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Comparative Law in a Time of Nativism

BY MARGARET WOO*

Abstract

Pressures of globalization have strained population movements, restructured markets have led to widening economic divides, and terrorism has redefined national borders and identity. What we have seen in response is a rise in nationalism, nativism and in the extreme cases, isolationism. This inward turn seems to be true at least in the U.S. and in China. This turning inward presents a challenge to those of us who work in and champion the cause of comparative law, since comparative studies by its nature urges us to turn our gaze outward. This article examines what the turn to nativism means for the field of comparative law and methodology, and how we as comparativists can combat this trend.

Introduction

The Chinese have an ancient curse: “May you live in interesting times.” While seemingly a blessing, the expression is always used ironically, with the clear implication that “uninteresting times,” of

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peace and tranquility, are more life enhancing than interesting ones, which from historical perspective usually include disorder and conflict.

We are now living in “interesting times.” The pressures of globalization have strained population movements, restructured markets have led to widening economic instability, and terrorism has been allowed to redefine national borders and identity. What we have seen in response is a rise in nationalism, nativism and in the extreme cases, isolationism – this seems to be true at least in the U.S. and in China.

In the U.S., the new Trump administration quickly moved to implement an inward looking policy. This policy include an almost exclusive focus on the threat of the Islamic State, a skeptical view of multilateral alliances including NATO, and an “America First” rationale for hard line economic policies. Within two weeks of his inauguration, America’s new President Trump moved to sign withdrawal from a major trade pact, a ban on all visitors from seven majority Muslim countries, and a temporary ban on all new refugees.

This is not an isolated trend. Many have analogized the U.S. turn inward to the recent and equally surprising Brexit, in which Britain by popular vote chose to leave the alliances of the European Union.¹ The electoral victory of Donald Trump, the Brexit vote and the rise of an aggressive nationalism in mainland Europe and around the world are all part of a backlash to globalization.² Interestingly, China too is facing retrenchment from its decades long policy of “opening up reforms,” a retrenchment which according to some is the most severe in 30 years.

Just after becoming the General Secretary of the Communist Party of China in late 2012, Xi Jinping announced what would

1. Ruchir, Sharma, *Globalization as we know it is over – and Brexit is the biggest sign yet*, THE GUARDIAN, (July 28, 2016), <https://www.theguardian.com/commentisfree/2016/jul/28/era-globalisation-brexit-eu-britain-economic-frustration>.

2. There is also a rising nativism as native purity is cast in contrast to the profane foreign. Across Europe from Bulgaria to Poland and the U.K., new nationalisms have a distinct xenophobia. Politicians such as Marine Le Pen in France recall an idealized past as a cure for the cultural chaos of modernity. Politicians can often gain political traction by describing national cultural traditions as under attack from the outside.

become the hallmark of his administration – that is, the pursuit of “the Chinese Dream.”³ The Chinese Dream, according to Xi is “the great rejuvenation of the Chinese nation.” Chinese citizens, President Xi urged, should “dare to dream, work assiduously to fulfill the dreams and contribute to the revitalization of the nation.” The goal is less about individual fulfillment or convergence towards a universal community but rather, about Chinese prosperity, national glory and the collective effort towards that goal. Since then, the turn inward has led to greater “internal repression, external truculence, and a seeming indifference to the partnership part of the U.S.-China relationship.” According to some, the China of 2016 is “repressive in a way that it had not been since the Cultural Revolution.”⁴

These retrenchments are notably distinct from the early 2000s when there were optimistic predictions of a transnational legal system and globalized judiciary.⁵ National boundaries were said to be less important in this global age. It was an active era of the formation of supranational courts and tribunals and exciting advances in the comparative law arena. Constitutional, national and regional courts were also beginning to take each other into account when rendering justice. Scholars speculated on a convergence of norms and others, such as Ann Marie Slaughter, even optimistically predicted one global legal system or at the very least, a global community of courts.⁶ This turning inward presents a challenge to those of us who work in and champion the cause of comparative law, since comparative studies by its nature urges us to turn our

3. Central Party School Central Committee of the Communist Party of China edited by Rogier Creemers, *The Chinese Dream Infuses Socialism with Chinese Characteristics with New Energy*, (May 6, 2013), <https://chinacopyrightandmedia.wordpress.com/2013/05/06/the-chinese-dream-infuses-socialism-with-chinese-characteristics-with-new-energy/>.

4. James Fallows, *China's Great Leap Backward*, ATLANTIC MONTHLY, Dec. 2016, <https://www.theatlantic.com/magazine/archive/2016/12/chinas-great-leapbackward/505817/>. In that same article, Asia Society's Orville Schell was quoted as saying, “In my lifetime I did not imagine I would see the day when China regressed back closer to its Maoist roots. I am fearing that now.”

5. See Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 345–387 (2005).

6. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARVARD INT'L L.J. 191, 191–219 (2003).

gaze outward.

Fears about the demise of comparative law are not new. Critiques of comparative law have ranged from challenges to its alleged lack of a methodological core to predictions that globalization would lead to the end of diversity in legal systems. Comparative law, Mathias Reiman famously argued, “has made little progress as a coherent enterprise generating broader insight of general interest. Most of its scholarship remains random, unconnected, and thus inconsequential.”⁷ But as globalization continued, comparative law gained greater importance in promoting international understanding. The methodology has been used to inform national law making, aid judges in difficult decisions, and provide a basis for legal unification or harmonization. According to some scholars, transnationalism has only made comparative law more complex, “in moving its focus from beyond the state as the sole lawmakers to significant lawmaking by non-state actors; beyond positive law to the importance of soft law, beyond legal science to an embrace of social science.”⁸

And so, during periods of globalization, the purposes of comparative law morphed in the promotion of transnational understanding, national reform and global unification.⁹

But is the comparative law discipline today facing yet a different challenge? This article looks at the flipside of globalization and examines the challenges facing comparative law from another direction – that of a nation’s turn inward with the rise of nationalism. Certainly, “the supreme paradox of this decade is the simultaneous acceleration of a globalized world and the vigorous reassertion of local claims to allegiance.”¹⁰ And in the most recent months, we

7. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. OF COMP. L., 671, 673 (2002).

8. Ralf Michaels, *Transnationalizing Comparative Law*, 23 MAASTRICHT J. OF EUR. & COMP. L. 2 (2016).

9. HIRAM E. CHODOSH, *GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY* 28 (2005).

10. Oscar Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. OF COMP. L. 861 (Autumn 1997).

have seen the growing surge of local claims to allegiance taking front and center stage. Within this local claim to allegiance are seeds of nativism and a rejection of a gaze outward as the gaze turns inward within a nation's boundaries, history and culture. And so, how should comparative law respond to these recent challenges to our tasks?

