What Does Globalisation Mean for the Comparative Study of Law?

MICHELE GRAZIADEI
University of Turin

INTRODUCTION

Both coveted and frustrating, globalisation is a sort of 'obscure object of desire' for comparative legal studies. Here is a complex world process, cutting across the national and the international dimension of law, whose promise is to deliver more for comparative legal studies than the staple diet of comparisons, mostly centred on Western countries, based on findings of similarities and differences across national legal regimes.[1]

At the same time, 'globalisation' is a portmanteau notion, associated with different meanings, accommodating different uses by different people. The burgeoning of cosmopolitan ideas, the enhanced role of international organisations and the increased visibility of their powers as standard setting and rule making actors, the corresponding decline of sovereignty of the nation states, the patterns of diffusion of similar policies and laws across the world, the dominance on international and national markets of corporations that have a global reach, the integration of markets at the world level, the emergence of laws and normative orders coordinating responses to global emergencies: all of this, and so much more currently goes under the label 'globalisation'.

One would be easily drawn to the conclusion that this is a flexible, if not confusing term, a notion that belongs to the narrative of late modernity, rather than to the vocabulary of law, alluding to a post-national order characterised by a reduced role of the state, the increased privatisation of services and the dominance of markets, the impact of the digital revolution, the unbundling of sites of production and consumption. In all declinations, the concept of 'globalisation' was not coined to define an object fitting easily within the boundaries of classical legal scholarship, however defined.[2] And yet, globalisation and the law has been

[1] For critical reflections on the 'Country and Western' tradition of comparative law Twining WL (2000) 'Comparative Law and Legal Theory: The Country and Western Tradition' in: Edge, I, (ed.) *Comparative Law in Global Perspective* Transnational Publishers Inc, 21-76 The malaise with this tradition is expressed as well by several voices of comparativists, both before and after the appearance of Twining's work: see, e.g., Legrand, P (1995) 'Comparative Legal Studies and Commitment to Theory' 58 M.L.R. 262; Reimann, M (2002) 'The Progress and Failure of Comparative Law' 50 *American Journal of Comparative Law* 671 at 685-6; Menski, WF (2006) *Comparative Law in a Global Context: the legal systems of Asia and Africa* Cambridge University Press.; Glenn, HP (2014) *Legal Traditions of the* World 5th ed Oxford University Press; Legrand, P (2015) 'Negative comparative law' (10) *Journal of Comparative Law* 405.

[2] Walker, N (2014), *Intimations of Global Law* Cambridge University Press; Lindahl, HK (2018) *Authority and the globalisation of inclusion and exclusion* Cambridge University Press. On the contested, collapsing boundaries of legal scholarship see more generally: Schlag P (2009) 'The Dedifferentiation Problem', (42,1) Continental phil. rev. 35.

(and is) a fashionable subject among comparative law scholars as well, who have stressed the plurality of phenomena that this label captures. This is why we should speak of globalisation in the plural, rather than in the singular, by considering the multiplicity of actors and trends at work.[3] Glenn has remarked, for example, that 'There now appear to be three main candidates in a race to globalize: the west, slam, and east Asia. No one is able to foresee the result of such a race, and some argue that other traditions, notably the chthonic one, hold the key to human and ecological survival.'[4] The unsettling vocabulary of globalisation has thus gained its place of honour in legal research and legal studies, well beyond the circles of comparative and international law. A simple search by title in the Peace Palace Library that I carried out at the end of 2020 returned over 256 hits for books and 934 hits for journal titles that contain the word 'globalisation'. My rough search did not cover contributions in languages other than English, many of which are substantial, of course. A mere literature review of these titles would be a herculean task, but these numbers speak of a sustained attention to all that globalisation implies both in terms of theory and of practice of the law.

Although globalising trends have lost some of their force since the financial crisis of 2008, it would be premature on this basis to conclude that the pendulum is swinging back at full speed.[5] The pace at which the covid-19 pandemic has spread across the world would have been unthinkable without high human mobility and closely interconnected systems of economic and social relationships. Consider as well China's current strategy to push a further wave of globalisation, or reglobalisation, as it has been called.[6] The year 2020 ended with the announcement of a new Comprehensive Agreement on Investment (CAI) between the EU and China,[7] which was received with some apprehension both in Europe and on the other side of the Atlantic.[8] The same year witnessed the Asia-Pacific countries coming together to form the world's largest trading bloc under the Regional Comprehensive Economic Partnership (RCEP). This is

[3] Husa J (2018) *An Advanced Introduction to Law and Globalisation* Edward Elgar Publishing at 89 and following.

[4] Glenn HP (2014) *Legal Traditions of the World* supra note 1 at 52.

[5] For concerns expressed in this respect: see, e.g., Sajo, A and Giuliano, S (2017) 'Is the Decline of Globalisation the End of Human Rights (As We Believe to Know them)?' *Annuario di diritti comparato e studi legislativi* 513.

[6] Dong, W and Cao, D (2020) *Re-globalisation: When China Meets the World Again* Routledge. In the same sense, but in a different vein, Mattei, U; Liu G, and Ariano, E (2020) 'The Chinese Advantage in Emergency Law' (21, 1) *Global Jurist* 1 argue that: 'the emerging pre-eminence of the "rule of technology" over the "rule of law" in a critical event of historic proportions like a pandemic […] might point to the emergence of an unexpected Chinese legal leadership, determined by the progressive undoing of the Western legal and political narratives whose backbone has been relentlessly eroded by decades of neoliberalism and populism'.

[7] Ursula von der Leyen commented on the deal in optimistic terms as follows. The new agreement will 'provide unprecedented access to the Chinese market for European investors […..] It will also commit China to ambitious principles on sustainability, transparency and non-discrimination'. (Press statement available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541> , last consulted on 9-01-2021). Several sceptical voices have been raised to contest this claim.

[8] Tiezzi, S (2021) 'China-EU Investment Deal Sparks Backlash Over Rights Concerns' *The Diplomat* January 13 available at: <https://thediplomat.com/2021/01/china-eu-investment-deal-sparks-backlash-over-rights-concerns/> (last consulted on 9-01-2021).

an extension of China's influence in the region, while the US withdrew from a rival Asia-Pacific trade pact in 2017. The new US Presidency will be less inclined to be a mere continuation of the previous one in this respect too.

The reality of the pandemic has had a deep impact on the whole system of networks and relations that were the backbone of globalisation, well beyond the huge global economic downturn caused by it.[9] For sure, risks, threats, and drawbacks associated with globalisation are perceived more clearly now, even by its supporters who call for strategies to deal with them.[10] Some of the disasters associated with economic growth and globalisation as we have known it, such as global warning and the destruction of the environment, will ultimately decide the fate of our planet and of humanity.

In the following pages, I do not intend disentangle all that goes under the label of 'globalisation', but rather to highlight where and why comparative law can productively engage with some aspects of the problems that are brought under that polyvalent concept. Those problems must be addressed through the lens of some *theory*, because globalisation is not at all a self-explanatory category. The notion is not associated with any precise theory dealing with the variety of phenomena labelled as manifestations of it. On the other hand, an inventory and a discussion of theories and approaches concerning globalisation and the law is now available, hence a first grounding of what is salient in this respect is possible.[11]

To put my case in a nutshell, I will argue that comparative law remains an essential tool to cope with today's challenges of legal research. This centrality is enhanced by the dynamic that was unleashed by the forces working for globalisation since the fall of the Berlin wall. At the same time, comparative law is also profoundly transformed by its efforts to meet those complex challenges.

To state my case, I reject any view of globalisation as a linear dynamic: transnationalism and nationalism, or globalising and localising processes, are rather mutually constitutive, as they shape one another.[12] Hence, how transnationalism nationalises, accentuates the local, invites discourses extolling everything that is 'native', is one of the big questions for the comparative lawyer in epistemological terms. Let me be clear in this respect. Local factors and traditions are a reality, as history shows, and it would be a huge mistake

[9] UN News (2020), 'The virus that shut down the world: Economic meltdown' at <https://news.un.org/en/story/2020/12/1080762>(last consulted on 17-01-2021).

[10] For some warnings see, Goldin, I, and Mariathasan I (2015) *The Butterfly Defect, How Globalization Creates Systemic Risks, And What To Do About It* Princeton University Press; Colgan, JD, and Keohane, RO (2017) 'The liberal order is rigged: Fix it now or watch it wither' (96, 3) *Foreign Affairs* 36-44.

[11] On the state of the art, with respect to comparative law: Michaels, R (2016) 'Transnationalizing comparative law' (23, 2) Maastricht Journal of European and Comparative Law 352; Husa J (2018) *An Advanced Introduction* supra note 3 at 31 and following; Muir Watt, H (2019) 'Globalization and Comparative Law' in Reimann M and Zimmermann R (eds) (2019) *The Oxford Handbook of Comparative Law* 2nd ed Oxford University Press 499; Bussani, M, (2019) 'Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law' (67, 4) *American Journal of Comparative Law* 701. On the general picture see as well the critical remarks by: Pfersman, O (2017) 'Legal globalisation as a Municipal American Problem' *Annuario di diritto comparato e studi legislativi* 475.

[12] In a similar vein: Muir Watt, H (2019) 'Globalization and Comparative Law' supra note 11 at 587.

to think that they are simply invented in the present age as a response to transnationalism, globalism, the neoliberal international legal order, and so on.[13] Still, it remains true that they can be played up and reinvented, or energised, to measure up to the challenges raised by such forces. Furthermore, to follow on the discussion on the normative side of the globalisation debates, the way the world order imagined by the first champions of globalisation unfolds does raise profound issues of justice, fairness, accountability, sustainability, solidarity. The sustainability of globalising trends ultimately depends, among other things, on whether and how justice understood in this very broad sense is being served by those trends. Is comparative law implicated on this front, and if so how ? Does the first set of remarks presented above lead to the second as well?

LOCAL, UNIVERSAL?

Let me briefly introduce my arguments by insisting on what is probably a rather obvious remark: comparative law can hardly be considered a monolith when confronted with similar questions.

