroad, potential immigrants who may be more reluctant to enter the country for fear of becoming trapped in the criminal justice system, and so on) are dispersed and have no real ability to advance their interests. Simi-
larly, there are significant voices within Texas itself who may want to have these consular rights protected. For example, Texas Attorney General Greg Abbott implemented a comprehensive set of reforms at the local level to try to make sure Vienna Convention rights are protected in the future. The ICJ

decision can, therefore, be seen as giving voice to these alternative epistemic communities.

Turning to Texas, from a pluralist point of view, a decision of the ICJ is not necessarily binding absent a local decision to be bound. Yet, that does not mean it should be ignored altogether. Rather, the Texas Court of Criminal Appeals should treat the ICJ decision similarly to the way it might think about recognition of judgments in the choice-of-law context. The judgment recognition inquiry considers under what circumstances a community should recognize and enforce a prior ruling of another community. A pure sovereignist might answer, “Never.” After all, what if the prior judgment was based on an entirely different set of governing norms? Why should such a ruling be enforced? And yet, we know that foreign judgments are often recognized and enforced.8

Moreover, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a court whose governing norms are less familiar, the important point is that the decision to enforce a foreign judgment is fundamentally different from the decision to issue an original judgment, and it should not be treated as equivalent.9 This is because judgment recognition implicates an entirely distinct set of concerns about the role of courts in a plural order. Thus, courts might consider

8 In most areas of law, United States courts have generally enforced foreign judgments as a matter of comity. See Mark D. Rosen Exporting the Constitution, 53 EMORY L.J. 171, 176 (2004) (noting that, since the nineteenth century, “the United States has been at the vanguard of enforcing foreign judgments”). Indeed, as far back as 1895, in Hilton v. Guyot, the U.S. Supreme Court made clear that comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” 159 U.S. 113, 164 (1895). The Second Restatement codifies this idea, noting that a “judgment rendered in a foreign nation … will, if valid, usually be given the same effect as a sister State judgment.” Restatement (Second) of Conflicts of Law § 117, cmt. c (1971). Moreover, validity is based only on whether the court that rendered judgment had proper personal jurisdiction over the parties and utilized procedures that were not inherently unfair. Id. § 92.

9 U.S. courts enforcing foreign judgments (as opposed to domestic ones) have sometimes applied a public policy exception to avoid enforcing particularly egregious rulings, but the public policy exception has been construed very narrowly. See Rosen, supra note 8, at 177–79 (surveying U.S. case law on enforcement of foreign judgments). Accordingly, courts only refuse to enforce “where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.” Restatement (Second) of Conflicts of Law § 117. Likewise, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Uniform Foreign Money-Judgments Recognition Act requires that a U.S. court enforce the judgment or arbitral award unless there is fraud or if doing so would be repugnant to the public policy of the enforcing forum. Thus, in most recognition of judgments cases, “[c]ourts consistently have enforced foreign judgments even if they would have refused to entertain suit on the original claim on grounds of public policy.” Rosen supra note 8, at 178–79.
the independent value of participating in an interlocking legal system, where deference to other community judgments is likely to have long-term reciprocal benefits. As Judge Cardozo once observed: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”

This is not to say, of course, that foreign judgments should always be enforced. Indeed, even employing a more pluralist approach, one would expect that judges might sometimes interpose local public policies where they would not in the domestic state-to-state setting. But if we acknowledge the importance of the values effectuated by strong judgment recognition, we will necessarily reject the idea that Texas is simply unable to enforce the ICJ judgment just because the local procedural default rule would have barred the Texas court from hearing the appeal had it come directly to the court. Thus, there will always need to be engagement with the foreign statement of norms; one could not simply reject the foreign as simply alien and therefore place it automatically beyond consideration.

