Oxford Handbooks Online

Globalization and Comparative Law

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The Oxford Handbook of Comparative Law
Edited by Mathias Reimann and Reinhard Zimmermann

Print Publication Date: Nov 2006 Subject: Law, Comparative Law
Online Publication Date: Sep 2012 DOI: 10.1093/oxfordhb/9780199296064.013.0018

Abstract and Keywords

If comparative legal studies are to retain their relevance in understanding the impact of global changes on existing local traditions, their modes of interaction and influence, and their strategies for survival, then, the article concludes, their focus certainly needs adjusting. This article attempts to examine the ways in which comparative law as a discipline is affected by the changes wrought by globalization, and in particular the challenges which such changes imply for the methodological agenda of comparative legal studies and for its ideological commitments. More pragmatically, it may also be useful to envisage the impact of increased access to information on foreign laws, and the growth of trans- or international sources of uniform law, on the practical usefulness of comparative law.

Keywords: globalization, comparative legal studies, foreign laws, uniform law, comparative law

To the extent that it affects the paradigm within which comparative law emerged as a discipline, globalization inevitably raises new challenges for comparative law. Comparative legal studies grew up within a vision of the world as divided into watertight 'legal systems' attached to, and contained within, the various sovereign states. Profound changes affecting the fabric of the international environment, particularly the progressive decline of the descriptive and normative significance of traditional (p. 580) geo-political divisions of the world, tend to reveal as irrelevant certain often unacknowledged assumptions on which mainstream legal comparison has long rested and call for rethinking its ideological stance and methodological agenda. The emergence of new spheres of normativity distinct from the nation state, the appearance of powerful private or transnational actors in the public international arena, and novel configurations of relationships between polities challenge traditional representations of law itself, blur distinctions between the public and private spheres, and call into question western representations of centre and periphery of the globe which have been foundational until now for comparative research.

In this respect, while globalization can best be seen as a process, involving the deconstruction of space and state,[1] it is also the seat of profound tensions and contradictions. Triumphant economic liberalism, which reduces law to the status of product, encounters the new universalism of human rights.[2] Thus, globalization may mean the 'dédoublement du monde'.[3] In this respect, David Nelken warns against making one-sided assumptions about what is meant by globalization and the way it affects the law, since it comprises multiple and contradictory aspects (social, cultural, technical, political, economic) and is moreover a label often used to cover developments which could be understood in other terms. Changes may indeed be attributed misleadingly to globalization which in fact result from parallel but indigenous processes affecting national laws.[4] And of course, globalization is not in itself a new phenomenon, at least in so far as it signifies the hegemony of a given legal tradition.[5] The Roman Empire carried a process of world-building through the law, while the rediscovery of the *ius commune* in medieval Europe exemplifies a similar culture-driven, rather than political, phenomenon. Be that as it may, the various upheavals which are occurring today in the wake of these developments on a world scale affect the very definition of the law, its relationship to state and society, and the patterns of mutual encounter and reaction between different legal traditions, and cannot therefore leave comparative law indifferent or unscathed.

Not the least challenge faced by comparative law in this context is the fact that globalization is to a large extent itself a narrative, projecting a world-view that is only partially shared by the world it aims to include. It may be no more than neo-liberal policy choices clothed in the language of economic inevitability,[6] a (p. 581) purely western artefact.[7] Indeed, the rhetoric of globalization partakes no doubt of the continuous massive efforts deployed by the western legal tradition to export western rationality, but, like colonial law, it may well be used to sustain other visions of the world, just as the western concept of state was turned against colonial states.[8] As Lawrence Rosen explains, the reason why the rhetoric of globalization developed in western legal culture is deceptive—and why comparison becomes so crucial—is the common tendency of the

west to see directionality where there is in fact variation.[9] Outside the western tradition, globalization may be perceived as partaking of a 'white mythology', harnessing the colonial legacy to iconic images of democracy and good governance[10] or alternatively, as a neo-liberal slogan.[11] But comparative legal studies themselves are in turn perceived as the narratives of the making of 'modern' law, serving a certain vision of the world and comforting Euro-American images of progress and 'developmentalism'.[12] From all these angles, the question is squarely raised as to the relationship of comparative law to global governance.

The fate of comparative law can obviously give rise to debate outside the context of contemporary economic globalization; indeed, comparison as a legal discipline was initially associated with ambitious projects for international uniformity of law. As Roderick Munday puts it, the purpose of the 1900 Paris Congress was to discover an 'objective, international "legal science", which if properly applied, was to reveal the deepest secrets of legal existence and ultimately lead to ever-greater uniformity among legal systems',[13] and might thus contribute to fostering peace and understanding among nations. However, the relationship of comparative law to global governance is posed with particular acuity in the present context. Indeed, as a product of western legal thought, and clearly bound up with a scientific conception of the law specific to the civilian tradition of continental Europe, where it became inseparable from the comparison of 'legal systems',[14] legal comparatism prospered in an environment composed of various legal traditions loosely identifiable with the nation states. It has long remained Eurocentric, focusing essentially on the respective characteristics of common law and continental civilian legal thinking, the post-war renewal of comparatism in the United States having prompted it to expand so as to include common law jurisdictions other than England. Comparative law thus shared many features with contemporaneous **(p. 582)** international law, both public and private, which similarly projected a view of the world according to the aspirations of European colonial powers. However, while the latter dealt with an international legal order composed of sovereign states, subordinating the private sphere, comparatism concentrated on the study of the private laws thus enclosed within the state, perceived in accordance with the epistemological tradition of the great civilian codes as sheltered from the intrusions of politics and thus amenable to scientific study as a system and ultimately to unification. The shadow of the nation state made itself felt nevertheless through the fact that the legal traditions under comparison were each assumed to be coextensive with the territory of a given community to which they were historically linked, while sources of law were in the main official sources, with judicial decisions in the fore as comparative legal studies began to flourish in the Anglo-American legal world.

While neither the figure of the state nor the normative authority of formal sources of law have disappeared under the pressure of globalization, fundamental shifts have occurred in the international landscape, favouring the emergence of concurrent actors and lawmakers, unsettling the territorial jurisdiction of states so as to include some sort of recognition of community responsibility extending beyond national borders,[15] spreading human rights discourse, generating transnational norms and dehierarchized networks,

and to a certain extent substituting markets for law.[16] 'Third spheres' constituted by international commercial arbitration and the emergence of the *lex mercatoria* are progressively dissolving the link between law and territory. Naturally, the challenges facing comparative law are not unlike those which affect international law, both public and private, which developed under analogous premises. Public international law has similarly to deal with international 'governance without government', while private international law has to grapple with the declining significance of territory. Comparative law is faced in turn with the issue of what makes up a tradition disconnected from state or irreducible to the concept of a national 'legal system'. It is equally clear that the resources of traditional comparative law alone are insufficient to take in the multiple dimensions of globalization and its effects on local legal traditions and that interdisciplinary approaches associated with these and other fields, such as political science, economics, and sociology of law, must all be invoked for a more complete standpoint.

Of course, even qualified as 'traditional', 'comparative law' is not in itself an ethically and methodologically homogeneous discipline. Thus, pioneering pre-war comparatists did not share the same ideological agenda as their post-war (p. 583) successors[17] and today mainstream comparatism, which remains Eurocentric even if methodologically eclectic, diverges considerably from concurrent contextualist voices, which challenge more or less overt presumptions of commonalities between diverse laws and focus on otherness and respect for difference. However, even in relation to the 'neo-Romantic turn' of contemporary comparatism,[18] the question arises as to the sustainability of comparative studies which are ontologically linked to context and society, in an environment which is undergoing profound changes on both counts. What seems clear is that if comparative legal studies are to retain their relevance in understanding the impact of global changes on existing local traditions, their modes of interaction and influence, and their strategies for survival, their focus certainly needs adjusting. This chapter will attempt to examine the ways in which comparative law as a discipline is affected by the changes wrought by globalization, and in particular the challenges which such changes imply for the methodological agenda of comparative legal studies (Section I) and for its ideological commitments (Section II). More pragmatically, it may also be useful to envisage the impact of increased access to information on foreign laws, and the growth of trans- or international sources of uniform law, on the practical usefulness of comparative law (Section III).

I. The Methodological Challenge

The exact methodological implications of globalization for the agenda of comparative law are controversial. The issue here is whether, in a global context characterized by the decline of the nation state, or at least the resettling of the concept of state sovereignty, and producing novel polycentric forms of normativity, legal comparison is still a

sustainable project, and to what extent, in order to remain a significant source of reflection on the nature of the law and its relationship to society in an extended and increasingly cosmopolitan world, comparative law must adjust its methodological agenda. First, there is a need to adjust the focus of comparison from nation states to traditions or epistemic communities (Section I.1). At the same time, there is a new awareness that only a dynamic perspective can make a useful contribution to comparative legal knowledge (Section I.2). It also appears necessary to revise some of the deep assumptions of the traditional comparative approach, overly concerned with 'private law' (Section I.3).

