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Breaking Barriers in Comparative Law

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I PATRICK'S PATH

H Patrick Glenn's works have contributed to the renewal of comparative law studies in several ways. A major, lasting contribution has been the revitalization of the notion of 'tradition'. This is the cornerstone of his *Legal Traditions of the World*, the textbook that grew out of his courses at McGill University to become a standard reference for comparative law teaching around the world.[1] The intuition that the notion of 'tradition' – in the plural – could become the intellectual frame to compare a variety of laws under a shared, common roof has been fruitful and productive beyond expectation.

A fitting example is the use of the notion of tradition by the Treaty on the European Union. The Treaty speaks of 'tradition' with respect to fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States' recognizing that they shall therefore constitute general principles of EU law.[2] The Preamble of the EU's Charter of Fundamental Rights and Article 52(4) of the same document also reference that key notion to the same effect.[3] The European Court of Justice has relied on the notion of tradition to adjudicate over a hundred high-profile cases.[4] Still, the potential of the notion is

[*] I wish to thank Amy Cohen for her comments on the draft of this chapter. The usual disclaimer applies.

[1] The fourth edition of the book was translated into Italian: see H Patrick Glenn, *Tradizioni giuridiche nel mondo: La sostenibilità della differenza* (Sergio Ferlito tr, Il Mulino 2011). For the relevance of Glenn's scholarship for legal historians, see Thomas Duve, 'Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History' (2018) 6 *Comp Leg Hist* 15.

[2] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 6(3).

[3] Charter of Fundamental Rights of the European Union [2007] OJ C303/01. See Sabino Cassese, 'The "Constitutional Traditions Common to the Member States" of the European Union' [2017] *Rivista Trimestrale di Diritto Pubblico* 939.

[4] Michele Graziadei and Riccardo de Caria, 'The "Constitutional Traditions Common to the Member States" in the Case Law of the Court of Justice of the European Union: Judicial Dialogue at Its Finest' [2017] *Rivista Trimestrale di Diritto Pubblico* 949. After the publication of this article, the ECJ

not exhausted. In 2018, the European Law Institute thus launched a collective project: 'To identify the source of Common Constitutional Traditions in Europe; their content; their relationship with national identity; whether they are an autonomous source of European law and the way in which they emerge as common to Member States and are expressed as such.'[5] Inevitably, this project will contribute to further highlighting the operative dimensions of the concept, showing why it is linked to a pluralistic approach to the development of law, and to the evolution of the law in the European Union.[6]

This is just one example, among many, of Patrick Glenn's ability to cast light on the direction of legal change, and to draw attention to the need to be prepared for it.[7] *Legal Traditions of the World* is the result of a sustained reflection on comparative law, focused on the current epistemological conditions of this academic subject. The ideas that lie at the root of that work were not widely shared in academic circles when they were first expressed. Patrick had to break down more than a few intellectual barriers to present comparative law neither as a complement nor as a supplement, to positivism, but as an alternative integrative enterprise, unfolding at the world level, and yet deeply interested in local knowledge. In this, he was all but a traditionalist, and this is also why, as Neil Walker rightly notes in his contribution to this collection, for Patrick, comparative law was always a subject in part defined against itself. Patrick coherently illustrated this vision over the years, and his wonderfully rich, thought provoking, and inspiring books on the cosmopolitan state[8] and on the common laws[9] of the world are powerful statements of it, along with the book chapters and scholarly articles in which he presented that vision.[10]

referenced the notion once more in the all important Case C-42/17, *Criminal Proceedings Against MAS and MB* (ECJ 5 December 2017) (*Taricco II*), para 53.

5 Sabino Cassese, Mario Comba, and Jeffrey Jowell, 'Freedom of Expression as a Common Constitutional Tradition in Europe', 2018, (*European Law Institute*) <www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/cct-in-europe>.

6 In this context, the dynamic nature of 'tradition' vindicates Glenn's reconstruction of that notion. Indeed, as David Nelken makes clear in Part I of his chapter, for Glenn, '. . . tradition is more an engine of change than a guarantee of permanence . . . .' David Nelken, Chapter 8 in this volume. In the EU context, reference to 'constitutional traditions common to the Member States' plays a conciliatory role that is fully in line with Glenn's elaboration of the notion of tradition. Martin Krygier's chapter in this book shows, however, why thinking of law in terms of traditions will not always be conducive to the mutual accommodations among legal and social orders that Glenn intended to favour. See Martin Krygier, Chapter 6 in this volume.

7 H Patrick Glenn, 'Quel droit comparé?' (2013) 43 *RDUS* 23.

8 H Patrick Glenn, *The Cosmopolitan State* (OUP 2013) (hereafter Glenn, *TCS*).

9 H Patrick Glenn, *On Common Laws* (OUP 2005).

10 I am thinking in particular of H Patrick Glenn, 'Choice of Logic and Choice of Laws' in H Patrick Glenn and Lionel D Smith (eds), *Law and the New Logics* (CUP 2017); H Patrick Glenn, 'A Transnational Concept of Law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP 2005); H Patrick Glenn, 'Are Legal Traditions Incommensurable?' (2001) 49 *Am J Comp L* 491; H Patrick Glenn, 'The Capture, Reconstruction and Marginalization of Custom' (1997) 45 *Am J Comp L* 613.