Since its birth, comparative law has experienced a dualism when interrogated on how to think about the local and the universal in the law,[14] nurturing visions that reflect different world views running deep in the history of Western thought,[15] thus showing a dynamic which is not peculiar to comparative law itself.[16]

The first component of this dualism borders on the ethnographic, and it is seemingly driven by the opinion that: 'The longest way round is often the shortest way home.'[17] To know who we are we must know other customs and other ways of living, varied as they are: «Homo sum, humani nihil a me alienum puto». This is a form of grounded universalism, that admits the variability of cultures, while recognising the fundamental unity of humanity. As the twenty-first century is unfolding, thinkers of the past, who have left their mark by following this intuition, like Michel de Montaigne did in the wake of modernity, appear to draw closer and closer to us.[18] The learning process leading to this view is to be found off the beaten track. Along this path, one can slip and take a wrong turning, even when the comparative exercise is well intended, of course. Nor

[13] For example, Russia has been an autocratic state for centuries, and the present state of Russian law is not simply a response to the problems raised by the fall of the Soviet Union, or the deep economic crisis following the demise of communism in 1991, and the traumatic, and highly problematic transition towards a market economy in the following years.

[14] Husa, J, *Advanced Introduction* supra note 3 at 90-91: "Quintessentially, strong normative universalism is difficult to reconcile with global legal pluralism.".

[15] Richler M (1997) 'Europe and the Other in Eighteenth-Century Thought' in Gerhardt, V, Ottmann, H, Thompson M (eds) *Politisches Denken Jahrbuch 3* Metzler Verlag, 25-47. Compare Richter M 'The Comparative Study of Regimes and Societies in the Eighteenth-Century' in Goldie , Wokler, R (eds) (2006) *The Cambridge History of Eighteenth-Century Political Thought* Cambridge University Press.

[16] For the wider, contemporary scene Walker, N (2014) 'Rethinking aloud' in Maduro, M; Tuori K, Sankari S (2014) *Transnational Law: Rethinking European Law and Legal Thinking* 381; Husa, J (2018) *Advanced Introduction* supra note 3 at 40 and following.

[17] Compare Kluckhohn, C (or ed 1949, 2017) *Mirror for Man: The Relation of Anthropology to Modern Life* Routledge at 18.

[18] Ginzburg, C (1993) 'Montaigne, cannibals and grottoes' (6 , 2-3*) History and Anthropology* 125.

does this approach always support a rosy, optimistic picture of what humanity is, but some of the most rewarding comparisons are based on it. Among recent works on comparative constitutional law, Bruce Ackerman's *Revolutionary constitutions*[19] is a major example of this type of comparison.

A second tendency is, however, also deeply rooted in the comparative law community, and that is to look for the 'best' solution(s), the better laws, so that a single set of universal solutions should be preferred over all the others. The norms that are being propagated are: ''cosmopolitan,' or 'universal' norms, such as the campaign against land mines, ban on chemical weapons, protection of whales, struggle against racism, intervention against genocide, and promotion of human rights'.[20] This creates a procrustean dichotomy between good global or universal norms and bad regional or local norms.[21] The latter are then considered to be of dubious validity or worthless (implicitly, an expression of backwardness, etc.). In the last quarter of the nineteenth century, during the age of imperialism, Friedrich Nietzsche expressed in crude form similar thoughts, with his remarks on the suffering that a similar posture will surely cause. Nonetheless, for Nietzsche this was nothing to regret or be afraid of, because such a 'selection of the forms and habits of a higher morality' will - in his words - be blessed by posterity: 'a posterity that knows itself to be as far beyond the isolated, original cultures of individual peoples as beyond the culture of comparison, but glances back with gratitude at both types of culture as at antiquities worth revering'.[22]. A similar sentiment of superiority leaves little room for productive, profound engagements with any alternative option. In *Ruling the Law: Legitimacy and Failure in Latin American Legal Systems* Jorge Esquirol has documented how a similar vision has driven comparisons between European, U.S., and Latin American legal systems.[23] The old cosmopolitan assumption that a single set of norms established at the world level is desirable and indeed inevitable is here revealed once more: these legal systems have often been depicted as failed legal systems, when compared to those of Europe and the US.

It is difficult to say which of these two attitudes is prevailing among comparativists on the contemporary scene, because—surprise!—there are important, but only partial assessments of the ideologies pervading the camp of comparative law.[24]

[19] Ackerman, B (2019) *Revolutionary Constitutions Charismatic Leadership and the Rule of Law* Harvard University Press.

[20] Acharya, A (2004) 'How ideas spread: Whose norms matter? Norm localization and institutional change in Asian regionalism' (58, 2) *International Organization* 239 at 242. The author picks his examples in the field of international and public law, but one could easily put forward examples related to commercial and private law.

[21] Ibid at 242.

[22] Nietzsche, F (or. ed. 1878-1879, 2012),'Of First and Last Things', in *Human, All Too Human, A Book for Free Spirits* translated with an Afterword, by Handwerk, G, Stanford University Press 15 at 33. This section of the essay (§23) is titled the 'age of comparisons'. Nietzsche's work on this theme is far too complex and ambivalent to be reduced to this remark only, still this is representative of deep-rooted convictions of the time.

[23] Esquirol, J (2019) *Ruling the Law: Legitimacy and Failure in Latin American Legal Systems* Cambridge University Press.

[24] See e.g.; Kennedy, D (1997) 'New approaches to comparative law: comparativism and international governance' (1997) *Utah Law Review* 545; Kennedy, D (2006) 'Three Globalizations of Law and Legal Thought: 1850–2000' in Trubek, DM, and Santos, A (eds) (2006) *The New Law and*

In the long run, these two different orientations appear as a couplet that has marched hand in hand through the centuries. In the West, recurrent doubts about the value of 'civilisation' go back to the beginning of the use of that word, so that civilisation itself has also been conceived as a variety of utmost barbarism.[25] This paradox is not to be taken lightly as it runs deep in the intellectual history of the West. It reflects a profound malaise within western thinking, to which leading intellectuals gave voice in the epoch of industrialism and imperialism. Charles Baudelaire, for example, pronounced civilisation to be nothing but a 'great barbarity illuminated by gas'.[26] In the twentieth century, between the two world wars, Walter Benjamin looked at 'civilisation' from this perspective: 'There is no document of civilization which is not at the same time a document of barbarism. And just as such a document is not free of barbarism, barbarism taints also the manner in which it was transmitted from one owner to another.'[27]

Civilisation in this epoch was considered to be a progress of reason; opponents to this thinking held that civilisation consisted of the traditional values of rank and ancestry, religion and chivalry—precisely those values that the revolutionary Enlightenment condemned as crude or barbarous.[28] Ultimately, the distinction was between those who thought that perils for society come from within, and those who thought that they are rather the working of outside forces, whose pressure could justify, as a reaction, the hallowing of the strongholds of a given civilisation.[29]

Lest these remarks are taken as divagations, consider how they resound in the well known and by now disavowed formula of Article 38 of the Statute of the Permanent Court of International Justice, and now in Article 38(1) of the Statute of the International Court of Justice.[30] This article lists among the sources of international law 'the general principles of law recognized by civilized nations'. Here a sentiment of superiority is written in the words of the law.[31]

Economic Development 19; Kennedy, D (2012) 'Political ideology and comparative law' in Bussani M, and Mattei U, *The Cambridge Companion to Comparative Law* Cambridge University Press 35; Husa, J (2018), *Advanced Introduction* supra note 3 at 43 and following; Corcodel, V (2019) *Modern Law and Otherness: The Dynamics of Inclusion and Exclusion in Comparative Legal Thought*, Edward Elgar. For a recent, fascinating analysis, see Seppänen, S (2020) 'After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law' (68, 1) *American Journal of Comparative Law* 186. On the other hand, comparative law has substantially invested on 'method'. For a fine assessment of what has been achieved so far in this respect: Samuel, G (2014) *An Introduction to Comparative Law Theory and Method*, Hart Publishing.

[25] Starobinski, J (1993), '*The Word* Civilisation' in Starobinski, J (1993) *Blessings in Disguise; or, the Morality of Evil* translated by Goldhammer, A Harvard University Press 1; Brett, B (2009) *The Empire of Civilization: The Evolution of an Imperial Idea* University of Chicago Press.

[26] Baudelaire, C (1975-1976) 'Edgar Poe, sa vie et ses œuvres' [Edgard Poe, his life and his works] in Baudelaire *Oeuvres completes* [Complete Works] Pichois, C (ed) vol. 2 Pleiade at 297. More on this in Starobinski, 'The Word Civilisation' supra note 25 at 26-27.

[27] Benjamin, W (1969) 'Theses on the philosophy of history', in *Id*, *Illuminations* (ed. Harry Zohn) Schocken Books, 253 ff at 256. On it, Baxi, U (2008) *The Future of Human Rights* 2nd ed. Oxford University Press, at xiv.

[28] Starobinski 'The Word civilisation' supra note 25 at 21-22 on Burke and the reaction in France.

[29] For important comparative consideration concerning how this dynamic plays out in contemporary China: Seppänen, S (2020) 'After Difference' supra note 24. .

[30] Đorđeska, M (2020) *General Principles of Law Recognized by Civilized Nations (1922-2018)* Brill.

[31] For the current debate on this norm: González Hauck, S (2020) ' "All nations must be considered

Surely the strong faith in the functional method shared by an earlier generation of European comparativists was also an attempt to drive the comparison towards more universalistic conclusions by asserting convergence beyond local variations.[32] This stance implicitly responded to the idea that the spreading of modernity would have produced more uniformity across the world's parallels and meridians.[33] These jurists were not alone in thinking along these lines, as social theory from the 1950s to the 1980s supported similar views.[34]

Nonetheless, when situated knowledge is projected on a larger plane, or presented as universal, what is generalised is often still only what is known best, namely one familiar system of beliefs, opinions, and norms.