(p. 584) 1. From Nation States to Epistemic Communities

Comparative legal studies are certainly linked ontologically to the existence of diverse local legal traditions, or at least to different societies. The lenses through which these diverse traditions have been viewed by successive generations of comparatists have differed, however. The unifying project borne by mainstream pre-war comparative law concerned the laws, or 'legal systems', of nation states. The links are patent between the world-views offered respectively by comparative law and public international law, which shared a vision of the international order divided into territorial polities each in charge of a specific legal system. While these links were later blurred through the decline of the unification project, the move to functionalist methodology, and the creation of a specific agenda for comparative law, it nevertheless remains the case that the representation of the object of this discipline as regards the various laws of nation states was still implicitly reproduced and reinforced. First, by philosophical representations as to the nature of the law, perceived either as expressive and coextensive with the territorial power of the sovereign, or alternatively as constitutive of a 'system' whose *grundnorm* was to be found in a national constitutional norm, the state appeared as the ascendance of a form of individualized, formal, rationality.[19] Second, on an epistemological level, a distinctive bias towards rule-based knowledge of the law indeed continues to a certain extent to push the emphasis in comparative work towards legal rules.[20] Thus, 'nationalistic perceptions have wielded enormous influence over the shape and direction of comparative studies'.[21]

Contemporary contextualist approaches to comparison tend to reject both the assimilation between law and rules, and law and state. The emphasis of this strand of research tends to lie on the link between law and community, de-emphasizing official or formal sources of law and privileging socio-cultural rather than geo-political divides. Sociology becomes a privileged partner in comparative studies,[22] which favours a focus on traditions rather than polities as an object of comparison.[23] Nevertheless, even according to this conception, history is perceived to play an important role in the constitution of a sense of community and identity, so that the link between tradition and polity is not wholly severed. While non-state local or nomadic communities secreting their own normativity belong to the field of comparative studies, it is also true that comparing, say, different spheres of transnational normativity is not comparative law, at least as we know it, even if novel issues of conflicts of law appear at times to overlap with areas of

comparative (p. 585) knowledge, confirming the idea that understanding globalization requires an interdisciplinary approach.[24]

Is the comparative project sustainable in a global context of increasing interdependencies between national systems and emerging spaces of transnational normativity? Such claims have been made.[25] The intermingling of national laws, the interconnectedness of markets, the emergence of 'third legal spheres' such as the *lex mercatoria* and the growth of uniform international state sources including human rights would tend either to generate a world differently configured from the traditional juxtaposition of national legal cultures, or to lead to a progressive erosion of diversity, thereby depriving comparative legal studies of their object or interest. At the same time, such changes suggest multiple polyvalent perspectives from which law can be perceived: beyond the perspective of the national court, law is evolving, being concurrently under the impetus of private arbitrators, mobile capital seeking to invest, transnational communities of interests, international courts, or non-governmental organizations. Law can alternatively be seen as a mere product on a global market, or on the contrary as the ultimate vehicle of fundamental values, defying national frontiers. Fischer-Lescano and Teubner see a global fragmentation of the law, due to profound collisions between colliding sectors of transnational society. Hierarchical solutions are no longer possible, any more than are sustainable static monodimensional visions of the world. Warning against reductionist perspectives, these writers observe that '… the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalised rationalities, which law cannot solve …'.[26]

Thus, the static interpretative approach represented as characteristic of traditional comparative law is claimed either to be no longer relevant for the 'dynamic longitudinal project',[27] or pointless in view of common causes and concerns, risking a turn to occidentalism or orientalism.[28] Although such claims may in fact be demonstrative less of the essential irrelevance of comparative law, than of the need to revise its methodological agenda, which would require adjustment to grasp the dynamics of globalization and its impact on local systems, they must be taken seriously. Just as the expansion of democracy, following the vision of Fukuyama, would herald the end of history; similarly, it might be supposed that the diffusion of human rights would herald the end of comparative law, in the sense that it (p. 586) announces an ahistorical society based on universal standards.[29] The question, then, is whether, despite globalizing trends towards transnational normativity and convergence through increased proximity, there are still distinct legal traditions, linked to stable communities (whether territorial or otherwise, connected or not to nation states), which are worth comparing, and, if the comparative project remains sustainable despite the changes involved in the process of globalization, what impact such changes are nevertheless likely to bring about to the way comparison is done.

Undeniably, diversity may be threatened by globalization in several ways. Pressure towards convergence may be induced variously through both public and private channels. Thus, the emergence of common global problems such as cross-environmental pollution

or international money-laundering call for cooperative responses on the part of states. Self-regulation of global markets secretes transnational uniform rules. The initiatives of various non-state transnational actors such as multinational firms spreading codes of conduct to level the global playing field, or NGOs fighting for transnational standards, also contribute to uniformity. Universalizing narratives such as human rights discourse tend to spread ideas and ways of thinking about the law. Various forms of legal transplants appear to take place at an accelerated rate, whether through imitation generated by cultural prestige,[30] or through the dominance of a given legal system with economic leverage.[31] Hegemony of one particular legal tradition is established through the creation of zones of influence. A particularly fascinating example of the contemporary Americanization of the law might be found in the exercise of universal jurisdiction in human rights cases under the Alien Torts Claims Act, whose potential effect could be to export American procedural concepts worldwide; one writer even considers that its effect is to invest the American judiciary with a mission to rewrite world politics.[32] Similar patterns of dominance can be found in all previous examples of globalization, such as in the Romanization of the laws of Europe, and later in the proselytizing tradition of the great civilian codes, which appear as the predecessors of contemporary Americanization.

Network effects such as exchanges among members of the judiciary of different countries or courts are yet another example of increased proximity and dialogue between epistemic communities, further enabled by information technologies, (p. 587) which are of course another important factor in facilitating the free exchange of ideas. The progressive creation of a transnational public space in which cross-fertilization regularly occurs is taking place through the use of comparative law in judicial decisions. The rise of the idea of due process (*procès équitable*) in European legal culture is an excellent example of a legal concept which has gained momentum and substance through a certain 'globalization of the judiciary'.[33] As other systems become better known, they may even constitute persuasive authority before foreign courts. Heightened opportunities for application of foreign law in national courts in conflicts of law cases or recognition of foreign judgments increasingly confronts national systems with otherness and provides important insights into the ways in which other systems work. The role of supranational courts in diffusing ideas among participant states, as in the case of the European Court of Human Rights, has obviously enhanced this phenomenon.

However, whether exchange and dialogue lead ultimately to uniformity is entirely debatable. And while the existence of centrifugal and universalizing pressures conducive to legal uniformity are undeniably at work, it remains a moot question as to whether they are of a kind to deprive comparative legal studies of their object and point. Although globalization brings heightened exchange in certain fields, its real impact on local legal culture remains to be seen. Empirical research appears to show that global pressure can actually strengthen the local. 'Despite a world with globalizing pretensions, [comparatists] would discover that intensity of contact actually emphasizes a sense of difference, not of sameness.'[34] It may be that accelerated exchange actually accentuates local particularisms; it does not appear, at any rate, that the world is becoming more homogeneous.[35] Increased awareness of alterity may generate a need for identity and

tradition, while accelerated contact and juxtaposition with other traditions may mean that all sides develop a sharper sense of identity.[36] The turn to tradition and local anchorage may mean that universalizing pressures are neutralized by fragmentation or 'globalization'.[37] It may be that the effect of interconnectedness is to institute a dialectic relationship between the global and the local. Even on a political level, a displacement of governance towards the global level may be compensated by the revalorization of the local.[38]

One of the reasons for the perennity of the local anchorage of legal traditions seems to lie in their efforts to reappropriate the global. This phenomenon is not new to contemporary developments, since it was apparent in previous forms of globalization: colonial law was used by local groups to strengthen diversity, even (p. 588) against the interests of the colonial state.[39] The same phenomenon may exist too when the ideas peddled by a certain form of globalization encounter other, concurrent globalizations. In the case of Islam, for example, a certain reappropriation of western ideas, if not ideals, seems to be taking place to a certain extent, resulting in a compromise between the Islamic ethic and market economy.[40] The axiological content of globalization is neutralized or channelled when it is represented as having an essentially economic-technical content. Interestingly if not unexpectedly, to the extent that globalization involves a certain recomposition of spheres of identity, the impact of external global pressure on local traditions varies according to the capacity of local culture to accommodate multiple affiliations. As the example of India indicates, such accommodation is easier, without loss of identity, in traditions with fuzzy or multiple identities.[41] The shock that globalization represents for French legal culture would tend to confirm this conclusion.[42] Be that as it may, the extent of local resistance to global pressures in the direction of uniformity, strategies of reappropriation of the global by local traditions, and more generally the meaning of legal culture and the ways in which traditions maintain their distinctiveness, should all now be put squarely on comparative law's methodological agenda.

