

RETHINKING THE GLOBALIZATION OF LAW

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THROUGH THE LENSES OF “NORMATIVES SPACES”

A brief memoir on two international workshops
dealing with legal globalization

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Between June 2009 and June 2012, four international workshops dealing with the globalization of law were organized at Maison franco-japonaise, Tokyo¹. The contributions presented in the following pages under the form of “occasional papers” consist in the revised version of preparatory documents that were circulated among the participants to the third and the fourth workshops (respectively entitled “Global Law and Global Legal Theory – Academic Knowledge in Question”, June 3-4, 2011²; and “The New Normative Spaces of Globalization – On International Commercial Arbitration in Asia and the Principles of Asian Contract Law”, June 7-8, 2012³). The notes below are a brief

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1. See the related information on: http://www.mfj.gr.jp/recherche/equipe/chercheurs/isabelle_giraudou_2013/; downloaded also on <http://www.glsn.eu>.

2. Co-organized by the French Research Institute on Japan (MAEE-CNRS) with the support of Fonds d’Alembert, in partnership with The Clarke Program in East Asian Law and Culture of Cornell University and the collaboration of the GLSN Global Legal Studies Network - Réseau Mondialisation du droit (Fondation de la Maison des Sciences de l’Homme, Paris).

3. Co-organized by the French Research Institute on Japan (MAEE-CNRS) and the Maison des Sciences de l’Homme en Bretagne (MSHB) with the collaboration of the GLSN Global Legal Studies Network - Réseau Mondialisation du droit (Fondation de la Maison des Sciences de l’Homme, Paris).

memoir of the motivation for organizing these two scientific events, and of some of their original features.

A few consensus items to start with

Globalization raises new challenges for law as a discipline and calls us, as legal scholars, to rethink both our paradigmatic postulates and methodological agenda. The appearance of powerful private or transnational actors generating dehierarchized networks and new spheres (or spaces) of normativity distinct from the nation state call into question traditional representation of law itself and the associated narratives of the relationship between the (supposed) center and the (so-called) periphery. In this regard, the challenges facing comparative law are not unlike those affecting international law, both public and private, which developed under analogous premises: while comparative law is facing the issue of what makes up a tradition irreducible to the classical concept of a national “legal system” (and to a general taxonomy of “legal families”), public international law has to deal with “governance without government”, and private international law has to grapple with the changing significance of the link between law and territory. The distinction between various continents of law or different legal areas, and classical concepts themselves such as the territoriality of law, the choice of law, public order, or even legal order are equally challenged. In order to analyze more sharply legal actors’ contemporary practices and to conceptualize current legal configurations as well as the complex ways law is hybridizing, legal theorists have to find some new definitions or to twist the classical ones. Moreover, the need to provide a more complete standpoint and to produce more fine-grained accounts of the various dimensions of legal globalization (not limited to a narrow focus on rules or legal cases) urge us to adopt interdisciplinary approaches. In fact, different legal fields are today reconfiguring around several points of general agreement (or “consensus items”⁴) identifiable among scholars interested in the globalization of law.

4. We broaden here the argument developed by Annelise Riles in reference to the rapprochement between comparative lawyers and socio-legal scholars; see A. Riles, “Comparative Law and Socio-Legal Studies”, in M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2008, p. 799.

First, legal scholars investigating the globalization of law generally agree on the necessity of expanding their subject-matter to include transnational phenomena. The descriptive treatment given by comparative lawyers to such phenomena may be different from the normative and doctrinal arguments of international lawyers. But in reality “there is little need for concern about losing our disciplinary distinctiveness by expanding our subject-matter”⁵. Second, legal scholars interested in the globalization of law agree on the necessity not to limit the subject of the study to legal orders supported by the coercive sanction of the nation-state: the point is indeed to understand how non-state-based normative orders interact with state-based regimes. Third, there is also a consensus today that scholarship in various legal fields needs to be both theoretically informed and empirically grounded – in other words: there is no need for legal scholars interested in legal globalization (be they internationalists or comparatists) to choose between “theoretical” and “empirical” work. Fourth, now is a good time for those of us who are investigating the global circulation of law to look for alternatives to the too-crude “legal transplant” concept. Fifth, and finally, it is also an opportune time to look for alternative categories, questions, approaches and projects to the too-vague “cultural analysis of law”.

By bringing together participants (mainly legal scholars and practicing lawyers) from different countries (Japan, France, China, Vietnam, and America) and from various legal systems/cultures/academic environments/specializations (comparative law, comparative legal history, legal philosophy, international private law, constitutional law, civil law, legal anthropology, socio-legal studies, and historical sociology), the international workshops held at MFJ in June 2011 and June 2012 both confirmed and built on such consensus.

A working hypothesis to go a step further

To go a step further may consist in questioning the complexities of legal globalization and contemporary norms-generating processes through a new *working hypothesis*. That is precisely what the organizers and the participants to the above mentioned workshops tried to do by focusing

5. *Id.*, p. 800.

on the concept of “normative space” as proposed by Gilles Lhuillier and defined in greater detail in the following pages. By proposing, discussing and elaborating on the concept of *normative space*, the participants have been able to challenge even more directly the pertinence of simple models, *e.g.* the classical approach of “legal orders” (which is central in international law) and the traditional approach of “legal systems” (which is paradigmatic in comparative law).

The initial general inquiry was to know more precisely how a variety of actors (including arbitrators, legal scholars, legal experts and practitioners) work in the global world, what kind of techniques they use to create a new set of norms in globalization and, in particular, the extent to which their borrowings, re-arrangements, constructions lead to the formation of some new regulatory spaces blending geographical areas (Asia, Europe, Africa, Anglo-Saxon World, etc.) and legal traditions (Continental Law, Common Law, Asian Law, *Lex mercatoria*, etc.) envisaged separately by the classical doctrine. Following a bottom-up approach, the participants considered various procedural mechanisms, institutions, objects and practices (professional as well as academic) that currently aim to manage interactions across territorial borders, and which relate to private international law, public international law or comparatism. Examples such as international mining contracts, UNCITRAL-based on-line arbitration, the regulation by “merchants” of collateral in the international financial market, the so-called Principles of Asian Contract Law (PACL), the incorporation of companies and international law shopping, but also the supposedly “imposed” Japanese Constitution or the Japanese law as a mixed legal system drawing from various national traditions, all have been scrutinized as concrete examples or possible illustrations of “normative spaces”.

By carefully examining all these examples not from a national/legal (legalist)/objective/static point of view, but rather from an individual/practical/subjective/dynamic one, two common features were distinguished. First, it appeared that the actors involved were always making a “choice of law” (indeed, national or international regulations, but also the legal cultures themselves render possible such choice of law). And, second, that they were mixing and articulating various legal sources. These two distinctive features are obvious not only in international contracts, international commercial arbitration, financial market

regulation, or through the elaboration of common legal “principles” at a regional scale, but also in the drawing of constitutions and national legislation.

Then it became possible to refine our questioning further concerning the *choice of law* and the *mixing* of various sources: How do the concerned actors (for example the legal scholars and practicing lawyers involved in the drafting of principles such as PACL, or the parties to international commercial arbitration) choose the law and mix a range of sources? How to grasp more accurately with such choosing and mixing practices? What are the norms that have been chosen and mixed? Is it relevant to consider such practices of choice and mixing in terms of normative creation? What are the discourses of the concerned actors regarding both these practices and the generated norms? Etc.