Presently, under the lens of critical analysis, globalisation is often discussed as well as yet another instance of the Americanisation of the world.[35] What is generalised, then, is not truly universal, but rather a specific instance of a local form of legal consciousness.[36] The same applies of course to European law, when is exported elsewhere, either through the 'Brussels effect', or by other means.[37] Global law as a patchwork of this kind is perfectly conceivable. Actually, it is what is most familiar to a student of legal transplants and receptions examining globalisation.[38]

to be civilized" : General Principles of Law between Cosmetic Adjustments and Decolonization' VerfBlog, 2020/7/21, available at <https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/>; Khan, D-E (2020) 'One day (Vandaag) …: Facing the Racist Legacy of International Law' VerfBlog, 2020/7/18, <https://verfassungsblog.de/one-day-vandaag/> (last consulted on 10-01-2020). On its background: Anghie, A (2005) *Imperialism, Sovereignty, and the Making of International law* Cambridge University Press at 52 and following.

[32] For perceptive remarks on this point: Curran, V (1998) 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (46, 1) *American Journal of Comparative Law* 43, at 53 and following.

[33] See, e.g., Kahn-Freund, O (1974) 'On uses and misuses of comparative law' (37, 1) *Modern Law Review* 1 at 10.

[34] For a critical assessment: Knobl, W (2003) 'Theories That Won't Pass Away: The Never-ending Story of Modernization Theory' in Delanty, G and Isin, EF (eds.) *Handbook of Historical Sociology* Sage Publications at 96 and following (modernisation theory is, after all not a theory, but rather a discourse).

[35] Snyder, F (2004) 'Economic Globalisation and the Law in the 21st Century' in *The Blackwell Companion to Law and Society* Blackwell 624; Wiegand, W (1991) 'The Reception of American law in Europe' (39, 2) *American Journal of Comparative Law* 229; For a sobering assessment: Reimann, M (2001) 'Droit positif et culture juridique: l'américanisation du droit européen par reception' [Positive Law and Legal culture the Americanisation of European Law by Reception] (45) *Archives de Philosophie du Droit*, Dalloz 61 (the entire issue of this review is dedicated to the topic); for the hype: Mattei, U (2003) 'A theory of imperial law: a study on US hegemony and the Latin resistance' (3,2) *Global Jurist* 383. The view that US law is *not* as exceptional as it is often claimed is advanced by Friedman, LM (2020) 'The Same Only Different: Reflections on Robert Kagan's Adversarial Legalism' (45, 4) *Law and Social Inquiry* 1170.

[36] This poses a chicken and egg problem when considering the thesis of a U.S. advantage in global lawyering, on which see Reimann, M (2014) 'The American advantage in global lawyering' (78, 1) *Rabel Journal of Comparative and International Private Law* 1; Reimann, M (2018) 'European Advantages in Global Lawyering' (82, 4) *Rabel Journal of Comparative and International Private Law* 885.

[37] *Cremona*, M and Scott, J (eds) (2019) *EU law beyond EU borders: the extraterritorial reach of EU Law*, Oxford University Press; Bradford, A (2020) *The Brussels Effect: How the European Union rules the World* Oxford University Press.

[38] See, for example, Siems, M (2018) *Comparative Law* 2nd ed., Cambridge University Press, at 229-261 (this chapter, entitled 'Global Comparative Law', is a full discussion of legal transplants).

MULTIPLE WAYS TO MODERNITY

The themes introduced in the preceding section pave the way for a second set of considerations. 'Classical' theories of modernization, and the sociological analyses of Marx and Engels, Durkheim, and (to a large extent) even of Weber, all assumed that the cultural program of modernity, as first developed in Europe, would ultimately take over in all modernising societies.

Far-reaching variability and difference are still present within the West, and more generally across the globe, however. Modern and modernising societies exhibit in various institutional arenas a large degree of autonomous dimensions. These: 'come together in different ways in different societies and in different periods of their development. The same was even more true with respect to the relation between the cultural and structural dimensions of modernity.'[39] This means that 'a very strong—even if implicit—assumption of the studies of modernisation, namely that the cultural dimensions or aspects of modernisation—the basic cultural premises of Western modernity—are inherently and necessarily interwoven with the structural institutional ones' is highly questionable.[40] There is no single, uniform path to modernity, although comparisons conducted across these different paths may also unveil surprising convergence. As Samuel N. Eisenstadt put it, this is a world of multiple modernities, where it is no longer decent to label some societies or peoples as 'primitive' and others as 'civilised', as in the heyday of imperialism, colonial aggression and exploitation. All these societies have become 'modern', as they are all struggling with the transformations of traditional ways of life, all over the world. Still, the way modernity has unfolded since the industrial revolution has not erased different institutional constellations, different systems of government, belief systems, discourses and practices across the globe, as the 'global' is eventually translated into the 'local'. An extreme, but illustrative contemporary case of this diagnosis is the surge of Islamic terrorism. Far from being an anachronistic, out of time manifestation of backwardness, this is yet another manifestation of how late modernity –with its contradictions – has been unfolding with some highly educated, well to do Muslims turning to deadly extremism. The question to tackle in analytical terms then is, how and why patterns of norms diffusion do not necessarily end up producing more uniformity across the world ? The easy answer to the question would be that what travels are not norms, but texts.[41] I just wish this could be the answer in all cases.

LEGAL TRANSFERS (TRANSPLANTS), AND POLICY DIFFUSION

Modern comparative law was born in the age of the nation states and historically reflects certain assumptions and beliefs about the relationship between the law and the State elaborated in the West. These assumptions involved as well

[39] Eisenstadt, SN (2006) 'Multiple modernities in the framework of a comparative evolutionary perspective' in Wimmer, A, and Kössler, R. (eds) *Understanding Change: Models, Methodologies and Metaphors* Palgrave Macmillan 199 at 200.

[40] Ibid.

[41] For brilliant reflections on this: Michaels, R (2013) ''One Size Can Fit All'–On the Mass Production of Legal Transplants? In Frankenberg G. (ed) *Order From Transfer* Elgar 56.

ideas about the cultural identity of the nation, and national sovereignty. The framework thus devised was always insufficient to cover normative systems that by their vocations ignored national boundaries, such as Islamic law, or socialist law. It also failed to do justice to other historical realities that could not be accommodated within this straightjacket (such as multinational empires).[42] The invention of the modern State belongs to the beginning of European history. Although for legal and political theory this was a major innovation, societies have existed and thrived without being subject to the machinery of the State and its apparatus for centuries in Europe as elsewhere as well. For a long time, the State did not exist, and nobody seemed to care.

Within the above mentioned State based framework, commerce was always a disruptive element because of its cosmopolitan orientation. In a world dominated by nations, commerce and trade represented a primary force undercutting nationalism, by working out its contradictions. This analysis was supported by leading comparative law scholars who maintained that trade law was the field where global or at least regional harmonisation could have best met success. This line of thought found its way into comparative law circles beyond official projects for the unification of law. In the post WW II period, René David's writings on arbitration typically reflected this stance. Through commercial arbitration: 'legal monism and the monopoly of law formulated and administered by state authorities are not attacked head-on; but standard contracts and arbitration allow the principle to subsist only in the eyes of those who accept a purely formal definition of the Law'.[43] Over half a century later this theme resonates in the literature.[44]

This general picture remained relatively stable until the late 1970s, when legal change by transfer and imitation, rather than by original creation, began to be regularly discussed in the comparative law community as a large scale dynamic, occurring not just episodically, but massively, thus calling for explanation.[45] The growth of a more cosmopolitan outlook on the law challenged the very idea of 'nation state' in full control of the sources of law, turning it into a problematic intellectual construct—to an extent—a misnomer, as H. Patrick Glenn argued in a thought-provoking book on the subject.[46] Hardly any State on earth truly corresponds to the ideal type modelled in nineteenth century Europe, on the basis of which patriotic forces reclaimed independence for entire countries. With the benefit of hindsight, one can say that an era thus came to a close.

The realisation that national boundaries are far from watertight when it comes to law making was a fundamental turning point for comparative law scholarship in the late twentieth century. I have already had the chance to

[42] For an excellent analysis: Bussani, M (2018) 'Strangers in the Law: Lawyers' Law and the Other Legal Dimensions' (40) *Cardozo Law Review* 3125.

[43] See, e.g., David, R (1959) 'Arbitrage et droit comparé' [Arbitration and Comparative Law] (11, 1) *Revue internationale droit comparé* 5 at 13-14.

[44] Karton, J (2020) 'International arbitration as comparative law in action' (2020) *Journal of Dispute Resolution* 293. The present Secretary General of the International Academy of Comparative Law, Professor Diego Fernando Arroyo, is a leading expert in transnational commercial arbitration.

[45] See Graziadei, M (2019) 'Comparative Law, Transplants, and Receptions', in Reimann, M and Zimmermann, R (eds) (2019) *The Oxford Handbook of Comparative Law* supra note 11 at 442 and following.

[46] Glenn, HP (2013) *The Cosmopolitan State* Oxford University Press.

address the topic in the chapter on *Comparative Law, Transplants, and Receptions* for the *Oxford Handbook of Comparative Law*,[47] and I do not wish to retrieve here what is discussed there, but this is a central topic for the subject of globalisation and comparative law.

The comparative law literature on legal transfers—I shall use this more neutral terminology here—presents rival views of the phenomenon in terms of causes and effects, (although some legal transfers are surely despicable, because of their causes *and* their effects).[48] Without going over the arguments once more, what is missing in this picture is a broader contextualisation of the debates relating to legal transfers, bringing into the familiar framework the huge amount of political science research covering policy transfers. To give an idea of the massive, growing investments of political science in the field, a study published in 2013 found that between 1958 and 2008 over 800 articles covered the topic, with half of these contributions being published between 1998 and 2008.[49] In other words, one field of study has practically ignored the other.[50] The annals of legal research abound with similar failures to conduct cross-disciplinary research, but missing the opportunity to take a closer look into this dialectic—policy making and the law - is nonetheless remarkable.

