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COMPARATIVE LAW: PROBLEMS AND PROSPECTS

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The following is an edited transcript of the closing plenary session of the XVIIIth International Congress of Comparative Law. The session took place on Saturday, July 31, 2010, in Washington, D.C., at the conclusion of the week-long congress, which is held quadrennially by the International Academy of Comparative Law (Académie Internationale de Droit Comparé). The remarks were given in a mix of French and English, but for ease of reading the transcript below is almost entirely in English.

1. Jean Monnet Professor in EU Law and Walter Gellhorn Professor of Law, Columbia Law School, and President, International Academy of Comparative Law.

2. Peter M. Laing Chair, Faculty of Law, McGill University.

3. Laurance S. Rockefeller Professor of Sociology and Public Affairs in the Woodrow Wilson School and University Center for Human Values, and Director of the Program in Law and Public Affairs, Princeton University.

4. Associate Professor of Law, American University in Cairo.

5. Professor of Law, American University Washington College of Law. Professor Snyder is the moderator and editor for the closing plenary. Professor Snyder would like to thank Sârra-Tilila Bounfour for assistance with translation.

6. Professor of Public Law, University of Paris II (Panthéon-Assas).

DAVID V. SNYDER: *Bonjour*. Good morning. I would like to start us thinking about the problems and prospects of comparative law.

At this point in the conference, at the end, it seems to me we should focus on two topics. First, we need to identify and consider the most challenging problems in comparative law. To articulate the issues often leads a long way toward a solution. Second, we should look to the future of the discipline, perhaps (but not necessarily) in light of those problems.

Over the years, and particularly in the last decade, comparative law has been criticized for excessive doctrinalism, shuttered attitudes to interdisciplinary inquiry, timidity in approaching broad-gauge study, as well as tendencies to superficiality, triviality, obscurantism, and exoticization—not to mention claims of ultimate irrelevance.

These sorts of problems have paralyzed me sometimes. It will not come as a surprise to you that I have written a certain amount in comparative law.⁷ But it may come as a surprise to you that I have never taught and have no plans to teach comparative law. I do not know how to do it.

I should perhaps say I have taught no course that has “comparative law” in the title. I do teach international sales, and in that course I cannot help but be a comparatist. From the standpoint of transactional lawyers, there are many legal choices to be made in engineering a transaction and in choosing the legal regime that will govern it. To be more concrete: an international sale will require some source of law. The sale might be governed by international law,⁸ or it might be governed, if the parties choose, by some domestic law. The parties often have the power to choose. The

7. Recent forays include David V. Snyder, *Hunting Promissory Estoppel*, in *MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND* 281 (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009); David V. Snyder, *Contract Regulation, With and Without the State: Ruminations on Rules and Their Sources. A Comment on Jürgen Basedow*, 56 *AM. J. COMP. L.* 723 (2008).

8. For example, a sale between two businesses will often, by default, be governed by the United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 89-9, 1489 U.N.T.S. 3. *See, e.g., id.* art. 1 (applying to contracts between parties whose places of business are in different states).

lawyer, then, must consider the different rules that might be chosen to apply to the transaction. Those are real choices and thus comparison with a pointed purpose. In my course, then, we cannot help but be comparatists in order to be good lawyers. We might choose international law. We might choose our own law. Or we might choose the law of the other party. We might make yet another choice. In any case, we have to compare.

That realistic exercise is a very different kind of discipline from the more theoretical inquiries that tend to dominate comparative legal scholarship. I have to admit that when I write about comparative law, I am sometimes awakened by nightmares about what I've done. And a nightmarish fear has certainly made me think about the problem. Perhaps if I could name it, the problem would disintegrate like other nocturnal phantoms.

The fundamental problem for me is incommensurability. Outside of the context of a particular transaction or case, comparison is difficult for me, at least if I am to move beyond simple observations. Measurement appears to be somewhere between explosive and impossible; insight is largely inarticulate, if not entirely incommunicable. Having thought about the problem, and not having come to a satisfying conclusion, I thought I would seek help. This attempt at help now brings us the constellation currently assembled.

I have gathered some of the comparatists I most admire and have asked them to tell me whether they worry too. Perhaps my concern is idiosyncratic. But if they worry too, then how might we feel better? I know this hope is wishful, perhaps even childlike, but I hope that spending daylight on dark worries will crystallize the real concerns, dispel the nightmares, and reveal the most promising paths forward.

There is a sunnier aspect for our panel as well. The end of the congress is for moving forward. Comparatists probably know almost as well as historians that looking back is necessary. And we know almost as well as philosophers that rigor in thought and expression is required. Yet, this necessary work is all in aid of looking forward.

So I have gathered here a panel of luminaries in comparative law. Let us attend to them.

GEORGE BERMANN: Obviously each member of this panel has his or her own personal perspective on what the prevailing challenges are in comparative law. That perspective will become

clear in what we say, whether explicitly or implicitly.

Although we have been invited to focus on problems or challenges or difficulties, I want to say at the outset that the discipline has made considerable progress. I am quite familiar with the critiques that have been made of late of the comparative law discipline. I've contributed to the critiques, but I've doubtless also contributed to the circumstances that have given rise to those critiques. But I think in all modesty that this congress has itself illustrated at least in some measure some of the ways in which those critiques have been addressed. We have a long way to go, but I am not approaching you here in pessimism or in an apologetic mode.

Still, like everyone else on this panel, I do have some concerns, even preoccupations. My principal concern, which has been a durable one, relates to the relationship between comparative law and its sister disciplines of international law, public and private. Comparative law has maintained a stable and steady relationship with those fields over the years, a relationship I would characterize as symbiotic for reasons I have not the time to develop here. I sense that the changes taking place in the world today are putting great pressure on the relationship between comparative law and international law. So let me try to sketch what I mean and, in so doing, distinguish between public and private international law, however unfashionable that distinction is today.

In the opening panel in this room on Monday, considerable attention was given to the contribution that comparative law has made to the development of public international law. Judge Simma, in particular, but not only he, spoke of comparative law as a fundamental source of both customary international law and general principles of law.

It can be said without exaggerating that comparative law has contributed importantly, alongside other sources, to the creation of public international law. Conversely, I believe that public international law has contributed importantly to comparative law's sense of mission. Helping develop public international law is by no means comparative law's only mission, far from it. But it is among them. In sum, I discern in the relationship between comparative and international law a healthy symbiosis whose continuation we have no reason to doubt.

Elsewhere, I do see a problem, or at least the risk of a problem. It has to do, as you may have guessed, with the changing relationship between comparative law and private international law. That relationship is actually really a much more complicated, intimate and even intense one than prevails between comparative law and public international law and therefore, by definition, a potentially more problematic one.

Let me focus first on the core of private international law to which Judge Simma alluded yesterday, by which I mean such questions as jurisdiction, extraterritoriality, choice of law, and recognition of foreign judgments. It is commonplace knowledge that neither lawyers nor judges can perform the tasks of private international law without utilizing comparative law. That alone furnishes the basis for an intensely symbiotic relationship as healthy as the one comparative law has with public international law. But, I believe there are certain changes afoot that present a growing challenge for comparative law in its relationship to private international law.