Patrick soon recognized that an unprecedented level of pluralism and cosmopolitanism was to shape the law in the twenty-first century. From the protection of the environment, to the management of health risks, from the regulation of labour conditions, to access to credit and payment systems, nearly all spheres of social and economic life are now affected by the tendency to inscribe the local dimensions of communities and individuals in the wider legal landscape, existing beyond and across state borders. Other factors as well work in the same direction, such as the direct or indirect influence of religious laws on individuals and their social life. The law of the state is thus interdependent with competing sources of authority. This dynamic is occurring on such a large scale because, contrary to what Kant and other thinkers suggested later on in the nineteenth century, no world government is established to rule the world in our time (and the demand for it has beaten a full retreat). The recent wave of nationalism that is reverberating around the world confirms this diagnosis. Highly contradictory and fragmented sets of regimes thus prevail beyond the state, as the effect of an integration process in which politics is not first in line.[11] It is mostly powerful socio-economic players, along with the availability of rapidly evolving technologies, that have driven globalization and have determined its concrete content. Politics and the state have adapted to this evolution, which has been supported by the growing weight of international and supranational institutions, and more widely by the rise of new global actors. The consequence is that the concrete form of globalization of law that we have is mostly a spill-over effect of particular developments occurring in various directions, and across many fields, in response to special interests and particular problems. This movement was matched at the constitutional and international level with increased convergence around certain values that are now more largely shared around the world.[12] The quest for justice, however, is far from being exhausted by the reference to these values, and is still precarious and uncertain in a world in which the distribution of wealth remains disproportionate both across countries and within them. The issue of justice on a world scale is thus emerging as a central subject for a number of academic disciplines, including political philosophy,[13] economics,[14] and international law.[15]

Within this landscape, two opposite representations of the law, arising in different arenas – from the field of international relationships and transnational commerce, to the more mundane areas of family law, property law, contracts and torts, administrative

[11] Gunther Teubner (ed), *Global Law without a State* (Dartmouth 1997) 3–28.

[12] See, eg, Dennis Davis, Alan Richter, and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law* (Bloomsbury 2015). For further considerations on this point, see John Bell, Chapter 3 in this volume.

[13] Chris Armstrong, *Global Distributive Justice: An Introduction* (CUP 2012).

[14] Dani Roderick, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton 2012).

[15] Frank Garcia, *Global Justice and International Economic Law: Three Takes* (CUP 2013); John Linarelli, Margot E Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018).

law, criminal law, and so on – have come to dominate thinking about the law in the contemporary age, namely legal monism and legal pluralism. The great merit of Patrick's work was to show how both have been transformed by the impact of the transnational and cosmopolitan dimensions of the law. Patrick knew that in many jurisdictions legal monism remains, for most lawyers, *the* framework to think about the law. Legal monism is still, to many, the orthodoxy, but for legions of lawyers in many jurisdictions, legal pluralism is now the most promising intellectual frame and the way to meet the challenge posed by the multiplicity of competing legal orders, coexisting at the same time, over the same territory. Furthermore, legal pluralism is often considered the best option to understand the dilemmas of individual action under the law, when the law makes contradictory demands. Nonetheless, Glenn also knew that these two frameworks of analysis do not exhaust the legal imagination, nor capture all that is possible and that is real. In the following pages, I thus intend to follow his steps, and pay tribute to his scholarship by highlighting the role that comparative law, legal linguistics, and legal anthropology play in shaping new thinking about the law in our age. Should the reader detect familiar features in what is presented later, this is because Glenn's seminal ideas have become a common reference point for a very wide audience around the world, well beyond the lecturing halls of McGill University.

In the following pages, I will first turn to the two alternative poles of contemporary jurisprudence, namely legal monism and legal pluralism, to offer my take on them. I will then consider what contributions comparative law, studies of law and language, and studies of law and anthropology can jointly make to cast light on the evolution of the law in the present age, which is markedly more pluralistic and cosmopolitan than many would have ever predicted, or would have ever wished.

II LEGAL MONISM OR THE LAW OF THE STATE

Legal monism is an analytical framework that is based on the recognition of the notion of sovereign power, and of a sovereign state, from which all law emanates. We know the predicament: for each territory, there is a sovereign state and, in that territory, a population governed by the organs of the state through the law, for whom the state is responsible. The applicable law is the expression of the will of the state, as enforced by its agents.

With the advent of democracies, the will of the sovereign was turned into the will of the people, and the idea of democratic self-government was then upheld on the basis of democratic constitutions. The assumptions upholding this framework remained the same, however, and legal monism was not abandoned, although the transition to democratic governments posed several serious and, to an extent, unresolved challenges to it.

The structure of the state is not the same everywhere. A federal state would have multiple levels of government, and lawyers working in a federal jurisdiction are surely less prone to ignoring the possibility of multiple norms emanating from

various centres of power. In the federal context, no general will of the people is to be implemented, as no centralized and homogeneous polity exists.[16] Nonetheless, legal monism often remains the principal tool of the trade, insofar as the law as an emanation of the state is still considered to be a generally accepted, legitimate means of government.

The law of the state is applicable to the generality of citizens, on the basis of the political bonds constituting citizenship. In this sense, it is of universal application and neutral as a means of government, given the formal equality of all citizens before the law. Often, the legitimacy of the law of the state was at first secured by the assumption of divine sanction of political power, then by its democratic legitimation under more inclusive democratic constitutions. The legitimacy of the law of the state also depended on the notion that state boundaries mark the limits of state power. This shaped the dynamic of international law, which was traditionally conceived as the law concerning the relations between states, each state being sovereign in its own territory.