An effort to close this gap quickly leads to the realisation that many legal transfers derive from the capacity and the urge to push or carry over a policy transfer. On the other hand, perhaps surprisingly, on closer examination there are also legal transfers that do not go together with a corresponding policy transfer. For example, the proclamation of the right of the citizens of the Russian Federation: 'to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets' (art. 31 of the Russian constitution of 1993) was not followed by a corresponding policy, but rather by the opposite of it.[51] Legal scholars have seldom looked at the phenomenon of legal transfers from the policy makers' point of view. Nonetheless, a whole range of legal reforms that countries all over the world have adopted has its roots in the dynamics of policy transfer. Observed from this angle, the dynamic of globalisation has first and foremost essentially been a dynamic of policy transfer and diffusion.

How to explain, e.g., the tides of foreign economic policy liberalisation and restriction sweeping the world, if not in terms of policy transfer, and global interdependence? The fact that these come in clusters, over a relative brief time span, speaks volumes about the implementation of a broad pattern of policy

[47] Supra note 45; see now Goldbach, T S (2019) 'Why Legal Transplants?' (15) *Annual Review Law and Social Science* 583 and the important chapter in Siems, M (2018) *Comparative Law* supra note 38 at 229 and following, as well as Frankenberg, G (ed) (2013) *Order from Transfer* Edward Elgar Publishing (an important collection of essays).

[48] Siems, M (2018) 'Malicious legal transplants' (38, 1) *Legal Studies* 103.

[49] : Graham, E R, Shipan, C R, and Volden, C (2013) 'The diffusion of policy diffusion research in political science' (43) *British Journal of Political Science* 673. For an earlier exercise in stock-taking: Dobbin, F; Simmons, B and Garrett, G (2007) 'On the global diffusion of public policies: Social construction, coercion, competition, or learning?' (33) *Annual Review of Sociology* 449; more recently Gilardi, F, and Wasserfallen, F (2019) 'The politics of policy diffusion' (58, 4) *European Journal of Political Research* 1245.

[50] Siems M (2018) *Comparative Law* supra note 38 is one of the few who has at least noticed this possibility. It is also true that political scientists have ignored the contributions on the topic coming from the field of law.

[51] I owe this remark to Prof. Nina Belyaeva.

design.[52] To name just three other instructive cases, from privatisation waves that were: '…diffused rather than reproduced independently as a discrete event in each country and sector',[53] to bans on tobacco smoking in public enacted one after the other,[54] to the diffusion of cost-benefit analysis in environmental matters,[55] policy diffusion begets legal change across the world.[56] While comparative law debated whether legal transplants were possible at all, and what they achieve, political science went on to discuss theories about change produced under these circumstances.

Compared with the legal literature the political science literature benefits from a richer, more theoretically focussed tradition of studies on the subject conducted at the world level and for various parts of the world. This literature explores policy transfers from a variety of perspectives that are usually more empirically grounded than the corresponding comparative law scholarship. On the theoretical plane, while certain observations converge across the disciplines, the literature on policy transfers shows how in the area of political sciences as well competing theories flourish about what factors drive policy transfers, and what are their preconditions, what they eventually produce, and when they 'fail' in one way or another.[57]

Considering these aspects, it is not too difficult to unearth cases in which a legal transfer is set in motion or realised without the full support of a corresponding policy transfer, namely an appropriate, congruent will to support it, whether in the exporting country, where the necessity or utility of pursuing the transfer may be disputed, or in the importing country, where the in site replication of alien normative material can be controversial, or even difficult to conceive, and where different views of what is to be done may ultimately prevail.[58] The working of purposes other than those officially declared on both sides, of course, is not to be ignored either. The enactment of a democratic constitution in a country that has not evolved a system of political parties supporting democracy is a case in

[52] Simmons, BA and Elkins, Z (2004) 'The globalization of liberalization: Policy diffusion in the international political economy' (98, 1) *American Political Science Review* 171.

[53] Levi-Faur, D (2005) 'The global diffusion of regulatory capitalism' (598, 1) The Annals of the American Academy of Political and Social Science 12 at 28.

[54] Toshkov, D (2013) 'Policy-Making Beyond Political Ideology: The Adoption of Smoking Bans in Europe' (91, 2) *Public Administration* 448. On the different effects of the policy in some contexts: Cairney P and Yamazaki M (2018) 'A Comparison of Tobacco Policy in the UK and Japan: If the Scientific Evidence is Identical, Why is There a Major Difference in Policy?' (20, 3) *Journal of Comparative Policy Analysis: Research and Practice* 253.

[55] Livermore, MA, and Revesz, RL (eds.) (2013) *The Globalization of Cost-benefit Analysis in Environmental Policy*. Oxford University Press.

[56] For an instructive discussion: Evans, M (ed) (2017) *Policy Transfer in Global Perspective* Taylor and Francis.

[57] See, e.g., Stone, D; Porto de Oliveira, O and Pal, LA (2020) 'Transnational policy transfer: the circulation of ideas, power and development models' (39, 1) *Policy and Society* 1; Stone, D (2020) 'Between policy failure and policy success: bricolage, experimentalism and translation in policy transfer' in Dunlop, C (ed) (2020*) Policy learning and Policy Failure* Policy Press 71; Gilardi, F, and Wasserfallen, F (2019) 'The politics of policy diffusion' (58, 4) *European Journal of Political Research* 1245.

[58] The Italian land reform (1945–1950), carried out among the contrasting inputs of the US State Department, the CIA, the Christian Democrats and the Communist parties, provides a fascinating case study: Bernardi, E (2006) *La riforma agraria in Italia e gli Stati Uniti* [*Agrarian Reform in Italy and the US*] Il Mulino.

point. To provide yet another example of the same dynamic, consider how some countries are willing to enact international conventions protecting women's rights, while not supporting corresponding policies.

Comparative law scholarship has been quick to point to a variety of factors that show how the diffusion of norms may result in reforms that remain on paper, as happens when a country enacts an international convention protecting women's rights, while not supporting the corresponding policies, or proclaims equality of rights for both sexes, while showing a poor record as far as equal pay is concerned. That ill-defined, catch all 'factor' that points to the existence of different social and legal norms, namely (legal) culture, has often been first in the list of causes of failed reforms. The overall argument is that law perhaps is not that all powerful instrument of change, when confronted with other societal forces, which are set in motion in the presence of different cultural elements.

These diagnoses should be refined by taking a closer look at what happens when legal transfers are attempted across societies that all belong to the Western world. Before drawing hasty conclusions on how to explain certain failures, or certain trajectories of reform projects abroad, in alien places, it would be wise to turn the comparative mirror onto ourselves, onto our societies. To pick a telling example from the field of EU law, infringement proceedings enforcing a certain EU policy attract very different responses by the Member States due to the presence of different vested interests, rather than for any other reasons. The same Member State can quickly end the infringement of EU law, or instead turn a blind eye to it, under the pressure of diverse special interests.[59] To speak of 'culture' in this context is to use a sledgehammer to crack a nut—and yet that device is all too easily available when dealing with similar analytical problems in more exotic contexts.[60]

Is it true that legal reform by way of imitation is more easily promoted and more easily turned into an effective policy in countries that all belong to the history of western civilisation? Surely some legal transplants mostly occur among countries that share a common past,[61] but comparative law scholarship could benefit from more systematic, empirically informed studies on the effects of legal transfers across countries all belonging to the Western legal tradition.[62] This is not the place to carry out a systematic review of the available evidence, but there are several indications that certain forms of resistance are independent of cultural differences related to the non—Western origin of the local law. This exercise in self-awareness – as I said above – could help avoid the recurrent temptation to exoticise those strangers living in distant places, at the other end of the world, or to naively picture their reactions when confronted with the possibility of legal change by way of imitation.

[59] Hofmann T (2018) 'How long to compliance? Escalating infringement proceedings and the diminishing power of special interests' (40, 6) *Journal of European Integration* 785.

[60] See von Benda-Beckmann, F and K (2010) 'Why Not Legal Culture ' (5) *Journal of Comparative Law* 104.

[61] Spamann, H (2009) 'Contemporary legal transplants: legal families and the diffusion of (corporate) law' *Brigham Young University Law Review* 1813.

[62] See, e.g., Mulder, J *(2017)* 'New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a turn to a Multi-layered Culturally-informed Comparative Law Method for a better Understanding of the EU Harmonization' (18, 3) *German Law Journal* 721.

Since identity is a complex construct, what can be learnt by an examination of legal transfers 'within the West' is that imitation as perfect conformity will seldom happen, or will seldom be fruitful, even though two territories and two social contexts might share much in common.[63] A certain level of pragmatism is part of the game; selective adaptation and borrowing is the most likely outcome of the transfer process. Whether one should be content with this depends entirely on why a certain change should have been should be introduced, and what ends it serves. The most important lesson to draw by far is that no transfer will take root, unless a local constituency supports it. This, however, involves a further paradoxical possibility, namely that that constituency which has the power to support the transfer shall also have the power to turn the outcome of process to its own purposes, which explains why selective adaptation and borrowing is a likely possibility, along with the total failure of the attempt to change the local reality.[64]

A careful examination of case studies of attempted transfers of institutional elements in relatively familiar contexts would have much to teach to comparatists on how to approach transfers in radically different cultural environments.

IDEOLOGY, ONCE MORE

I have claimed above that the global constitutes the local, as these two contradictory tendencies are mutually constitutive. With respect to globalisation, the comparative law community as well shows different, alternative visions concerning its long term sustainability and effects. Possibly, the time has come to unveil the ideological commitments of leading practitioners of the discipline. I will do so by considering just a tiny part of the story relating to the role played by markets in the unfolding of globalisation, touching upon the diffusion of human rights doctrines incidentally, as they are brought into this picture by proponents of the expansion of markets.

To address this theme, let us focus on three alternative visions of market societies first developed in the West with respect to trade and later to capitalism that still largely hold for globalisation as driven by world-wide markets and multinational firms.[65] I will not try to document how comparative law has embraced these visions, I am content to set them out, and think that each has inspired commitments, explicitly or implicitly underpinning comparative work.

[63] Jacoby, W (2001) *Imitation and politics: Redesigning modern Germany* Cornell University Press. Compare: Mulder, J (2017) 'New Challenges for European Comparative Law', cit, at 725, who warns against the risk that harmonisation in the UE is perceived by large parts of the public as a top-down process that would force them: 'to give up legal concepts and social and commercial conventions that are deeply engrained in their national socio-legal identity and culture'.