The change that I would like to highlight for you is the manifest increase in transnational relations and operations. In other words, comparative law is increasingly put to the service of the practice of private international law. The question that arises—only slightly though, there is no need to exaggerate—is whether the requirements of private international law imply for comparative law not only an obvious and reassuring utility but also a potential danger. In my experience, the practice of private international law involves a significant reduction in the complexity, the richness, and the nuance of the law, and foreign law in particular, which is reduced to a series of legal propositions sufficiently simplified to feed the machinery of the practice of law and of private international law.

I believe that the appetite private international law has for comparative law is only growing. What are the consequences, then, for foreign law as a subject and for comparative law as a method? In other words, does the utility of comparative law have a price, and if so, what is the price? Yet, there is no need to overdramatize the situation. This is not, certainly not, the death of comparative law. On the contrary, comparative law is in a sense actually valorized by this evolution. Comparative law is not being denatured either, because comparative law continues to carry out, as always, its function to

inform private international law. The challenge is much more subtle: Can comparative law, at a time when it is increasingly put at the service of private international law—a phenomenon to which I contribute—be pursued for its usefulness while safeguarding and preserving the character of comparative law, a character that values precisely the precious richness of the law, the complexity of the law, and its subtleties and nuances? The challenge for comparative law is thus, despite its instrumentalization, to continue to make its intellectual curiosity, as well its genuine appreciation of ideas, prevail over its undeniable practical utility.

The challenge faced by all disciplines that will last is to find a way to fulfill their traditional roles and, at the same time, to adapt themselves to new circumstances. For international law—private as well as public—the mission is clear in an increasingly globalized world. But the path of comparative law is less evident in this new landscape, and I believe it is even a little threatened. So, what to do?

There are three aspects to the role we can play in this regard. Our role as scholars is the easiest one to identify, as it is unchanged. We can continue to conduct the kind of research and write the kind of scholarship that preserves the integrity and authenticity and complexity of the fabric of law as a subject and that preserves the calling of comparative law. I am not at all worried about the capacity and the will of the people in this room to address through the traditional methods of legal academia the challenge that I have sought to describe.

Second, as teachers, we must prevent comparative law, both in our curricula and in our writing, from becoming eclipsed by the greater immediacy and more manifest utility of international law, whether public or private. We must bear in mind that it is the kind of intellectual curiosity that comparative legal inquiry fosters that should drive what we do in the classroom and in our scholarship.

Third and finally, as jurists who engage with practice, whether as authors of expert opinions or as arbitrators or as contributors to the construction of new legal institutions and new legal regimes, we need to resist the '*banalisation du droit comparé*' [trivialization of comparative law] that can, but need not, accompany the relevance that comparative law today enjoys in the practice of international law. There I conclude and thank you for your attention.

PATRICK GLENN: Thank you Mr. Chair. I come to the podium with a keen sense of disappointment, a disappointment which flows from the realization that I won't have the occasion to hear my young and brilliant colleague Nicholas Kasirer, already *doyen honoraire*, as they say, of my law school and already ascended to the Quebec Court of Appeal. Nicholas is a jurist of great subtlety and great originality, who is perhaps best known for his notion of the *outré-langue*, or 'language beyond,' a general concept designating the language which exists as a historical and ongoing source beyond each of the particular languages we know today.⁹ For Nicholas, and for me, the language beyond the English language is French, which gave so much of its vocabulary, concepts and structures to English, and especially to legal English. This is why the adjectives in 'court martial' and 'fee simple' come after the noun. So I will continue speaking in that particular derivation from Norman French which we today call English. But I will return to Nicholas' notion of the language beyond each language, the *outré-langue*, to reflect briefly on its potential for comparative law.

There is an absolutely splendid barrage (from the French *barrage*) of criticism in the program about comparative law. And since it was expressed partly by David in French, I will return to it in English. If you're the author, David, I congratulate you on this splendid polemic. It is said in the program that comparative law has been criticized for excessive doctrinalism, a shuttered attitude, timidity in approaching broad-gauged study, as well as tendencies to superficiality, triviality, obscurantism and exoticization.

Do I worry about that? I don't worry about that at all. I think I'm guilty of most of that myself. I think I've even been guilty of being at the same time trivial and obscure. So one can't worry about this at a personal level. What is more encouraging is that I think one can find similar criticisms made with respect to most other disciplines, both

9. See generally the discussion in Nicholas Kasirer, 'L'outré-loi', in *ÉTUDIER ET ENSEIGNER LE DROIT: HIER, AUJOURD'HUI ET DEMAIN—ÉTUDES OFFERTES À JACQUES VANDERLINDEN [STUDYING AND TEACHING LAW: YESTERDAY, TODAY, AND TOMORROW—STUDIES OFFERED IN HONOR OF JACQUES VANDERLINDEN]* 329 (L. Castonguay & Nicholas Kasirer eds., 2006).

by people outside them and, most interestingly perhaps, by people within them. So each discipline today goes through crises of one type or another. In that, I think comparative law is comparable to many other intellectual pursuits.

I do have a problem, however, with comparative law as a *distinct discipline*. Why do we have a distinct discipline of comparative law? Most people say comparative law is a discipline that began with the great World Congress in Paris in 1900. I think that's probably not strictly exact, though Professor Blanc-Jouvan may correct me. I think the *Société de législation comparée* was begun in the mid-nineteenth century, in the 1860s. So we've probably had a recognizable and distinct discipline of comparative law for 100 to 200 years. What is striking about that—to me—is that the discipline of comparative law emerged at the time of the most radical introspection of lawyers in the world, at a time of radical state construction, and at a time of radical nationalism in law and in other fields of thought.

Now how should we think about this paradoxical situation? One way of thinking about it is optimistic. The optimist says that as the world closed down, comparative lawyers opened windows of light and maintained contact with other sources in the world. I like to think that way myself. But my darker side tells me that it may not have been entirely a process of illumination. It may also have been the case that comparative lawyers were complicit in nationalistic endeavors of the time. You can find support for that notion of comparative law as nationalism in the great taxonomic project of comparative lawyers, discussed for well over a century, of essentially classifying all national legal systems as members of given legal families. There is clearly a process of solidification or reification of national legal systems in this taxonomic process—national laws as autonomous, static, incontrovertible entities. This concept of the task of comparative law was therefore state-centric and nationalistic. It was very largely Eurocentric.¹⁰

I don't think this was part of any conspiracy. I don't think it was

10. For the taxonomic project, and use of the biological metaphor of 'legal families,' contrasted with a more dialogical notion of legal tradition (conceived simply as normative information), see H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 421-439 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

the result of any deliberate decisional process of comparative lawyers. I think it was probably part of a much larger impression on legal thought of the scientific positivism which prevailed at that time. What is it to compare? Everybody knows what it is to compare. It's in the dictionaries and anyone can tell you. To compare is to examine two things, A and B, and to say how A and B resemble one another or differ from one another. That's it. There's no hint of normative inquiry in the process. It is pure *constatation*, as they say in French, or as we say in Quebec English 'constatation.'

It may be that's why few law students choose to take courses in comparative law. They regard it as an oxymoron. Comparison is a purely descriptive process. Law is a normative process. How can one do both at the same time? So I don't think what the world needs is a discipline of comparative law dedicated to those nineteenth century ideas of comparison. We certainly need the data which the social sciences provide us, and which many comparative lawyers provide us. But there is a real need for the skills and knowledge of comparative lawyers in adding a normative dimension to the debate about comparative law. My view of the future of comparative law follows from that proposition.