The virtue of this great framework was its ideal simplicity. Apparently, the implication of this model was that the unity of the state implied the unity, rather than the multiplicity, of the law. Here I must stop to notice a first paradoxical fact, which Glenn duly emphasized in *The Cosmopolitan State*.[17] This ideal was never fully achieved in the old days of absolutistic rulers and legal regimes. The law of France, for example, was never completely unified under the King of France. During the *ancien régime*, customs of various kinds existed outside the domain of state law and thus posed a challenge to its effectiveness. State law did not claim to govern the life of French subjects in every respect. Apart from customs, religious laws and religious courts had a strong hold on the life of individuals and communities.[18] One has to wait for the collapse of the *ancien régime*, and the instauration of the Napoleonic rule, to actually have the monopoly of state law established over every other kind of law in every domain of social life, and even then custom (and canon law) did not completely disappear.[19]

Legal monism did not rule out the possibility of the evolution of a universal law for the entire world. Rather, it assumed that the development of such laws would have required the creation of a single sovereign and a single legal community constituted at the world level. Short of a world government, legal monism allowed for a law governing the relationship among the states, but could not conceive secular laws applicable across the entire world, which were not sanctioned by state authorities or resulting from state practices.

[16] For penetrating reflections on this point, see H Patrick Glenn, 'Conflicting Laws in a Common Market? The NAFTA Experiment' (2001) 76 *Chi-Kent Rev* 1789.

[17] Glenn, *TCS* (n 8) 49–50.

[18] A case has been made for the productive effects of this duality: see Harold J Berman, *Law and Revolution* (Harvard University Press 1983); Paolo Prodi, *Una storia della giustizia* (Il Mulino 2000).

[19] Cf H Patrick Glenn, 'The Capture, Reconstruction and Marginalization of "Custom"' (1997) 45 *Am J Comp L* 613.

III FACTORS UNDERMINING LEGAL MONISM

Over time, several factors undermined legal monism as a working hypothesis. The list of these factors is long.[20] Some of them have been more prominent than others. With respect to the European context, the rise of democratic governments and the development of transnational economic relationships probably have had a decisive impact. Beyond Europe and the Western world, legal monism has been defeated – if it ever ruled – by a more complex set of circumstances. They include the sheer complexity of the law on the ground and a persistent gap between the authority of the state and its laws on one side, and those followed by communities and individuals on the other side. In colonial times, the fault line also reflected the existence of unequal legal regimes established by the metropolitan state and its organs towards individuals and groups in the colonies.

The first set of factors I mentioned with respect to the European scenario, that is, the rise of democracy and the development of transnational economic relationships, show the working of forces pulling all in the same direction. These forces go together with the recognition of an unprecedented level of personal autonomy.[21] Democracy brings with it a new kind of pluralism, because democracy thrives thanks to the political and the legal recognition of a plurality of values and opinions.[22] Democratic constitutions accommodate a plurality of values, which are often in conflict. They preserve the possibility of finding an equilibrium among them, without suppressing one or the other. A well-known instance of this dynamic is the balancing exercises that are characteristic of all areas of the law under contemporary democratic governments. Indeed, the strength of contemporary democracies comes from the competence they have in handling such conflicts by upholding a plurality of values despite the tensions existing among them. Democracies declare and defend the equality of citizens before the law, but they also allow for individual diversity and personal and collective autonomy. A vibrant democracy must therefore be able to accommodate diversity under its constitution. This leads to a new kind of 'open' legal monism, which is inclusive rather than exclusive, and pluralistic in terms of citizens' participation in democratic life and life trajectories.[23] As

[20] For a brilliant, in-depth analysis of some of them, see Gunnar Folke Schuppert, Chapter 14 in this volume.

[21] The early diagnosis of this movement is linked to the name of HS Maine: see Henry Sumner Maine, *Ancient Law* (London 1861) 170 ('from status to contract'). On its present value, see Katharina S Schmidt, 'Henry Maine's "Modern Law": From Status to Contract and Back Again?' (2017) 65 *Am J Comp L* 147. For a revealing critical analysis of the contradictions in Maine's thought, see Veronica Corcodel, 'The Governance Implications of Comparative Legal Thinking: On Henry Maine's Jurisprudence and Liberal Imperialism' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014).

[22] Harold Laski, a long-time correspondent of Oliver W Holmes Jr and other legal realists, was one of the most influential political thinkers who defended a pluralistic view of society. Since his time, political pluralism has branched off in many directions.

[23] Cf Marie-Claire Foblets, Michele Graziadei, and Alison Dundes Renteln (eds), *Personal Autonomy in Plural Societies: A Principle and Its Paradoxes* (Routledge 2018); Kyriaki Topidi (ed), *Normative Pluralism and Human Rights* (Routledge 2018).

such, it allows for reasonable accommodations, as well as principled compromise over ethical dilemmas, such as those relating to abortion or end-of-life decisions. Instances of pluralism within the framework of state law concern labour conflicts, citizen participation in administrative decisions about, for example, environmental governance, the regulation of matters relating to the freedom of religion, and so on. The framework of state law in modern times is needed to guarantee the possibility of such pluralism by establishing the equality of all citizens before the law. The rise of democratic governments in areas of the world where large parts of the population were excluded from government and did not enjoy full citizenship, or even full legal recognition as subjects of rights, eventually involved a turn towards a more inclusive and pluralistic approach to citizenship and democracy. The recent constitutional changes of countries like, Colombia, Peru, and Ecuador (which introduced the recognition of indigenous rights), for example, are telling in this respect. To be sure, at first democracy was not for all and everybody. Democracy in the United States did not mean equal rights for all for the greatest part of the history of the Union. The end of racial segregation and the emergence of the civil rights movement is still within memory for many US citizens. Canada's appalling assimilationist policies towards indigenous peoples were abandoned only gradually beginning in the 1970s. Significant gestures towards truth and reconciliation for past abuses are much more recent. Closer to home, in Europe, constitutions banning discrimination based on a variety of grounds became common only after the end of the Second World War. The job is clearly not finished if we consider gender-related issues.[24]