A contribution to the emerging work on legal knowledge

Such approach to the globalization of law helps to advance the emerging work on legal knowledge. It is obviously valuable in the field of international (private and public) law, where the choice of law – both as a technique and as a concept – happens to play a primary role. But an analysis in these terms is also valuable in comparative law, where the notion of the choice of law (in its enlarged meaning) may throw light on what is commonly referred to as “legal hybridization” and explain in a new and more comprehensive way the “reception” and “diffusion” of law, both in its historical dimension and contemporary aspects. To tell it more precisely, let us briefly mention how the participants have been invited to engage both in epistemological analysis and methodological introspection.

Questioning more accurately through the lenses of “normative spaces” how legal practices, specifically in the field of on-line dispute resolution, both shape and are shaped by legal globalization (as did a participant, well known for being both a practical lawyer and a critical scholar), may contribute to renew no less than the theory of international arbitration itself. Investigating in the same way some new “spatiality” of law and addressing both the new legal techniques at work in the world of merchants and the resulting decentralized rules (as did the initiator of the concept of *normative space* here addressed) may well contribute to renew the classical concepts of private international law,

the so-called conflict of law method as well as the unilateral method. Directly asking about what has been dismissed so far by the doctrine, *i.e.* legal formality and technicalities (as did a participant wishing to expand her horizon without limiting it to the late modern American law school she is coming from) may indeed put light on a particular feature of “normative spaces” and also help to refine the distinction between *rules* and *norms*. At the same time, pointing out critically the very normative foundation of global law, exploring the choice-of-law problem both from the perspective of legal cultures and through examples rooted in public international law, and questioning how autonomous and cultural constraints delineate such choice of law (as did one participant, a legal philosopher explicitly adopting a Dworkinian outlook) may well put light on another feature of “normative spaces”: in effect, normative spaces can also be understood as a *interpretative/translational* nexus of different norms, with “normative translation” at the core of such legal hybridity shaping process. Also, examining through the lenses of “normative space” the very choices of law effectuated by the actors involved in the construction of Japanese law (which is often described as being “hybrid”) may help to refine even an alternative approach such as the one of *Japanese law as a mixed legal system*⁶. Being asked through a questionnaire about how the drafters of the so-called Principles of Asian Contract Law very concretely choose and mix various legal sources to create a new law applicable to commercial transactions in Asia (as did one participant, the initiator of the PACL himself) may encourage us to deal with our own practices and knowledge in a much more reflexive way; it may also put further light on the *decentering* process the new normative spaces of globalization are based on. Etc.

Taken as a whole, these contributions show that when it comes to the globalization of law, the conventional questions and oppositions are rapidly becoming obsolete. And that legal knowledge is indeed a constellation of theories and practices far more complex and nuanced

6. For a detailed presentation, see the “Report on the International Workshop held at Maison franco-japonaise, Tokyo (June 2001, 3-4)”: http://www.mfj.gr.jp/web/sympo_20110603/pdf/CR-IW_3-4_June_2011.pdf. On the last two points, see also I. Giraudou, “Le droit japonais comme traduction”, *Ebi-su - Études Japonaises*, No. 46, 2011, p. 111-144; and: “Le droit au Japon, quel modèle?”, Working Paper (August 2012): http://www.mfj.gr.jp/recherche/working_papers/

than legal theorists and practitioners may have acknowledged up to now. If there is any “global legal theory” to look for, it should be understood not as a new *grand, single and uniform theory on global law*, but as a *theory made global through its common objects and new methods*⁷.

7. See G. Lhuillier, “Analysis of Global Law”, <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/>; or: <http://www.glsn.eu>

ACADEMIC KNOWLEDGE

Three views on global law and global legal theory

Gilles LHUILIER*

Is there a global legal theory? Not a unique theory on global law, but a global theory of law, a theory made global through its common objects and methods?¹ Such a question represents a kind of ethnological study on the astonishing tribe of global “academics”, their uses and practices, that is to say their “local knowledge” to quote the ethnologist Clifford Geertz.

To start with, it is now obvious that contemporary legal thought is undergoing a profound change characterized by the French epistemologist Bruno Latour as “a passage from law as an institution to law as an enunciation”.² Now, a very strong “coherentist” stream is building legal thought on a unique theoretical pattern, with a semiological origin, in spite of extremely diverse sources, comparisons and established theoretical systems. This new idea shows an evident openness to social sciences (“Law and...”). Concepts are therefore being deeply renewed and, above all, the “legal” is being widened, no more limiting itself to formulating technical questions about legal rules, but also questioning rules’ relations to culture or cultures, as well as to individual or collective identities.

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1. See G. Lhuillier, “Analysis of Global Law”, in <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/> or <http://www.glsn.eu>

2. B. Latour, *La fabrique du droit. Une ethnographie du Conseil d’État*, Paris, La Découverte, 2002.

This slow but now irreversible epistemological break, from a pattern inspired by the sciences of nature to one which is closer to the sciences of language, is linked to an increased circulation of these new interdisciplinary theories of legal thought, travelling from continent to continent during the past thirty years, and enabling, at last, the rise of a worldwide, and not solely western, point of view. The emergence of this “world legal thought” is linked to new intellectual shifts and journeys. But can we describe this emerging global theory more precisely, not as a global “substantive” theory, of course, but as a set of common academic practices? I make the hypothesis that international – global – legal theories are now facing the “refiguration of social thought” described twenty years ago by the anthropologist Clifford Geertz in his 1980 article “Blurred Genres: The Refiguration of Social Thought”.

Some of Geertz’s tricks are now commonly used by legal academics sometimes without even knowing it: a semiotic/interpretative approach, but also a “microscopic approach” (the small facts speaking to large issues), the assertion that “culture” is context and that theory must be “actor oriented”, the emphasis on “words” that are part of specific concepts but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality; and – last but not least – a pluralism, neither state centered nor “culture centered”, the actor contributing to defining the limits and the meaning of what I called “normative spaces”, those local techniques which work on the basis of local shared knowledge. To quote some old texts of Geertz’s allows us to feel the current relevance of his works:

The concept of culture I espouse... is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning. It is this explication I am after, construing social expressions on their surface enigmatical.³

And the image of cobwebs has nothing in common with “systems” or “order”, all the work of Geertz being an escape from the order, a decentring of legal theory:

3. C. Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, p. 5.

Interpretative explanation trains its attention on what institutions, actions, images, utterances, events, customs, all the usual objects of social-scientific interest, means to those whose institutions, actions, customs, and so on they are. As a result, it issues not in laws like Boyle's or forces like Volta's, or mechanisms like Darwin's, but in constructions like Buckardt's, Weber's, or Freud's: systematic unpacking of the conceptual world in which Condottierre, Calvinists, or paranoids live.⁴

Well... But how can Geertz be used today in the academic field of global law studies? Let's take three examples of recent works: the last book by Annelise Riles on the financial markets, the seminal article by Hasegawa Kō on Japanese law as a "creole law", and my current work on international contracts as "normative spaces".

Firstly, Annelise Riles.