In part, answering this question requires an understanding of the trajectory of comparative law, a shift in our critiques of the field, and an adjustment in our goals. We examine these questions in the context of two countries – China and the U.S. – each with a vastly different legal system from the other, but each has proceeded down similar paths in recent procedural reforms. Where the U.S. is a common law, adversarial system based on a liberal democratic tradition. China, meanwhile, is a civil law, inquisitorial system based on a Maoist socialist legality. While both countries have experimented with looking abroad towards transnational procedures, both countries have also in recent years withdrawn their attention inward. Whether this is a reaction to global transnational efforts or nationalism or simply the guise of legal imperialism,¹¹ this trend is worthy of our attention as we comparativists search again for a proper balance between the transnational and the national and mediating between the conflict claim of the global and the local.

Comparative Law in the U.S. and China

Although reformers and scholars have historically used the technique of comparison (Aristotle in the 4th century was said to have collected the constitutions of no fewer than 158 city states in his effort to devise a model constitution),¹² the term “comparative law” was not introduced until the end of the 19th century. Countries, such as Japan and China, used the comparative method in the late 19th

11. TARAN TARAYAOGUI, *LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA* (2010).

12. PETER JOHN RHODES, *A COMMENTARY ON THE ARISTOTELIAN ATHENAION POLITEIA 2–5* (Oxford University Press) (1993); see also *Constitution of the Athenians*, *The Encyclopedia of Ancient History* (2012).

century in the establishment of their modern legal system. Most notably, China's contemporary legal system is an amalgam of civil law structure from Japan, Germany, and socialist law tradition from the former USSR, and traditional Confucian legal thought.

Comparative law received a revival of sorts in the last decade of the 20th century with the double process of economic globalization and Europeanization of law. It served as the tool for the many "rule of law" projects underway in many countries and funded by multinational organizations such as the International Monetary Fund. Comparative law has been critical to the work of European Union institutions. From the basic question of whether the E.U. should be permitted to act to whether legal differences created obstacles to the internal market, comparative law was called upon as the E.U. decided on new areas of regulation and assessed how it should interact with national law in complex ways. And where E.U. law did not replace national laws, a good comparative understanding of member state laws has been a prerequisite for the successful implementation of E.U. laws.

For a number of reasons, procedural law proves particularly fruitful for comparative studies. Rules of procedure uniquely combine the universal with the cultural. Procedural rules are simultaneously cultural messages about how we fight but they receive legitimacy precisely from their universal claim of "rule of law" and procedural justice. And so, efforts abound with a focus on a search for the universal or at minimal, harmonization in the area of procedural law. Furthermore, within the last twenty or so years, civil procedural reforms have been unusually active in national systems of civil procedure, often aided by comparative studies. Countries as diverse as Japan, Korea, England and Austria have all adopted new civil procedure systems.

Certainly, the reason for focusing on comparative procedure in particular is due to the growth in international economic transactions. In this era of transnational conflicts, the pressure for harmonization of domestic civil procedure rules is strong to prevent parties from forum shopping in transnational disputes. As international economic transactions aided by technology increasingly lead to complex legal problems without borders, efforts are being made to draft transnational rules. And so, we see the development of influential international

regulations and conventions playing an important harmonization role, such as article 6 of the European Convention of Human Rights.

The European Union, in particular, has taken the lead in a movement towards transnational procedure. For example, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in civil and commercial matters, now converted into a European Regulation, is applicable to all member states except Denmark. In the European Union, Article 65 of the Treaty Establishing the European Community (Articles III-158, and III-170 of the proposed European Convention) provides a legal basis for the harmonization of civil procedural law, at least as regards civil matters having cross border implications and in so far as necessary for the proper functioning of the internal market. More globally, under the sponsorship of the American Law Institute and UNIDROIT, The Principles of Transnational Civil Procedure were drafted under the sponsorship of the American Law Institute and UNIDROIT aimed at providing a framework that a country might adopt for the adjudication of disputes arising from international transactions that find their way into the ordinary courts of justice.¹³

Finally, procedure also took a front and center place in the “rule of law” movement. Multi-national organizations equate economic development with “rule of law” and democratization.¹⁴ Thus, a well-functioning system of public dispute resolution, particularly for ordinary people, is said to be an essential element of justice and important in avoiding privatization of enforcement.¹⁵ Civil procedure is at the heart of this belief and the growth of statistical methodology has led to such ambitious comparative studies as the *Courts: Lex Mundi* study, which created an index of procedural formalism of dispute resolution for 109

13. See ALI/Unidroit, Principles of Transnational Civil Procedure, <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

14. See, e.g., Matteo Cervellati et al., *Democratization and the Rule of Law* (2009), https://www.wto.org/english/res_e/reser_e/gtdw_e/wkshop10_e/fortunato_e.pdf.

15. Thus, an independent and properly functioning judiciary is a prerequisite for the rule of law, which requires a just legal system, the right to a fair hearing and access to justice. See Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, U.N. CHRONICLE, vol. XLIX No. 42012 (Dec. 2012), <https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>.

countries.¹⁶ The controversial *Lex Mundi* study concluded that procedural formalism is associated with higher expected duration of judicial proceedings, more corruption, less consistency, less honesty, less fairness in judicial decisions, and inferior access to justice. More problematically, *Lex Mundi* also suggested that legal transplantation might have led to an inefficiently high level of procedural formalism, particularly in developing countries.

A. The U.S. Experiment

In both China and the U.S., the use of comparative law has ebbed and flowed. The ebb and flow of comparative law is particularly surprising in the case of the United States in light of the country's history of immigration and assimilation of different cultures. Even the formation of the U.S. itself can be said to be an experiment in comparative law. While later interpretations of the U.S. Constitution have been more pointedly restricted to the original language and intent of the drafters at the time and place of the drafting, the text of the constitution itself is undeniably an "international document" drafted with reference to foreign models and imbued in the ideologies of the European Enlightenment.¹⁷

And so, the U.S. has not always been a stranger to referencing foreign legal materials. Throughout its history, U.S. courts have honored foreign law in both federal and state courts as long as it does not conflict with public policy. Thus, U.S. courts will apply international and foreign law without much fanfare in ordinary cases, such as in cases involving a right under a treaty or when parties agreed to choice of law of another country, but it is most controversial when it comes to interpreting the Constitution or U.S. law. Yet, even in the area of constitutional interpretation, in the aftermath of WWII and fascism, the "inherent dignity" of all people

16. Simeon Djankov et al., *Courts: The Lex Mundi Project* (Nat'l Bureau of Econ. Research, Working Paper No. 889, April 2002), http://www.lexmundi.com/images/lexmundi/PDF/courts_nber1.pdf?SnID=.