International regimes securing the respect of individual rights beyond the national sphere have a part in this story. National courts are often unwilling to secure justice in the presence of violations that are not perceived as such by national authorities, or which are perpetrated by actors protected by the state. This explains why, when the promotion of universally recognized values is in danger, the international community can consider intervention to support or – in extreme cases, such as those concerning the prosecution of war crimes – replace domestic judges, particularly in securing justice. This essentially means that even constitutional courts today may not be the ultimate arbiters of a dispute in which such values are involved. Indeed, constitutional courts and other supreme courts in Europe have gradually learned to defer to the jurisprudence of the European Court of Human Rights. Within the ambit of the European Union, constitutional courts have also begun to refer questions for a preliminary ruling to the European Court of Justice. The recognition of these obligations is inevitably a factor of crisis for any view of the law that considers state law as the only source of legal authority.[25] Unsurprisingly, political leaders tend to deny this reality in the name of national sovereignty, as happened when the European Court of Human Rights delivered important rulings

[24] Ruth Rubio-Marín, 'Women in Europe and in the World: The State of the Union 2016' (2016) 14 *ICON* 545.

[25] Sabino Cassese, 'The Globalization of Law' (2005) 37 *NYU J Int'l Law & Pol* 973.

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in controversial cases, such as those concerning, for example, the voting rights of prisoners in the United Kingdom.[26]

As mentioned earlier, the second great force at work to undermine legal monism is the development of transnational economic relationships. The decision to end those beggar-thy-neighbour economic policies that were among the causes of the Second World War was a decisive step in this direction. The establishment of these relationships owes a great deal to the intrinsic means that private law has to develop cross-border interaction.[27] Although the state, through its organs, enforces private law as well as public law, private law has historically enjoyed a degree of autonomy from the state, being the expression of personal and group autonomy, namely of an independent capacity for self-organization. Indeed, human societies existed for millennia without resorting to state organization. Only under totalitarian dictatorships, in a war economy, or under similar regimes, does the state tend to absorb and suppress private law, as it did, for example, in the Soviet Union. As history shows, such regimes are exceptional, precisely because they suppress a capacity for autonomy that is inherent in individuals and communities. Apart from extreme cases represented by totalitarian regimes, private law arrangements are binding beyond the state, except when they are contrary to the local legal order, typically represented by *ordre public* rules. Drawing attention to this self-sustaining capacity of private law does not imply that private law is politically neutral or value free. Many private law rules reflect specific political arrangements, or certain sets of values, that are often common to public laws. Nonetheless, even when it pursues specific political goals or values, private law relies on mechanisms of decentralized decision-making that distinguish it from public law, a feature that is still evident beyond the decline of the idealised, classical versions of that distinction.[28]

The full implications of the establishment of networks of international economic relations for the state and its monopoly of legislative power were already clear to eighteenth-century thinkers, who reflected on the rise of international currency markets. They are set out with great clarity by Montesquieu in his *Spirit of the Laws*, a work that is a milestone in the history of comparative law studies and political science.[29] In that masterpiece, Montesquieu noticed that bills of exchange secured, for the first time in history, the possibility of transferring money from one

[26] The leading case is *Hirst v UK (No. 2)* ECHR 2005-IX 681. It is significant that the UK judiciary distanced itself from the reaction of the government in this matter.

[27] Daniel Caruso makes the point that '[i]n this context, private law is a central subject in globalization discourse, and contributes in many ways to the decline of the state'. Daniela Caruso, 'Private Law and State-Making in the Age of Globalization' (2006) 38 *NYU J Int'l Law & Pol* 1, 3.

[28] For an instructive analysis, see Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *U Pa L Rev* 1349 (tracing the public/private distinction from its heyday to its collapse); for a thorough treatment, see Ralf Michaels and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' in Nils Jansen and Ralf Michaels (eds), *Beyond the State: Rethinking Private Law* (Mohr Siebeck 2008).

[29] Montesquieu, *De l'esprit des lois* (Geneva 1748). On what follows in the text, see in particular Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* (2nd edn, Princeton University Press 1997) 70ff.

place to another quickly and cheaply, and that money exchanges introduced the possibility of buying and selling various currencies, and thus imposed new limits on the actions of rulers. The power of commerce domesticated rulers, so that under those new circumstances – according to Montesquieu – only the goodness of the government could confer prosperity. The violent exercise of state authority leads to the fall of the ruler, rather than to its success, as the local currency falls vertically on international markets. Montesquieu knew that the issuing of money is a manifestation of sovereignty, but he was also able to highlight the essential point: the value of a state's currency is in the hands of international markets. They operate beyond the powers of a single state, and unilateral action by a single state cannot govern them.