Her last book is about the meaning of globalization. But its method is ethnographic, and Annelise Riles quotes explicitly Geertz's 1973 book *Thick Description: Toward an Interpretative Theory of Culture*. And the title of Annelise's book, *Collateral Knowledge* can also be read as an implicit quotation of Geertz's main work, *Local Knowledge*. If she presents a new theory of law and market, it is purposely a "theory close to the ground", building its analytical categories at close proximity to those of market and regulatory practices, and it does so inductively rather than deductively. She follows this up and goes further in her main idea in her article "The Anti-Network: Global private law, legal knowledge, and the legitimacy of the state".⁵ She stresses that the academic discussion about global law is not pertinent when it opposes the laws of states to private international "norms" developed by merchants. In her mind there is such a thing as "global law without state" only if the analysis relies on "rules" and institutions, but not if you focus on "norms", a broader and practical understanding of what "law" means. She argues that rather than focusing on how global private law is or is not an artifact of state power, a body of private norms, or a coherent

4. C. Geertz, "Blurred Genres. The refiguration of social thought", *American Scholar*, Spring 1980, p. 165.

5. A. Riles, "The Anti-Network: Global private law, legal knowledge, and the legitimacy of the state", *American Journal of Comparative Law*, Vol. 56, No. 3, 2008; Cornell Legal Studies Research Paper No 07-025.

legal system, we should view global private law as a set of institutions, actors, doctrines, ideas, documents, that is, as a specialized set of knowledge practices. And in so doing, in her book, with the global market appears a (global) space of shared practices, a common world, a “private constitution”, neither entirely private nor public: “Collateral financial governance is also, I argue, *a set of routinized but highly compartmentalized knowledge practices, many of which have a technical legal character*”⁶

She analyses a financial technique, the Global Collateral (*sûretés* in French), which appears to be in fact at the root of the financial market, being the safeguard of swap transactions. No swap without security, without collateral. And, this quote from her article stresses the novelty of her approach:

In the simple technology of collateral, this nexus of paper documents, legal theories, legal experts, clerical staff, computer technologies, statutes and court decisions, then, are encapsulated some very grand hopes. As a transplanted legal technology, collateralization is paradigmatic of global private law solutions. Although collateral is rooted in multiple bodies of national law, such as bankruptcy codes, it is designed to be in the first instance a tool of self-help. It also is intended to serve as a blueprint for relationships, what I will call a “private constitution”.⁷

Secondly, Hasegawa Kō.

Since the publication of his main article – “Incorporating Foreign Legal Ideas Through Translation”⁸ – the work of Hasegawa Kō is sometimes assimilated to the “legal polycentricity” movement.⁹ The “Legal polycentricity” is a post-modern theory of globalization which stresses both law “generated by numerous centers” in a global world, and a law from the point of view of the person, the actors, too often excluded from the theory of law.¹⁰ Called “Hō no kureōru to shutaiteki hōkeisei no

6. *Op. cit.*, p. 10.

7. *Op. cit.*, p. 7.

8. In A. Halpin & V. Roeben (eds.), *Theorizing the Global Legal order*, Oxford, Hart Publishing, 2009, pp. 88-89.

9. Hanne Petersen *et al.* (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Dartmouth Pub. Group, 1995; Surya P. Sinha, *Legal Polycentricity and International Law*, North Carolina, Carolina Academic Press, 1996.

10. H. Petersen, *Knitted Law: Norms and Values in Gendered Rule-Making*, Dartmouth, Aldershot, 1996.

kenkyū” (A Study on the Creole and the Agency Formation of Law), the research programme directed by Hasegawa tries to characterize the normative exchanges between four “regions” (South East Asia, Europe, North America, and Japan).¹¹

But Hasegawa builds a very singular theory of law as “interpretation”, in order to study the construction of Japanese law under the influence of foreign law so doing he renews the old fashioned concepts of comparative law. He uses the semiotic metaphor of “creole law”, maybe as an implicit homage to the “polyglot discourse” of Geertz.¹² And Hasegawa’s work stresses the importance of some words, “words” which are part not only of a specific concept but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality, as Geertz did with the Arab words *haqq* or the Sanscrit *dharma*, which came from different “moral worlds” and rely on different conceptions of law.¹³ But it is true that his theory of Japanese law as a translation has less to do with the theory of translation than with the theory of law, the American style theory of Dworkin and the Japanese theory which stresses the particular role of the actor – the translator – according to the specificity of Japanese writing¹⁴:

I think that Japanese modernization of law is to be characterized as the legal amalgamation through translation: Japanese intellectuals attempted not transplanting European law but rather grappling it for Japanese society. Indeed, they tried to understand and introduce Western ideas and values into Japanese society principally to enlighten and westernize it. But that was a selective incorporation, which made the Japanese legal system an organic unit of heterogeneous legal ideas and values. Here we should ideally distinguish the multi-layered legal system from the organically combined or hybrid legal system as in the case of Japan that I am discussing. This distinction is concerned with the totality of translation in the process of law-making. In the case of Japan, the main legal codes were

11. See www.juris.hokudai.ac.jp/~hasegawa/lcreole/en_index.html

12. Geertz, *op. cit.*, 1986, p. 226.

13. *Op. cit.*, p. 230.

14. See especially I. Kitamura, “La traduction juridique : un point de vue japonais”, *Les Cahiers de droit*, 28, 4, 1987, pp. 747-792; and Y. Noda, *Introduction to Japanese Law*, Tokyo, Tokyo University Press, 1976. See also I. Giraudou, “Le droit japonais comme traduction”, *Ebisu. Études Japonaises*, No. 46, 2011, pp. 111-144.

not simple transplants from European law but rather the reconstruction of various European laws through translation, which includes not only the adaptive modification but also the critical discarding of European legal ideas and values. In addition, the operation of the legal system in Japan is conducted through the traditional sense of justice, i.e., of harmony or equitability. Even if the legal provision in question was derived from a similar Western one, the understanding and application of it is curbed with the mind that ordinary Japanese people tend to appreciate by their own valuational sense¹⁵.

Thirdly, Gilles Lhuilier (myself!).

I'm currently interested in the common knowledge used by lawyers and senior managers of transnational corporations in the elaboration, writing and implementation of international contracts.¹⁶ This knowledge obviously tends to organize the obligations between the parties but, moreover, to choose the law binding the parties, to shape a group, to organise a supply chain, etc. However, international legal practices are very far from the classical presentation of the conflict of law concept, made from the state perspective, the perspective of the judge who tries to "localise" the contract. On the contrary, the private actors now "localise" themselves on singular "normative spaces". The old concepts of international law, which were all "state centered", are now questioned by the globalization of law. The "mobility" of the private actors is changing the concept of territoriality of law, the concept of choice of law, of public order or even the concept of legal order. To be able to describe their practices we have to find some new definitions or to twist the old definitions of the choice of law theory. I have called this new set of practices "law shopping" in a broad sense¹⁷. Here are some illustrations.

15. K. Hasegawa, "Incorporating Foreign Legal Ideas through Translation", in A. Halpin & V. Roeben (eds.), *op. cit.*, 2009, pp. 88-89.

16. GLOBEX (Recherches pluridisciplinaires sur la mondialisation : contrats globaux et nouvelles régulations sociales). See: http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publicques_et_privées/globex)

17. Voir G. Lhuilier, "Le concept de 'Law shopping' (Droit international privé, droit social, droit de l'environnement)", in M.-P. Blin-Franchomme *et al.* (eds.), *Droit du travail et droit de l'environnement. Regards croisés sur le développement durable*, Paris, Éditions Lamy-Wolters Kluwers, 2010; "Law shopping (La redéfinition du choix de la loi par la pratique du droit international des affaires)", in X. Boucoba (dir.), *Les groupes internationaux de sociétés : nouveaux enjeux, nouveaux défis*, Paris, Economica, 2007.