[64] This is a lesson that some analysts are considering more seriously now, after a number of egregious failures: e.g., Radin, A (2020) *Institution Building in Weak States: The Primacy of Local Politics* Georgetown University Press. With respect to Germany and Japan after WWII: Kostal, RW (2019) *Laying down the Law: The American Revolutions in occupied Germany and Japan*, Harvard University Press at 345 (highlighting as well the importance of the turn to conservative politics in the US).

[65] See the splendid essay by Hirschman OA (1992) 'Rival Views of the Market Society' (Chapter 5) in Hirschman, OA (1992) *Rival Views of the Market Society and Other Recent Essays* Harvard University Press 106.

The first of these visions goes back to the old *douce commerce* thesis, aired, among others, by Montesquieu.[66] Basically, its proponents hold that the spreading of commerce and trade leads to a more peaceful world.[67] The twenty-first century version of this story enshrines this narration in a defence of markets by the constitution of a world economic order inspired by neoliberalism.[68] The alternative, much more pessimistic story, is that markets as developed in capitalist societies are bound to undermine their own basis, by destroying the very values on which they depend. Conservative thinkers in eighteenth century England and Germany already formulated critiques of trade and trade sponsored policies that still have a familiar ring. Consider, for example, the opposition expressed in that epoch to centralising bureaucrats 'who would like to derive everything from simple principles', or how to comply with such demands for universal, standardised law favouring commerce would be to: 'depart from the true plan of nature, which reveals its wealth through its multiplicity, and would clear the path to despotism, which seeks to coerce all according to a few rules and so loses the richness that comes with variety'.[69] These are words written in eighteenth century Germany, and yet they read like some contemporary comments upon EU plans for further harmonisation of the laws of the member States. Indeed, the invective against 'our century so pregnant with all sorts of books of general laws'[70] could easily be attributed to several distinguished colleagues today, who express similar misgivings towards uniform or harmonised laws. Romantic anticapitalism went out of fashion by the mid nineteenth century, when Marx and Engels set out an even more ambitious account of the corrosive nature of capitalism in the *Communist Manifesto*: 'All that is solid melts into air, all that is holy is profaned…'[71].

The twenty-first century narrations that develop this theme—how markets ultimately destroy the values that are necessary for their working—picture the spread of greed and corruption in several markets and across many industries at the turn of the twentieth century and beyond.[72] They have impressed upon

[66] Montesquieu, CL (1748), *De l'esprit des lois* [The Spirit of the Laws], book XX, chap 1. For the intellectual movement in which this thesis fit see Hirschman AO (1997) *The Passion and the Interest* (20th anniversary edition), Princeton University Press at 57 and following. In a critical vein: Larrère, C. (2014). Montesquieu et le «doux commerce»: un paradigme du libéralisme. [Montesquieu and the «Gentle Commerce»: a Paradigm of Liberalism] 123 *Cahiers d'histoire. Revue d'histoire critique* 21.

[67] Montesquieu, *De l'esprit des lois*[The Spirit of the Laws], book XX, chap 2 « L'effet naturel du commerce est de porter à la paix ».

[68] For a typical example of this literature: Mousseau, M. (2019) 'The end of war: How a robust marketplace and liberal hegemony are leading to perpetual world peace' (44, 1) *International Security* 160.

[69] See Möser, J (1772) 'Der jetzige Hang zu allgemeinen Gesetzen und Verordnungen ist der gemeinen Freiheit gefahrlich' ['The Present Tendency towards General Laws and Regulations is Dangerous to the Common Freedom] in *Möser J (*1943-1990) *Sämmtliche Werke Historisch-kritische Ausgabe in 14 Bänden* [Collected Works Historical and Critical Edition in 14 volumes] Stalling, volume 5, 22-27, 22-24. On it: Muller, JZ (1990) 'Justus Möser and the Conservative Critique of Early Modern Capitalism Central European History' 23(2/3*) Central European History* 153.

[70] Möser, J (1772) 'Der jetzige Hang, etc.", supra note 69, at 22.

[71] Engel F, Marx K (or. ed. 1848: 2002), *The Communist Manifesto* Jones GS, Jones G (eds) Penguin at 253; Miller, D (1987) 'Marx, Communism, and Markets' 15(2) *Political theory* 182-204.

[72] Partnoy, F (2003) *Infectious Greed: How deceit and risk corrupted the Financial Markets* Profile Books; Herzog, L (2017) *Just Financial Markets?: finance in a just society* Oxford University Press.

us the notion of an unsustainable architecture, doomed to collapse due to deep systemic failures. There is no lack of contemporary evidence of the tendency of capitalism to undermine its moral basis in sinister ways. The cautionary tales of globalised industries failing miserably on moral as well on economic grounds are plenty. From the Rana Plaza building collapse in Bangladesh, causing over a thousand deaths,[73] to the scandal over Volkswagen and other car manufacturers cheating pollution emissions tests, thus defrauding customers and provoking thousands of pollution-related deaths,[74] to the crash and the downing of the Boeing 737 MAX passenger airliner, with the shameless attempt by Boeing to blame the pilots who died in those accidents together with 348 other victims for the defects of the airliner navigation software,[75] to the manipulation of the Libor by leading London banks,[76] it's a parade of grossly inadequate, criminal conducts. Recurring concerns over the moral limits of markets (and their transgression) are also voiced by thinkers who decry the corrosive powers springing out of unbridled pro market choices more generally. The redoubtable side of the economy is exposed by the inability or difficulty to define the moral limits of markets, with regard to a whole range of exchanges (e.g. surrogacy arrangements, the sale of human tissues or organs, etc.).[77] In these morally controversial cases, an optimistic view of market societies is often supported by an appeal to autonomy, and autonomous choice: 'choice is good'. This is a rather strange mix of utilitarian and non –utilitarian motives, coalescing all to support a fundamental choice favouring 'free' markets. In the same vein, economic globalisation is sometimes upheld as favourable to a 'human rights revolution', as in arguments connecting non-discriminatory open markets, global competition, and a more effective protection of human rights.[78]. Markets

[73] Salminen, J (2018) 'The accord on fire and building safety in Bangladesh: a new paradigm for limiting buyers' liability in global supply chains?' (66, 2) *American Journal of Comparative Law* 411; Trebilcock, A (2020) 'The Rana Plaza disaster seven years on: Transnational experiments and perhaps a new treaty?' (159, 4) *International Labour Review* 545.

[74] The estimate is 5000 excess deaths per year in Europe alone: Jonson JE; Borken-Kleefeld J; Simpson D; Nyiri A; Posch M and Heyes C (2017) 'Impact of excess NOx emissions from diesel cars on air quality, public health and eutrophication in Europe' *Environmental Research Letters* 18 September 2017.

[75] Gates, D (2019) 'Ethiopian Airlines calls criticism of its pilots an effort to 'divert public attention' from Boeing 737 MAX flaws' *The Seattle Times* (May 17, 2019). Boeing agreed to pay just over $2.5 billion to resolve a federal charge of criminal misconduct for how it misled regulatory officials during certification of the 737 MAX. Less than 10% of that amount is a fine paid to the U.S. government for the criminal conduct. U.S. House Transportation Committee Chair Peter DeFazio, Democrat from Oregon, who managed to the successful approval Aircraft Certification Reform and Accountability Act 2020, called the agreement 'a slap on the wrist' and an insult to the victims: 'The settlement sidesteps any real accountability in terms of criminal charges […] Senior management and the Boeing board were not held to account, and in fact, the former CEO skated out with more than $60 million'. (see Gates, D, and Kamb L (2021) 'Boeing to pay $244 million penalty to settle fraud charges tied to 737 MAX crashes' *The Seattle Times* Jan. 7, 2021).

[76] Cohan, WD (2017). *The Spider Network The Wild Story of a Math Genius, a Gang of Backstabbing Bankers, and One of the Greatest Scams in Financial History* Custom House.

[77] See, e.g., Satz, D (2010) *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* Oxford University Press.

[78] See e.g., Petersmann, EU (2001) 'Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships' (4, 1) Journal of International Economic Law. For a critical assessment: Slobodian, Q (2020). *Globalists: The end of empire and the birth of neoliberalism* Harvard University Press, at 279; Tushnet, M (2019) 'The globalisation of constitutional law as a weakly neo-liberal project' 8(1) Global Constitutionalism 29-39.

should not suffer a legitimacy crisis, and human rights law and democracy must thus find their place in the picture.

The more pessimistic view of the moral effects of markets highlighted above has hardly bought into these add on correctives. Meanwhile, the theme of the self- destruction of the neoliberal order by the very forces that generated it is on the rise, gaining traction among anti-globalisation supporters on the right as well. What follows, for example, is the opinion of a conservative commentator who decries: 'hyperglobalization, which sought to minimize barriers to global trade and investment, resulted in lost jobs, declining wages, and rising income inequality throughout the liberal world. It also made the international financial system less stable, leading to recurring financial crises. Those troubles then morphed into political problems, further eroding support for the liberal order.'[79]

There is, however, yet another possibility to consider, namely that the appeal to self interests and to capitalist markets as efficient, wealth enhancing institutions, is an appeal to forces that come up short, and to not deliver the revolution they promise.[80] In several contexts, these do not have the power to counter local vested interests, and fail to introduce the form of rationality that eventually shall domesticate autocrats, free people from feudal shackles, bring in democracy. Capitalism itself may come to term with precapitalist forces, and so fail to change deep seated social structures. From Latin America, to Eastern Europe, to the Arab world, one is tempted to resort to this third kind of analysis to describe how globalisation has played out for these parts of the world. A few American friends probably think that Europe itself is a hostage of its past in so many different way; while America, not having had the experience of Europe's social and ideological diversity resulting from its past, would be the ultimate expression of what a market economy can achieve. Of course, one is tempted to retort that the US has been unable to escape its 'irrational Lockeanism' or 'colossal liberal absolutism' and precisely for this reason: it never knew the complex, pluralist constitution of the *ancien regime* in Europe, nor the alternative political philosophies contending for political power that have been the hallmark of the twentieth century in Europe.[81]

IMITATION, BORROWING, RESENTMENT

There are also cases in which widespread disillusionment and resentment follow as a consequence of a full and pacific integration of a country into a market society, inspired by liberal values. The situation occurring in several parts of Eastern Europe after completion of the transition process and the accession to the EU is a case in point. The democratic backsliding experienced by Poland and Hungary speaks of the will of the elites in power and of large sectors of the population to reject certain features of democratic liberalism that are prized by

[79] Mearsheimer, JJ (2019) 'Bound to fail: The rise and fall of the liberal international order' (43, 4) *International Security* 7-50.