My McGill colleague, Charles Taylor, has written that all normative debate is comparative, every normative proposition standing in relation to, and alongside, other normative claims.¹¹ I think this is the message which comparative law can give to the world, and I think this is presently happening. It is most visible in the form of transnational judicial dialogue, a normative dialogue which is being vigorously pursued today (itself surrounded by normative debate).¹² This requires us to rethink what it is to compare.

If our present understanding of comparison doesn't allow us to do

11. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 72 (1989) ("Practical reasoning . . . is a reasoning in transitions. It aims to establish, not that some position is correct absolutely, but rather that some position is superior to some other. It is concerned, covertly or openly, implicitly or explicitly, with comparative propositions.").

12. A recent survey of the debate identified some 3,000 law review contributions in the United States alone. *See, e.g.*, Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 *FORDHAM L. REV.* 647 (2008). For a recent, book-length treatment of the debate, in terms of necessary 'engagement,' see VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

that, then there are useful suggestions in the history of the word itself. Where does the English word 'compare' come from? It comes from the *outré-langue* of English, French, and the French word *comparer*. Where does the French '*comparer*' come from? It comes, of course, from one of the *outré-langues* of French, Latin—specifically the Latin word '*comparo*.' This is a composite word, composed of the word *com* (or *cum*), in English 'with,' and *par*, in English 'peer' or 'equal.' So com-paring can be seen as a process of existing with an equal, or that which is taken to be an equal, in spite of evident differences. It is a process of what was once referred to in Spain as *convivencia*, the process of living together in a non-conflictual manner in spite of profound differences or beliefs.¹³

I think it is today the main task of comparative lawyers to develop multiple means of *convivencia*, as a way of enabling the world to live in a non-violent manner. Now the exquisite irony of this is that the more successful comparative lawyers become in doing so, the less visible comparative law will be as a discipline. Everyone will be doing it. There is a clear parallel with Alice in Wonderland's Cheshire Cat who would slowly disappear while smiling. The last thing you saw was the smile. Perhaps the last comparative lawyer in the world will disappear leaving only a smile [audience laughter]. And the smile of the world's last comparative lawyer will be the sign of the ultimate triumph of comparative legal thinking. Thank you very much.

KIM LANE SCHEPPELE: I gather that I am on this panel for two reasons. First, I am not just an academic law professor but also a social scientist. And second, I've worked extensively on the part of the world formally known as Eastern Europe.

After 1989, I began studying the political transitions in the former Soviet world, focusing on how police states turn into rule of law states through dismantling surveillance, bringing police under law, increasing procedural guarantees for criminal suspects, increasingly parliamentary lawmaking, and generally bolstering transparency,

13. The *convivencia* was that of Muslims, Christians, and Jews during the time of Islamic reign in Spain. There is, of course, debate on the extent of their peaceful co-existence. For the methods and logic of com-paring, see generally H. Patrick Glenn, *Com-paring*, in *COMPARATIVE LAW: A HANDBOOK* 91-105 (Esin Örüci and David Nelken eds., 2007).

accountability, and rights enforcement. After 2001, I've been studying the rise and entrenchment of the global anti-terrorism campaign. In this campaign, states have been ramping up surveillance, giving the police and intelligence services more leeway, eliminating procedural guarantees, moving to forms of executive lawmaking, and generally decreasing transparency, accountability, and rights enforcement. The very aspects of authoritarian governance that were dismantled in the post-Soviet transitions all show some signs of being newly attractive after 9/11 as states take steps to fight terrorism. It's like *déjà vu* all over again, but backwards.

I say this to give you a sense of my frame of reference. The study of the transitions out of state socialism on one hand and the rise of the anti-terrorism campaign on the other illuminate some particular problems in the study of comparative law more generally. In particular, I want to address three issues: considering the comparative treatment of ideological subjects, attending to the gap between law on the books and law in action in comparative scholarship, and noting the effects of global trends and global institutions as we look at changes in domestic law.

First, on ideology. Both of my lines of work involve ideological subjects and there are specific problems that come with this territory. What are ideological subjects? It's hard to have a neutral view about communism, terrorism, and things of this kind. In fact, people who work on these topics tend to have strong views in favor of neoliberal law over socialist law or human rights concerns over anti-terrorism programs—or their inverses. Strong prior beliefs about what is right in an ideological battle raise some methodological red flags for comparative law.

For example, for many comparativists who worked across the socialist law/non-socialist law divide, there was a tendency to compare ideal systems with real ones. During the Cold War, it was a commonplace to compare ideal democratic rule of law systems with actually existing socialist ones or, if the analysts had the reverse politics, they compared ideal socialism with actually existing capitalism. Any ideal will look better than any real system, so these are not fair comparisons. And the comparison is even more unfair when one assesses a system against an ideal that it does not aspire to reach. It is easy to caricature the system one doesn't like by pointing

out the ways in which it falls short of an ideal, particularly of some ideal that the system in question does not share.

This practice of flogging legal systems for failing to live up to others' ideals carried over into the post-Soviet world, when those who believed that they "won" the Cold War urged countries once on the other side to hasten in making their legal systems look as nearly as possible like those of their former adversaries. The legal systems that have emerged from these changes often lurched toward their ideological opposites with predictable results. The lurches failed and something altogether more complicated took hold. We can only understand what really happened if we stop looking through these ideological lenses and recognize the current legal systems in the former Soviet world as the mixes of historical legacies and complicated aspirations that they are.

With respect to terrorism, one can also see the dangers of ideology. Some who work in the field start from the view that the greater danger to human flourishing in an age of terror comes from the governments that overreact rather than from the terrorists who attack. Others start from the view that the fundamental human right at stake is the right to security, which must be guarded against the constant danger of terrorist attack. Those who write with security clearances cluck-cluck at those naives who are not getting the "ghosts and goblins" reports that detail the imminent threats waiting in the wings. Those on the outside who focus on the effects of anti-terrorism policy call attention to the "collateral damage" to human rights that such policies have had for Muslim communities as well as for communities of dissidents everywhere. Here too, the security hawks often fail to see that the values of the human rights advocates are not antithetical to security, and the human rights advocates often fail in turn to recognize that there may be real threats that need to be addressed. A less ideological look at the law and its effects (as well as at lawlessness and its aftermath) will reveal that there is much to be learned from comparative experience that starts from facts on the ground rather than ideologies in the air. Ideal human rights views contrasted with the details of an actually existing anti-terror campaign will overestimate what is possible, while a security-only view overestimates the disruptive effects of rights.

As a first methodological matter, then, I would counsel that it is

unwise to compare the ideal with the real, especially across an ideological divide.

My second methodological point urges that it is also unwise to compare doctrine in one system with practice in another. Since many of us often compare systems with which we're very familiar because we live in them with systems about which we learn from afar through reading, it is a constant temptation to compare the details of the systems one knows from daily practice with the doctrinal rules of another system one knows about only from reading. The field of sociolegal studies has been dedicated to demonstrating that law in action is almost always very different from law on the books. If one compares the doctrine on one side with the practice on another, one is comparing very different beasts, a less helpful enterprise than one imagines.