Transnational trade involves the integration of markets. There are many ways to obtain market integration. Some of them, once more, are conducive to a greater pluralism than a national legal system, in principle, would allow for. Market integration in Europe was carried out through harmonization measures and by regimes of mutual recognition in the provision of goods and services. Legal harmonization involves a hierarchical transfer of sovereignty between the member states and the EU, but mutual recognition involves a horizontal transfer of sovereignty, insofar as the rules of one country are given effect in another country: as long as goods or services are legally marketed in a member state, they can also be marketed in all other member states. As one commentator observed, under this regime, '[m]ember states can no longer guarantee a certain level of regulation of products marketed to their nationals as these regulations are being determined by other countries. The previous unity of territory, legitimation and the setting of rules is broken up'.[30] Transnational economic transactions, by requiring a certain degree of market integration, bring new problems. Legal monism cannot be the frame of reference to understand, analyse, or control those problems.

IV LEGAL PLURALISM: LAW BEYOND THE STATE

As a frame of reference to understand the law, pluralism has a remarkable history. This history shows that 'pluralism' must be defined in the plural, rather than in the singular: legal pluralism represents a group of conceptions that share certain common features, but differ in other respects.[31] Furthermore, other catchwords also convey ideas closely related to those currently put under the label 'legal pluralism'. For example, Masaji Chiba, a leading figure among scholars working on legal pluralism, rightly observed that the notion of legal culture evokes the multiplicity of sites where the law is produced, just like the notion of legal pluralism does.[32]

[30] Susanne K Schmidt (ed), *Mutual Recognition as a New Mode of Governance* (Routledge 2008) 6.
[31] Emma Patrignani, 'Legal Pluralism as a Theoretical Programme' (2016) 6 *Oñati Socio-Leg Series* 707.
[32] Masaji Chiba, 'Other Phases of Legal Pluralism in the Contemporary World' (1998) 11 *Ratio Juris* 228.

In the European context, legal pluralism as a theoretical framework for exploring the interplay of state and non-state legal orders is at least a century old. The roots of the idea go back to the notion of social law and living law, linked to the autonomous practice of social groups and their interactions with state officials. Eugen Ehrlich, an opponent of both legal positivism and legal monism as represented by Hans Kelsen, was the eminent advocate of this conception of the law.[33] His valuable work never fully penetrated mainstream legal thinking in Europe, but his intellectual legacy was an important one for all those who rejected legocentric statism as an ideology. Recently, his work inspired Gunther Teubner's reflections on the structure of global law.[34] As mentioned earlier, with the rise of contemporary democracies, the protection of a plurality of beliefs, values, and modes of life, and the recognition of individual and collective autonomy as the foundation of democratic life vindicated a pluralist approach to democratic constitutionalism. Whenever this turn happened, this conception gained ground, becoming the norm as part of the development of democratic governments after the fall of dictatorial regimes.[35]

A second wave of interest in legal pluralism originates in the context of colonial and postcolonial regimes. In the colonies, a plurality of legal orders was in place. Those regimes were not operating on equal footing, as the colonizers refused to accept and live by local customs or local systems of law and justice, opting instead for the application of the legal regimes they brought to the colony. These regimes did not necessarily reflect the values and the structure of the system of government prevailing on the metropolitan territory. For example, colonial rulers ignored the division of powers, even when the metropolitan constitution was based on it. Furthermore, the local laws did not usually provide for institutions that governed certain types of transactions and relationships that were typical of a modern, industrialized economy, based on the division of labour (eg, commercial transactions, labour law). With independence, the foundations of the local power systems changed, and yet the newly independent states, whether they opted for democracy or not, often did not develop 'single, vertically integrated sovereignties sustained by a highly centralized state'.[36] A single law for the entire territory was very often beyond question. Legal pluralism was thus the condition of entire continents, either by choice or necessity.[37]

Probing deeper into this matter, it turns out that pluralistic legal arrangements are neither irregular occurrences in the history of European law nor are they to be found only in countries that once were subject to colonization. When the question is

[33] For a presentation and a discussion of some of the key notions and ideas presented in his work, see Marc Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (Hart 2008).

[34] Teubner (n 11).

[35] See the discussion in Nick W Barber, *The Constitutional State* (OUP 2010) 145ff.

[36] Jean Comaroff and John L Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006) 35.

[37] Brian Z Tamanaha, Caroline Sage, and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (CUP 2012).

examined on an international scale, legal pluralism is to be recognized as the predominant way of living under the law, rather than the minor or marginal exception.[38]

Pluralism is not simply the outcome of the simultaneous interaction of different bodies of law or of norms. As the law changes over time, it simultaneously exhibits elements of the old and new order, operating in the same context. This part of the story is well known to legal historians. From monarchy to republic, from fascism to democracy, from socialism to capitalism, at every turn in history, legal historians detect the permanence of certain elements of the old in the new institutions, and in the new legal discourse. Overlapping normative regimes over time are yet another triumph of pluralism as an essential feature of the law.

Lastly, legal pluralism can be approached from the perspective of the subject, as Jacques Vanderlinden did when he abandoned his former rule-oriented approach to redefine legal pluralism in the following terms:

> [F]rom the standpoint of the individual . . . it is the condition of the person who, in his daily life, is confronted in his behavior with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is, voluntarily or not, a member.[39]

By adopting the perspective of the subject, this conception highlights the role of agency over structure in the law. The law can indeed be one of many tools available to advance individual purposes and ends, rather than the formal expression of an overarching social order. From here it is but a short step to think that state law does not play at all the dominant role that legal monists assign to it. Some enthusiastic adopters of pluralism seem to think that state law is almost a sort of dangerous collective (and malfunctioning) illusion.[40] Although the failures of state law are numerous, and the disasters brought about by certain experiments with modernization are immense,[41] what is done in the name of the state is not at all that illusory, preposterous, or ineffective.