1. *Tincorporation*. The *lex societatis* – but also the law applicable to the board – being the law of the incorporation, the transnational corporations have many ways to use the “Delaware effect”, often for escaping tax law, bankruptcy law, freezing asset action...or simply the identification of the shareholders. This old “law shopping” which has no limits in some regional areas (such Europe), is the conceptual model of all the other techniques.
2. *Subsidiaries*. The creation of subsidiaries is also a common form of law shopping, an easy way to escape public order law such as criminal law, transnational companies not being a legal person as a “group”, subsidiaries allowing “groups” to hide under the corporate veil.
3. *Joint ventures*. To draw the limits of a group with a joint venture between a subsidiary and a company incorporated in a so-called “tax haven” (which are also “secret havens”) is an easy way to make a soft choice of the law, the joint venture having no existence from a tax point of view. And the remaining cash can be used for “non-conventional commercial practices”.
4. *Tsub-contracting*. Outsourcing can be defined as an operation to close a production site and transfer it abroad to enjoy better legal systems for the employer. Outsourcing is less an act of management than a technique of choice of law, a technique of “law shopping”. This new legal technique is a reaction against the “publicising” of the rule of conflict of law. For in all industrialized countries *favor laboris* has significantly limited the scope of the choice of law. The desire to protect employees has realized what the internationalists called a “coloring” of the rules of conflicts of law that has ended their so-called “neutrality”. But outsourcing can be reached by some other very simple legal action: either the incorporation of a subsidiary abroad or – more simply – outsourcing by subcontracting, as Nike does for example.
5. *The contract as a law*. In the recital or the operative part of the contract, professional definitions, rules or obligations are often longer than the international convention on sale of goods.
6. *The choice of law*, « dépeçage » and the « contract without law ». International contracts have nowadays sometimes some very sophisticated choice of law clauses, such as those choosing an international convention like ICSID, and a soft law text, a Professorrecht such as

the Unidroit Principles in order to fill the gap of the international convention. In so doing, they build an international code of sales contracts mixing international convention, soft law, and the principle of the choice of law by the parties.

7. *Contractual public order*. This concept is used to build the “supply chain” and to introduce clauses, from the end of the chain to the beginning, through labelling and the certification of the supply chain, to make sure that some mandatory law is really binding.
8. *The forum shopping*. Very classical!
9. *Contractual mediation order*. The international contracts organise several negotiations, transactions, mediations inside the contract itself, often through *ad hoc* or permanent dispute board.
10. *The choice of the site of the arbitration*. To choose the site of the arbitration is a way to choose the procedural law of arbitration.
11. Eleven: *freedom or the arbitrator*. To quote Berthold Goldman’s well known sentence: “l’arbitre n’a pas de for/arbitrator has no forum”, is enough to remind everyone that the rules of conflict of law are mandatory for the arbitrators who are free to choose the law applicable to the contract. To choose arbitration is to choose to stay away from public judges but also from the rules of conflict of law.

Mobile public order. International arbitrators are now practicing what I call the concept of “mobile” public order, the unique public order taken into account by the arbitrator being the public order of the place – the state – of the *exequatur*. The significance of public order is then deeply renewed if it depends only on the place of the assets of the parties...

All those practices (the so-called “law shopping”) and the rules chosen create what I called “normative spaces”. Normative spaces have two significations.

1. Firstly, normative spaces are a *set of* “practices”. These set of “practices” is constituted by practices of law shopping which allow merchants to designate the “rules” binding their relations, that is to say – to use Annelise Riles’s terms – of routinized but highly compartmentalized knowledge of practices, many of which have a technical legal character.

2. Secondly, normative spaces are also a set of “rules” designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, etc.

Each international contract is then a “web” – to use Geertz’s terminology. Each “normative space” refers at the same time to the ability to spin the web – that is to say, the boundaries of the applicable chosen law – and the web itself, that is to say, the chosen law. It is neither a private commercial order (a new *lex mercatoria*), the applicable laws being mainly national laws; nor a legal order, national or international, the boundaries of the law being drawn by the merchants themselves.

Between these three works, some obvious differences appear, sometimes stressed by the authors themselves.¹⁸ These differences obviously lie sometimes in “tribal knowledge”, some academics being closer relatives to the ethnologists’ tribe, some to the philosophers’ tribe, others to the tribes of internationalists or commercialists. But all these works are nevertheless representative of the emergence of a global legal theory that realises a “decentring” of the theory of law.¹⁹

Questions rise however: the importance of the legal technicalities as an autonomous language, the fall of the theory, the local dimension of the theory, the signification of the renewed concept of culture, or such elaborations as “private constitution” or “normative spaces” and their many uses – for example in order to renew comparative legal studies... There is obviously an emerging global legal theory, not a unique theory on global law, but a global theory of law, a theory made global through those common questions.

18. K. Hasegawa, “How Can Law Hold Hope in Cultural Complexity? Critical comments on Professor Annelise Riles’ View of Law and Culture”, Working Paper: <http://www.juris.hokudai.ac.jp/~hasegawa/HowCanLawHoldHope.pdf>.

19. See <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/> or <http://www.glsn.eu>

ANCHORING NORMATIVE SPACES IN GLOBAL LEGAL ORDER

A brief comment on Gilles Lhuilier's
working paper*

HASEGAWA Kō**

Appreciating his interesting paper “Academic Knowledge: Three views on global law and global legal theory”, I think that Gilles Lhuilier's main point lies in grasping “law shopping” as a typical phenomenon for yielding decentered normative spaces in the making of global law. Lhuilier also seems to take Annelise Riles' emphasis on the spontaneous shaping of collateral knowledge in the global legal practice of finance as another example of his theme. There is a slight difference, though, from my viewpoint that, while Lhuilier tries to capture the strategies for making various new spheres in law, Riles does to capture various movements of legal actors in yielding those spheres as a result.

I have no substantial objections to these analyses, both because I am a layperson to this transforming field of international private law and because I sense these analyses will give much stimulation to the theorizing of the today's change in law. Still, it seems to me that these two distinguished scholars tend to praise the diversity of law especially against the existing positive and state-bound legal practice and

● The working paper mentioned correspond to the text presented in these *Cahiers d'Ebisu* under the title “Academic Knowledge: Three views on global law and global legal theory”.

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its understanding, and that they do not have much concern about the problem of possible connections for the integration and its conditions in such a transformation of law. Of course, one might say that a point of their perspectives is in such a postmodern one which appreciates the devolution or even deconstruction of the modern project of state-bound law-making; which is basically understandable for the recognition of the emergence of polycentric legal practice in today's globalizing circumstances.

In this respect, the point in my article Lhuillier mentioned, "Incorporating Foreign Legal Ideas through Translation"¹, may look rather a modern one in emphasizing the connection of apparently heterogeneous laws especially typified in the process of legal modernization in the late 19th century East Asia, even if seen through the interpretative/translational perspective (which itself can be postmodern). Indeed, my theoretical concern so far is the problem how the significant connection of culturally heterogeneous legal ideas (such as "rights" and "kenri 権利") is possible and what the salient features of the connecting point for them is. If so, the question may be raised from Lhuillier's or Riles' standpoint to what extent this kind of integrative perspective is related to the decentering movements and their products in globalizing law today. And I also sense this is why Lhuillier seems to be a little bit uneasy to place the points of my article in the problem concern in his paper, in contrast with Riles' work.