17. Similarly, it was one of the first U.S. treaties responsible for establishing American sovereignty: The Treaty of Paris, ratified by Congress in 1784. See Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat.80.

was recognized¹⁸ and entered into the vocabulary of international law and later, made its way into U.S. jurisprudence. Thus, in 1942 and 1943 cases upholding a criminal defendant's right to counsel and detained individuals' rights to be brought before a neutral third party, Justice Felix Frankfurter explained that, "democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process."¹⁹

Since then, the term "personal dignity" has been linked to equal protection, liberty and due process rights of the U.S. Fourteenth Amendment. Thus, in more recent cases such as those upholding an individual's right to same-sex relationship²⁰ and marriage,²¹ Supreme Court Justice Anthony Kennedy pointed to a person's dignity and autonomy as central to the liberty protected by the Fourteenth Amendment. The "dignity" term also entered state constitutional amendments after WWII, such as the 1972 amendment of the Montana state constitution with Louisiana following suit in 1974.

But in the area of procedure, Americans are notoriously "exceptional," clinging closely to the adversary system. Comparative procedure is rarely studied, taught or followed. With the exception of perhaps the Field Code, enacted around the turn of the 19th century, there may be three areas of comparative reference in recent years – pleadings, punitive damages, and the involvement of the judge. Thus, for example, the Supreme Court in *Exxon Shipping Co. v. Baker* compared American punitive damage awards with those of Great Britain, Canada and Australia, among other

18. These include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

19. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

20. As Justice Anthony Kennedy explained for the majority, states cannot make criminal the act of same sex sodomy because "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

21. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Justice Kennedy, in finding the congressional refusal to recognize same sex marriages to be unconstitutional, again wrote of relational rights in dignity terms. *Id.*

jurisdictions, to determine whether a punitive award was excessive.²² And in 2004, as mentioned earlier, the American Law Institute and UNIDROIT jointly drafted, Principles of Civil Procedure in an attempt to develop harmonized principles for transnational litigation. But neither the Federal Rules of Civil Procedure nor state civil procedure rules make reference to these principles.

Furthermore, the last decade saw a progression in heightened antagonism against the relevance of foreign legal materials in U.S. courts. For example, the citation to the almost universal rejection of the death penalty in Europe in interpreting the Eighth Amendment's prohibition on cruel and unusual punishment was met with objections.²³ Meanwhile, the last four nominees to the U.S. Supreme Court were repeatedly questioned about whether they would turn to sources outside the United States when interpreting domestic constitutional obligations, with each nominee eschewing the use of foreign legal materials.²⁴

In 2005, soon-to-be Justice John Roberts cited "democratic theory" as a basis for his view that using non-U.S. law for constitutional interpretation was unwise.²⁵ Samuel Alito in 2006 also rejected foreign law for constitutional interpretation and held the position "We have our own law. We have our own traditions. We have our own precedents. And we should look to that in interpreting our constitution."²⁶ In 2009, Sonia Sotomayer stated "American law does not permit the use of foreign law or international law to interpret the constitution."²⁷ Elena Kagan in 2010 likewise

22. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

23. *Atkins v. Virginia*, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting).

24. See JUDITH RESNIK, CONSTRUCTING THE FOREIGN: AMERICAN LAW'S RELATIONSHIP TO NON-DOMESTIC SOURCES, IN COURTS AND COMPARATIVE LAW (Mads Andenas et al. eds., 2015).

25. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the Comm. of the Judiciary*, 109th Cong. at 201 (2005).

26. *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. to be an Associate Justice of the Supreme Court of the United States Before the Subcomm. of the Judiciary*, 109th Cong. at 320 (2006).

27. *Confirmation Hearing on the nomination of Sonia Sotomayer to be an Associate*

registered an insistence on the use of American sources. Justice Kagan stated, “And except with respect to a very limited number of issues . . . the fundamental sources of legal support and legal argument for that Constitution ought to be American.”²⁸

This resistance to global norms can be similarly seen in a debate between U.S. Supreme Court Justices Antonin Scalia and Steven Breyer.²⁹ In considering the relevance of foreign legal materials in U.S. constitutional cases, Justice Breyer maintained that as a judge, he is looking for the best answer to and for that purpose reason takes into account the views of other judges throughout the world. This is in contrast with Justice Scalia who maintained that, when interpreting the American Constitution, it should be “to try to understand what it meant, what it was understood by the society to mean when it was adopted,”³⁰ and not “to selectively choose foreign law when it agrees with what the justices would like the case to say, but not use it when it doesn’t agree.”³¹

By 2013, antiforeign law prohibitions had been introduced in 31 states, although most without success of passing. In Oklahoma, 70 percent of Oklahoma citizens who voted supported a 2010 constitutional amendment (“Save our State”) instructing that state judges not to look at the “legal precepts of other nations or cultures and specifically not to consider either “international or Sharia law.” After being challenged and overturned, Oklahoma then enacted a statute that no longer mentions Sharia law but banned reliance on foreign law if not providing the “same fundamental liberties, rights

Justice of the Supreme Court of the United States Before the Subcomm. of the Judiciary, 111th Cong. at 442 (2009).

28. *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the Subcomm. of the Judiciary*, 111th Cong. at 127 (2010).

29. Norman Dorsen, *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 523. (2005).

30. *Id.* at 525.

31. *Id.* at 521. But Justices Breyer, Ginsburg, Kennedy, and Sotomayor diverge from the view to support “broader consideration of foreign and international law in U.S. judicial opinions.” While on the court, Rehnquist and Sandra Day O’Connor at times supported judicial consultation of decisions of other constitutional courts outside the United States.

and privileges granted under the United States and Oklahoma Constitutions.”³² More problematically, some of these bans not only prohibit the use of foreign law when the law at issue is at variance with constitutional values, but when the legal system of the country from which the law emerges is itself said to be not in conformity with these values. This essentially engages state courts in wholesale evaluation of foreign legal systems.³³

In addition to Oklahoma’s constitutional and statutory enactments, the states of Alabama, Kansas, Arizona, Louisiana, South Dakota, Mississippi, and Tennessee have put into their laws variously worded prohibitions against ‘foreign’ law.³⁴ Some of these bans not only prohibit the use of foreign law when the law at issue is at variance with constitutional values, but also when the legal system itself of the country from which the law emerges is said to be not in conformity with these values. This essentially engages U.S. courts in wholesale evaluation of foreign legal systems.³⁵

On the national front, members of Congress have repeatedly introduced resolutions such as the one by Representative Diane Black (R-TN) to ban the use of foreign law in federal courts.³⁶ In

32. OKLA. STAT. ANN. tit. 12, §20 (B) (West 2017).

33. FAIZA PATEL, MATTHEW DUS, & AMOS DOH, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 3 (Ctr. for Am. Progress & Brennan Ctr. for Just. at N.Y.U. 2013). Many have attributed this antiforeign law campaign to be a guise for the patently unconstitutional practice of anti-Sharia.