The crucial point lies in a different consideration: the sanctity, legitimacy, morality, and effectiveness of state law is no longer self-evident, nor beyond discussion (if it ever was). Its goals and means are to be justified, its efficacy empirically tested, rather than assumed. The law emanating from the state intersects different notions of justice, morality, and social order in different social contexts, and may be called into question by a variety of forces. If those notions and those forces are sustainable over the long term, they may pave the way to a regime change. What was

[38] This is also true with respect to religious systems of law, as shown in Ahmed Fekry Ibrahim, Chapter 9 in this volume.

[39] Jacques Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 8 *J Leg Plur* 149, 153–54.

[40] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34 *J Leg Plur* 37 (providing a careful statement of the pluralist position in this respect too).

[41] James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1999).

staunchly opposed by the state yesterday may become today's new code. Those who unthinkingly resisted change all along the way, turn out to be the losers in the game, losing the moral high ground.

V COMPARATIVE LAW IN THE AGE OF GLOBALIZATION

It is now time to turn to the three disciplines mentioned earlier to examine how they bring about a better, more realistic understanding of the contemporary legal landscape. The first pillar of a renewed approach to law still involves comparative law, a discipline that has been reinventing itself in recent decades. Why does comparative law remain an essential tool in carrying out serious legal analysis in our time?

In our epoch, a world government is not imminent, nor does there seem to be much appetite for it. Transnational and international legal regimes are the response to problems, concerns, and challenges spanning state borders. Climate change, large-scale environmental pollution, cross-border economic transactions, disease outbreaks, and the regulation of the internet, among others, are issues that require regulation at the world level. The institutions and norms that are in place around the world to tackle these problems constitute the present structure of the global legal order. But the order we have (to the extent we have it) is sector specific, and is fragmented rather than general as well as territorially limited. No government runs it. This is why we speak of *governance*, and not of *government* when these themes are addressed.[42] The study of this new world order is the study of the myriad of legal regimes that substantiate it, many of which are based on a dynamic of transplantation, or rather, of imitation and adaptation of specific legal institutions, as well as of original innovations, policies, and none of which is exclusively the product of a single ruling power.

A huge amount of comparative law literature is currently dedicated to analysing this dynamic and to the resulting tapestry of norms. I think this explains something about the field itself, which is characterized both by international tendencies to integrate different legal regimes and by a high level of fragmentation and regime collisions, which explains why 'pluralism' is a label that has been applied in this context too.[43] The task of studying this multiplicity of regimes is by and large a principal task for the community of comparative lawyers and their allies. If the comparative law community is not up to the challenge, others will step in to do the job. Consider that policymakers are already making wide use of comparisons that include elements of the law as well. Several international institutions and entities

[42] Jacob Torfing and Eva Sørensen, 'The European Debate on Governance by Networks: Towards a New Paradigm?' (2014) 33 *Policy & Society* 329.

[43] On this, see Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *S Cal L Rev* 1155; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *TLT* 141; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

have been at work to produce indicators and rankings with the intention of representing how legal systems of the world perform in various sectors. These indicators and rankings are both sources of knowledge about societies and technologies of governance, as they are also used by market actors, NGOs, states, national administrations, and international organizations. Many of them draw explicitly upon the comparative law literature available on legal change, legal institutions, and law and development. It would be surprising if comparative lawyers were to miss the uptake of their discipline in understanding how the law is shaped at the world level.[44] Finding appropriate means to discuss the choices that are made around the world with respect to legal change and reform is a mission of the comparative law community in today's globalized world. Comparative law is deeply involved and interested in developing an informed critical debate about legal change at the world level, its effectiveness in pursuing democracy, social inclusion, justice and fairness, and the respect of legality across state boundaries.

VI LEGAL LINGUISTICS, TRANSLATION, AND COGNITION

Legal pluralists are often confronted with the argument that nobody today really believes anymore in the picture of legal monism and state law portrayed earlier.[45] In the twentieth century, the jurisprudential attack on mechanical jurisprudence opened up the Pandora's box of the law's indeterminacy. Under this condition, the plurality of interpretations that compete to respond to that indeterminacy seem to further strengthen the pluralist position. This theoretical move – the interpretivist turn – is not as iconoclast as it may seem, however.[46] The common wisdom shared by legions of lawyers is still that words frame the law and control its content.[47] Accordingly, the tendency is to assume that only in specific and somewhat exceptional cases is the link between language and law unstable, thus requiring a more prolonged and deeper analysis of the language employed by texts or proffered orally that should express the law. The fact that similar cases are regular occurrences all year long in the courts of every country has not been enough to shake this faith in the power of words.

[44] For a view from the trenches, see David Trubek, 'Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method?' [2014] *Nagoya U JL & Pol* 11. In a critical vein, see Kevin Davis and others (eds), *Governance by Indicators: Global Power Through Quantification and Rankings* (reprint, OUP 2015).

[45] See, eg, Ido Shahar, 'State, Society and the Relations between Them: Implications for the Study of Legal Pluralism' (2008) 9 *Theo Inq L* 417.

[46] This is my reading of Duncan Kennedy, *A Critique of Legal Adjudication: Fin de siècle* (Harvard University Press 1998).