[80] On this tendency, Hirschman OA (1992) 'Rival Views of the Market Society' supra note 65.

[81] The citations in the text are from: Hartz L (1955), *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* Houghton Mifflin Harcourt, at 10-11, passim and 285. On this classic: Abbott, P (2005) 'Still Louis Hartz after all these years: A defense of the liberal society thesis' (3, 1) *Perspectives on Politics* 93.

other parts of the population and that should have been secured by accession to the EU.

An in-depth analysis of this situation is beyond the purpose of this essay, but there is a specific feature of it which is worth considering in a more general perspective.

To explain the ongoing illiberal backlash, Ivan Krastev and Stephen Holmes suggest that the distinction between imitation and borrowing is of crucial importance in considering the effects of emulation.[82] Imitation is the demand to replicate the same *goals* that others have. This would have much more profound effects on collective identity and self-esteem than mere borrowing, which implies only the adoption of certain *means* without changing goals. Borrowing may be an adaptive strategy to reinforce one's ability to resist foreign influence or pressure, without conceding much beyond the form of what is borrowed,[83] while the drive to imitate would ultimately result in a sense of loss of identity and self-esteem. Consider that, while being democratised, these countries had to enact policies and laws elaborated in Brussels, while pretending to exercise self-government. For a time, imitation was justified as 'a return to Europe' and thus, in a sense, a return to their authentic self. Still, at some point, the suspicion grew that that the original was better than the copy, while an idealised model of the West was constantly held up to them. When the prosperity of the West suffered the blow of the financial crisis of 2008 all of this began to unravel. Soon elites of provincial origins garnered considerable political support, especially outside the capitals, by speaking the language of national identity, an element that was neglected or devalued in the process of harmonisation with the incoming tide of supranational legislation of the EU.[84] The universalism of human rights and open border liberalism could thus be denounced as an expression of the West's lofty indifference to the national traditions and heritage. A fertile soil for resentment was thus ready to be cultivated. It would be naïve to ignore other complex factors that have led to this situation,[85] but one may still ask the question of whether the encouragement to emulate in particular Germany's model of post-Second World War democratization was very wise.[86]

At a more general level, transnational human rights norms and advocacy may stir up similar responses, and provide an obvious instance of transfer with a potential for backlash.[87] This type of advocacy commonly appeals to the norms of the exporting society. On the recipient side, teaching and

[82] Krastev, I, and Holmes, S (2019) *The light that failed: A reckoning* Penguin at 7 and following.

[83] Seppänen, S (2020) 'After Difference' supra note 24 204-205, shows how similar arguments play out among Chinese academics who discuss legal transplants and the influence of Western scholarship in contemporary China.

[84] Krastev, I and Holmes, S (2019) *The light that failed* supra note 82, at 14.

[85] See, e.g., Sadurski (2019) *Poland's Constitutional Breakdown,* Oxford University Press at162 and following; Bluhm, K and Varga, M. (eds) (2018) *New Conservatives in Russia and East Central Europe.* Routledge. For a response to the crisis: Bignami, F (ed) (2020) *EU Law in Populist Times: Crises and Prospects* Cambridge University Press.

[86] For a discussion on this point: Krastev, I, and Holmes, S (2019) *The light that failed,* supra note 82, at 56.

[87] Acharya, A (2004) 'How ideas spread: Whose norms matter' supra note 20. Bloomfield, A (2016) 'Norm antipreneurs and theorising resistance to normative change' (42, 2) *Review of International Studies* 310.

preaching, naming and shaming the perpetrators of human rights violations, and exhibiting outrage for their conduct, can play into the hands of elites in a traditional power structure, with a popular backlash against a perceived loss of status. It has thus been observed that: 'The backlash narrative alters public discourse, reinvigorates and reshapes traditional institutions, and in these ways locks in and perpetuates patterns that leave the progressive namers and shamers farther from their goals.'[88] Are there remedies to these risks ? Those who have taken them seriously give some advice: do not pretend to have the moral high ground, do not push legalism and universalism to the extreme, recognise the validity of local normative systems, and use an appropriate language of respect and fairness that travels across normative systems.[89] 'Backlash' itself is a rather crude category to describe the complex setting originating from the interaction between various formants of the law.[90] Surely what comes from abroad may resonate with domestic preferences and political aims too. In each context, vernacularisation and localisation are a necessary move; they will happen anyhow, whether or not this is understood, or predicted.[91] Dynamics of change 'within' the West once more highlight the same point. When Roosevelt launched the New Deal he did not proclaim a revolution, he presented his ideas as much in line with the best part of traditions of the US '…a recognition of the old and permanently important manifestation of the American spirit of the pioneer.'[92]

THE HARD BORDERS OF GLOBALISATION

Globalisation has sometimes been presented as a process of integration among various parts of the world, marked by increasing interconnections, a kind of huge 'coming together' of humanity. This, is, of course, a pipe dream scenario. The reality on the ground is both more complicated and conflictual.

This is a more interconnected, interdependent world, but it is also a world divided by more international borders than there have ever been. The number of international borders is expanding across the world, and border control has become a growing international concern, showing an increasing desire to enhance their security, control, and governance even before the emergency measures adopted for the pandemic.[93] Europeans belonging to the Union, who take advantage of the liberal regime established for intra-European mobility, have

[88] Snyder, J (2020) 'Backlash against naming and shaming: The politics of status and emotion' (22, 4) *The British Journal of Politics and International Relations* 644.

[89] Snyder, J (2020) 'Backlash against naming and shaming' supra note 88 at 651; compare An-Na'im, AA (2016) 'The spirit of laws is not universal: Alternatives to the enforcement paradigm for human rights' (21, 2) *Tilburg Law Review* 255; Baxi, U *The Future of Human Rights* supra note 27.

[90] Compare Husa, J (2018) *Law and Globalisation* at 54 and following on the rule of law with Chinese characteristics.

[91] Berger, T (2017) *Global Norms and Local Courts: Translating the Rule of in Bangladesh* Oxford University Press. Berger notes that the local translations of universal norms are mostly lost in the communications from the periphery to the centre. Merry, SE (2006) 'Human rights and transnational culture: Regulating gender violence through global law' 44 *Osgoode Hall Law Journal* 53.

[92] Roosevelt FDR (1933) *First Inaugural Address*; Hartz (1955), *The liberal Tradition in America*, cit, 264, speaks of 'sublimated Americanism'.

[93] Simmons, BA (2019) 'Border Rules' (21, 2) *International Studies Review* 256.

perhaps a diminished perception of what is going on elsewhere in this respect, but this cannot be an excuse to ignore the ongoing tragedy taking place at the borders of Europe, with more securitised border controls, and the proclaimed necessity to incorporate human rights and humanitarian ideals into border policing practices.[94] The reality of borders sits in an uneasy tension with the proclaimed universality of human rights, and with economic policies favouring migration as a solution to the demographic problems for ageing societies. The way immigration is politicised in many countries should make clear that neither human rights, not economics, provide the essential explanations to realise how the regulation of immigration, with its tendency to make people illegal, is actually framed.[95] The traditional expression of state-level sovereignty that is involved in selecting immigrants seems to be a balm of comfort for nationalist forces in many countries, a sort of moral compensation for the loss of sovereignty that the State must accept on other grounds. Furthermore, the labelling of part of the population as 'illegal' accomplishes a form of exclusion when the border itself fails to achieve this effect: 'Capturing the moral panic about extra-legal migrants and enshrining it in law allows governments control that their borders lack. When a part of the population is labelled 'illegal' it is excluded from within.'.[96] Illegal immigrants are subjected by these conservative political positions to a paradoxical regime, both legally and morally. They significantly contribute to a nation's wealth, but must live on the margins, as undeserving of the level of integration enjoyed by the 'legitimate' population of the territory. In the process of developing national policies concerning immigration, citizenship itself has become a much more sensitive, contentious issue. Citizenship tests have acquired a symbolic meaning in these contexts, they have usually been developed to respond to demands by the political right, to entrench the prevalent public morality of the nation.[97] In this environment, even wilder versions of globalisation are set forth as possible, relying on the premise that the flow of goods, services, and capital across borders should be accompanied by stricter, more selective controls over the movements of people.[98]

COMPARISONS IN A GLOBALISED, DIVIDED WORLD

The globalised world of today is still a divided world. It is no longer divided along the lines established for the greatest part of the twentieth century. But it still has borders, ruling powers, and States. Certainly it is also a more interdependent world, with global markets and global firms, with a myriad of global actors. It is a world in which sovereignty is constantly put under the

[94] Aas, KF, Gundhus, HO (2015) 'Policing humanitarian borderlands: Frontex, human rights and the precariousness of life' (55,1) *British journal of criminology* 1; Ghezelbash, D (2020) *Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees*. 868,3) American Journal of Comparative Law 479..

[95] Dauvergne, C (2008) *Making people illegal: What globalization means for migration and law* Cambridge University Press.

[96] Ibid at 18.

[97] Dauvergne, C (2016) *The new politics of immigration and the end of settler societies* Cambridge University Press at 100 and following.