34. For a full list of the proposed bills in 2016, see Gavel to Gavel, *Bans on court use of sharia/international law: GA House approves modified bill; Mississippi bill to ban sharia in divorce cases dies* (March 1, 2016) <http://gaveltogavel.us/2016/03/01/bans-on-court-use-of-sharia-international-law-ga-house-approves-modified-bill-mississippi-bill-to-ban-sharia-in-divorce-cases-dies/> (last visited Oct. 3, 2017). Georgia’s house was the latest to join the list in passing a heavily amended version of HB 171. As introduced, the bill provided:

Any tribunal ruling shall be void and unenforceable if the tribunal bases its ruling in whole or in part on any foreign law that would deny the parties the rights and privileges granted under the United States Constitution or the Georgia Constitution.

35. Faiza Patel, Matthew Dus, and Amos Doh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, Center for American Progress, Brennan Center for Justice (May 2013). Many have attributed this antiforeign law campaign to be a guise for the patently unconstitutional practice of anti-Sharia.

36. U.S. House Resolution 3052 provides: Limitation on use of foreign law in Federal

support of bills such as this one, Senator John Cornyn (R-TX) warns that a trend of citing foreign decisions would mean that, “the American people may be losing control over the meaning of our laws and of our Constitution.”

B. Comparative Law in Chinese Procedural Reform

Comparative law has played a strong role in the development of the modern Chinese legal system. Certainly, the early Republican legal system in the early 20th century was modeled after the German civil law system as imported to China from Japan. After the establishment of the People’s Republic, further legal transplantation took place with the addition of socialist ideology. The period from 1989 until early 2000 again saw legal transplantation of ideas from western nations and this time, from the United States with its adversary system.³⁷

But China has been very effective in differentiating and segregating its legal system with one part more consistent with international standards for commercial disputes involving foreign parties, and one more in line with Communists/traditional Chinese ideology for disputes involving domestic citizens. Thus, China has a robust arbitration system model run by China’s International Economic and Trade Arbitration Commission for commercial disputes involving international parties that is based on international norms and customs.³⁸ The arbitral system was adopted early in

courts “In any court created by or under article III of the Constitution of the United States, no justice, judge, or other judicial official shall decide any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law.” http://black.house.gov/sites/black.house.gov/files/BLACK_036_xml.pdf.

37. Zhaoxing Liu & Jinyuan Su, *Comparative Law in China: Over 30 Years’ Development and Paradigm Shift in Research*, 1 CHIN. J. COMP. L. 158, 158–84 (2013).

38. The State Council’s Official Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Amendment of Its Arbitration Rules, THE GAZETTE OF THE STATE COUNCIL OF THE PRC, (June 21, 1988). On December 2, 1986, the NPC of China declared to adhere to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See Convention on the Recognition and Enforcement of Feign*

China's economic reform in 1979 and based primarily on the Arbitration Rules of the United Nations Commission on International Trade Law,³⁹ the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and later, on The UNCITRAL Model Law on Trade Arbitration 1985 (amended 2006).

Within the domestic court area, it was a different matter. The early civil court system that was reinstated and the 1982 civil procedure code (trial implementation) emphasized conciliation, rather than adjudication, as under the communist and traditional Chinese system. It was thought that civil disputes in which no "enemies" stood out would most be resolved by the neighborhood or mediation committees. Formal trials were quite rare and it was a supra inquisitorial mode of civil procedure in which the court took control of everything from investigation with no limitations and beyond parties claims. It was not until the enactment of the 1991 civil procedure law that greater change took place in the domestic civil litigation system.

The 1991 Civil Procedure Law took on elements from continental Europe and Anglo-American laws.⁴⁰ It was a transition from conciliation to adjudication with the introduction of western procedural concepts into civil justice, such as the burden of proof from the Anglo-American tradition and the "principles of oral argument" (*Verhandlungsmaxime*) from the German/Japanese tradition.⁴¹ It was also a principle of party rather than court disposition.⁴² Later amendments added pretrial procedures, which, combined with a more robust trial opening structure, brought about

Arbitral Awards, U.N. COMM'N ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

39. This was recommended by the General Assembly in its Resolution 31/98 of December 15, 1976. General Assembly resolution 31/98, *Arbitration Rules of the United Nations Commission on International Trade Law*, A/RES/31/98 (15 December 1976).

40. Ya Xin Wang, *The Various Roots of Civil Litigation in China and the Influence of Foreign Laws in the Global Era*, 2 CIV. PROC. REV. 119, 119–47 (Sept.-Dec. 2011).

41. See *Several Provisions of the SPC on the Issues Concerning the Civil and Economic Trial Mode Reform* (1998); see also *Some Provisions of the SPC on Evidence in Civil Procedures* (2001).

42. China Civil Procedure Act, art. 13. (1991).

the so-called two stage trial structure. In focusing on the parties and the trial process, these changes were said to pave the way to greater transparency as decisions were rendered in open court after exchange of evidence and oral arguments.⁴³

Indeed, the 1990s saw China quite openly experiment with various models of civil justice. Many foreign codes as well as legal works written by foreign leading scholars were translated and published. According to one count, comparative law scholarship increased by more than 20 times within the last 30 years.⁴⁴ Concepts such as “due process,” class/representative actions, legal vs. objective truth, “equality before the law,” “the rule of law,” “judicial independence,” made their way into the conversation in the development of the Chinese civil procedure.

But, as in the United States, the most recent decade saw caution raised by party leaders against borrowing institutions wholesale from abroad. As the reality of greater legal formality without greater legal representation led to greater dissatisfaction with the Chinese courts, litigants flocked to file letters and petitions of appeal to governmental agencies, and sometimes, to the streets.⁴⁵ Concerned with threats of social instability because courts were not able to “end the disputes,” the Chinese government launched the next set of policy and reforms. This time, the emphasis was on preserving social harmony.⁴⁶ The then President Xi Jinping announced the national goal of preserving a “harmonious society.” Chinese courts similarly followed suit, with a returned emphasis on mediation and conciliation, and a more diversified approach to civil trials. Chinese judges were asked to multitrack litigation, to mediate cases, and to “end” disputes, rather than adjudicate them, in an effort to preserve

43. See SPC interpretations such as the *Several Provisions of the SPC on the Issues Concerning the Civil and Economic Trial Mode Reform* (1998); see also *Some Provisions of the SPC on Evidence in Civil Procedures* (2001).