My role on the panel as a social scientist is to exhort us all to think about what we are doing when we compare doctrine from one system with practice from another. In every system, we know that there is a gap between these two things. And yet somehow it is very hard to keep that gap in mind when looking at a number of different legal systems precisely because it is extremely difficult to know the detailed practice of so many systems without living for long periods of time in each place. If we see law as a practiced activity, as something that exists as actual habits and practices of people and not just as doctrinal categories, we will have a much better grasp of what comparative law can tell us. Recognizing the gap between law on the books and law in action is necessary if we are to make headway in understanding how any legal system works or how one legal system is different from another.

Moreover, and this brings me to my third point, we need to understand this relationship between law and practice in a new international frame. Our field has assumed for a long time that most similarities across legal systems are achieved horizontally—that countries borrow legal ideas from other countries, or that they give and take transplants. Alternatively, similarities have been imagined genealogically through the metaphor of legal families. But in the last several decades, we can see the increasing prominence of top-down international influence, from international organizations straight into domestic legal systems without the usual horizontal or genealogical

processes in place. I very much agree with George Bermann that one of the key challenges for our field is the increasing role and increasing penetration of international law into domestic law. George is a specialist in international private law where the dynamic is quite different than in international public law where I tend to work. In my areas of research—legal transitions and anti-terrorism law—international institutions have had an enormous effect on the landscape of domestic law in parallel ways in multiple countries at once. Let me give two examples that illustrate both the gaps between law on the books and law in action as well as the increasing penetration of domestic law by international law.

In the former Soviet world, international financial institutions had an important say about how countries in the region accomplished their transitions. Almost all of the countries of the former Soviet world came under International Monetary Fund tutelage at some point in that process. When that occurred, the domestic law of countries under the IMF-mandated austerity programs could no longer be understood primarily in terms of the country's own internal law-making processes. Agreeing to loans from international financial institutions required changing domestic law in particular ways, even when domestic lawmakers had no desire to do so. As a result, we saw sweeping across the former Soviet world programs that slashed social safety nets, imposed flatter tax systems, created openings for global capital to come into the domestic economy, and took back benefits that had been promised to citizens from the Soviet period. Much of this was accomplished by law, and the legal effects had to be documented back to the international financial institutions to show that they had worked. The requirements of the international financial institutions not only necessitated legal change, but also mandated that there be more than the usual degree of correspondence between law and practice. If we as comparativists only examined these countries horizontally—comparing Poland with Hungary or Russia with Ukraine—we would have missed that these common programs sweeping across such a wide swath of the former Soviet world were the result of the common mandate of international institutions. Moreover, we can see in these austerity programs external demands for results, which made law in action rather closer than it often is to law on the books.

In the global anti-terrorism campaign, a series of resolutions of the

UN Security Council, Resolution 1373 and others, have required states to change their domestic law in specific ways to comply. Here too, from the fall of 2001, one could see sweeping across the legislative landscape of a surprising array of countries new laws that criminalized terrorism offenses, authorized asset freezes of people on newly constructed watch lists, permitted new forms of intrusive surveillance, and tightened up on refugee and asylum claims. The Security Council's newly formed Counter-Terrorism Committee insisted on reports from UN member states that first documented the legal changes and then provided statistics on how many terrorists and how many dollars were seized through these new mechanisms. Doctrinal changes worked very much in parallel but domestic compliance with these new laws varied widely. The extraordinary similarity of the laws states have passed after 9/11 can only be understood by reference to the common international pressure that brought those laws about—but the gaps between laws on the books and laws in action tell us that doctrinal change doesn't mean that law hits the ground in the same way in all places.

In particular, some states seem to have passed anti-terrorism laws to comply with these Security Council mandates and just stopped there, while other states have used the draconian new anti-terrorism laws to rout their domestic opposition or to carry out their own unique programs of repression rather than to fight global terrorism in parallel with other states. So, for example, even though Vanuatu passed an anti-terrorism statute that was nearly bigger than the country itself, the statute has not been used at all. By contrast, Thailand adopted an anti-terrorism law on the Security Council model and that law has been actively deployed. But the anti-terrorism law in Thailand has not been used to fight the kind of global terrorism that the Security Council had in mind. Anti-government protestors occupying the main square in Bangkok were forcibly dispersed by the government in spring 2010, and many were shot and killed. Even though these protestors were not at all connected to the global war on terror, those protestors who were arrested were charged under the anti-terrorism laws that the Security Council required Thailand to adopt. Having similar laws on the books in Vanuatu and Thailand did not produce similar uses of these laws in practice. These two examples—which could be endlessly multiplied—show that global templates emanating from international

organizations may be adopted by different countries in very similar ways. But one must look to the practice to understand they are being used for highly different purposes from place to place. Having similar laws on the books does not necessarily begin to demonstrate that these laws are carried out the same way everywhere.

So then, how should we think about comparative law as we meet at this international congress? The examples I have just given show that we should no longer think of domestic law as particularly self-contained. The more that countries become enmeshed in global institutions, the more they adopt templates that allow them to adapt to the forces of globalization. And so increasingly, domestic law is being changed through the effects of international institutions. But even though international law may be becoming increasingly important for understanding comparative law, it is only the comparative lawyer who can see just what this means in practice.

In my remarks today, I have tried to call attention to three problems – the dangers of working in ideological subjects where there is a tendency to compare one system's legal practice with another system's legal ideals, the problem with failing to see that law in action is quite different than law on the books and the necessity of recognizing that the forces of globalization mean that domestic law is changing rapidly in response to the top-down pressures of international institutions. In thinking about these three problems, however, a single solution suggests itself: more careful, observant and patient comparative law research.

AMR SHALAKANY:¹⁴ Good morning. *Bonjour*. And *sabah el-kheir!* If we're going to introduce French heavily on this panel, then we might as well include my mother tongue, Arabic. But don't worry, I won't impose that on you now. Not yet!

As George mentioned, a lot of our views on where comparative law stands today and how we can take our discipline ahead happen to be quite autobiographical—and such is certainly the case in my own work. More specifically, my biggest challenge for the last couple of

14. Because of the advent of the Arab Spring in Egypt, Professor Shalakany was not able to participate fully in editing these remarks. The editors have worked with, and we hope remained faithful to, his text, but he has not been able to check all editorial changes. His remarks in response to the interventions from the audience could not be included for similar reasons.

years has been to grapple with how Islamic law has been traditionally defined as a field of comparative legal studies, pretty much since 1932 when the First Hague Congress of Comparative Law passed a resolution put forward by the Egyptian Delegation, and adopted ‘à main levée,’ formally reserving “dans le prochain Congrès, une place à l’étude du droit islamique non seulement comme source de droit comparé.”¹⁵ That to my mind was the historical moment when my field became a subject of comparative law, a deeply emotional moment for the Egyptian Delegation which returned back to Cairo beaming with nationalist pride that Islamic law has finally made it on an equal footing with civil law and common law, and a deeply disciplinary moment out of which came an entire field of study concerned with finding functional analogues across these three legal traditions, all the way from family law to banking and finance.