Then, I would say from my own standpoint that: 1. there will be several global legal contexts each of which indicates a different posture of decentering and shows another possibility of new connection: while it may be seen that in the field of international private law to which both Lhuillier and Riles invite to pay attention certain legal strategies for dissociating from the existing state control occurs to secure the freer spaces of global economic activities, the expansion of constitutionalization through state to market as well as to civil society especially in the field of international public law is to be observed; furthermore the hyper-jump, as it were, between international and state law is also to be seen in the problem of, say, the legal mobilization of indigenous people

1. K. Hasegawa, "Incorporating Foreign Legal Ideas through Translation", in A. Halpin *et al.* (eds.), *Theorizing the Global Legal Order*, Hart Publishing, 2009, pp. 85-106.

in a society by utilizing a variety of legal documents or discussions (which shapes itself a transnational legal problem), and thus that: 2. in this regard, what I tried to explicate for the interpretative/translational connection in the late 19th East Asian and Japanese context can be relevantly claimed as actually still occurring in various fields of law today, even in the strongly decentering normative spaces yielded by the law shopping Lhuillier is concerned about.

In the expansive process of modern constitutionalism, particularly for the necessity of the judicial review of human rights issues, we are experiencing the connection problem among various societies including such international or regional institutions as UN and EU. Here is no denying in that the possibility of transcultural understanding of the significance and meaning of particular human rights, say, freedom of expression, freedom from torture, religious freedom, or protections of women's rights, is heatedly debated; which necessarily includes the problem of the proper interpretation/translation of Western understanding of those rights in non-Western societies. Just for one simple example, we should consider about the translatability and commensurability of the meaning of "human dignity" against the backgrounds of divergent cultural settings. It will be clear that how to understand the core meaning of the idea of "human dignity" is a contested interpretative/translational question among divergent societies outside the West such as China, India and other East Asian societies including Japan.

Also, in the case of the indigenous rights claims against the colonial stance of modern states, it is very popular that those indigenous peoples try to justify and even share their claims by resorting to international and other related legal sources in any available ways, say, by resorting to the UN Declaration of the Rights of Indigenous Peoples established in 2007. This is itself a possible strategic move for their legitimate legal claims for land and language interests; which may be regarded as a sort of hyper-jump mentioned above between multiple legal sources. In so doing, indigenous peoples can utilize non-national legal documents for their own domestic problem situation beyond the border of nation-state and try to transform the existing (often narrow) understanding of the domestic laws in question. For example, some interpretative/translational question will arise in such a context as constructing the meaning of "the right to self-determination" in the international declaration above. Understanding the meaning of this right in a particular

domestic context (say, as in the Japanese concept of “*jiketsuken* 自決権”) may evidently include the interpretative/translational problem noted here.

In the field of international private law rapidly globalizing and decentering as Lhuillier and Riles heed to above, the situation might be seen different at the first look. In various normative spaces in this context, interpretation/translation might not seem to be such a serious problem; mutual understanding with interchangeability of legal and other related words and phrases looks almost always simply mechanical. Indeed, the focus on the dynamic pursuit of subtle techniques among private legal actors for extending the free economic activities can find that sort of connection problem as ignorable, especially when the party in question tries to stipulate their own legal terms and easily equates technical words and phrases in their own legal knowledge as a simple analogue making. Nevertheless, I wish to point out that, even if in the field of such technicality, there do exist certain interpretative/translational problems: one problem consists in the semantic shift, as I call it, aroused culturally and strategically, say, as to the understanding of background conditions of contracts such as the scope of the principle of “good faith and fair dealing”; another problem is the multifarious hyper-jump among various national, international, or private norms in a particular field of law to pursue more successful endeavors in it (with its spill over to other normative spheres; needless to say, this is an aspect of law shopping); still another problem is the problem of the background understanding of the economic in global capitalism such as the pursuit of efficiency or rationality. This point that the technical link in various legal fields may be possible without any interpretative/translational connection problems is only made significant with those problems being possibly solved in some suitable way in the shared understanding of relevant culture.

In this respect, interpretative/translational problems are both ubiquitous and valuational regarding any possible connection among various legal spheres² on this globe (including further internal logical configurations within one legal sphere); even in the decentering of law, interpretation/translation is inescapable for valuationally anchoring

2. The word “legal sphere”, as I use it hereafter, means the space of various laws, including national legal systems, international law, normative spaces as Lhuillier call them, and other relevant legal standards.

divergent normative spaces. Here, the difference of emphasis between the mechanical links in the economy-oriented legal spheres, the substantial connections in the publicized secure legal spheres, and other kinds of inventive connections among different spheres involves a moral debate on the importance or the priority of one sphere among various spheres. And various legal activities would yield various interpretative/translational interconnections among various norms in different levels of legal interactions. Here we may probably distinguish the anarchist, the totalist, and the integrationist of legal spheres, and also, within the integrationist camp, the libertarian, the liberal, and the communitarian positions on global law. They will contest with each other for the moral struggle in shaping global law. Then the ultimate point of this kind of debate will be concerned with the moral attitude toward shaping global law to attain trust for global human order.

This point seems to finally lead us to the problem of the point of our academic discussion itself, as Lhuillier perceptively remarked in his paper. What I have noted above never means that the academic explorations of global law are ultimately a matter of bare political ideology. What I mean is only that we cannot but face with the moral point of law in some part of our theorizing. As it is well known, this is the theme a legal philosopher Ronald Dworkin has been famously arguing for. Here lies the famous (or notorious?) debate between modern legal positivism and the Dworkinian legal interpretivism in the jurisprudence on the grounds of law. Although this debate has been concerned with the understanding of domestic law, I believe this issue is also much relevant to the understanding of global law. In particular, the important issue here is whether one does positive description of law without any value-load or interpretive articulation of law with moral valuation.

The other related point I wish to raise is that there are two kinds of exploration in the interpretive approach to global law: constructive and therapeutic. Whereas the constructive approach tries to capture the positive side of global law in an active engagement of explorer, the therapeutic approach tries to analyze the hidden side of global law in a critical watch of explorer. In contrast with the constructive one, the therapeutic approach is negative in the sense that this aims at the critical dislocation of our pre-understanding rather than aiming at the prospective configuration of it. One might say these are the opposites, and

yet I believe that these are complementary, though with the priority given to the constructive one. The therapeutic approach makes sense by coming after the constructive one, simply because the therapeutic approach needs the constructive one as its target. This also means that the therapeutic approach may provide the *ex post facto* revisions or corrections for the constructive approach. Thus I believe that the constructive approach to global law is inevitable. In our legal practice today, we need a truthful view of global law for developing it with reason. And I wish to add that our theoretical enterprise (including my own in this comment) is itself already an aspect of this development.

THE CONCEPT OF “NORMATIVE SPACE”

A very short introduction

Gilles LHUILIER*

The concept of *normative spaces* tries to renew our approach to globalization. It is sometimes used by international lawyers – without definition – in reference to legal situations beyond the national legal order or the international legal (fragmented) order. For example, from a micro sector point of view, we can observe the emergence of new rules beyond national legal orders – such as African and Asian contracts on mines, which are of decisive importance for industry, armament, and telecommunications. These rules adopt unprecedented legal forms: global contracts on goods and services (offset contracts, Build-Operate-Transfer contracts, Finance-Build-Transfer contracts). These new rules also consist of global regulations on products (UN, mining professionals, OECD, United States laws with international scope, etc.).

During the international workshop held at MFJ in June 2011, I was especially interested in the common knowledge used in the writing of international contracts by Transnational Corporations Lawyers¹.