44. Fallows, *supra* footnote 4.

45. Carl F. Minzner, Xinfang: *An Alternative to Formal Chinese Legal Institutions*, 42 *STAN. J. INT'L L.* 103, 103–05 (2006).

46. See China.org.cn, *China Publishes ‘Harmonious Society’ Resolution*, (Oct. 19, 2006), <http://www.china.org.cn/english/2006/Oct/184810.htm> [hereinafter *Harmonious Society Resolution*].

harmony.⁴⁷

In the 2012 Amendment to the 1991 Civil Procedure Law, the latest and the most comprehensive to date, the amendments took a multitrack approach to litigation, in which the court must, in the early stages of litigation, assess and track the case in one of the following four ways – if the case has little or no factual disputes (such as in debt collection), an expedited procedure (*du cu cheng xu*, 督促程序, translated loosely as “supervising procedure”); mediation is to be used if the litigants’ dispute is more substantial, but believed to be capable of settlement; simplified procedure (*jian yi cheng xu* 简易程序) or ordinary procedure (*pu tong cheng xu* 普通程序), according to the needs of the case; trial procedure (*kai ting sheng li* 开庭审理) for a case that requires litigants to exchange evidence to clarify the points of dispute (Article 133). The multi-track approach reemphasizes mediation as the preferred method of resolution and funnels cases away from trials and adjudicated results.

Undeniably, this multitrack system is partly a response to the dramatic caseload now facing the overburdened Chinese courts. According to the Supreme People’s Court, the number of court cases rose by at least 25 percent between 2005 and 2009 but the total number of judges (190,000) remained almost the same. According to at least one observer, such reforms are a reflection of an ‘institutional pragmatism’ on the part of Chinese courts to protect their own institutional power by enhancing efficiency.

Since then, the latest Chinese leadership has pronounced yet another national goal – that of the “Chinese dream.” Just after becoming the General Secretary of the Communist Party of China in late 2012, Xi Jinping announced what would become the hallmark of his administration – that is, the pursuit of “the Chinese Dream,”⁴⁸ which according to Xi is “the great

47. See Zuigao Renmin Fayuan Guanyu Jinyibu Jiaqiang Sifa Jianyi Gongzuo Wei Goujian Shehui Zhuyi Hexie Shehui Tigong Sifa Fuwu de Tongzhi, 最高人民法院关于进一步加强司法建议工作为构建社会主义和谐社会提供司法服务的通知 [Opinion of the Supreme People’s Court, Regarding the Next Step Towards Litigation Development According to Socialist Principals and Harmonious Society] ¶ 2 (2007), http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=91949 [hereinafter *Next Step*].

48. Central Party School Central Committee of the Communist Party of China, *The*

rejuvenation of the Chinese nation.” Chinese citizens, President Xi urged, should “dare to dream, work assiduously to fulfill the dreams and contribute to the revitalization of the nation.” The goal is less about individual fulfillment or convergence towards a universal community but rather, about Chinese prosperity, national glory and the collective effort towards that goal. Since then, the turn inward has led to greater “internal repression, external truculence, and a seeming indifference to the partnership part of the U.S.-China relationship.”⁴⁹

The turn inward was reinforced by the issuance of the Decision concerning “Comprehensively Promoting Governing the Country According to Law” (the Decision) by the 4th Plenum of the 18th Central Committee of the Chinese Communist Party (CCP).⁵⁰ While this is not the first time the CCP inserted law in its programmatic proposals,⁵¹ this is the first time a CCP central committee devoted an entire plenary session Decision solely to the topic of law. Significantly, while reaffirming the importance of law in governance and giving greater operational meaning to the term, the Plenum Decision unequivocally reaffirms the primacy of the Party and its central role as the initiator of law.

In focusing attention on law, the Plenum Decision is the Party’s effort to capture law as “socialist rule of law with Chinese characteristics.” Containing both symbolic messages and concrete

Chinese Dream Infuses Socialism with Chinese Characteristics with New Energy, (May 6, 2013), <https://chinacopyrightandmedia.wordpress.com/2013/05/06/the-chinese-dream-infuses-socialism-with-chinese-characteristics-with-new-energy/>

49. James Fallows, *China’s Great Leap Backward*, ATLANTIC MONTHLY, Dec. 2016. In that same article, Asia Society’s Orville Schell was quoted as saying “In my lifetime I did not imagine I would see the day when China regressed back closer to its Maoist roots. I am fearing that now.”

50. CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward (Oct. 23, 2014), <http://chinacopyrightandmedia.wordpress.com/2014/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

51. Since the 11th Party Congress, China has recognized the need for law in a market economy and in 1999, China incorporated the words “rule the country according to law, establish a socialist rule of law state” into its constitution.

proposals, the Plenum Decision unapologetically outlined the dominance of the Chinese Communist Party and China as a developmental state. Having studied foreign models in other countries for the last thirty years, a more powerful and assertive China is now emphasizing that as in its economic reforms, China will follow its own path to legal reforms and “will not indiscriminately copy foreign rule of law concepts and models.” China under the leadership of the CCP will be the one to define what is meant by “socialist rule of law with Chinese characteristics.”

And “socialist law with Chinese characteristics” means the leadership of the Chinese Communist Party. Operationally, the Plenum Decision openly acknowledged that “in all cases where legislation involves adjustment to major structures or major policies, it must be reported to the Party Centre Committee for discussion and decision.” While it is common knowledge that most legislation originates from Party policy and must meet the approval of Party leadership, this was the first time that the Party openly acknowledged and affirmed concretely the role of the Party in China’s governance and in the making of laws. Further, the Plenum Decision explicitly emphasized the dual structure of the Party-state constitutional order. China will govern according to law 依法治国, but the Party will be governed according to its own internal regulations 依规治党. According to the Plenum Decision, Party discipline can be more stringent than law.⁵²

But the Plenum Decision is unequivocal. China will govern by law, but China will not necessarily abide by “rule of law” as defined by western liberal democratic thought. China will move to curb arbitrary powers according to law; but it will not necessarily subject

52. However, to ensure that leaders in all sectors take law seriously, the Plenum Decision anticipates that law indicators be written into annual cadre performance evaluations. The Plenum Decision also promises a more rule-based order for the Party – party rules will be strengthened, and while party institutions such as political legal committees and party cells in the courts will continue, their roles, authority and duties will be clarified. Interestingly, Party internal rules are highly formal and structured and some even contain aspects of due process protection (“shuang gui” hearing). A Xinhua report on a two-year-old campaign within the Party system (中央 办公厅法规局) to clean up (qingli) old/conflicting Party rules and regulations.

public authority to a higher law. This “rule by law” is a socialist conception of “rule of law,” in which law is positive, created by the people as led by the Party, the true democratic representative of the people. Thus, China’s leaders defend their system of governance as “socialism with Chinese characteristics,” and similarly, their legal system as “rule of law with Chinese characteristics.” They argue it is best suited to China’s “national conditions.”