2. From a Static to a Dynamic Perspective

Indeed, if globalization does not mean the end of comparative history or at least of diversity in the legal sphere, it must inevitably impact on the way in which comparison is undertaken. What is it that is compared? In the first place, the assault of globalization on state sovereignty means that the identity of cultural or epistemic communities needs to dissociate from geo-political divisions of the globe.[43] Their increasing irrelevance leads to comparing legal cultures which find expression in fora which are wider than mere states.[44] Similar difficulties arise for private international law, which will henceforth be required to think in terms of communities rather than territories, while ultimately, statehood and national identity will be redefined. From this standpoint, it has been suggested that 'tradition' may well be a more promising concept with a view to defining the object of comparative law in a global context than that of a 'legal system', which is linked to (p. 589) an outdated scientific approach to comparison, suggests a rational, rule-based model of legal knowledge and remains inextricably bound up with the pre-eminence of the 'frozen accident' of state. However the political concept of state sovereignty is affected by globalization, comparative law must ask whether and to what extent legal traditions can retain their sense of identity or distinctiveness in the face of change.[45] Much of course depends upon what is meant by tradition, which may itself be no more than 'imagined community'.[46] According to Patrick Glenn:

> Once tradition is seen as transmitted information, an ongoing bran-tub churned by new generations, with no inherent elites or hierarchy, the linking of tradition with stability becomes less obvious and less defensible. Tradition becomes rather a resource from which reasons for change may be derived, a legitimating agency for ideas which, by themselves, would have no social resonance.[47]

Comparative law then should harness its agenda to the question of how, if law fits society, this could be changing, or on the contrary consolidating, under globalization.[48] Heydebrand's point[49] is that mainstream comparative methodology tends to be static. Whether functionalist or contextualist, it tends to focus primarily on an internal historical link between law and tradition, whereas the important questions raised by globalization processes are essentially dynamic and concern the impact of these changes on the configuration of legal traditions, on how they adapt or maintain their distinctiveness, on how they reinterpret their foundational myths, how they make strategic use of law in relationships with other cultures, whether law itself is a vehicle or a factor of resistance to global pressure, what is special about current developments attending legal transfers.

> Among the formidable challenges which await tomorrow's comparatist … are the tasks of tracing the sometimes improbable paths taken by migrating laws, of investigating the ways in which they come to be assimilated, rejected or refashioned within the host system, of analysing the consequences that flow from

> this process of transplantation and adaptation, and finally of assessing the inevitable conceptual implications inherent in these phenomena.[50]

Mainstream functionalist methodology[51] may not be sufficient to apprehend these impacts and interactions. Indeed, as Lawrence Rosen points out, static methodological approaches may actually downplay change.[52] For this writer, comparatists create categories that tend to neutralize direction, whereas human society is best characterized by variation: '(i)t's context that matters'.[53] The methodological focus should be on interpenetration of ideas and reciprocal influence, on change and (p. 590) resistance to change. The theoretical and political dangers of the functionalist approach are pointed out by Pierre Legrand, in so far as such an approach assumes that all societies face the same problems. As Nelken emphasizes in turn, there is considerable variation as to how problems are conceived. And even whether given situations are treated as problems, varies.[54] It may well be that one of the main errors of dominant comparative law lies in its reluctance to question its own methodological and culturally embedded assumptions about what law is and how it is structured. Similar conclusions are being reached in neighbouring disciplinary fields, particularly in private and public international law,[55] which have traditionally shared some of the entrenched assumptions of comparative law.

3. Abandoning the Private Law Focus

A certain conception of comparative law defines its task as identifying an 'unspoken body of assumptions' within a given tradition.[56] Comparative methodology itself, emerging in a given cultural context, also rests on unacknowledged assumptions which its confrontation with narratives of globalization may contribute to calling into question. While the traditional focus on Euro-American legal traditions is clearly ideologically conditioned (see below, Section II), what of the fact that comparative legal studies have also tended, as a methodological matter, to privilege private law? It is remarkable that much of comparative legal theory has referred to private law, and that current projects of harmonization of law using comparative legal knowledge, whether in a global or European context, tend to focus on the central Roman categories of obligations or property law, with rarer incursions into family law or procedure. The *corpus iuris* project, designed to harmonize aspects of criminal law, is a notable exception. Moreover, such projects appear to entertain little doubt as to how to identify or delineate 'private law' and what it actually comprises. This methodological stance, and its apparent inevitability, appear to result from the conjunction, on the one hand, of the influence of systematic legal thinking on the initial methodological options of comparative legal studies, and on the other, of the epistemological signification of the private/public divide in the civilian tradition.

On the first point, Patrick Glenn explains:[57]

> With the growth of systematic thinking, the idea began to take hold that comparison also had to be systematic. If systems were to be built, systematic comparison was essential to the construction, and thereafter to their refinement. So the process of comparison, the (p. 591) intellectual process of keeping traditions in touch with one another, itself became subject within the civil law tradition to the characteristics of the tradition itself. If the civil law was to be rational and systematic, things could get all mixed up again by just allowing other ideas or concepts to wander in. The tradition's definition of system could be called an open one, but it had to be a controlled openness …

Thus, comparison was 'co-opted to the rationalist effort' and thereafter, comparative law had a formal structured place in civilian legal thinking. A close look naturally traces this influence on the deep assumptions behind the fundamental choices of comparative methodology. The scientific neutrality of post-war comparatism, its detachment from distributional effects—and later also the legal transplant thesis, although easily overturned when considering civil law as the private law constitution of society—have all been reinforced by the fact that private law is traditionally perceived in codified civilian thinking as strictly non-political and non-distributional. For scientific comparative law, private law epitomized the 'grammar of the law'.[58]
The separation between public and private law crystallized with the great civilian codes. The law of the codes is by essence systematic, decontextualized, ahistorical.[59] As the constitution of civil society, it encloses inter-individual relationships in a hermetic, private, and apolitical sphere.[60] The codified form of private law was a guarantee of no return to the secrecy and mystification of *l'Ancien droit*, while the separation of the private from the public meant protection for individuals from the arbitrariness of sovereign will. However, this separation also favoured the emergence of the dogma of the neutrality of private law, which was long sustained despite acute disharmony with the rise of the regulatory and post-regulatory state, and the correlative transformation of the function of the law of property, contract, or torts, henceforth deeply involved in the management of the complex, the massive, and the prospective.

Now, current comparative projects focusing on private law tend to imply that the scope, function, and content of that category are to a large extent determinate.[61] (p. 592) However, projects which claim to identify private law through the identity of actors or subject-matter will be communicating only an incomplete picture of legal reality. Indeed, one of the most spectacular effects of globalization is to blur the distinction between the public and private spheres. While some of these changes might be due to parallel indigenous movements of national legal systems moving out of an overly restrictive formal structure, it is clear that international developments have had much to do with the new fuzziness of the public/private divide. First, the emergence of a competitive paradigm of international relations linked to globalizing markets transforms law into product and puts an end to the monopoly of states as providers of public goods.[62] Second, the rise of the regulatory function of private law and of modes of regulation involving a plurality of both public and private actors is equally linked to developments involving interconnected markets, although the influence of the European law may be more obvious for the time being than global pressure. The retirement of the regulatory state, the

declining significance of territory, the growth of spheres of self-regulation, and increasing involvement of private actors in the regulatory process mean that the conventional view of the state and the normative process is changing profoundly, and calls for a rethink of the governance structures associated with regulatory processes and the interaction between private and public governments.[63] As Fabrizio Cafaggi states, 'the major phenomenon we are witnessing at a global level, but to different degrees, is a move from a world in which public and private regulators occupy different and independent spaces of the regulatory domain to a world in which they coordinate through hierarchy, cooperation and/or competition'.

Here, comparative law needs to be sensitive to these new modes of governance and to the gradual mixing and redefining of private and public spheres. The redefinition affects diverse legal traditions differently, if only because it has been more or less culturally entrenched. In this respect, on the level of comparative legal epistemology, Geoffrey Samuel observes that the unscientific culture of the common law, which had never lent itself to a scientific division between public and private law, is better equipped to embrace complexity in a globalizing world than the more systematic civilian ways of acceding to legal knowledge.[64] Be that as it may, the example of the private law focus of dominant comparative methodology shows that certain entrenched assumptions are therefore severely challenged by the pressure of globalization. Predictably, such assumptions also have an ideological resonance, which is perhaps the second main challenge globalization poses to comparative law.