During this workshop, we saw that such international legal practices are very far from the classical presentation of the *conflict of law*

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1. GLOBEX (Recherches pluridisciplinaires sur la mondialisation : contrats globaux et nouvelles régulations sociales). See: http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publicques_et_privées/globex

concept, made from the state perspective, the perspective of the judge who tries to “localise” the contract. On the contrary, if we adopt an actor oriented approach, we are able to notice that the private actors now “localise” themselves on singular “normative spaces” made of all these national and international law chosen by the parties. I called this new set of practices “law shopping” in a broad sense², and all these practices (or “law shopping”) – plus all the chosen laws – constitute what I called “normative spaces”. Normative spaces have two significations. Firstly, normative spaces are a *set of “norms”*. This set of “norms” is constituted by practices of law shopping which allow merchants to designate the “rules” governing their relations, that is to say of routinized but highly compartmentalized knowledge of practices, many of which have a technical legal character. Secondly, normative spaces are also a set of “rules” designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, etc.

For the international workshop organized at MFJ in June 2012, I wanted to go further.

Firstly, I wanted to adopt not a “micro” point of view anymore but a “macro” geographical point of view. From “macro” geographical point of view, these new regulations of globalization show a shift of the creation of norms to Asia. Asia now appears as the source of an Asian business law which borrows from various legal traditions (Common Law, continental law, learned law, *Lex mercatoria*, etc.). This is for example the case with Chinese contract law, but also the so-called Principles of Asian Contract Law (PACL), or the Chinese arbitration law and generally the international arbitration in Asia. Thus, the organizers of this workshop³

2. G. Lhuilier, « Le concept de “Law shopping” (Droit international privé, droit social, droit de l’environnement) », in M.-P. Blin-Franchomme *et al.* (ed.), *Droit du travail et droit de l’environnement. Regards croisés sur le développement durable*, Paris, édition Lamy-Wolters Kluwers, 2010; « Law shopping (La redéfinition du choix de la loi par la pratique du droit international des affaires) », in X. Boucboza (dir.), *Les groupes internationaux de sociétés : nouveaux enjeux, nouveaux défis*, Paris, Economica, 2007. See also G. Lhuilier, “Academic Knowledge: Three views on global law and global legal theory”, *Occasional Paper* (presented in the previous pages of these *Cahiers d’Ebisu* No. 3); and I. Giraudou, “Report on the International Workshop held at Maison franco-japonaise, Tokyo (June 2001, 3-4)”: http://www.mfj.gr.jp/web/sympo_20110603/pdf/CR-IW_3-4_June_2011.pdf (online also on: <http://glsn.eu/>, “Actualités” column).

3. Isabelle Giraudou, Gilles Lhuilier.

decided to analyse two new “objects”, the PACL and international commercial arbitration in Asia, in order to raise two questions:

1. First question: can the “normative spaces” approach of global law renew the theories of international law, and especially the theory of arbitration, not as a transnational legal order anymore but as a normative space? The interest of the question at stake is to provide us with a theory of transnational law and also of international arbitration.
2. Second question: can the “normative spaces” approach bring up to date the theory of comparative law, not anymore made of “transplants” and “legal families”, but of “normative spaces”? The interest of the question at stake is to elaborate a new methodology for comparative law.

These two questions have then for hidden purpose to help us to better understand the many uses of the of normative space concept: is this concept only a new methodological approach to the globalization of law? Or does it also consist in an alternative concept of the legal order in a transnational context? Is it a new concept for international arbitration? Is it also a new method for comparative law?

Secondly, I wanted to go further in the construction of the concept of normative spaces. To answer clearly to Hasegawa Kō’s friendly remark expressed last year on the link between technicality and morality in international law⁴, I proposed this year to add a new element to our definition of normative spaces. A normative space is made of:

1. First element: **a set of “norms”**. This set of “norms” is constituted by “practices” of law shopping which allow merchants to designate the “rules” governing their relations.
2. Second element: **a set of “rules”** designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, and so on.
3. And a third element, the additional one I was just referring to: **a set of “discourses”** of the actors on the “norms and rules”, in order to

⁴. See K. Hasegawa, “Anchoring Normative Spaces in Global Legal Order: A brief comment on Gilles Lhuillier’s working paper”, *Occasional Paper*, presented in the previous pages of these *Cahiers d’Ebisu* No. 3.

introduce the legal “representation” of the international lawyers of their work, which are the links between legal “practices” and “rules”.

My “hypothesis” now is that a “normative space” is composed of:

1. **practices of choice** concerning law
2. the **designed rules** to be applied
3. as well as the concerned **actors’ discourses**.

And to “verify” this hypothesis, the organizers of the international workshop of June 2012 drew a questionnaire for each case study (i.e. the PACL and the international commercial arbitration in Asia) and sent it to the participants a few days before the workshop. The three set of questions it was based on corresponded to each of the three elements of a normative space. As follows:

1. First set of questions: the *practices of choice* – or what are the concerned actors’ practices of choice?
2. Second set of questions: the *chosen norms* – or what are the rules applicable to arbitration in Asia? What are those chosen in the PACL?
3. Third set of questions: the *choice makers’ discourses* – or what kind of discourses the actors themselves have on such practices and norms?

In other words: “Objects”, “Hypothesis”, “Verification of hypothesis”.

OF *BENTŌ* AND BAGELS

Globalization and new normative spaces

Andrew J. SUTTER[•]

The terms “normative” and “normativity” have been associated with “spaces” by numerous authors in a wide variety of disciplines (e.g., O’Shea 2010, De Oliveira *et al.* 2007, Berman 2006, Maleuvre 1999), including law (Lixinski 2008, Ruiz Fabri 2003, Delmas-Marty 1994; cf. Berman 2007, “hybrid legal spaces”). No one can deny that suggestive ambiguity may be stimulating (Empson 1947), perhaps least of all those who organize academic conferences. Nonetheless, the purpose of the June 2012 conference and workshop at the Maison Franco-Japonaise in Tokyo (MFJ) was to try to consolidate a more concrete notion of “normative space” in the context of legal studies, and to explore in what ways it might be a useful unifying notion for scholars, law-givers and practitioners.

What is a “normative space”?

Some earlier legal writers have used the term “espace normatif” to generalize the notion of a national legal system. For example, Girard 2003 cites the following as examples of national spaces: English public law, French criminal procedure, French administrative law, French private international law, and Russian law (as such); and the following

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as examples of international spaces: the International Court of Justice, the International Criminal Court, the WTO and its dispute resolution procedure, and the European Convention on Human Rights and its juridical organs. In her view, and those of the authors of a volume on “due process in normative spaces” to which she was writing an introduction, considering all of the foregoing sorts of spaces as “normative spaces” permits more complex types of comparison than had been traditional. While she also declared that normative spaces are “open” and “can communicate with each other,” the mechanisms and examples of this were not so fully fleshed-out.

Others find the analogy to national legal systems unnecessarily limiting. Gilles Lhuilier has used the term “normative space” (including in seminars held in 2009 and 2011 at the MFJ) to capture what he observed while negotiating project finance transactions in Africa. The various parties, who could mostly be grouped dichotomously as representing the interests of China or of an African nation, were actually organized under the laws of several different jurisdictions. The several contracts in a deal were also governed by the laws of different jurisdictions, not all of which were domiciles of parties. Within the same contract, specific contract provisions or issues might be governed by separate choices of law. The texts of some provisions themselves were often based on foreign models, such as English or American contracts, originating outside the jurisdictions whose laws will apply. The governing language might be one in which none of the parties’ representatives are native. And even when the national laws of the home jurisdiction of one party or another did apply, those national laws were very likely to have been influenced by the legal systems of former colonial occupiers.