My biggest challenge is the definition put forward since 1932 at the Hague Congress on what constitutes ‘Islamic law’ for comparatist purposes. See, if you’re going to study Islamic law, then what you’re fundamentally studying is Islamic legal history because, as you all know, Islamic law is not fundamentally thought of today as a law in action, but rather a law that existed in the past and then was replaced after the colonial encounter by a variety of civil and common law transplants from the late nineteenth century onwards. In that historical understanding of Islamic law as fundamentally a thing of the past, there is one definition that dominates comparative legal studies since 1932, which must now come to grapple with very serious critiques that demand of us a rethink of what constitutes Islamic law.

To give this a bit of a theoretical framework, I’m going to use the work of the French philosopher and historian Paul Veyne, specifically a beautiful short book published back in 1971 called *Comment on écrit l’histoire*, or “how we write history,” in which he introduces something called “[l]a notion d’intrigue.” According to Veyne, for the historian “les faits n’existent pas isolément, en ce sens que le tissu de l’histoire est ce que nous appellerons une intrigue, un

15. Translation to English: The Congress passed a resolution by show of hands formally reserving, in the next Congress, a place for the study of Islamic law not exclusively as a source of comparative law.

mélange très humain et très peu « scientifique » de causes matérielles, de fins et de hasards Le mot d'intrigue a l'avantage de rappeler que ce qu'étudie l'historien est aussi humain qu'un drame ou un roman, Guerre et Paix ou Antoine et Cléopâtre." In answering the question, "*Quels sont donc les faits qui sont dignes de susciter l'intérêt de l'historien ?*," Veyne answers "*Tout dépend de l'intrigue choisie; en lui même, un fait n'est ni intéressant, ni le contraire. . . . car le fait n'est rien sans son intrigue [E]n histoire comme au théâtre, tout montrer est impossible, non parce qu'il faudrait trop de pages, mais parce qu'il n'existe pas de fait historique élémentaire*"¹⁶

What does that mean? Basically for Veyne, if one is going to write history, including legal history, then one by default is engaging in an 'intrigue'—and the best English translation for 'intrigue' I could think of is a 'plot,' both in the amusing literary sense of the term (such as an interesting plot of action underlying a good play or novel), but also a 'plot' in the more darkly conspiratorial sense.

Islamic legal history, as the core of my comparative legal studies, can also fall under one of three alternative plots. So what I'll do for the remainder of my time is I'll take you through first, what has been the dominant plot of Islamic law history since the Hague Congress of 1932; second, how this plot has been challenged by two alternative plots over the last 20 to 30 years; and then three, why you should care as comparative lawyers engaged in Islamic law between these alternative plots.

The first plot, which is the dominant plot, boils down pretty much to the following—if you're going to study Islamic law, then the doctrines that you are studying have to be derived from some

16. PAUL VEYNE, COMMENT ON ECRIT L'HISTOIRE: TEXTE INTEGRAL [HOW WE WRITE HISTORY : FULL TEXT] 51-53 (1971). Translated to English: "Facts do not exist individually in the sense that the structure of history is what we will call a plot; a very human but not so much scientific mix of material causes, ends, and hazards. The word 'plot' has the advantage of calling to mind that what the historian studies is as human as a drama or a novel such as *War and Peace* or *Antony and Cleopatra*." In answering the question: "Which facts are worthy of the historian's interest?" Veyne answers: "Everything depends on the chosen plot. In itself, a fact is neither interesting nor uninteresting because the fact is nothing without its plot. Thus, in history as in theatre, showing everything is impossible, not because it would require too many pages, but because there is no elementary historical fact."

scripturally revealed text. This means, basically, either the Koran or the Sunna of Prophet Mohammad or *Ijmaa* (a matter about which there is scholarly juristic consensus), or alternatively *Qiyas*, which is analogical reasoning derived from any of these three sources. Anything that is outside of these four scriptural sources of Islamic law does not merit study by a comparative lawyer interested in Islamic law.

There is a huge problem with that scriptural definition of Islamic law, namely that it does not include a whole variety of judicial structures and doctrinal arrangements that have existed since at least the time of the Byzantines, and which have been later collected under the doctrine of *siyasa shar'iyya*, or in French '*politiques juridiques*' [legal policies]. These doctrines are dismissed from the study of the comparative lawyer, indeed from the study of the historian of Islamic law generally, as being either 'secular' or from 'extra-Sharia' jurisdictions—certainly for the two leading scholars of Islamic law history, Schacht and Coulson.

This means that in Plot No. 1, which continues to be the plot dominant until now, you are relying on a particular set of primary materials which happen to be juristic textbooks of *fiqh* or Islamic jurisprudence, textbooks that come in various lengths and forms but are fundamentally written by jurists, for jurists, and about jurists. And that story is not of a law in action but rather a law in books. It's not about what people are doing in courts, it's rather how the jurists theorized the legal system as a whole.

This particular conception of Islamic law came under attack from the 1970s onwards particularly after the publication of Edward Said's book, *Orientalism*. The concern was that the conception of Islamic law presented there makes Islamic law exactly the radical opposite of any form of Western law, whether it's civil or common. If the history of Western law has been a history of evolutionary functionalism—Western law develops over time in order to deal with changing needs of society or indeed leading these societies to its new reactions—Islamic law, by contrast, seems to be almost dysfunctionally resistant to evolution, in the sense that there's one right answer, God revealed it, it has to be based in one of the scriptural sources, and it applies today just as it applied a thousand years before.

Against this, a second plot emerged from the 1970s onwards which has a very clear anti-orientalist streak to it. Without getting into much detail, this plot is fundamentally a variation on Plot No. 1.; it relies on the same set of primary materials—again juristic textbooks without looking at all these other institutions that existed in practice, but argues that Islamic law has actually developed here and there by tweaking some of the major historical moments of its development.

I don't have much time so I'll move on to Plot No. 3, which by contrast has emerged now for the last almost 10 years. It's very different from the two other plots because first, by way of primary materials, it looks at Ottoman court records as opposed to juristic textbooks. Second, it does not tell the history of Islamic law as a law of jurists, but rather tells a history of Islamic law by looking at the history of people coming to court, something that we might call subaltern history. And third, it gives you a sense of Islamic law as something much more changing and developing over time than the other two plots would concede.

This Plot No. 3, which I would call a new historiography of Islamic law, has so far been marginalized both in defining Islamic law as a field of legal history, and therefore also as a field of comparative legal studies. I would argue that if one wants to move forward in dealing with Islamic law in comparative law, then one should take Plot No. 3 a bit more seriously. And I hope the stakes in taking it seriously are evident in the paper that is distributed on your tables.

If one is interested in comparing the governance of sexual crimes under Islamic law before the colonial encounter, and if you stick with Plots No. 1 or 2, then you are also stuck with the *hudood* table on the first side of the page, which basically states a number of punishments, distinctively harsh, from stoning to lashings, but also reveals a set of background norms of evidence and privacy that effectively stop them from being applied in practice. You flip the paper on the other side and you find alternative *siyasa* punishments for the same crimes, not lashings or stonings this time, but a series of fines that vary depending on the social class of the person who is being accused.