(p. 593) II. The Ideological Challenge

A study by David Kennedy of 'The Methods and the Polities' of post-war comparatism has shown it as adhering to a certain ideological agnosticism.[65] David Kennedy has shown that post-war comparatists, unlike their pre-war predecessors, have been careful in the main to distance themselves from the sphere of governance and the choices of political life.[66] Curiously, this ideological agnosticism and a certain 'retreat to the academy' came about at a time when sociological jurisprudence had become mainstream in most other fields, connecting law to politics and social realities.[67] Indeed, their pre-war forerunners had played a significant role in the methodological assault against parochialism and formalism, spreading socially orientated ideas about the law.[68] Comparative law had come to stand for an opening up to values outside formalism. While serving the cause of legal realism, comparatists eschewed neither philosophical debate about the law nor ideological commitment to projects of world-building. Despite certain methodological differences,[69] the shared vision of international governance of Lambert, Pound, or Rabel tended to be cosmopolitan, humanist, and progressive.[70] Whatever the reasons behind the ostensible political detachment of contemporary mainstream comparative law (Section II.1), it seems that that it has never in fact been innocent of a world-vision

(Section II.2), while today globalization clearly raises issues of governance on which it is now difficult for comparatism not to take a stance (Section II.3).

1. The Contemporary Academic Retreat

As observed by David Kennedy, mainstream comparatism in the latter half of the twentieth century has self-consciously asserted political agnosticism, retreating in acute discomfort from the sphere of ideology and projects of governance.[71] The widespread acceptance of functionalism as mainstream comparative methodology has reinforced the idea that comparison consisted essentially in the 'mapping' of commonalities and differences between legal systems, and that the knowledge thus produced was itself independent of policy choices and governance projects.[72] Revealing the existence of a common core of European legal principles might then leave the legislator free to codify or not. Mauro Bussani thus describes the Trento (p. 594) Common Core project as aiming to 'produce reliable information', which may then be used to unearth features that hitherto remained obscure or provide a useful instrument for legislative harmonization. 'But this has nothing to do with the common core research itself'.[73] Thus distributional consequences are downplayed, while the choice of private law regimes for privileged study is that of regimes apparently 'innocent of distribution'.[74]

An explanation for this paradoxical escape to political limbo might lie, it has been suggested, in 'academic post traumatic stress disorder',[75] in which pre-war comparatism is remembered as entangled in ideological debates as to the nature of law. This traumatic memory may in fact distort the reality of pre-war comparatism, where ideological disagreement was no doubt more limited than it was later represented, particularly by European refugee academics in the United States.[76] These comparatists were keen to turn a world-weary page, leaving ideology behind them for the comfort of agnosticism and science. Be that as it may, 'compulsive hand-washing is still traumatic':[77] methodological eclecticism and political agnosticism undeniably obscure comparative law's contribution to global governance, but do not eliminate it. Indeed, asserted apolitical sensibility may well have its own politics.[78] It has been suggested in this respect that functionalism may well postulate commonalities, and conceal a desire to assimilate the 'other'. Thus, for Pierre Legrand, dominant epistemological discourse has operated an 'institutionalization of sameness', comparatists having made it their collective and coercive purpose to proscribe disorder and to invalidate dissonance.[79] Difference then appears as a disturbance of the universal, inciting comparative projects to 'take the law in hand, lay claim to it'.[80]

Ideological agnosticism in comparative law is less easy to sustain today, simply because the world, or rather the categories hitherto used to represent it, is becoming progressively less compartmented. Even in a domestic setting, private law which constituted the privileged field of comparison cannot be held aloof from politics and social realities; within Europe, Community law contributes actively to the blurring of the public/private divide. Transborder politics are not only the realm of public international

law, but find expression in transnational public interest litigation initiated by private parties through ordinary courts.[81] Legal pluralism finds expression in private transnational norms with contractual fora. The spread of human rights discourse means that reflection on the universality of rights and the relativity of cultures cannot be avoided, even as the increase in economic and social exchange generates multiple occasions for contact with profoundly different legal cultures outside the western orbit and brings home the (p. 595) reality of 'extraordinary places' in the legal world.[82] Multiple standpoints become simultaneously valid and equally worthy of respect. At the same time, contemporary jurisprudence has opened increased opportunities for reflection on the deep assumptions of law as narrative.[83] Just as comparative law contributed in the pre-war period to the spread of ideas about law as social reality,[84] more recent currents in law and literature, and law and development, focus on the metalanguage of legal and cultural traditions, so that the ideologies involved respectively in the globalization process and in the politics of comparative law cry out for analysis in these terms.

2. The Unacknowledged World Vision of Comparative Law

As David Kennedy has again shown, comparative law, while ostensibly neutral, often supports ideological projects developed in other disciplinary fields, particularly in international law, where it has been used to promote projects of international unification of private law. Indeed, the methodological agenda of comparative law can then be seen to carry an implicit world-view. In particular, choices as to the traditions to be compared or the disciplinary field of comparison, the emphasis laid on commonalities or differences, the conception of law as instrumentality or as narrative, may all contain hidden assumptions concerning the globe's cultural or economic centre and periphery, the relationship between the legal and economic spheres, the way in which economies develop, theories of dominance, the relationship between public and private spheres. It is therefore important to think about the role comparative law might be playing within the contemporary global context, in constructing and promoting a vision of the world. In this respect, dominant comparative theory has served a particular narrative of the relationship between the centre and the periphery.

Indeed, it seems clear that comparative legal theory, which can be seen as a 'narrative of the making of modern law', [85] has actively contributed to the 'exoticization of legal cultures'.[86] It has been instrumental in the construction of a deliberate view of 'us and them', of the world's centre and its relationship to the periphery. Thus, P. G. Monateri explains, the beginnings of comparative legal theory in civilian legal thinking should be repositioned in the context of the cult of Roman law and Roman specificity in German legal history, which were in turn linked to the great civilian codifications of the nineteenth century.

> (p. 596) The stress on the overall importance of Roman Law led to a conception of Roman Law as something more than just positive law. Roman Law came with an implied intellectual history, but it was a peculiar history. In order to build a new German law on its basis, Roman Law had to be studied as a complete and autonomous system which in turn could be elaborated and developed according to scientific principles into a modern legal system. It is not hard to see at work here the theory of the renewal of the old, and an eye towards the projects of governance that are reaffirmed today. This approach produced an 'ideology' of Roman uniqueness which entails an almost total exclusion of all other laws' importance.[87]

Similarly, the French *Code civil* constitutes the divisions and categories of Roman law in products of natural reason. This crystallization of Roman ideas and classifications in the Code was clearly part of the construction of the specific identity of civilian systems.[88] According to parallel schemes in law and linguistics, the world was divided into legal 'families'. The ideological thrust of these classifications, carrying a hidden agenda of governance, appears with the realization that the trend to demonstrate the intellectual purity of Roman culture serves to divide the world into a centre and periphery.

> In fact, in this project, Comparative Law assumes the typical function of depicting the frame of diversities between an 'us' and a 'them, 'a centre and a periphery, a West and an East. What is peculiar is that this theory entails a devaluation of the classical Common Law/Civil Law distinction, in favour of a convergence among 'modern' Western systems which ultimately depicts a more unitary Western legal family resting on the Roman pillars of Roman jurisprudence, superior to all the other world legal cultures.[89]

In the centre, the Roman tradition is presented as organic, conserving its essence despite inevitable borrowing from elsewhere. The mythology of the codes were in turn to inherit this metaphysical transcendence or integrity.[90] But the civilian 'family' has clearly multicultural origins. Monateri suggests a

> shift in approach [which] has various consequences for the 'ideology' of Western law. The first is that Western law is a patchwork no less exotic than others. The second is that Western law is derived not only from Roman Law, but from other ancient laws as well. This suggests a more globalized view of Western institutions, and of their origins. Indeed, it intimates that 'Western' law is not nearly so 'Western' as we have been led to believe.[91]

Was Gaius black? (One recognizes the figure of 'Black Athena'.) Rome itself was the projection of a myth. 'Historical consciousness and genealogies associated with it have a political dimension which cannot be underestimated: there is something worth fighting for'.[92] And again,