In this context, the four corners of each contract bound a “normative space.” Lhuilier emphasized the way in which this space gets filled: the laws and other norms that apply (i) come from a **mixture of** national (and possibly other) legal systems, and (ii) are **selected** by the parties in an eclectic (though not at all arbitrary) fashion. Whereas for Girard (2003) the notion of normative space seems to serve as a way of identifying domains where law “happens,” Lhuilier’s notion shifts attention to the space as a locus of mixture and choice. In this view, the “communication” between different systems and domains of law is the most salient feature of the space.

A culinary analogy can be found in the humble *bentō*, or Japanese box lunch. This usually consists of an assortment of small dishes placed within a frame (*bentōbako*) of lacquered wood, or more recently, of plastic. Subdivisions may be “hard” (of wood, and either removable or integrated into the box itself), “soft” (such as little paper cups or wrappers, or pieces of greenery) or nonexistent. The contents could in principle be one main dish, such as grilled fish on rice, but more usually are a selection of small dishes that the buyer can choose. Japanese and “Western” style dishes can easily be mixed – though whether these dishes are of Japanese or “Western” provenance isn’t always so clear anyway. For example, *tonkatsu*, a “typically Japanese” lunch dish consisting of a fried breaded pork cutlet, is derived from Portuguese cuisine. It may be alongside along a piece of grilled fish, some rice and Japanese pickles – as well as potato salad, spaghetti and a small green salad. Yet in this last triad, the recipes will be distinctively Japanese, and the greens will be inscribed with intricate swirls of mayonnaise according to the local art.

Where do normative spaces arise?

The image of Japanese potato salad is a good reminder that the notion of a normative space as a locus of mixture and choice doesn’t apply only to contracts. The modern Japanese system of civil law born in the Nineteenth Century consciously modeled itself on the example of German law. Even today, German law serves as a relational common law (Glenn 2007) available to fill in gaps in Japanese law, though judges may look to additional sources and models, such as American law, as well. Relational common laws, “reception” of foreign law, postcolonial law and other phenomena of interest to scholars of national legal systems all rest on the elements of mixing and choice similar to those in contract-based normative spaces.

Transnational regimes of private international law and private ordering are additional contexts in which choice and mixing of legal norms come into play. Vivid illustrations were provided by the two main presentations to the June 2012 MFJ conference and workshop. Naoki Kanayama described the efforts of a multi-national group of Asian contracts scholars to develop a private convention of contract law principles, drawing from multiple national traditions. And Yoshihisa

Hayakawa explained the roles of choice and mixing in developing the infrastructure for private commercial arbitration in Asia.

Although not represented at that conference, public international law is another area in which similar phenomena occur. Here the work of Amartya Sen in combining philosophical notions of justice from Western and South Asian sources (Sen 2009) might be an exemplary case.

So national legal systems, as well as private, transnational and public international ordering regimes, all can serve as *bentōbako*. It remains to be investigated whether other structures can be added to this list.

How does this analogy relate to Gilles Lhuillier's troika of practices, norms and discourses mentioned elsewhere in this volume? What follows is a tentative guess. Perhaps practices are like the particular dishes in the *bentō* – e.g., potato salad, rice, steak. Norms might be like the choice of cuisine used to prepare the dish – e.g., is the potato salad prepared according to a German, Japanese or American recipe?; or if rice, is it *koshihikari*, jasmine, *arborio*, or some other variety? And discourses might be like the process of selecting and negotiating what goes into the *bentōbako* – why potato salad instead of spaghetti, why German-style instead of Japanese-style, and so on. Of course, sometimes analogies can be taken too literally! I leave it to the reader to improve on this suggestion.

What good is the category of “normative space”?

So far, scholars of legal systems and of comparative law have been getting along quite well without the “normative space” idea. Indeed, it's a commonplace among comparativists that “all legal systems are mixed systems.” And the shapers of transnational legal and private ordering regimes, as well as globe-trotting legal practitioners, have been happily mixing and choosing law without perhaps reflecting much on it. Nor are they likely to think about how their activities relate to those of judges and legislators who import foreign legal concepts into their own national systems. Occam's Law counsels that we shouldn't multiply entities without necessity – so what added insight can we gain from a category of “normative spaces”?

A hasty reply is that it's a unifying concept. All of these activities and phenomena involve mixing and choice from a variety of national legal regimes. Unfortunately, this reply runs the risk of being as facile as it

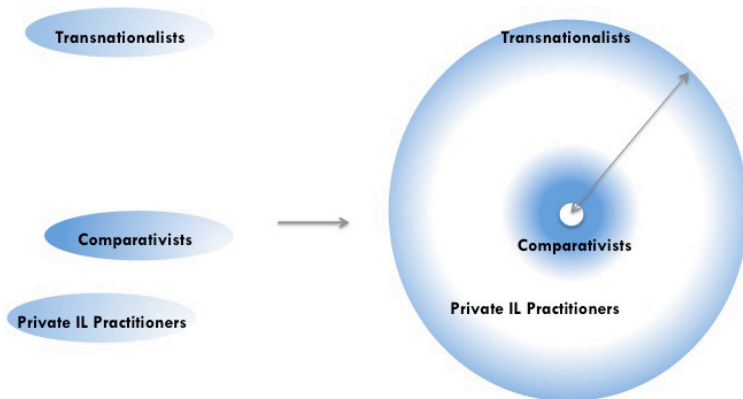
is obvious, if we allow “normative space” to be simply an amorphous catch-all term for a wide range of heterogeneous phenomena.

Can the term steer us toward any synthetic insights about what all these diverse activities might have in common? For Ruiz Fabri (2003) and her collaborators, the idea of normative space facilitated a comparative analysis of due process (*procès équitable*) across the heterogeneous range of spaces cited above. But if we broaden this idea to include contracts and other objects, and focus especially on the mixing and choice that occur within a space, what do we gain?

That we can gain something was the working hypothesis of the June 2012 workshop. The evidence is tantalizing. Consider Figure 1:

The left side of the figure presents various activities of practitioners and scholars as they are without the “normative space” concept – *i.e.*, as fairly autonomous fields.

Suppose we map these fields to the circular object on the right side of the figure. Along the radius of the circle let’s posit a gradient from a “pure” national legal system at the center to a maximally mixed



Not isolated fields of activity,
as today ...

... but sharing some common
activities and concerns, at different
spots along a continuous spectrum
("purely" national at the center)

(whatever that might mean) set of applicable laws at the boundary.¹ Since the comparativists are right, that all legal systems really *are* mixed, the exact center of this circle is missing. That is, the diagram is topologically equivalent to a bagel (in two dimensions, at any rate).

This mapping suggests that comparativists studying the “reception” of foreign legal concepts and similar phenomena have been focusing their attention relatively close to the center of the bagel. Private international law practitioners and scholars formulating transnational legal schemes have been engaged relatively closer to the boundary. Locating their activities along a continuous radial gradient instead of within entirely distinct domains is a way of saying that all these phenomena and activities are examples of the same kind of thing.

We still need to connect our culinary metaphors. To do this, we simply suppose that at each point of the bagel there could be one or more *bentō*. (A reader familiar with poppy, sesame, garlic or salt bagels will have a rough idea.) Metaphorically speaking, if the *bentō* contains just some Japanese rice with a pink *umeboshi* (pickled plum) at the center – a dish known as *hinomaru*, because it resembles the Japanese flag – it would be near the center of the bagel. If it used jasmine rice, it would be a little farther out. A *bentō* comprised of German-style potato salad, Italian-style spaghetti and American-style hamburger would be at a different spot from one with the same dishes (practices) that were all prepared in the Japanese style (a different norm) – though as to where each would wind up, your guess is as good as mine.