[47] Against it, see Roderick A Macdonald, 'Custom Made – For a Non-Chirographic Critical Legal Pluralism' (2011) 26 *Can JL & Soc'y* 301 (highlighting the significance of implicit and inferential legal norms in the working of written law as well, so that regimes of written rules too are consistently made over by those whose conduct they are presumptively meant to govern).

Language is indeed a much more complex affair than many lawyers and accomplished legal scholars would suspect, or would like to think, or openly admit. This point comes out dramatically when communication must take place across different languages and with reference to different legal systems. Considering how legal change occurs today around the world, the crucial point is that any transition from the law expressed in one language to that expressed in another language raises communication and translation problems. Just as there is no global universal law, but rather a whole set of fragmented transnational legal regimes aspiring to universality, there is no universal language that carries uniform meaning around the world; there is, rather, a multiplicity of languages that do not necessarily overlap in terms of possibilities of expression. This is a challenge for the framers of norms that should have transnational or international effects, as well as for operators who must work across boundaries. To take a relatively simple case, think of a company that must enact a set of rules for property investments to be followed by its management, in order to govern in a uniform way its property acquisitions in the different regions of the world. Can it frame those rules without regard to the law of any of the jurisdictions where a property acquisition may eventually occur? In which language should those rules be expressed? Which terms should such a company code use to achieve its purposes? Think of an NGO that speaks the language of human rights in carrying out its mission. How can it achieve its mission, and how should it convey the message to the local community?[48]

A good question for today's world is therefore how can we do justice to this plurality, which remains a challenge, even when there is broad convergence and agreement about what is to be done?[49] In other words to what extent are we able to cope with this linguistic and conceptual diversity? Most legal pluralists have not gone far enough in exploring this issue. By contrast, legal pluralists from Quebec, like Nicholas Kasirer, Daniel Jutras, and Patrick Glenn, who have produced outstanding contributions on this point, show an acute awareness of the problem.[50] The pity is that such awareness is not so widely shared by the rest of

[48] Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9 *Global Networks* 441; cf Lisbeth Zimmermann, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation* (CUP 2017).

[49] With respect to the framing of uniform law, see the brilliant essay by Gyula Eörsi, 'Unifying the Law (A Play in One Act, with a Song)' (1977) 25 *Am J Comp L* 658. See also Gerhard Dannemann, 'In Search of System Neutrality: Methodological Issues in the Drafting of European Contract Law Rules' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012).

[50] Nicholas Kasirer, 'Le *real estate* existe-t-il en droit civil? Un regard sur le lexique juridique de droit civil de langue anglaise' in Rodolfo Sacco and others (eds), *Les multiples langues du droit européen uniforme* (L'Harmattan Italia 1999); Daniel Jutras, 'Énoncer l'indicible: Le droit entre langues et traditions' (2000) 52 *RIDC* 781; H Patrick Glenn, 'Qu'est-ce que la common law en français?' (2003) 5 *RCLF* 97. Esin Örücü, in Chapter 4 of this volume, provides a profound reflection on how mixed legal system challenges mainstream comparative law; this is a point not to be missed in considering the dimension of the languages of the law.

the pluralistic tribe outside Canada. The lesson to take home is that comparative law can only achieve its objectives if it does not unwittingly attempt to force upon one system the language of another. Meeting the challenge involves finding adequate linguistic mediations among the languages that come into contact by working through translations, by building shared terminologies, etc. Learning more about how natural languages actually work, and what they achieve as expressive means in the various contexts, as well as mapping the similarities and differences among them, is a significant enrichment of the comparative enterprise.

The frontier of these studies is represented by translation and terminology studies, writing systems research, sociolinguistics, cognitive research on preverbal and non-verbal communicative behaviour and on their relation to verbal behaviour, and linguistic anthropology. So far, however, the comparative law community as a whole has just caught a glimpse of what it means to take up the challenge originated by the plurality of languages that normative communities have and use.[51] Attention to law and language research is constantly growing, but much remains to be done. In all the above-mentioned fields of research, an intellectual and scientific revolution has been going on over the years. Our understanding of how language works, how translations work and what they achieve, and what cognitive structures are involved in verbal and non-verbal communication has changed dramatically in the past few decades. The time is ripe to turn to these fields and benefit from research carried out in this direction, to close the knowledge gap, and open up the gates of comparative law to contributions that are of the highest theoretical and practical value. They will help to dissolve a good number of false problems plaguing some comparative law debates, such as those raised by the question of whether it is ever possible to convey exactly the same normative meaning across two different languages.[52]

VII COMPARATIVE LAW AND THE ANTHROPOLOGY OF LAW

In tapping into these resources, comparative law is not alone. It has a confederate in the neighbouring field of anthropology, and more specifically in the field of the anthropology of law. Although there are anthropologists who were first trained as lawyers, and lawyers who have turned to social anthropology in the later part of their

[51] This assessment is based on how the new generation of comparative law handbooks in English fares in this respect. See eg, Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 19–21, 130–31; Jaakko Husa, *A New Introduction to Comparative Law* (Bloomsbury 2015) 193ff; Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016), and on it, in a critical vein, see Pierre Legrand and Simone Glanert, 'Law, Comparatism, Epistemic Governance: There Is Critique and Critique' (2017) 18 *Germ LJ* 702. For an essential critical update, see Vivian Grosswald Curran, 'Comparative Law and Language' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019).