The latest Supreme People’s Court Five Year Reform Plan (2014-2015) also made clear that “Deepening of reform on the people’s courts will be carried out start to finish under the leadership of the party.”⁵³ But more blatantly, the reform plan warns that China will not be following foreign models blindly. Chief Justice Zhou, the head of the Supreme People’s Court in Beijing, in a recent statement to legal officials in Beijing declared that, “We should resolutely resist erroneous influence from the West: ‘constitutional democracy,’ ‘separation of powers’ and ‘independence of the judiciary.’” Chief Justice Zhou has been recognized as a moderate reformer who has strived to professionalize the Chinese judiciary in recent years. His speech was widely seen as a bow to the strict political climate that Xi Jinping has established in China in response to rising domestic instability created by the greater disparity from the global marketplace.⁵⁴

Since then, Chinese Education Minister Yuan Guiren laid out new rules restricting the use of Western textbooks and banning those sowing “Western values.”⁵⁵ Current leadership has rejected many of

53. 最高法发布全面深化人民法院改革的意见(全文), Supreme People’s Court Five-Year Reform Plan (2014-2018), <http://news.xinhuanet.com/legal/2015-02/26/c127520462.htm>. Susan Finder, a Hong Kong-based legal scholar, speculated, however, that such statements were made to give political cover to more substantial changes. *Don’t Call it Western: China’s Top Court Unveils Vision for Reform*, WALL ST. J., (Feb. 26, 2015).

54. Michael Forsythe, *China’s Chief Judge Rejects Judicial Independence and Legal Reformers Wince*, N.Y. TIMES, (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>; China News Service, 最高法：划清与西方“司法独立”“三权鼎立”界限, http://news.china.com.cn/2015-02/26/content_34888966.htm),

55. Chris Buckley, *China Warns Against Western Values in Imported Textbooks*, N.Y. TIMES (Jan. 30, 2015), https://sinosphere.blogs.nytimes.com/2015/01/30/china-warns-against-western-values-in-imported-textbooks/?_r=0.

the universal/western legal values that China accepted – at least in principle – under communist rule in some earlier eras. Today, for example, to talk freely about constitutional reform, even within the sheltered confines of universities and academic journals, is not a safe enterprise. And discussion of judicial independence from the Communist Party at the central level is a forbidden subject.⁵⁶

Comparative Law in a Time of Nativism

Even in the best of times, comparative law is not without its critiques. Several critiques historically plague the field with most in the category of methodological challenges. These methodological critiques contrast, however, with today's objections that seem to be more emotionally based and normative in their opposition.

Historically, comparative law is challenged as a discipline. Critics point to the body of existing scholarship that is mostly descriptive of foreign law, with or without explicit comparison, and that this body remains “random, unconnected, and thus inconsequential.”⁵⁷ At its strongest, it is argued, this body of scholarship contributes to the categorization and world mapping of legal families, traditions, or cultures but has yet to develop any overarching theoretical basis or framework towards a better understanding of legal systems. Situating more along the similarities end of the similarities/difference approach, this critique would like to see the development of broader theories to explain certain functional legal phenomena underlying different legal systems.

On the other extreme, there are those comparativists who caution against the pronouncement of such “grand theories.” Particularly those who study non-western legal systems point to the danger of speculating broadly across cultures and across times, and

56. Jerome A. Cohen, *A Looming Crisis for China's Legal System*, FOREIGN POLICY (Feb. 22, 2016), <http://foreignpolicy.com/2016/02/22/a-looming-crisis-for-chinas-legal-system>.

57. Mathias Reiman, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 699 (2002).

the danger that “efforts at engaging in broad theoretical work may unwittingly lead us to believe that we are considering foreign legal cultures in universal or value-free terms when, in fact, we are examining them through conceptual frameworks that are products of our own values and traditions, and that are often applied merely to see what foreign societies have to tell us about ourselves.”⁵⁸

These comparativists emphasize our responsibilities to appreciate more fully the importance of “descriptions” and, particularly, the type of textured, reflective examination that Clifford Geertz terms “thick description.” Not wishing to run the risk of cultural relativism, these critics recognize that the effort to understand a different legal system necessarily entail the formation of judgments. But these critics argue for more thoughtful and careful comparisons and particular and modest, rather than grand, guidelines for our endeavor and conclusions.

By contrast, there are those who voice concerns as to whether comparative law is even possible since law is so rooted in national traditions.⁵⁹ These theorists, such as those in the “legal origins” school, would point to the different legal traditions as the root of national economic development and of indelible distinctions. They reject projects of unification because “minds of continental and common lawyers follow incommensurable patterns of thought.”

But notably, more recent critics have taken the critique beyond a methodological objection to voice an objection based more on fear that unification would erase traditions and national legal cultures. On a more philosophical level, recent critics focus their arguments not that it is impossible to do comparative methodology but rather that it is not normatively desirable.

Thus, while U.S. Chief Justice John Roberts voiced a methodological objection to reference to international law by U.S. courts because consulting how other countries treat particular legal questions pending in the United States is like “looking out over a

58. William Alford, *On The Limits of ‘Grand Theory’ in Comparative Law*, 61 WASH. L. REV. 945 (1986).

59. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 29 (1974).

crowd and picking out your friends,” Justice Samuel Alito, during his confirmation hearing, emphasized a more philosophical objection that,

The Framers of the U.S. Constitution did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans, and . . . I don't think it's appropriate to look at foreign law.

These recent changes present challenges to comparativists. But comparative law and reference to foreign legal materials are more important than ever. There is certainly no single answer, but rather, there are a number of cautionary guidelines to keep in mind in our comparative work. This might mean adjusting our perspective, methodology and goals.