Colorful analogies aside, I should emphasize that this is a working *hypothesis*, which future research will substantiate or falsify.² But if it

1. An argument might be made that, say, private and transnational mixing activities should be along different axes; I ask the reader's indulgence to let me to use a simpler heuristic for now.

2. Proposing a category as a hypothesis to be investigated empirically might not be so common in law practice or legal studies, but there are plenty of examples in other fields. As the late microbiologist Carl Woese (2004: 179) pointed out, “conjecture is necessarily the mainstay of defining and understanding issues” in the study of biological evolution. This approach isn't without perils. Woese described with some irony how the category of “prokaryote” was used for several decades as a shortcut by which “the concept of a bacterium could be gained without having to know the natural relationships among [the various phylogenetic groups of] bacteria” (177) – *i.e.*, the category masked a certain complacent ignorance. Economics provides another unfortunate object lesson. In a 1955 speech, Simon Kuznets (1955: 26) first hypothesized that as a country's per capita GDP increases, income inequality first rises and eventually falls (tracing out an inverted-U graph now known as “the Kuznets curve”). Kuznets

holds up, it could be unifying in more than a superficial sense. For one thing, it could mean that scholars and practitioners working in hitherto separate fields might be able to learn from each other's discoveries.

One important class of potential discoveries concerns possible constraints on mixing – *i.e.*, about types of mixing that don't work so well. It's not hard to find a simple illustration of such a constraint in what we might call brute-force transposition. If you take a chunk from another jurisdiction's statute and incorporate it into your own legal system without modification, it probably won't work out so well. You run into similar problems if you dump it into your own transnational private ordering system without trying to harmonize it with the other bits and pieces and new ideas you are mixing in. And again if you copy a chunk of someone else's contract and paste it into your own without modification, you'll probably regret it (all the more so if the source and the target are governed by different jurisdictions' laws).

Of course, few people actually would take such a simplistic approach. Yet it illustrates a mixing technique that is a bad idea *in multiple contexts* – at various spots along the radius in our diagram.

Perhaps there are other techniques that are similarly awful in many contexts. Or others that are particularly successful. Then the notion of normative space will have helped us to identify some facts about the mixing of laws that can be useful guides for those focused on national systems, as well as for those framing transnational or other systems for public or private ordering. With any luck, we might even be justified in calling these facts (roughly) “universal” principles for mixing laws.

Finally, just as law isn't aloof from political, social and cultural concerns, we shouldn't expect normative spaces will be, either.

emphasized that the idea was based on “5 per cent empirical information and 95 per cent speculation, some of it possibly tainted by wishful thinking.” Nonetheless, developmental economists almost immediately reified it into a causal “law,” justified by something like the “trickle-down” economics hypothesis later favored by US Republicans. They designed aid programs that deliberately targeted funds to the wealthiest residents of poor countries – the supposed investors and job creators – in order to speed up industrialization, on the principle that more inequality today would lead to less tomorrow. It didn't quite work out that way (Moran 2005). As Woese put it, “it is not guesswork per se that is anathema; it is guesswork, conjecture, and the like that masquerade as problem-solving, interest-ending fact” (2004: 179). So I propose that for the time being we should treat normative spaces more in Kuznets's original spirit, as a category that has yet to prove its worth.

Long ago, the ultimate source of law was a “social contract,” but recently, it is becoming more and more a matter of private contract. For example, the United States Supreme Court in recent cases like *Rent-A-Center v. Jackson* (2010),³ *Compucredit v. Greenwood* (2012),⁴ and *Marmet Health Care Center v. Brown* (2012)⁵ has upheld mandatory arbitration in a wide range of consumer protection, employee discrimination and wrongful death cases – fields in which citizens could formerly rely on redress in the courts. In *Rent-A-Center*, the Court even went so far as to hold that the question of whether an arbitration clause in a consumer contract is enforceable should be decided by **arbitrators**, not by a judge.

Indeed, the recent rapid expansion of this form of “private ordering” was one of the motivations for the notion of normative space put forth in the June 2012 conference and workshop. But I hope that the category of normative spaces will help us to interrogate such changes, and not merely to describe them. For example, who benefits from the transition to orderings farther from the center of the “bagel”? What is the impact of this transition on democratic accountability, and on faith in democracy itself?

Do all these musings make sense? Are they worthwhile to pursue and develop? The first step toward an answer is to sharpen the notion of normative space, so that it can become a productive seed for future study.

3. 561 U.S. ___, 130 S. Ct. 2772 (2010).

4. 565 U.S. ___, 132 S. Ct. 665 (2012).

5. 565 U.S. ___, 132 S. Ct. 1201 (2012).

References

- BERMAN, Jonathan. 2006.
"Jonathan Berman Wanders Off
Into Normative Space."
Debating IR
<http://irdebate.blogspot.jp/>
(blog), 2006.02.28.
- BERMAN, Paul Schiff. 2007.
"Global Legal Pluralism."
Southern California Law Review,
Vol. 80, pp.1155-1238.
- DELMAS-MARTY, Mireille. 1989.
Pour un droit commun. Paris: Seuil.
- DE OLIVEIRA, Marcos,
Stephen CRANFIELD
and Martin PURVIS. 2007.
"Normative Spaces
in Institutional Environments
by the Means of Commitments,
Reputation and Petri Nets."
Proceedings of the 8th International
Workshop on Agent Oriented
Software Engineering (AOSE 2007),
2007 International Conference
on Autonomous Agents and
Multiagent Systems (AAMAS 2007),
Honolulu, Hawai'i.
- EMPSON, William. 1947.
Seven Types of Ambiguity.
New York: New Directions.
- GIRARD, Charlotte. 2003.
"Procès équitable et enchevêtrement
des espaces normatifs: réflexions
sur la problématique générale."
In RUIZ FABRI (2003).
- GLENN, H. Patrick. 2007.
On Common Laws.
Oxford: Oxford University Press.
- KUZNETS, Simon. 1955.
"Economic Growth
and Income Inequality."
The American Economic Review,
Vol. 45, No. 1. (March 1955),
pp. 1-28.
- LIXINSKI, Lucas. 2008.
"Editorial: In Normative Space."
European Journal of Legal Studies,
Vol. 2, No. 1, pp. 1-11.
[Introduction to special issue,
"Spaces of Normativity".]
- MALEUVRE, Didier. 1995.
"Philosophe dans le boudoir:
l'intérieur dans la prose du dix-neu-
vième siècle."
The French Review, Vol. 68, No. 3
(Feb., 1995), pp. 431-444.
- MORAN, Timothy Patrick. 2005.
"Kuznets's Inverted U-Curve
Hypothesis: The Rise, Demise,
and Continued Relevance of
a Socioeconomic Law."
Sociological Forum, Vol. 20,
No. 2 (June), pp. 209-244.
- O'SHEA, James R. 2010.
"On the Structure of Sellars'
Naturalism with a Normative Turn."
In Willem DE VRIES, ed., *Empiricism,
Perceptual Knowledge, Normativity,
and Realism: Essays on Wilfrid Sel-
lars*. Oxford: Oxford University Press.
- RUIZ FABRI, Hélène, ed. 2003.
*Procès équitable et enchevêtrement
des espaces normatifs*.
Paris: Société de Législation
Comparée.
- SEN, Amartya. 2009.
The Idea of Justice.
Cambridge, MA:
Harvard University Press.
- WOESE, Carl R. 2004.
"A New Biology for a New Century."
*Microbiology and Molecular Biology
Reviews*, Vol. 68, No. 2, pp. 173-186.