[52] For some clarity on this issue, see David Bellos, *Is There a Fish in Your Ear?* (Penguin Books 2011); David Bellos, 'Halting Walter' (2010) 1 *Camb Literary Rev* 207. Bellos denies validity to translation theories that aspire to translate the ineffable. I agree with his stance. Unfortunately, some translation theories advanced in the legal community as well aim precisely at that.

professional life, it remains true that the core tenets of these subjects have little in common. Anthropology does not share the same normative commitments, and the law goes about its business without incorporating many of the insights about its ways and shortfalls that anthropology has acquired.

In the sub-domains of comparative law and of the anthropology of law, the overlapping of spheres of research becomes apparent, however.[53] Comparative law does not have normative ambitions as such, but has instead a certain empirical orientation, which is shared with anthropology, and which is necessary to explore the various dimensions of 'otherness' and 'sameness'.[54] Anthropology, on the other hand, regularly meets many of the methodological problems with which comparative lawyers are familiar, and which are encapsulated in the classical and still very much open question: How to compare?

It is tempting to draw the dividing line between the two disciplines by holding that comparative law mostly covers the laws of jurisdictions that belong to the industrialized world. Its boundaries would then be set by the presence of the familiar institutions and tools of the legal professions, namely legislatures, courts, a public administration, legislative enactments, court decisions, administrative practices, academic commentaries on the law, and similar paraphernalia. On the other hand, legal anthropology would be called upon where learned jurists and lawyers are on unfamiliar ground, because the law is not presented as a distinct field of learning and practice, power is not exercised through state institutions and the corresponding bureaucracy, and there is no specialized legal vocabulary to discuss, for example, binding obligations, forms of ownership and possession, norms governing family life, and succession.

Nonetheless, in a changing world, the distinction based on this rough rule of thumb is a thing of the past, and if I were to cite a single book that has made the point, that book would be Glenn's *Legal Traditions of the World*. Anthropologists are thus now active in contexts where lawyers intervene in everyday practice. The anthropological study of, for example, the administration of justice, financial markets regulation, human rights regimes, international criminal procedures, constitution making, indigenous rights, and cultural heritage, has become 'nothing less than a critical anthropology of the present.'[55] This critique involves all kinds of law makers and legal operators that are on the scene, both at home and in less familiar places.

[53] Cf Fernanda Pirie, 'Comparison in the Anthropology and History of Law' (2014) 9 *J Comp L* 88; Fernanda Pirie, *The Anthropology of Law* (OUP 2013), and see as well with respect to the question of interdisciplinarity in the sociolegal field, Annelise Riles, 'Comparative Law and Socio-Legal Studies in Language' in Reimann and Zimmermann (n 51).

[54] Mauro Bussani, 'How to Do Comparative Law: Some Lessons to Be Learned', Chapter 1 in this volume, eloquently shows that Glenn's rejection of positivism as well as his comprehensive notion of normativity, go precisely in the direction of rendering this exploration salient for comparative law studies, as I also have argued earlier, under Part I.

[55] Mark Goodale and Sally Engle Merry, *Anthropology and Law: A Critical Introduction* (NYU Press 2017) 5.

Comparative lawyers, having abandoned the narrow notions of the law that marked the beginnings of their academic discipline – once called comparative *legislation* – are now taking up the challenge to work in contexts where the interaction between formal and informal law, official and alternative kinds of normativity, traditional and modern systems of laws, is ever present. For them, the matter often is how to render effective under state law as well, institutions that are rooted in the norms of the community. The last barrier to fall is, of course, that which leads us to take notice of the necessity of an anthropology of law with respect to the jurisdictions that are considered to be at the centre rather than at the periphery of the Western world.

Legal anthropology and comparative law should therefore join forces. If we think, for example, of how property is regulated, there is a need for a lawyer to understand how property is recovered by bringing legal proceedings, but there is a need for an anthropologist to understand how it is exchanged and shared by informal arrangements that may trump formal arrangements, and how a certain ideology of property is produced and upheld by social and institutional practice. Similar examples could be given with respect to business practices, such as the taking of financial collateral to secure debts.[56] Family life, the regulation of adoption and reproductive technologies, the functioning of administrative law, the regulation of religious practices, and so on are fertile grounds for collaboration. The dialogue across disciplines in similar cases helps us understand the complexity of social and institutional interactions: it is a necessity, not a luxury.

CONCLUSIONS

My conclusions are brief. The path towards a richer understanding of the world of social relationships through the study of law has been marked by an attempt to build explanatory models of the law such as those I have examined. These models all have a tendency to take on a life of their own. Inevitably, actors rely on their perceptions of their social environment to structure their discourses and practices. Quite often these perceptions soon turn out to align with a preferred ideology. In the contemporary age, movements towards more integrated laws across the globe have not followed the path once indicated by those philosophers, political scientists, and jurists who first imagined a world government. What we have at the transnational level are mostly sectorial integrations of specific subsystems. This is brought about by fragmented law, spun out of networks of actors who often claim only technical competence and legitimation. Global law thus results from interactions between a variety of local regimes that have been transformed and integrated by forces pulling for the establishment of transnational regimes, which are often still in the making.

[56] Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011).

Within this framework, comparative law has a place of honour as a means to understand how this complex set of systems evolves. This central place can be maintained if comparative law remains open to change and engages with the theories, methods, and results that have produced substantial advances in a few neighbouring areas. This approach corresponds to a tradition of studies that Patrick Glenn cultivated admirably, in the spirit of true scholarship.