And so at stake in choosing what kind of Islamic law we will deal

with in comparative law between Plot No. 3 and Plots 1 and 2 is first, a very clear distinction between lashings and stonings on the one hand and fines on the other; second, for someone who is interested, as myself, in a progressive transformation of Islamic law in the future, if you include *siyasa* as part of your study of Islamic law, as opposed to the dominant tradition in scholarship today, then the very definition of your discipline becomes unclear.

And this is where I am torn. It seems on the one hand that it's much better to be fined than it is to be lashed or stoned. On the other hand, the evidentiary barriers to conviction that exist at the bottom of the first table and that effectively stop Islamic law from ever being applied might also take you in an opposite direction. It might be actually better for you to stick with Plot No. 1 because it might actually provide more safeguards in keeping the state outside of the bedroom.

This has been an incredibly short and brief description but I'm glad to expand it more in questions and answers. Thank you.

ELISABETH ZOLLER: First, I would like to thank Professor David Snyder for having invited me on this panel and for giving us such good directions as to what we should talk about this morning. Each of us was invited, to all feasible extent, to choose a particular theme among the numerous problems of the discipline comparative law. My own theme deals with the indeterminacy of the discipline—what I could also term the uncertain object of comparative law.

What makes me uncomfortable in comparative law is the indeterminate nature of the discipline. What is its goal? What is its end? What are we trying to do, to prove, or to achieve when we compare legal systems?

Where is the need to ask such metaphysical questions, will you say? My answer is based upon Jean de la Fontaine's advice, the French fabulist who recommended in *The Fox and the Goat*: "Whatever way you wend, consider well the end."¹⁷

17. JEAN DE LA FONTAINE, *Le Renard et le Bouc [The Fox and the Goat]*, in OEUVRES COMPLETES: FABLES CONTES ET NOUVELLES [COMPLETE WORKS: FABLES AND SHORT STORIES] 115 (Jean-Pierre Collinet ed., 1991), translated in Jean de la Fontaine, *The Fox and the Goat*, ETURAMA.COM, <http://www.eturama.com/histoires/the-fox-and-the-goat-1068> (last visited Jul. 1, 2011).

This is wise advice. How many of us have a clear vision of what we are doing and where we are going? Personally, I must confess that I have difficulties to give clear and straightforward answers to such questions.

Of course, the indeterminate nature of the object of comparative law varies according to each comparatist. There are as many uses made of comparative law as there are individuals interested in it. Nonetheless, what is striking is that, in spite of their diversity, all of these individuals, with a few exceptions, seem to see the discipline only as useful, and sometimes even under a utilitarian doctrine. Comparative law is now entirely dominated by an instrumental approach. President Bermann said it very well before me. It is perceived as a means to an end, one end only, which is to resolve concrete practical problems.

Foreign laws are like objects displayed on the shelves of a big legal Walmart. Everybody walks by with a cart, taking one or several articles that they need to resolve a particular problem. Foreign laws are no longer objects of study. They are products, consumer products, regarded as quick fixes to pressing needs. In the worse cases, they are considered as convenient means to respond to embarrassing popular demands and to follow through on hazardous electoral promises. True, this consumer approach may turn out to be useful more often than not. But I have difficulty to conceive comparative law as a toolbox only.

The utilitarian function of comparative law cannot be questioned, and should be pursued. Yet, comparative law should not be reduced to that. For a scholar—I mean a scholar educated in the tradition of classic humanities who was taught that what matters is not to resolve problems but to formulate them—the utilitarian approach does not permit us to understand the diversity of legal worlds, and even less to make sense of them.

We live in a world where everything is globalized, but in which legal systems remain as diverse as they were in the last century. If there has in fact been interpenetration of the public law systems, notably between European states, I do not believe—no, I do not believe that we can speak of a standardization of public law, even through international law. Regarding the issues of government organization, the purposes of the State, the notion of State itself, a

real abyss exists between the American and European conceptions of public law.

Regarding the content of public law, it is not true that only judges guarantee rights and liberties. Jean Carbonnier was right when he left it up to a civil code and a public prosecutor to guarantee freedom. In countries of codified law, freedom starts with the legislator. On this side of the Atlantic, things are seen differently. But why? Isn't it something that should be explained? The main task of the comparative legal scholars does not fundamentally differ from that which Montesquieu had given himself on the threshold of the *The Spirit of Laws*.

"I have, first of all, considered mankind; and the result of my thoughts has been, that amidst such an infinite diversity of laws and manners, they were not solely conducted by the caprice of fancy."¹⁸

It is not enough to know how the law works to explain the diversity of legal systems and make sense of them. In the same manner that, in 1987, Allan Bloom worried about *Closing of the American Mind*, closing of the comparative mind is one of the greatest dangers we must face.

The turn has come for the comparatists to be "*des juristes inquiets*," that is—concerned lawyers for their discipline, as the French civilists were for theirs in 1929, according to the adjective Paul Cuche used to describe critics of the school of exegesis.¹⁹ In order to stop the appalling depletion of the legal thought that threatens legal education, we must bring humanities and social sciences back to law school; we must resist the temptation to make it a professional school only. Yes, there is room for humanism at law school, as it is true that their function is not to produce filled minds but good minds. Thank you.

18. CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, 1 *THE SPIRIT OF LAWS* xliii (Thomas Nugent trans., G. Bell & Sons 1914).

19. See Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 380 (defining "*juristes inquiets*" as "worried or anxious" French legal academics whose goal was to overthrow legal classicism and renew French legal thought at the end of the nineteenth century).

INTERVENTIONS FROM MEMBERS OF THE AUDIENCE²⁰

CHRISTIAN ARMBRUSTER: Thank you very much. I just want to make a few remarks about the notion of legal families just used by Patrick Glenn. I think one of the key challenges to comparative law nowadays is to reassess the concept of legal families because the good old days—when we easily divided the world into legal families—are obviously over I think a reassessment in any case is necessary. . . . We have heard a lot about the growing influence of international law on national legal orders. . . . So I have a question for Professor Glenn: Where does that leave the notion and concept of legal families?

TALIA EINHORN: I am from Israel. I also wanted to respond to Patrick Glenn about the Cheshire cat at the end. One of the first chapters of the Bible tells the story of the Tower of Babel when the people had one language and one word—the same words. And the story, of course, is that they wanted to build the Tower of Babel and God came and confused their languages and dispersed them over the Earth and that was the end of that story.

Now some say it was a punishment but in fact, another commentary says it was the saving of humanity because when people speak the same language and have the same words or ideas, essentially, it is problematic because a variety of thought is lacking. So I like much better your idea of *convivencia*, the same as living next to each other—existing next to each other because in fact, one of the greatest things about comparative law is reflecting upon our own system in a completely different way after we've stepped down and looked at it and really understood what makes the differences. So, I think this is one of the objects of comparative law. And thank you very much for a wonderful time.

LOUIS DEL DUCA: I will first thank the panel for a very stimulating and informative presentation. And as I listened to the

20. Many of the interventions were not entirely audible in the recording and thus not available for transcription. The editors, with apologies to intervenors, have done their best to state the sense of each intervention. In addition, not all intervenors are audibly identified in the recording, so not all can be identified here. As with the panelists' presentations, all French is here translated into English by the editors.

presentation, I was impelled to parlay the comments that the panel made to the development of teaching materials particularly in the post-World War II period. When George Bermann talked about the new concern, interest and focus on public international law, I looked back at the casebooks and materials that we were utilizing in the '50s and '60s and '70s. And you compare that now with the kinds of materials and new kinds of subject matters that we're addressing, I'm optimistic as I look at that development.