> if modern Western law is to be rooted on Roman uniqueness, we can still perceive Western legal history as a unit evolving from Roman times through the Middle Ages to its actual (p. 597) predominance as 'the' modern law par excellence … From this point of view it is true that Comparative Law, coupled with traditional Roman-based legal history, becomes a project of global cultural governance in the field of law. A major strategy of this project is the exoticization of legal cultures different from the Western one.[93]

The 'epistemological racism' of mainstream comparative legal theory has further been emphasized by Upendra Baxi. For this writer, the choice of the *genre* of comparative legal studies clearly determines what can meaningfully be said about the colonialist heritage.[94] Thus, the positivistic genre strictly addresses forms of normative or institutional diffusion of global legal reality; instrumentalist approaches, including Old and New 'law and development', remain concerned with issues of efficient management of transitions from non-modern to modern law; the sociological genre explores productions of difference within, between, and across legal cultures, while the critical comparative genre provides frameworks for understanding the spread of dominant legal-ideological traditions and the transformations within them. 'Each of these and related genres develops its own kind of (pre-eminently Euro-American) epistemic communities sustaining the practice of inclusion/exclusion that define the distinctive domain of comparative legal studies.'[95] And further

> Comparative legal studies, understood as the narratives of the making of 'modern law', still stand marked by the 'Caliban syndrome', the construction of colonial/post-colonial narrative voices in ways that comfort the Euro-American images of progress and 'developmentalism'. Caliban is the history of exclusion and exploitation for the purposes of another's development.[96]

For Upendra Baxi, the dominant tradition of comparative law

> reproduces the binary contrasts between the common and civil law cultures or the bourgeois and socialist ideal-types, thus reducing the diversity of the world's legal systems to a common Euro-American measure.[97]

> A Jurgen Habermas, a John Rawls or a Ronald Dworkin thus remains able to expound theories of justice, public reason and judicial process *as if* the *living law* of the third World or the south, transcending colonial inheritances, simply does not exist or is supremely irrelevant to theory construction.[98]

The perspective of the excluded Other can be seen as part of the 'colonial inheritance'. As Upendra Baxi puts it,

> in every sphere, the ‘modern law’ remains the ‘gift’ of the west to the rest. The large processes of ‘westernisation’, ‘modernization’, ‘development’ and now ‘globalization’ of law present the never-ending story of triumphant legal liberalism … Thus emerges a history of a mentality that maps unidirectionality of legal ‘development’. Unidirectionality leads to perfectibility of global epistemic hegemonic practices which consolidate the view (p. 598) that the masters and makers of modern law have nothing worthy to learn from the discursive tradition of the Euro-American tradition's other …[99] ‘It becomes the mission of the laws’ late modernity to arrest deflections from the path of legal liberalism by persuasion when possible and through justified arms intervention when necessary’.

In this context, globalization is a narrative which perpetuates the mythology of the modern law, which Upendra Baxi depicts as an aspect of the wider phenomenon of ‘White Mythologies’. This discourse presents the progress of modern law in terms of foundational and reiterative violence of ‘modern law’.[100]

A similar ethnocentric world vision supported by comparative law can be found in connection with human rights discourse. The potential for universalization of human rights lies squarely in the idea that if a right is a fundamental attribute of humanity, it must necessarily be of universal relevance. However, this conception tends to rest upon an essentialist vision of humanity which leaves little place either for the diverse histories of peoples or for the concurrent conception of a reciprocal relationship between the individual and the community.[101] Human rights discourse contains both the potential for a ‘flattening effect’ of abstraction and an ideological project presented as having universal, objective validity. Positing individual rights free from all duties to the community, it creates an obvious risk of arbitrariness and conflict, for the solution of which the same rights are then required to intercede. Hence criticism of its auto-referential character, which tends to reinforce its propensity to reduce diversity.[102] From the Islamic perspective, the apparent neutrality of human rights discourse occults a certain conception of social structures, in which the relationship between power and society, religion and politics, are clearly marked by western modernity, long since rejected by the Arab-Muslim world.[103] Indeed, a similar weakness affects more generally ‘civilizational’ approaches to globalization, [104] which rest on the premise that democracy itself is essentially a western political and cultural phenomenon. But the democratic ideal can have western origins without necessarily being anchored in a substantive conception of human dignity indissociable from Christianity.[105]

Thus, the patterns of dominance carried by the world-view supported by comparative legal theory are sufficiently clear. They can easily be linked up today to the narrative of globalization itself. Comparison of different visions of human dignity reveal the strong cultural dimension of the world vision projected by the western rhetoric of globalization, which ‘reworks and harnesses the colonial legacy and the post-colonial experience in the pursuit of visions of the globalising world's iconic images of democracy, good governance, economic rationalism’.[106] Is there any way (p. 599) out of this hermeneutic conundrum? It could be that comparatist reflection on difference or otherness can provide enlightenment. For Pierre Legrand, the function of comparative law, far from imposing

one's own vision on the Other, is to ‘organise the diversity of discourses around different cultural forms’.[107] ‘The notion of relation must be at the heart of any comparative endeavour’.[108] His plea for differential thinking takes on a particular significance in a globalizing context, echoing that of Papaux and Wyler in favour of an ethic of international law founded on the respect of the self-hood of the Other. Citing Hamacher, the author goes on to say,

> the point is to avoid cultural fusionism which permits the other … ‘to be perceived no longer in its alterity but only a variant of one's own culture and further permits treating one's own culture as homogeneous, given fact, ignoring its internal tensions, contradictions and struggles and giving oneself over to the fantasy that it is a logical continuum without history and does not always *also* contain the demand to transform that history’.

The point, then, ‘is to impel the comparatist toward an ethical encounter with the other-in-the-law’.[109] That the ethics of comparative legal studies in a globalizing world should be founded on a respect of otherness seems particularly apt. It remains to be seen how far from this ideal is the strategic use of comparative knowledge in the world today.

3. Comparative Knowledge and Issues of Global Governance

Mainstream post-war comparatism, as David Kennedy points out, cultivated aloofness from the distributional consequences of particular policy choices or institutional arrangements. Contemporary comparative projects purport to map differences and commonalities between national laws, without pre-judging the pragmatic use to which such knowledge could be put. It is deemed futile to attempt to discover the practical usefulness of comparative knowledge, which certainly provides a better understanding of the Other, and no doubt a sharpened awareness of what law is, but does not in itself carry a political or strategic agenda. However, as the study of the colonial heritage in comparative law has shown, this stance of neutrality towards the strategic indifference of comparative law is hardly credible.

In this respect, globalization entails deep implications for the relationship between law and market. The triumph of economic liberalism means that there is a global market for laws based on difference, which not only reverses the traditional articulation between markets and laws, but also impacts on the mutual interaction between different laws, which henceforth interact according to a competitive model. Private international law and economics are best equipped to highlight (p. 600) the paradigmatic changes wrought by globalization concerning the relationships between legal systems. Thus, for the best part of the twentieth century, despite cultural cleavages concerning the proper place of politics in the regulation of private relationships between private actors, certain postulates tended to be shared. Conflicts law purported to define the thrust of law and judicial decisions concerning persons, activities, or things geographically dispersed; independently of the methods used to get there, it supposed that transactions between individuals were subjected to law and not the other way round. While the distinction between the public and private spheres on an international level was growing increasingly indeterminate, it was generally accepted that there was an important difference between rules which, from the standpoint of a given state organ, could be set aside by the parties to an international transaction and those which carried fundamental state policies which necessarily trumped individual arrangements. Generally the latter category was perceived to comprise rules addressing both market organization and market failures, through mandatory protection for weaker parties. But these shared assumptions were bowled over by the globalization of markets, which signalled a new paradigm under which national lawmakers were henceforth subjected to the arbitrage of consumers on product markets and mobile capital looking for immediate profit. As essential actors in these changes and the main beneficiaries of the deregulation which accompanied the decline of the state, multinational firms pursue purely financial strategies, looking for the highest rate of return on investment without regard to the geographic location of their activities. Protective legislation is seen as having a cost. In many cases, mechanisms of private international law ensure juridical ‘lift-off’ of these

actors from legal regulation.[110] Such changes impact directly on the relationship between law and market.