A. Law is National Identity

Whether or not we like it, we must keep in mind and acknowledge that law is sovereign identity. While in the past, we have recognized that law may be rooted in tradition, history and culture, we have not have fully appreciated the constitutive aspect of law in creating national identity. Where previous institutions of religion and tribes defined a particular state, today, it is the institution of law and, “Directing judges to use certain legal sources is a means of locating sovereign identity in law.”⁶⁰

But unlike history or tradition or cultural identity in which one is born into, national identity is one that can be adopted, created and shed. And law, as both reflective and constitutive of this national identity, draws physical and as well as political boundaries. Thus, for example, civil procedure laws define the overall parameters of a

60. JUDITH RESNIK, COURTS AND COMPARATIVE LAW 439 (Mads Andenas et al. eds., 2015).

court's authority, and jurisdiction rules delineate the political power of any given state. Jurisdiction rules defines where a court sits in the political division of governance and draws a metaphysical border in authorizing a state's right to exercise coercive power over an individual or dispute within and without its physical border. Thus, the growth of a court's jurisdiction often coincides with state expansion. As enactments of the state, procedural requirements are symbolic and physical messages as to the power of the state. Tensions between states often morph into more technical disputes over jurisdiction of the courts.

Prominent political geographer, Richard Hartshorne, argued that the integration of a state's territory involves two competing types of forces: *centrifugal forces* that pull populations apart (away from the center), and *centripetal forces* that pull populations together.⁶¹ Centrifugal forces can include geographic divisions such as water bodies, mountain ranges or sheer areal size and distances that limit interaction by the state's population. Human dimensions such as differences in religious belief, culture, and economic activity can also act as centrifugal forces. These forces can limit interaction, producing regionalism and creating dissimilarity among groups of citizens within a state. Under such circumstances, what stops a state from falling apart? If a state is to exist in a stable form, there must be centripetal forces of greater magnitude than the existing centrifugal forces. Law can act both as a centrifugal or centripetal force.

If recent events demonstrate the persistence of nation states and borders, then, we must find ways to delineate national identity through law without insisting on the exclusivity of a national legal regime. Or in other words, how can we use law as a centripetal force (pulling populations together) and use comparative law without turning the exercise into one that is centrifugal force (pulling populations apart). Comparative studies have the potential to promote law as a centripetal force. Law is adaptive and the very act of comparative studies in recognizing differences and yet drawing out commonalities allows law to be adaptive in selective ways. Yet,

61. Richard Hartshorne, *The Functional Approach to Political Geography*, 40 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS, 95, 95–130 (June 1950).

fundamental to comparative law's success must be an assurance that law is part and parcel of national identity and that the comparative gaze is not an erasure of national identity. By recognizing that law is part and parcel of national identity, comparative law can reassure populations and combat their fears of change and the rise of nationalism as an exclusionary banner.

B. Law is not "Neutral"

One type of centrifugal force is inequality and so, one of our tasks must be to recognize the inherent power disparity in any legal reforms efforts and that the failure to recognize power imbalances can lead to hegemonic imposition of supposedly objective values by more economically developed countries onto less developed countries. This is often the case with the at times messianic route of the U.S. with its many "rule of law" projects. Such comparative law projects without recognizing inequality effects could act as a centrifugal force.

Centrifugal force may also be part of a greater problem of comparative law taking on an evolutionary trajectory of legal reforms – often with modern civilization associated with adaptation of western legal norms. And so, one task of comparativists is to recognize inequality and distributional ramifications and avoid evolutionary trajectory of any legal problem or solution we seek. Rather than taking on the "neutrality" of postwar comparativists, it is important not to be disengaged from ideological debates and participate less readily in public life or government work.⁶²

Critics, such as David Kennedy, have accused comparativists of "talking about distributional effects like accidental tourists."⁶³ The criticism is that comparativists downplay distributional consequences in assessing similarities and differences among legal regimes, and

62. This distance from practical engagement with government is explicitly promoted by Rodolfo Sacco, the Italian comparativist who provides the link between Schlesinger's Cornell project and the current effort led by Sacco's students to mobilize researchers for a description of the common core of European private law.

63. DAVID KENNEDY, *THE COMMON CORE OF EUROPEAN PRIVATE LAW*, 191 (Mauro Bassani & Ugo Mattei eds., 2003).

instead investigate and highlight technical similarities or cultural differences. Yet, not only is this “objectivity” intellectually impossible, this “objective” perspective also limits the impact and contributions that comparative law can make. The “objectively” neutral position would limit comparative law to societies that are comparatively similar, and to areas of law that are decidedly “apolitical” such as private and commercial law. An emphasis only on private law would be in contradiction to the changed understanding of private law in the 20th century which reorients private law as a political tool of regulation, and which views constitutional and administrative law as the dominant areas of a country’s legal system superseding private law.

In fact, comparative law can easily succumb to inequality in the guise of neutrality and legal transplantation misused as a tool of colonization.⁶⁴ Historically, comparisons between Chinese legal traditions and European ones are especially popular and indeed, lie at the heart of Max Weber’s seminal studies on economy and society.⁶⁵ But as pointed out by recent scholars such as Taisu Zhang,⁶⁶ such comparative studies are often one sided with the comparisons done by those from more developed countries of legal systems in “less developed countries.” Rarely are these works focused on better understanding European institutions. Using European institutions as the benchmark risks “Eurocentricism” in which that “other parts of the world must become like Europe to “develop” or “modernize.” More problematically, “There is always the danger that something is ‘lost in translation’” – some subtle but perhaps significant aspect of Chinese law actually becomes harder to understand once we explain them via comparison to European ones. As such, comparative methods encourage us to overemphasize the differences, or overlook deeper distinctions that course beneath facial similarities.

64. See, e.g., TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013).

65. MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Rheinstein ed. & trans., 1954).

66. Taisu Zhang, *Beyond Methodological Eurocentricism: Comparing the Chinese and European Legal Traditions*, 56 *AM. J. LEGAL HIST.* 195 (2016).

We cannot ignore the reality of power disparities among the legal systems we study and the distributional effects of whatever solution we suggest. Indeed, perhaps the most important factor in the transplantability of foreign models is the congruence between the comparative power structure of the receiver and sending country. In other words, whenever we propose that the model from one country be applied in another country, we must always consider the comparative power structures of the two countries. But if legal reform is to be achieved, the political context, the power differential between systems, and the recognition of distributional effects cannot be ignored.

C. Localization/Synchronization

These ideas are also in line with present comparative law debates in China on the nature and aim of legal transplantation. Today, Chinese comparativists are concerned about the interrelationship between legal localization and legal transplantation; namely, the aim of legal transplantation being achieving localization. Thus, Lijun Wang observes that recent trend of globalization has reflected a quality of localization and has affected the legal practice of sovereignty in various aspects. While acknowledging that domestic laws and foreign legal experience can provide valuable information, Wang reminds us that the development of law is driven by social realities that have their own character of autonomy. It is distinct from the “legal origins” school that posits the origins of a country’s legal system in one or the other legal family determines its economic success and ability to change. Rather, Wang’s position urges recognition of the determinants presented by social realities, and a study of the interconnectedness among these determinants.⁶⁷

In the area of civil procedure, for example, while class actions can be used to funnel social discontent into courts as in the U.S., in

67. Ralf Michaels, *The Second Wave of Comparative Law and Economics*, 59 U. TORONTO L. REV. 197 (Spring 2009).

countries such as China which values harmony above rights, class actions are seen as instigators in times of social instability. Or, for example, it is difficult to apply the concept of burden of proof in a society with limited lawyers, particularly where substantive law has not adapted accordingly. Similarly, a local preference for substantive justice may mean resistance to the concept of *res judicata*. There must therefore be synchronization based on local conditions.