In addition, thinking of Medellín using a judgment recognition frame encourages courts to consider the normative community that the ICJ decision represents. This normative community, significantly, includes the United States. Indeed, the Optional Protocol to the Vienna Convention, which makes the ICJ the venue to consider all “[d]isputes arising out of the interpretation or application” of the Convention, was not only ratified but also drafted (and championed) by the United States in the first place.

Further, the concept of sovereignty is unhelpful to resolve the Texas case because there is no monolithic set of “state interests” to be effectuated; there are myriad voices within Texas. Texas must interact with the world, its citizens go abroad and might well want their consular notification rights honored, the Texas Attorney General has actively attempted to educate local law enforcement concerning Vienna Convention rights, and so on. In addition, the procedural default rule at issue here was most likely not enacted specifically with foreign defendants in mind. And even when legislators actually consider activities abroad, they do so to pursue domestic policy priorities, with little consideration for multistate implications. Thus, a choice-of-law regime that only offers two options (the home state or the foreign one) improperly insists on judging citizens according to a single state norm in a world where those citizens affiliate with multiple states or nations. Indeed, the mere fact that a dispute is multinational necessarily means that it implicates interests that are different from a purely domestic dispute. Accordingly, judges should consider these added factors and craft rules based on a variety of national and international legal norms. Here, there are obviously lots of additional in-

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terests at play to distinguish the case from a purely domestic one, including concerns about diplomacy, foreign relations, citizens abroad, the federal government’s stated interest in compliance with the ICJ order, and so on.

Finally, as noted above, the ICJ did satisfy the two requirements for the sort of intersystemic jurisdictional assertions that should command deference. First, it provided a detailed justification for its decision to intervene in an otherwise seemingly “local” criminal case. Second, it issued a very limited order, not attempting to overturn the convictions involved in toto, but instead simply asking for a further evidentiary hearing. Thus, the ICJ attempted a nuanced balance of international and local interests, and the decision therefore deserves a similar kind of deference and accommodation from the Texas court. Indeed, once the distorting filter of Texas’ purported sovereign power is put aside, this seems like a relatively easy call.

As Gunther Teubner has recognized, both our conflict-of-laws discourse and our discourse surrounding legal jurisdiction more generally are too often trapped in a language of sovereignty that fails to capture the reality of life in an era of cross-border interaction. Accordingly, instead of bemoaning either the “fragmentation” of law or the messiness of jurisdictional overlaps, Teubner understands that we must accept these supposed problems as a necessary consequence of the fact that communities and legal systems cannot be hermetically sealed off from each other. Moreover, we might even go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows multiple ports of entry for strategic actors who might otherwise be silenced.

The Medellín case has now been “decided” by the U.S. Supreme Court, and although positivists view such a decision as the “final” word on this dispute, pluralists know that no statement of law, no matter how seemingly authoritative, is ever really final. Thus, the conversation will go on. Moreover, the Vienna Convention and the ICJ decision will continue to have an impact, regardless of the Supreme Court, because local law enforcement authorities around the country are now cognizant of their obligations in a way that they were not ten years ago. Indeed, the U.S. State Department maintains a Consular Notification and Outreach Division specifically to help educate local prosecutors and police officers around the country concerning their obligations under the Vienna Convention. Thus, pluralism
recognizes the tangible, day-to-day ways in which international law is “brought home,” sometimes regardless of official legal pronouncements.

Most fundamentally, all of this interaction is elided or ignored if we continue to think and speak in the language of sovereignty, with its purportedly clear lines of demarcation, its assumed allocations of authority, and its formalistic conceptions of legitimacy. Such a language cannot hope to guide us in a world of interdependence, inevitably permeable borders, multiple communities, and overlapping jurisdictions. In the face of this messy world, we can retreat and insist on a set of pure theoretical models divorced from reality, or we can accept (and perhaps even celebrate) the potentially jurisgenerative and creative role law might play in a plural world order. This is the vision that Teubner’s scholarship has always conjured for me, and it is why I continue to draw inspiration from his dense, evocative, and profoundly generative work.