Under the new competitive paradigm, national laws are themselves the object of a globalizing market, of which the regulation is the sole province of interjurisdictional competition and not of mandatory state intervention, which is powerless to prevent international arbitrage linked to the lifting of restrictions on free movement and trade barriers. Henceforth, state policies are to a large extent tributary to either consumers' market decisions or investment decisions of private capital. This means the state is no longer the monopolistic provider of public goods, but is itself subject to competition: 'Former monopolistic states seem to change into mere "locations" that must compete with each other for public goods and services. The monopoly paradigm of economic policy, therefore, tends to be replaced by a competition paradigm of economic policy'.[111] According to the (p. 601) teachings of economic federalism, competition between legal systems in a borderless economy would be an alternative mode of governance to centralized regulation: the global market would determine the optimal intensity of state regulation across the board. The development of third spheres of normativity such as international arbitration contributes to the reversal of the relationship between law and market, since ever-more liberal rules on the free choice of law and forum allow parties to move freely from one system to another, evading mandatory rules when desired. This phenomenon of 'barrier-crossing' is then consolidated by increasingly generous rules for enforcement of arbitral awards, according to which the violation of state public policy is no longer necessarily a cause of non enforcement.[112]

Under the competitive paradigm, differences between sets of legal rules and institutions are part of the make-up of the law as product. In theories of global economic federalism, differences are generally supposedly healthy as they will generate emulation through consumer or investor arbitrage and lead to specialization of legal systems across the board.[113] Such an effect will only take place if the legal product is heterogeneous, creating winners and losers likely to vote with their feet and thereby create pressure on the legislator: private law rules may arguably be excluded.[114] The strategic importance of comparative law appears in the evaluation of the economic attractivity of given regulations and their institutional setting: 'Doing business' abroad means choosing the most efficient, but also the least costly, legal system.[115] However, there are times when the global market fails to regulate. While capital crosses boundaries freely, arbitrage between various legal environments tends to take place at the expense of the immobile local workforce. States desirous of capturing capital engage in a race to the bottom, lowering standards and thereby costs to the point of depriving the local population of conditions which in other parts of the world are considered as prerequisites to human decency. Comparative law can serve to highlight the private international law mechanisms which then come into play to lock a population into the lower standards. The doctrine of *forum non conveniens*, for instance, as practised in the United States, may

lead to depriving victims of industrial accidents or environmental harm of their access to the forum of the state where the multinational defendant is domiciled.

Comparative law could step in here to help understand these mechanisms of 'global liftoff'.[116] To what extent is regulatory competition transposable to fields of (p. 602) private law? Is private law homogeneous or does it contain 'implicit regulatory schemes'.[117] What are the unacknowledged assumptions made by studies such as that of the World Bank as to the elements which make up the economic attractiveness of a given law? Why are civilian systems deemed less competitive? What are the regulatory fields in which competition leads to the sacrifice of standards? What would the effect of raising minimum standards be on economic development? The answers to these questions are all essential to global governance, and it is difficult not to involve comparative law in them. As David Nelken points out,

> many of the governmental and international agencies which promote legal change in developing countries focus on formal as opposed to informal institutions. These are easier to identify, analyse and engineer in ways by which such bureaucracies justify their existence. Yet there are likely to be informal institutions, less amenable to change by external interventions, which already carry out many of the tasks of the formal institutions whose performance the agencies are seeking to improve.[118] The 'Doing Business' Report of the World, which purports to measure economic attractiveness in a global setting, is a case in point.

The necessary implication of comparative knowledge in issues of world governance is confirmed by recent reflection on the effects of the expansion of the rule of law and the separation it supposes of law and market, in a global setting. Globalization in western narrative comprises a tendency to spread democratic ideals.[119] Economic leverage tends to be used by powerful agencies such as the World Bank to export democratic institutions, and among them, particularly the concept of the rule of law. William Scheuerman argues that the political and legal infrastructure of globalization bears little resemblance to the liberal model of the rule of law.[120] The rule of law was useful to business when it created certainty, making distance in time and space manageable in contexts of commercial exchange. Private international law contributed to the reduction of uncertainty by allowing binding party choice of the applicable law. But compression of time and space means that there is 'less of an elective affinity between capitalism and the rule of law'.[121] The risks which the rule of law was designed to manage are better dealt with directly through technology. Law loses its autonomy. Moreover, the rule of law was valued because it protected private transactions from the arbitrariness of the state. But now private actors frequently have at least as much leverage as the states themselves, the balance of power is no longer to their advantage. As seen above, (p. 603) there is considerable evidence that economic globalization flourishes where lower standards in health, labour, and environment are exploited by powerful multinational firms. 'It would be misleading', opines David Nelken, 'to ignore these and other similar factors when assessing the likely outcomes of introducing the type of separation between state and market as identified with the classical (but now somewhat dated) idea of the rule of law'.[122] Thus, comparative legal knowledge clearly has a role to play in global governance. Here, the challenge which globalization presents to comparative legal studies lies in understanding the effects of paradigm changes in the relationship between local laws and global markets and in highlighting ways, in conjunction with neighbouring disciplinary fields, in which a global race to the bottom could be countered.

III. The Practical Challenge

On a practical level, the changes wrought by globalization, including new information technology, interconnectedness of national economies, and the emergence of transnational norms and practices, raise two different and apparently contradictory challenges to comparative law. On the one hand, the ever-widening access to data about foreign laws, as well as the expansion of transnational or international sources of uniform law might appear to make comparative law obsolete. What need is there of comparative scholarship if information on foreign law is readily available or if the applicable rule is a rule of substantive uniform law? However, comparative scholarship still has an important rôle to play, albeit in novel forms. An increase in the available volume of information renders all the more necessary a comparative legal grammar capable of converting bare data on a national legal system into an understandable form for the foreign user (Section III.1). At the same time, uniform law requires, for both its elaboration and its interpretation, a comparison of possible alternative solutions (Section III.2).

1. Increased Information and Interconnectedness

First and most obviously, increased access to knowledge of foreign law through new information technology has important implications for the usefulness of comparative law as a source of information about foreign laws. Traditionally, as (p. 604) David Gerber has pointed out, one of the main functions of comparative law was to provide information about other, different, legal cultures.[123] Indeed, comparative studies often tended to be descriptive or 'anatomical', concentrating on the assembling of stark data about a foreign law which was otherwise unobtainable. As access to information improves, this particular function of comparative legal scholarship is no doubt becoming redundant.

While essential in this respect, new information technologies are not the only reason for the increase in widespread knowledge about foreign legal cultures. The existence of supranational courts such as the European Court of Human Rights, for instance, inevitably feeds a common core of knowledge about the legal systems of the other contracting states. Its case-law, binding all the legal communities within the ambit of the Convention it applies, acts inevitably as a vector of information on the content and functioning of neighbouring national laws. Much cross-border knowledge has been created in this way about the criminal and procedural laws of the various states party to the European Convention on Human Rights, or, similarly, about various aspects of civil procedure and jurisdiction in civil and commercial matters among the states of the European Union.

At the same time, increased contacts between legal systems through the rise of international travel and transactions make such knowledge all the more important for the practising lawyer. Legal advice and litigation involve increasingly cross-border elements —from products liability to investment choices to car accidents abroad—which may require making decisions in the light of foreign law or which call for the application of foreign law under conflict of laws principles. The easy availability of information about foreign law is obviously likely to enhance cross-border legal practice. However, comparative law as a disciplinary field is far from obsolete in this context.

As David Gerber has emphasized, while significant data about foreign law is directly and rapidly available via the Internet, it is generally both unstructured and decontextualized.[124] Available information may be increasingly dense, but it may be becoming more opaque. It may be creating a new, double problem of understanding, since bare data such as texts may be undecipherable to the uninitiated and even in the clearest form are unlikely to provide insights as to how they fit within the foreign legal system or how the latter actually works in practice. Much of comparative scholarship has been devoted in recent years to uncovering the hidden formants which cement and drive a given legal community, and clearly, bare access to data cannot replace this type of reflection but on the contrary makes it increasingly indispensable. Language may also be a barrier to access. 'Knowing foreign law means crossing a linguistic border' even when a language base is shared.[125] It would (p. 605) seem then that, more than ever, a common conceptual language, a comparative legal grammar, will be necessary to maximize the benefits of increased information and make them significant to the foreign user.

Beyond the difficulty of access to significant knowledge of other legal cultures, Gerber warns too of the increased risk of distorted perceptions which may be the price of the new proximity between legal cultures induced by availability of information.[126] Stereotyped assumptions about other systems which tend to shape the perception of legal knowledge may well be intensified by increased contact. Globalization, he warns, may influence the accuracy of knowledge of foreign law by intensifying the impact of such distorting factors. Thus, twin illusions of ‘similarity’ (differences are negligible) and ease (any differences there are may easily be overcome), which are recurrent temptations within comparative scholarship itself, are likely to be fostered as information moves more rapidly and becomes more dense. Relying on ready-made assumptions is a cognitive strategy likely to develop as the user is subject to increased time pressures and the need to simplify the task of processing information. Clearly, such pressures generated by the ready availability of information need to be counteracted by strong intellectual efforts to structure knowledge about foreign law and maintain the awareness of otherness.