Localization of foreign laws would contribute to the achievement of autonomy in the legal development of the state, and avoid imposition of formal changes without adjusting for bottom up resistance. Globalization does not mean “de-nationalization.” In the diverse legal order that can result from globalization, the sovereign state can maintain the independence and autonomy of its domestic laws even as it participates in comparative studies and understanding. As comparativists, we understand law, not only as the rules and how they operate in practice, but also from where these rules derive, the choices they represent, and the principles they encompass; that is, information and values that come from local synchronization.

D. Overlapping Rather than Convergence

Finally, we may want to recognize the limitations of harmonization and convergence as the sole goals of comparative law. The goal of harmonization has driven mainstream comparative legal studies in Europe since the Paris Congress of 1900. As Rodolfo Sacco concluded at the centennial celebration of the First Congress of Comparative Law, “comparative legal science triumphs because we are indebted (that is to say, mankind is indebted) to its masterpieces: harmonization, uniformity, and unification of the law.”⁶⁸

Unquestionably, harmonization has played an important role in the various comparative law projects of the European Union,

68. Rodolfo Sacco, *Centennial World Congress on Comparative Law: One Hundred of Comparative Law*, 75 *TULANE L. REV.* 1159 (2000-2002).

including that of the Common Core Project. This project involves compiling the similarities and differences between European legal systems using detailed comparative law case studies. Other groups connect comparative law surveys with normative searches for the best solution (Restatements). This is the case for the Lando Commission on European Contract Law (Principles of European Contract Law) and the Study Group on a European Civil Code, which emerged from it, as well as the European Group on Tort Law (Principles of European Tort Law).

As I mentioned earlier, the pressure for harmonization of domestic civil procedural rules is particularly strong today to prevent parties from forum shopping in transnational disputes. As international economic transactions aided by technology increasingly lead to complex legal problems without borders, efforts were made to draft transnational rules such as the completion by the American Law Institute and UNIDROIT of the proposed “Principles of Transnational Civil Procedure. While this work has substantial descriptive value as a source of comparative analysis of civil procedure, it also has a normative objective, which is to promote the international “harmonization” – in this context, apparently meaning uniformity or near-uniformity of procedural law.

But an undue focus on harmonization or convergence can limit one to an undue focus on looking for single answers, which is problematic in a number of ways. On the one hand, harmonization/convergence can funnel one into a view that only the state can make law, and neglect other sources of legal norms. Theorists, such as those within the legal pluralism school, have pointed out that legal orders may be rooted in different sources of legitimacy, such as tradition, religion, or the will of the people, and that such legal norms often coexist in the same field as state promulgated norms.⁶⁹ Also, the reality of pluralism between state and nonstate legal orders inevitably takes the comparative focus away

69. Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Introduction to THE POWER OF LAW IN A TRANSNATIONAL WORLD.: ANTHROPOLOGICAL ENQUIRIES ENQUIRIES*, 1-29 (Franz von Benda-Beckmann, Keebet von Benda-Beckmann, & Anne Griffiths eds., Berghahan Books 2011).

from western legal systems and towards the customary law of developing countries, and the laws of groups and communities such as the Quakers, Romani, Native Americans, and religious organizations.

Furthermore, harmonization as a sole goal also understates the undeniable task of law as a source of sovereign identity. Brexit may be the strongest recent rejection of harmonization. A single-minded push to harmonization may neglect to recognize the continued pull of distinct but equal spheres legal spheres defined by national borders. Harmonization and convergence, if at all, can only occur in the context of the overlapping normative orders of national legal systems, whether in Europe or elsewhere. This preserves national identity, lessens resistance, even as it allows for each nation state's participation in the global order.

Conclusion

In sum, comparative law needs to revisit its mission in the latest turn of global events. Undeniably, the historical tensions of comparative law methodology – similarities and differences, functionalism and cultural studies – remain all too clearly reflected in the present day of comparative law. But in the light of rising nationalism/nativism worldwide, we may be better served if we were to focus on the interaction of the two trends – that is, global legal exchanges (not convergence) and assertion of local practices.

The suggestion is not to abandon the task of globalization. In this world of transnational economy, globalization is inevitable. But rather than rushing headlong to harmonization or convergence, the recent resurgence of national interest may be a reminder that we as comparativists have a task of serving as mediators. It is the process of adaptation that warrants inquiry rather than simply the relentless pursuit of harmonization or any “grand” theory.” An undue focus on harmonization or convergence can limit one to looking for single answers and to the perennial common law/civil law divide.⁷⁰ And the development of

70. Rodolfo Sacco warned of this danger of looking for single answers as far back as

grand theories of law, or the ambitious multicountry rankings downplays the function of comparative law as the discipline that attempts to understand the various legal systems in their totality (similarities and differences) and in their relationship to each other. Without the ambition of promoting a generalized theory of the law, one can examine one aspect of a legal norm in the context of “thick descriptions,” and develop an understanding of how each is related to each other. This is not an apology for totalitarian departures nor am I downplaying the positive force of universality and rights. Rather, I am simply proposing a comparative law methodology that is more attuned to history, culture, context, and difference.

Indeed, such a comparative method can provide a check on the claim of jurists within a legal system who argue that their method rests purely on logic and deduction. Proponents of looking at “legal formants” make it possible to keep the ambivalence and multiplicity of legal rules in each system at play in the comparison. Living law contains any different elements such as statutory rules, formulation of scholars, decision of judges, and the multiplicity can give rise to several interpretations with no single one being correct and the other one false. “Within a given legal system with multiple ‘legal formants’ there is no guarantee that they will be in harmony rather than in conflict.”⁷¹

As Oscar Chase so succinctly wrote, we as students of comparative procedure must marvel “at the persistence of local forms to which even we worldly scholars feel no small attachment. We should understand our work as mediating between the global and local.” Both local culture and universal rule of law are features in contemporary social development and it is their interplay that provides the critical foundation for new and more adaptive values and institutions to emerge.

the centennial celebration of the Society of Comparative Law. Sacco, *supra* note 70, at 1165.

71. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991).