[98] Slobodian, Q (2018) 'Trump, populists and the rise of right-wing globalization' *The New York Times.*

pressure of transnational players and trends. The phenomenal impact of the digital technologies accentuated this trend in the last years, opening up new frontiers for constitutional law.[99] The rise of global constitutionalism as a response to this pressure, and as an aspiration to the remedy the shortcomings of national constitutional law, is clearly confronted with the plurality of approaches and perspectives emerging across the globe around this theme and the variability that can be detected through comparisons.[100]

In this complex environment, a whole range of global legal regimes respond to the need to address coordination problems that have worldwide dimensions.[101] Global actors and institutions of various kind, beyond the State, are in charge of the design and the evolution of these regimes,[102] which rely on harder and softer forms of law.[103] Their negotiation and design is the preserve of a multitude of forces, including transnational epistemic communities, relying on experts scattered across the globe. Which codes bind them, and how they work together, is very much still an open research question. [104] Little should be taken for granted in terms of capacity to achieve: failure is always possible along the way, because neither the appeal to self-interest, nor the appetite for coordination, are working constantly in the same direction in the space beyond the State. Other subjects play in this arena as well, some more visible than others, like multinational firms and global non-profit organisations. Global regulatory regimes are established by these actors too, once more in the form of hard or soft law.[105] Mobilisation, activism in the public sphere, also contributes to the setting of formal and informal norms governing firms, markets and state actions at the transnational level, often to avert disasters, or to react to them, or to curb the most egregious forms of exploitation, or simply to contest the existing order of affairs.[106]

[99] See, e.g. Pollicino, O, and Romeo, G (eds.) (2016) *The Internet and Constitutional Law: The protection of fundamental rights and constitutional adjudication in Europe* Routledge.

[100] See, e.g., Suami, T, Peters A., Vanoverbeke, D, and Kumm, M. (eds.) (2018) *Global Constitutionalism from European and East Asian Perspectives* Cambridge University Press; Romeo, G. (2020) 'The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition' 21(5) German Law Journal 904.

[101] Husa *Advanced Introduction* supra note 3 at 48 and following; Cassese, S. (2012) *The Global Polity: Global Dimensions of Democracy and the Rule of Law* Global Law Press; Auby, J B (2017) *Globalisation, Law and the State*. Bloomsbury Publishing.

[102] See., e.g., Block-Lieb, S and Halliday, TC (2017) *Global Lawmakers: International Organizations in the Crafting of World Markets* Cambridge University Press.

[103] Roger, CB (2020) *The Origins of Informality: Why the legal foundations of global governance are shifting, and why it matters* Oxford University Press.

[104] Harrington, B and Seabrooke, L (2020) 'Transnational professionals' (46) *Annual Review of Sociology* 399.

[105] See e.g., Halliday, TC and Shaffer, G (eds) (2015) *Transnational Legal Orders* Cambridge University Press.

[106] For a retrospective study on a first case of mobilisation: Sasson, T (2016) 'Milking the Third World? Humanitarianism, Capitalism, and the Moral Economy of the Nestlé Boycott' (121, 4) *American Historical Review* 1196, on the present landscape: Stephen, MD and Zürn, M (eds.) (2019) *Contested World Orders: Rising Powers, Non-governmental Organizations, and the Politics of Authority Beyond the Nation-state* Oxford University Press.

The overall picture is often fitted into the conceptual frame of 'global legal pluralism', whose appeal is mostly linked to the double edged ideas of bottom up growth of norms and rules, and overlapping normative orders.[107]

The interesting paradox lying before our eyes is that, while the need for global governance is more evident than ever before, it is also being more contested and rejected than ever before'. The current pandemic is a typical instance of one of those 'problems without a passport' - to use the expression coined by Kofi Annan in 2009 - that call for the action of international organisations to combat problems common to humanity.[108] And yet, the States stricken by the pandemic did not follow the blue print for coordination suggested by the former Secretary General of the UN:[109] 'A global crisis that needed coordination and cooperation was instead characterised by defection and dissension.'.[110]

The reason for this situation are to be found in the contradictions inherent in the systems of legitimation and authority that underlie global governance in our time. This gives rise to the tensions brilliantly illustrated and discussed in Michael Zürn's *A Theory of Global Governance: Authority, Legitimacy*, and to the corresponding politicisation of the international sphere.[111]

A discussion of this recent contribution is beyond the scope of this essay. For present purposes, it is enough to highlight that comparative law has been one of the building blocks of the above mentioned regimes, often in rather discreet, incremental ways, as a gap filler, where the high ambitions of the international lawyer give way to more down to earth, daily concerns.[112] By showing overarching patterns of difference and similarity, comparative law has opened the black box of 'law', showing its multiple dimensions, pushing for an examination of the possibilities that are already in place, or could be designed, when change is desired, or appears to be necessary. The inevitable conclusion

[107] Teubner G (ed) (1995) *Global Law Without a State* at 3; Snyder, F (1999) 'Governing Economic Globalization: Global Legal Pluralism and European Union Law' 5 *European Law Journal* 334; de Sousa Santos, B and Rodríguez-Garavito, CA (eds) (2005) *Law and Globalization from Below: Towards a Cosmopolitan Legality* Cambridge University Press are among the seminal, influential essays. The idea is then picked up in a new vein by Berman, PS (2012) *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* Cambridge University Press, and see now: Berman, PS (ed) (2020) *The Oxford Handbook of Global Legal Pluralism* Oxford University Press. For critical remarks: Moore, SF (2014) 'Legal Pluralism as Omnium Gatherum.' 10 *Florida International University College of Law* 5.

[108] Annan, K (2009) 'Problems 'Without Passports' Special Report: International Community' November 9, 2009 *Foreign Policy* 1.

[109] Johnson, T (2020) 'Ordinary Patterns in an Extraordinary Crisis: How International Relations Makes Sense of the COVID-19 Pandemic' (74, S1) International Organization E148.

[110] Pevehouse, JC (2020) 'The COVID-19 Pandemic, International Cooperation, and Populism' (74, S1) International Organization E1 91.

[111] Zürn, M (2018) *A Theory of Global Governance: Authority, Legitimacy, and Contestation* Oxford University Press.

[112] Pistor, K (2019) *The Code of Capital: How the Law Creates Wealth and Inequality* Princeton UP at 134, makes the point that: 'Building the legal infrastructure for global commerce has taken, for the most part, one of two forms: the harmonization of laws in different states, and the recognition and enforcement of foreign law. Is not comparative law deeply involved in both aspects of the story?'.

is that we are now truly living in the age of comparisons, and that its end is not in sight.[113]

This function of comparative law will be accentuated by what is coming. The new world of digital technologies is no exception in this respect. At the European Court of Justice, the litigation initiated by Maximilian Schrems over privacy protection in data transfers across the Atlantic has been in substance a huge exercise in comparative law over the respective EU and US data protection regimes.[114] More of the same is predictable for a whole range of new issues relating to the design and the applications of digital technologies, as well as for other issues that require harmonisation and mutual recognition of regimes.[115]

The interesting part of the story concerning the Schrems litigation is linked to the fact that it does not revolve around the technology, but rather on how privacy is understood on the two sides of the Atlantic, and how markets and the action of public powers should correspondingly be regulated. It would be better to avoid hasty conclusions on where the dividing line exactly lies, however: the current European approach has some defenders in the US, while the US approach may be more robust than its European counterpart when it comes to sanctioning some egregious behaviours on the markets.[116]

Similar comparisons in our epoch are no longer confined within the boundaries of the Western legal tradition; they will be even less limited in the future. Obviously 'problems without a passport' - like global warming and environmental protection - will maintain their centrality in this perspective. The covid-19 pandemic has immediately raised questions concerning, for example, how parliaments worked in the emergency across the globe, while the threats for health were becoming more and more ominous.[117] But, beyond this, there will be more comparative contributions coming from a variety of new voices from many parts of the world, and more collaborative comparative law work, which is just beginning to show its promising future.[118]

In the same vein, it is also telling that a whole set of comparative projects launched at the world level are now established, and that many of them concern aspects involving the laws and the legal systems of all the States that compose the international community. The use of many of these instruments to exert soft

[113] This was Nietzsche's diagnosis, 'Of First and Last Things' supra note 22, and in this respect at least he was right.

[114] Case C-362/14, Maximilian Schrems v Data Protection Commissioner, ECLI:EU:C:2015:650; Case C-311/18, Data Protection Commissioner v Facebook Ireland and Max Schrems, ECLI:EU:C:2020:559.

[115] See, e.g., Wiener, JD et al (eds), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* RFF Press.

[116] See, e.g., the US rejoinder by Department of Justice, the Department of Commerce and the Office of the Director of National Intelligence (2020) 'Information on U.S. Privacy Safeguards Relevant to SCCs and Other EU Legal Bases for EU-U.S. Data Transfers after Schrems II', at <https://www.commerce.gov/> (last consulted on 17-01-2020).

[117] Waismel-Manor, I et al (2020) '*Covid-19 and Legislative Activity: A Cross-National Study*' Bar Ilan University Faculty of Law Research Paper No. 20-12 SSRN 3641824 (last consulted on 19-01-2021) available at SSRN: https://ssrn.com/abstract=3641824 or http://dx.doi.org/10.2139/ssrn.3641824

[118] Riles A (2015) 'From comparison to collaboration: experiments with a new scholarly and political form' (18) *Law and Contemporary Problems* 147.

power is obvious. They have been instrumental in advancing various policies by speaking the language of persuasion, competition among legal orders, and ranking, ultimately showing what the soft power of governance means.[119] How 'description' turns out to be prescription in this respect too should be problematised.[120] An interesting part of the story—for our discipline – is that most of the efforts thus conducted have not seen comparativists involved, at least not in the front ranks.[121] Comparison here is the new wheel being reinvented. This is a compliment paid to the value of comparisons, but it is also a call to check how comparisons as artefacts are made and then employed. If these comparative tools are employed at the national or international level to push a certain policy endorsed by legislative means, or by executive measures, they should be scrutinised to check whether they actually provide a proper, legitimate basis to develop it.[122] Do all these projects actually benefit from such accurate checks? There are reasons to doubt it. In any case, they all touch upon the serious problem of how to measure the empirical effects of norms.[123] Furthermore, as they intend to encode empirical knowledge, and then to measure what is found by comparative assessment of specific data sets, they also touch upon the problem of how to frame the research questions across the different cultures and institutional systems of the world. Increasing attention towards the relationship between law, language and translation, to the implicit dimensions of the law, as embedded locally, should be considered when building up or assessing tools for quantitative comparisons as well.[124]

EVOLVING COMPARATIVE LAW: QUESTIONS OF JUSTICE

In the last few decades, comparative law has grown and changed: it has addressed a whole new range of research questions; it has developed a sensitivity for legal pluralism, and for alternative forms of normativity emerging in the transnational dimension, across the globe. The fields of comparative constitutional and administrative law have grown tremendously, along with all the disciplines

[119] See Davis, K; Fisher, A; Kingsbury, B and Merry, SE (eds) (2012) *Governance by indicators: global power through classification and rankings* Oxford University Press; Michaels, R (2009) 'Comparative law by numbers? Legal origins thesis, doing business reports, and the silence of traditional comparative law' 54(2) *American Journal of Comparative Law* 765; Siems, M and Nelken, D (2017) 'Global social indicators and the concept of legitimacy' 13(4) *International Journal of Law in Context* 436.