We now have the public law component and the comparative teaching is evident in new constitutional law comparative books that didn't exist until relatively recently on this side of the Atlantic. And we look at the new kind of development of teaching materials like the West Publishing Company series of books which are addressed to the task of providing law teachers who have not had exposure to comparative law training and experiences with materials that relate contract laws specifically in a comparative context, injecting CISG kinds of materials into that field. And it's comparably in the constitutional law field, judicial review on a comparative basis. None of that really existed until relatively recently.

I look at what's happening in Europe and on this panel for example. The panel put on a wonderful presentation that we had from Justice Ginsburg and Miguel Maduro. Here is the European Union in its own fantastic integration of this great experiment in a public kind of institutional development that has occurred there—unique in the history of the world. But they're not satisfied to just think of themselves as such; after all, what did Miguel Maduro tell us yesterday—that they're in the process of forming a global governance program in thinking beyond their own limitation. And this includes talk about the vertical imposition of rules, combined with transplant processes, moving beyond the historical horizontal process.

I'm merely trying to suggest that new horizons have been developed—and very constructively, very creatively. And the fact that this has occurred leads me to be rather optimistic about what the developments are, where the use of comparative law not only for academic purposes, not only for skills training to develop expertise to handle private counseling. I think what has evolved in the recent years is a concern, a motivation to utilize comparative law to develop

new institutions, new structures that can address the problems that need to be addressed.

UNIDENTIFIED SPEAKER: I'll join the chorus here. I take issue with Professor Bermann's comment. If I understood it correctly, the appearance of public international law and private international law elevates utility over practicality. I think that for comparative law—in my class I focus on this, I have a practice background—the most important thing in international practice is understanding where your clients come from. And for that you need to know comparative law. That's the most important thing in practice.

I would say the other really practical value is—one of the panelists already said this—any law reform is comparative. So I would just agree with the other side in this fashion, that that's the core basis. And I think it's still perfectly valuable.

OLEKSIY KRESIN: Oleksiy Kresin, Ukraine. I have a comment and a question for Patrick Glenn. You mentioned something about the history of comparative law and the start of this history. Two centuries ago in 1810, Paul Feuerbach mentioned comparative law as an academic discipline, called comparative legal science. If we take this as a starting point, maybe Feuerbach's commentary should be taken to be a sign of a well-established comparative legal science as, perhaps, he assembled the first well-established treatise on comparative law as general subject.

You know it's an eternal question—what is the starting point of comparative law? But you know it's quite curious when you point to 1869 and the creation of the French Society of Comparative Legislation as a starting point because in the same year, we had in Ukraine, in Kiev, a treatise on the history of comparative law. So how could this have started in 1869 when the history of comparative law was already being written? Thank you.

RALF MICHAELS: Ralf Michaels, Duke University. There is a certain call on the panel, as I take it, to have more sophistication in comparative law. However, it seems to me that one problem of comparative law in action where it is most influential—in the World Bank, in the Rule of Law Project of the American Bar Association—is that these projects do not even reach the modest level of sophistication that we comparative lawyers already have, or put differently, that there is almost no comparative law in these projects

at all. So, to take Islamic law as an example—as misguided or shocking as its understanding by many comparative lawyers may be, this understanding is still more informed than that of many law reformers and of people advocating war against Islamic countries.

So my question is: what do we, as comparative lawyers, do with this situation? Do we, firstly, say we try to dumb down our work so as to make sure our work remains relevant in these projects? Or, secondly, do we emphasize the complexity of comparative law in order to try to keep back such governance projects, by telling them that things are actually not as easy as they take them to be? Or, thirdly, do we say we are in fact a non-interventionist discipline, so we remain on the sidelines and we critique from the outside while we observe? I am personally quite unsure which of the three options, each of which sounds quite unattractive, we should actually take. But that seems to be, to me at least, the biggest task that we have as comparative lawyers right now—to determine how we engage with these governance projects of which we are not a part.

ADRIEN WING: I am Adrien Wing from the University of Iowa. I'd like to congratulate the panel for the wonderful perspectives. I'm particularly delighted that Professor Shalakany was here who was able to speak not only in English and French but also could have done the whole thing in Arabic as well and probably several other languages. And so I have loved this discussion but I think, for the future, I have a plea that it would be really great if at the next international congress we could actually not worry as much, "Have we closed down?" but "When will we open up so that we will hear the voices of the majority of the world who are not in this room?"

And so because of the nature of this discipline and how it has evolved over time, we're still, in the twenty-first century, literally only hearing from a small portion of the world—as I was just looking around this room. And so I think we really need the voices of the majority of the world, whether we are talking about many more people from Asia, a mass of people would be from Africa, the Middle East and so forth. I'm glad to see there are some Latin American people here. But we need more voices in the dialogue or else we're just kind of perpetuating the kind of things that Edward Said and others with the orientalist kind of discipline said—we're just talking to each other and we're not really getting their

perspectives. And the majority of the world may have very different ideas about lots of these issues.

And because of the problems with so much wealth, as represented in this room, and not enough wealth from the majority of these countries, I think it would great if somehow we could get the resources in the next four years to assemble critical masses from a variety of countries. And I don't know if that's by foundations sponsoring people or by different institutions here at the Society sponsoring people. So we could update these debates with many of the voices that are not in the room.

And I'm hoping, as Patrick was saying, that there would be this Cheshire cat with a grin. And the grin would come about from the joy that would come from hearing from the majority of the world scholars and practitioners on these topics. Thank you.

NICOLÁS ETCHEVERRY: I will just follow up your thoughts. Thank you for this wonderful panel. And I would like to congratulate you all. A special thanks to Professor Elisabeth Zoller for what she said about warning us about the risk and danger of finding comparative law only a consumer product and having only a very utilitarian view of it. She quoted Montesquieu and the infinite variety of mankind. And that is if that infinite variety of mankind is not telling us to become those voices of the world that are not listened to today, then we are in debt. The infinite variety of mankind forces us to understand, respect, and love each other, each time more, and each time better. And if humanism and human sciences do not intersect with comparative law, then comparative law loses its meaning and its goal. Thank you very much.

PABLO LERNER: Pablo Lerner, Ramat Gan School of Law, Israel. And I have a question to Professor Shalakany. As a matter of fact, I continue the path of Professor Wing. I have read your article addressing the adoption of foreign ideas in Egypt.

During this congress I was asking different people about their thoughts on the following idea: I don't know how it is possible to seek harmonization and multiculturalism. So this is what led me to the question. On one hand we study for a world of codification; on the other hand, there are a lot of people who want multiculturalism, pluralism, and so on. Furthermore, the problem of harmonization continues. They do not have a very clear role in this process. They do

not play the game. And I am not sure of even in the following congress there will be 300 persons from China, 300 persons from Europe, 300 scholars from Guatemala. Honestly, I do not know. And especially that you have to deal with this question. So perhaps you can help me finish the congress on this matter. Thank you.