A related issue concerns the impact of available information on the question of judicial notice of foreign law in conflicts of laws cases.[127] Since heightened cross-border contacts generate more conflicts of laws, greater ease of access to information about other legal cultures raises the question of the status of foreign law before the national courts. At a time when the availability of reliable information about foreign systems remained extremely difficult, the courts of most countries traditionally avoided direct involvement with the determination of the content of foreign law, relying in the main upon the parties and the adversarial process to bring convincing proof of the substance of applicable foreign rules. The quasiuniversal subterfuge used here was to consider foreign law as fact to be proved to the satisfaction of the court. Supreme courts thereby avoided the embarrassment of committing themselves to a faulty version of another state's law. However, improved access to information lessens the need for such prudence, and in various countries, and to varying degrees, courts must now take notice of foreign laws. This is of course particularly so among the sister or member states of federal or quasi-federal systems, where, in addition to constitutional requirements of equality of treatment or full faith and credit between the laws of the various states before each other's courts, there exist both heightened judicial cooperation and a common body of rules. However, even outside such a context, changes are taking place, with (p. 606) the result that courts will increasingly be acceding directly to data about the foreign law governing a given case. Indeed, progressively, they may well be ready to cite available foreign sources as persuasive authority in hard cases. But, once more, in either case, the usefulness of comparative legal methodology and insights are in no way obsolete. Here again, easily obtained information as to the content of a given statute does not tell how that statute is actually applied by the courts of the foreign country, nor indeed whether judicial decisions bear weight, nor how that particular solution fits into the foreign law as a whole.

2. The Rise of Transnational Uniform Law

A second practical challenge for the comparative lawyer in a global context stems from the changes affecting the sources and nature of applicable legal rules. These will frequently be contained in international conventions bearing uniform rules, or will consist in commercial customs and practices assembled under the banner of the new law merchant or *lex mercatoria*, or indeed in various forms of transnational soft law such as the UNIDROIT or Lando principles. Once more, in view of this trend towards unification, the question arises as to whether comparative law is becoming redundant through the lack of national, local laws to compare. But once again, the answer appears to be that comparative law retains all of its usefulness, albeit in new ways.

First, at the outset, comparative legal scholarship can contribute to the improved content of transnational uniform rules, whether these are negotiated at a diplomatic conference or chosen by a single arbitrator invested by contract with a mission to apply a better rule. A uniform rule is always to some extent the product of competition between diverse legal rules. Preparatory comparative studies should therefore be, and frequently are, systematically undertaken in both a diplomatic and private context. At a later stage, similar comparative knowledge remains essential when courts and arbitrators are called upon to interpret uniform rules in a given case. When a given uniform rule is clearly borrowed from a given national legal culture, insights as to the difficulties it raises and its mode of functioning are clearly useful even if national case-law or doctrinal constructions can clearly have no more than persuasive authority in such a context. Quite frequently, too, international instruments appeal to common principles of national law to fill the gaps in its own provisions. A variation on this theme appears in the 1980 Vienna Convention on the international sale of goods that requires courts to take account of its international character and of the need to reach uniform results in its application (Art 7). This means that courts may need to look at foreign case-law, applying the convention itself when in doubt as to its meaning. A similar appeal to principles common to different legal systems may be found in international commercial arbitration agreements. In all these contexts, comparative law as a way of structuring knowledge (p. 607) about foreign laws, and translating it into a comprehensible form for the user, retains real practical usefulness.

Bibliography

Antoine Garapon, ‘French Legal Culture and the Shock of “Globalization”’, (1995) 4 *Social and Legal Studies* 493

A. Papaux and E. Wyler, *L’éthique du droit international* (1997)

Mireille Delmas-Marty, ‘La mondialisation du droit: chances et risques’, (1999) *Recueil Dalloz* 2 ff

H. Patrick Glenn, *Legal Traditions of the World* (2000)

P. G. Monateri, ‘Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”’, (2000) 51 *Hastings LJ* 479 ff

William Twining, ‘Comparative Law and Legal Theory: The Country and Western Tradition’, in Ian Edge (ed), *Comparative Law in Global Perspective* (2000)

David Gerber, ‘Globalization and Legal Knowledge: Implications for Comparative Law’, (2001) 75 *Tulane LR* 949

Michael Likoksy (ed), *Transnational Legal Processes. Globalisation and Power Disputes* (2002)

Geoffrey Samuel, *Epistemology and Method in Law* (2002)

Jean-Bernard Auby, *La globalisation, le droit et l’Etat* (2003)

Duncan Kennedy, ‘Two Globalizations of Law & Legal Thought, 1850–1968’, (2003) 36 *Suffolk University LR* 631 ff

Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003)

Ugo Mattei, ‘A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance’, (2003) *Indiana Journal of Global Legal Studies* 383 ff

‘La mondialisation entre illusion et utopie’, (2003) 47 *Archives de Philosophie du Droit*

Guy Canivet, Mads Andenas, and Duncan Fairgrieve, *Comparative Law before the Courts*, (2004) **(p. 608)**

Notes:

(1) Jean-Bernard Auby, *La globalisation, le droit et l’Etat* (2003).

(2) Michael Likoksy (ed), *Transnational Legal Processes. Globalisation and Power Disputes*, (2002); Mireille Delmas-Marty, ‘La mondialisation du droit: chances et risques’, (1999) *Recueil Dalloz* 2 ff.

(3) Auby (n 1), § 18.

(4) David Nelken, ‘Comparatists and Transferability’, in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 437 ff at 460 ff.

(5) See Duncan Kennedy, ‘Two Globalizations of Law & Legal Thought, 1850–1968’, (2003) 36 *Suffolk University LR* 631 ff.

(6) Allan Scott, ‘Globalization: Social Process or Political Rhetoric?’, in Allan Scott (ed), *The Limits of Globalisation: Cases and Arguments* (1997), 1–24 ff.

(7) M. Mahmoud Mohamed Salah, ‘La mondialisation vue de l’Islam’, (2003) 47 *Archives de Philosophie du Droit* 27, 37 ff.

(8) H. Patrick Glenn, *Legal Traditions of the World* (2000), 49 ff.

(9) Lawrence Rosen, ‘Beyond Compare’, in Legrand and Munday (n 4), 502 ff.

(10) Upendra Baxi, ‘The Colonialist Heritage’, in Legrand and Munday (n 4), 51 ff.

(11) Salah (n 7), 29 ff.

(12) Baxi (n 10), 49 ff, citing Patrick Chabal, ‘The African Crisis: Context and Interpretation’, in Richard Werbner and Terence Ranger (eds), *Post Colonial Identities in Africa* (1996), 45–6 ff.

(13) Roderick Munday, ‘Accounting for an Encounter’, in Legrand and Munday (n 4), 3, 5.

(14) Glenn (n 8), 151 ff.

(15) Paul Schiff Berman, ‘The Globalization of Jurisdiction’, (2002) 151 *University of Pennsylvania LR* 311 ff.

(16) William Bratton and Jospeh McCahery, ‘The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World’, (1997) 86 *Georgetown LJ* 201 ff.

(17) David Kennedy, ‘The Methods and the Politics’, in Legrand and Munday (n 4), 345 ff.

(18) See James Q. Whitman, ‘The Neo-Romantic Turn’, in Legrand and Munday (n 4), 312 ff.

(19) Glenn (n 8), 132 ff.

(20) Geoffrey Samuel, *Epistemology and Method in Law* (2002), at 15 ff.

(21) Munday (n 13), 12 ff.

(22) See Roger Cotterell, ‘Comparatists and Sociology’, in Legrand and Munday (n 4), 131 ff.

(23) H. Patrick Glenn, ‘The National Heritage’, in Legrand and Munday (n 4), 76 ff.

(24) See Andreas Fischer-Lescano and Gunther Teubner, ‘Regime Collisons: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999 ff.

(25) Reported by Nelken (n 4), 462 ff.

(26) Fischer-Lescano and Teubner (n 24), 5 ff.

(27) Wolf Heydebrand, ‘From Globalization of Law to Law under Globalization’, in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001), 117 ff.

(28) Maureen Cain, ‘Orientalism, Occidentalism and the Sociology of Crime’, (2000) 40 *British Journal of Criminology* 239; Nelken (n 4), 460 ff.

(29) See Bernard Bourgeois, ‘La fin de l’histoire, aujourd’hui?’, (2003) 47 *Archives de Philosophie du Droit* 141 ff.

(30) Rodolfo Sacco, ‘La comparaison juridique au service de la connaissance du droit’, (1991) *Economica* 122 ff.

(31) Ugo Mattei, ‘Why the Wind Changed: Intellectual Leadership in Western Law’, (1994) *AJCL* 195 ff.