[120] See, e.g., Jung, J and Dobbin, F (2015) 'Agency theory as prophecy: How boards, analysts, and fund managers perform their roles' (39) Seattle University Law Review 291.

[121] Siems, M (2005) 'Numerical comparative law: do we need statistical evidence in law in order to reduce complexity' 13 *Cardozo Journal International and Comparative Law* 521 . was the first to draw attention to this comparative technique, but this article was really a pioneering effort at the time. See now Siems *Comparative Law* supra note 38 at 180-228.

[122] Infantino, M (2019) *Numera et impera. Gli indicatori giuridici globali e il diritto comparato* [Numera et Impera. Global Legal Indicators and Comparative Law] Franco Angeli.

[123] The *Annuario di Diritto Comparato* 2012 is dedicated to this theme, with several important contributions.

[124] Merry, SE (2016) *The Seductions of Quantification: Measuring human rights, gender violence, and sex trafficking* University of Chicago Press; McCormack, G (2018) 'Why 'Doing Business' with the World Bank May Be Bad for You' (19, 3) *European Business Organization Law Review* 649. Even in the field of law and economics 'social norms' have been recognised as determinative in many contexts.

sitting on the fence of the private-public law distinction, such as environmental law, consumer law, labour law, law and religion, and so on. Criminal law and procedure as well is following this trend. Meanwhile, new equilibria at the world level are setting a new agenda. They are shifting research towards more comparative law studies dedicated to Asia, Africa, and South America. The borders of the discipline are much more porous in methodological terms too. Studies conducted by anthropological, ethnographic, and sociological methods and concerns abound, although comparative law has been slow in taking notice of them. Indeed while it hardly necessary to highlight that top-notch comparative studies dedicated to various dimensions of the law are flourishing in neighbouring disciplines like economics , and sociology, anthropology - even legal anthropology - is not yet very present in the literature on comparative law, with a few remarkable exceptions.[125] More and more often, legal history itself is turning to comparisons and to transnational, global approaches to illuminate legal change across time.[126] Comparative law and the study of legal translation go together as well, to clarify to what extent concepts and categories are mutually intelligible and travel across languages.[127] An awareness of all these developments does not yet pervade all the branches of our discipline, but turning a blind eye to what is to be welcomed as an important overture has become increasingly difficult.[128] All these productive disciplinary exchanges bring with them different methodological commitments and outlooks. They enrich the subject, especially when the question is the empirical content of the analysis developed by comparative law and the theory of it. Where comparative law expertise poses problems concerning the law and its empirical 'take', some answers come from these other fields, as I have shown. Furthermore, any conclusion about what 'globalisation' implies is better illuminated by the study of empirical evidence. To have the means to establish what consequences follow from it, e.g. for human health, when transnational actors set in motion, is necessary to draw conclusions on such a complex dynamic.[129]

Within this overall framework, comparative law has seldom explicitly taken a stance on questions of justice as an integral part of the comparative exercise. I will not raise the question of whether there were reasons to ignore them in

[125] Foblets, M-C, Goodale M, Sapignoli M, and Zenker (2021) *Oxford Handbook of Law and Anthropology* Oxford University Press is a contribution towards changing this state of affairs.

[126] Duve, T (2020) 'What is global legal history?' (8, 2) *Comparative Legal History* 73; for an outstanding collection of essays: Moréteau, O, Masferrer, A, and Modéer, K A (eds.) (2019). *Comparative legal history* Edward Elgar Publishing.

[127] Laske, C (2013) 'Translators and legal comparatists as objective mediators between cultures?' In Husa, J and Van Hoecke, M (eds) (2013) *Objectivity in law and legal reasoning* Hart Publishing 213; Husa, J (2017)'Translating legal language and comparative law' (30, 2) *International Journal for the Semiotics of Law* 261; Curran, VG 'Comparative Law and Language' in Reimann, M, and Zimmermann, R (eds) (2019) *The Oxford Handbook of Comparative Law* supra note 11 681 and following Ferreri S, DiMatteo LA (2019) 'Terminology Matters: Dangers of Superficial Transplantation' 37 B.U. Int'l L.J. 35; Pozzo, B (2019) 'Legal transplant and legal translation: how language impacts on the reception of foreign legal models' In Simonnæs, Iand Kristiansen, M (eds.) (2019) *Current Issues and Challenges in Research, Methods and Applications* Frank & Timme 65 ; Ioriatti, E (2021) 'Comparative Law and Language: Towards a European Restatement?' Global jurist 1. These citations are just the proverbial tip of the iceberg.

[128] Compare Siems, M. (2019) 'The power of comparative law: what types of units can comparative law compare?' (67, 4) *American Journal of Comparative Law* 861.

[129] See, e.g., Labonté, R (2019), 'Trade, investment and public health: compiling the evidence, assembling the arguments' 15 Global Health 1.

past. Even if there were, then it is less clear why there should be today.[130] Yet there is still some reluctance to explore or discuss in more explicit terms all the dimensions of the comparison relating to questions of justice.

Comparisons are made to test some hypotheses, and much of what is being compared actually already incorporates a dimension relating to 'justice', however defined. Many institutions across the world are upheld by recourse to that quintessential notion, which in the history of the comparative law literature has often appeared as variable from place to place, from context to context.

Questions of justice concern multiple aspects, such as recognition, distribution, sustainability, etc. How to avert the impeding ecological catastrophe for humanity and the planet that entirely is entirely part of these debates.

Each of these aspects can be examined through comparisons in various contexts. By the same measure, comparative law itself must be able to discuss its approach to these issues, and accept responsibility for its contributions to policies that protect the weak, or make their position more difficult. Whether the law pushes in one direction or another when it comes to consider how the law works around the world is a legitimate question. These and other similar questions are merely outlined here because they have been traditionally discussed at the national level. They should now be carefully pursued as a vital part of the discussion of what globalisation implies, in terms of its unequal consequences for societies and human groups, with disparate impacts on winner and losers.[131]

CONCLUSIONS

Comparative law has grown enormously in recent years. Living in a more complex, more interconnected world has produced an expansion rather than a contraction of the subject. This has raised new challenges, and opened up new horizons for our subject. It has also helped to bring into the arena of comparative law new practitioners of the art from various parts of the world. New perspectives on the vocation of comparative law as a means to know how the law unfolds in various places have emerged. The once prevailing, nearly exclusive attention to the national dimensions of the law is a thing of the past. A strong awareness has matured about what lies beyond the State and how to work on these dimensions of the law. Comparative law thus plays a major role in clarifying how various legal regimes, deriving from diverse origins, interact at the world and at the regional, national and sub national level, as well as structures of various transnational communities. A big part of the story is the emergence of truly global legal regimes, but the impact of globalisation on the law cannot be reduced to that. In any case, comparative law is indispensable to map the dynamics of (attempted) transfer and ad hoc adaptation that are part of world-wide trends. All these tasks go beyond the traditional contribution of comparative law to developing uniform laws by way of treaties and conventions. Although global trends in a number of domains have emerged, this is not a world without borders. In this context, comparative law should be fully aware of

[130] See the literature cited supra note 24.

[131] More on this in: Graziadei, M (2017) 'Dentro le dinamiche della globalizzazione: questioni di riconoscimento e di giustizia distributiva' [Inside the Dynamics of Globalisation: Issues of Recognition and Distributive Justice], *Annuario di diritto comparato e di studi legislativi* 338.

how globalising and localising processes are mutually constitutive, rather than reciprocal opposites. They shape each other, and thus co-exist. No unilinear process is at work here. Complexity prevails, often beneath the crust of apparent similarity, and legal pluralism is a manifestation of this situation. There is now an unprecedented possibility of mutual, positive learning across boundaries through comparative studies of the most diverse phenomena, although history is there to remind us that not all lessons are eventually learnt.

Our discipline is still confronted with tendencies that highlight both the universalising and the localising views of the subject. I think this makes comparative law more interesting than many other subjects, provided that these ideologies—as I have labelled them—are not couched in irreconcilable scripts, but are linked to a sustained reflection on what each of them achieves. That reflection calls for an analysis on law as conveyed by language, and on the translation processes across languages, of what can be described through it, and what is instead ineffable. Once more, not all notions or categories are designed for travel across space and time. Lastly, I have expressed a concern for the capacity of comparative law to address themes related to justice. Globalisation has had an effect in this respect too, by making entire communities, groups, and individuals more alert to these dimensions of the comparison too. Traditionally, issues of justice have been discussed at the national level. Theories of justice at the global level are still very much debated. Nonetheless, if the trends that have prevailed in the last quarter of the twentieth century and in the first decades of the twenty first century will continue to prevail in the future, this will happen because they are able to satisfy demands for justice in a world that is no longer governed by national and international legal regimes only.[132] There is a lesson for comparative law here. One can thus conclude by quoting a classic, 'But one must not always so exhaust a subject that one leaves nothing for the reader to do. It is not a question of making him read but of making him think'.[133]

[132] Delmas-Marty, M (2020) 'Governing Globalisation through Law' 11(2) *European Journal of Risk Regulation*, 195.

[133] Montesquieu, C (or. ed. 1748: 1989) *The Spirit of the Laws* Cohler, AM Miller, BC, and Stone, HS (eds) Cambridge University Press at 186.