(32) Ugo Mattei, ‘A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance’, (2003) *Indiana Journal of Global Legal Studies* 383 ff. However, extreme prudence is requisite here. In an overwhelming number of cases brought under the Alien Tort Claims Act, the concept of universal jurisdiction is not needed because jurisdiction over the defendants can be based squarely on other grounds.

(33) Julie Allard and Antoine Garapon, *Les juges dans la mondialisation* (2005); dialogue between Justice Breyer and President Canivet, (2005) *Culture Droit* 16 ff.

(34) Munday (n 13), 21 ff.

(35) Nelken (n 4), 460 ff.

(36) Glenn (n 8), 30 ff.

(37) Pierre Legrand, ‘The Same and the Different’, in Legrand and Munday (n 4), 240 ff; ‘L’hypothèse de la conquête des continents par le droit américain’, (2003) 45 *Archives de Philosophie du Droit* 37 ff.

(38) Auby (n 1), at § 106.

(39) Glenn (n 23), 84 ff; on previous globalizations, see Duncan Kennedy, ‘Two Globalizations of Law & Legal Thought, 1850–1968’, (2003) 36 *Suffolk University LR* 631 ff.

(40) See Salah (n 7), 44 ff, observing ‘la tentative ambigüe d’une réappropriation de la mondialisation par l’Islam’.

(41) François Chenet, ‘La mondialisation vue de l’Inde’, (2003) 47 *Archives de Philosophie du Droit* 55 ff.

(42) Antoine Garapon, ‘French Legal Culture and the Shock of “Globalization”’, (1995) 4 *Social and Legal Studies* 493.

(43) Nelken (n 4), 445 ff.

(44) Glenn (n 8), 49 ff.

(45) Nelken (n 4), 445

(46) Glenn (n 8), 78 ff.

(47) Glenn (n 8), 22 ff.

(48) Ibid.

(49) See n 27.

(50) Munday (n 13), 9 ff.

(51) On which, see Michele Graziadei, ‘The Functionalist Heritage’, in Legrand and Munday (n 4), 100 ff.

(52) Rosen (n 9), 503 ff.

(53) Rosen (n 9), 505 ff.

(54) Rosen (n 9), 443 ff.

(55) S. Hobe, ‘Globalisation: Challenge to the Nation State and to International Law’, in Michael Likosky (ed) *Transnational Legal Processes. Globalisation and Power Disputes* (2002), 378 ff.

(56) Whitman (n 18), 315 ff.

(57) Glenn (n 8), 151 ff.

(58) Pierre Legrand, ‘The Strange Power of Words: Codification Situated’, (1994) *Tulane European and Civil Law Forum* 1 ff, at 16 ff.

(59) On the intemporality of the codes, see Legrand (n 61), 16 ff. The Romanist Peter Stein traces this idea back to Justinian: ‘Certainly Justinian decreed that his Corpus Iuris contained the whole law and that no reference should be made to earlier sources. The idea, therefore, that the code wipes the slate clean and offers a new beginning to the law may be traced to him’. ‘Roman Law, Common Law and Civil Law’, (1992) 66 *Tulane LR* 1591 ff.

(60) Denis de Béchillon, ‘L’imaginaire d’un code’, (1998) 27 *Droits* 173 ff at 175 ff; Geoffrey Samuel, ‘English Private Law in the Context of the Codes’, in Mark Van Hoeke and Francois Ost (eds), *The Harmonisation of European Private Law* (2000), 47 ff; Guy Canivet, ‘Preface’, in François Ewald (ed), *Naissance du Code civil* (2004) at xxxvi.

('l'institution d'un droit civil est faite pour sinon dépolitiser, du moins dépubliciser la vie des citoyens').

(61) Fabrizio Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability: Rethinking Institutional Complementarities', in F. Cafaggi (ed), *The Institutional Framework of European Private Law* (2006), 191.

(62) See below, section II.2.

(63) Cafaggi (n 61), 195; Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State', in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (2004).

(64) Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences', in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (2004), 35 ff.

(65) Kennedy (n 17), 345 ff.

(66) Ibid. See too William Twining, 'Comparative Law and Legal Theory: The Country and Western Tradition', in Ian Edge (ed), *Comparative Law in Global Perspective* (2000), 47 ff.

(67) Kennedy (n 17), 414 ff.

(68) Ibid.

(69) On which, see Kennedy (n 17), 374 ff.

(70) Kennedy (n 17), 414 ff.

(71) Kennedy (n 17), 349 ff.

(72) Graziadei (n 51).

(73) Mauro Bussani, 'Current Trends in European Comparative Law: The Common Core Approach', (1998) *Hastings International and Comparative LR* 78, 787 ff.

(74) Kennedy (n 17), 415 ff.

(75) Kennedy (n 17), 353 ff.

(76) Ibid.

(77) Ibid.

(78) Kennedy (n 17), 345 ff.

(79) Legrand (n 37), 249 ff.

(80) Legrand (n 37), 250 ff.

(81) Harold Konju Koh, ‘Transnational Public Law Litigation’, (1991) 100 *Yale LJ* 2347 ff.

(82) On this concept, particularly adapted to comparative law in a global setting, see Esin Örücü, ‘Comparatists and Extraordinary Places’, in Legrand and Munday (n 4), 467 ff.

(83) For an example of such reflection, see Baxi (n 10), 46 ff.

(84) Kennedy (n 17).

(85) Baxi (n 10), 49 ff.

(86) P. G. Monateri, ‘Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”’, (2000) 51 *Hastings LJ* 479 ff.

(87) Monateri (n 86), 592 ff.

(88) Stein (n 59).

(89) Monateri (n 86) 485 ff.

(90) De Béchillon (n 60), 178 ff.

(91) Monateri (n 86), 514 ff.

(92) Monateri (n 86), 515 ff.

(93) Monateri (n 86), 469 ff.

(94) Baxi (n 10), 46 ff.

(95) Baxi (n 10), 46 ff.

(96) Baxi (n 10), 49 ff.

(97) Ibid.

(98) Baxi (n 10), 53 ff.

(99) Baxi (n 10), 50–1 ff.

(100) Ibid.

(101) A. Papaux and E. Wyler, *L’éthique du droit international* (1997).

(102) Papaux and Wyler (n 101), 102 ff.

(103) See Salah (n 7), 32 ff.

(104) See S. P. Huntingdon, *The Clash of Civilisations and the Remaking of the World Order* (1996).

(105) René Sève, ‘Introduction’, (2003) 45 *Archives de Philosophie du Droit* 3, 7 ff.

(106) Baxi (n 10), 49 ff.

(107) Legrand (n 37), 299 ff.

(108) Legrand (n 37), 301 ff.

(109) Legrand (n 37), 303 ff.

(110) Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age’, (2002) 40 *Columbia Journal of Transnational Law* 209 ff.

(111) Wolfgang Kerber, ‘Interjurisdictional Competition within the European Union’, (2000) *Fordham International LJ* 217, 248 ff.

(112) Luca G. Radicati di Brozolo and Horatia Muir Watt, ‘Party Autonomy and Mandatory Rules in a Global World’, (2004) 6 *International Law Forum* 88 ff.

(113) Stephen Choi and Andrew Guzman, ‘Portable Recognition: Rethinking the International Reach of Securities Regulation’ (1998) 71 *Southern California LR* 903 ff.

(114) See Anthony Ogus, ‘Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law’, 48 *ICLQ* 405 ff.

(115) See the criteria used by the World Bank, ‘Report on Doing Business, Eliminating Obstacles to Growth’ (2004).

(116) Wai (n 110).

(117) On which, see Hugh Collins, ‘Regulating Contract Law’, in Christina Parker, Colin Scott, Nicola Lacey, and John Braithwaite (eds), *Regulating Law* (2004), 23 ff.

(118) Nelken (n 4), 465 ff.

(119) See Michael Likoksy, ‘Cultural Imperialism in the Context of Transnational Commercial Collaboration’, in Likoksy (n 2), 221 ff; Baxi (n 10), 49 ff.

(120) ‘Globalization and the Fate of Law’, in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order*, (1999), 243, discussed in Nelken (n 4), 465 ff.

(121) Nelken (n 4), 466 ff.

(122) Ibid.

(123) David Gerber, ‘Globalization and Legal Knowledge: Implications for Comparative Law’, (2001) 75 *Tulane LR* 949, 969 ff.

(124) Ibid 953 ff.

(125) Gerber (n 123), 967 ff.

(126) Ibid 968 ff.

(127) See the various contributions in Guy Canivet, Mads Andenas, and Duncan Fairgrieve, *Comparative Law before the Courts* (2004).

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