SYMEON SYMEONIDES: Thank you, David. I shall be brief. I don't think it should matter when comparative law began, but since several dates were mentioned, let me give you another date. How about 700 BC? When Solon, the lawmaker in Athens, was asked to draft the laws of Athens, do you know what he did before that? He traveled around the known world, at least the Mediterranean villages. He studied the customs and went back home and drafted laws based on the wisdom or experience of that excursion. So in a sense, comparative law, or at least the idea of observation, began then. And I'm sure there are other examples in history where the laws of other countries were recognized before, but I don't know.

Another point on George's take on the connection between private international law and comparative law: I think that connection is becoming increasingly close. I will give you an example. In the old days, we used to choose the applicable law based on the context of all states with a relationship. You didn't need to know what you were choosing. In fact, you were not supposed to care what you were choosing until after you had made the choice and then you have the *ordre public* exception and so on. So a lot has changed since then. At least in the United States, and increasingly in other countries in the world, we care very much what we choose and why we choose it. And we believe that there cannot be an intelligent choice unless you know and understand very well the laws which you choose. As a result, that has made choice of law far more complex but it also increases its dependence on comparative law. It made choice of law more uncertain but we believe it made it more rational. So the relation continues, and it is becoming even more intense. Thank you very much for an excellent, excellent time and an excellent congress. Thank you.

RESPONSES FROM THE PANEL

ELISABETH ZOLLER: I would like to react to the interaction between public international law and comparative law. I'm very

skeptical about ‘narrowing the gap’ between public international law and comparative law because I do not see how comparative law has changed public international law. Here, of course, I’m not referring to private international law, which is something quite different and must be governed by domestic laws in the absence of international treaties or conventions.

As far as public international law is concerned, I’m sorry to say I do not see many changes which would have been triggered by comparative law in the basic norms of public international law that apply to the subjects of international law, the law of treaties, or international responsibility. I don’t think that comparative law has modified these fundamental principles. International law—public international law—remains the law of a society of states.

Now where it comes to the interactions that can be made in private and public international law, I think that in this country, we have a tendency to view the two as very similar or let’s say to view the two as forming a continuum. I doubt that in other parts of the world, the view is the same. I would suggest that federalism as a basic tenet in the constitutional structure of the country is very important in that respect. Thank you.

AMR SHALAKANY: [Remarks were largely inaudible and must unfortunately be omitted.]²¹

KIM LANE SCHEPPELE: I would like to address the problem of socialist law. Of course, if you look at comparative law in textbooks before a certain date, socialist law appears as one of the great legal families. But it has now apparently disappeared. I want to suggest that it actually lives on. Ironically, one of the places where socialist law has been preserved is in the United States. If you look at the jurisprudence of the Warren Court in the 1950s and 1960s, in criminal procedure decisions in particular, it was a common practice for the Supreme Court to cite Soviet sources and to say that if the Soviet Union does things this way, we will do the opposite. Soviet law lives on in the constitutional criminal procedure of the Warren Court—or what remnants of those decisions still remain.

In addition, law from the socialist period still exists as law in the books in many post-Soviet places. Labor law, which had not been

21. *See supra* note 14.

enforced as written in the Soviet period, suddenly came to be enforced by courts taking law seriously in the 1990s after socialism was gone. Or social rights were for the first time universally enforced only after the Soviet Union collapsed. Practice changed, even when the letter of the law remained largely intact.

The IMF targeted the post-socialist states' enforcement of social rights provisions in constitutional law in the early years after the collapse of the Soviet Union. But the IMF's insistence on shredding social safety nets came into conflict with the IMF's Rule of Law projects. The constitutional courts of both Russia and Hungary made extraordinary decisions in the mid-1990s announcing that there was a constitutional limit to how much social rights programs could be cut back in the course of these austerity programs. The reactions of the governments in Russia and Hungary to these constitutional pronouncements were actually very different, however. In Russia, President Yeltsin paid no attention to the Constitutional Court. Their decisions were simply ignored, and the austerity programs were pushed through as the IMF insisted. In Hungary, however, where the government really didn't actually want to cut back social programs to begin with, the government went back to the IMF after the Constitutional Court decisions and said, we have a Constitutional Court that tells us we can't construct the austerity program the way you would like us to, and of course, you wouldn't want us to violate the decision of our Court, would you? The IMF backed down, and the Hungarian Government was able to use the decisions of the Court to renegotiate the bargain with the IMF.

On the question of legal families and international law in the anti-terrorism campaign, the program of laws that countries must adopt is universal and doesn't depend on a country's own legal history. But one sees great differences both in the ways that laws are adapted to fit the specifics of each country's legal systems and also the ways that laws are applied. For example, the Security Council framework requires an extraordinary amount of change in banking regulation. Financial transactions must be made more visible to states. And yet in some countries, data privacy has been entrenched in ways that require local adaptation of this mandate. As a result, most states are adopting these laws as required by the Security Council, but they are doing so in slightly different ways. The same is true in the area of criminal law where again the Security Council Framework requires

the criminalization not only of terrorism but also of inchoate crimes like conspiracy. And of course, systems vary a lot in whether inchoate crimes are permissible in the system of criminal law. Sometimes states will adopt these new laws and then not enforce them.

As a result, I think what we're seeing is that international law produces pressure toward the standardization of law, but that cultural differences among legal systems emerge when these laws have to be locally adopted, interpreted, and then applied.

PATRICK GLENN: Thank you. Thank you for all of those comments and those from the panel as well. Some of the comments suggest to me all of the obstacles that are before us. And all of these obstacles are before us in a time of globalization essentially because of the confrontational and conflictualist teaching of the last two or three centuries.

We see that in private international law where the dominant language is that of conflicts of law. In the 11th edition, I think of Dicey and Morris on the Conflict of Laws, the authors state in their discussion of the name of the subject that 'laws may differ but they do not conflict.' Yet the authors conclude that the language of conflict should be retained because of the 'obvious inconvenience' of changing a name in use since the seventeenth century. In public international law, as was just said by Professor Zoller, we have the idea that the law is exclusively that of states. But once again you think in terms of the conflictual relations between states and, of course, the law of war is historically a dark part of the discipline of public international law.

Those are all lawyer problems. The real problem I think that societies face today is the result of teaching 'what law is' to the public of our countries. We have taught for the last two or three centuries that the basic form of human organization is what is called a 'nation state.' And every nation state should be uniform. There should be coincidence between the nation and the state. And publics therefore react faced with irritants to that uniformity, which should be the rule according to the teaching given for the last two or three centuries. So we see riots. We see killings when there are suggestions of deviation from what is taken to be a uniform norm of law and governance.

There has never been and there never will be a nation state. But we have not taught that. We have not taught in reality how successful states are successful. Diversity exists but it is within them, as with the *convivencia* that the Spanish identified and were very successful in implementing for a long period of centuries. So the task, I think, of being comparative lawyers of the future is to attract attention to the actual complexity of human relationships. And Ralf, it's not for us to dumb down the World Bank; it's doing a good enough job of that itself [audience laughter].

GEORGE BERMANN: Thank you. And of course, those were all very stimulating and, in some cases, provocative comments. What I sought to convey in my remarks is the challenge of performing comparative law on a level of sophistication that's appropriate for the task to which it's being harnessed. And I think that the message that I think Elisabeth Zoller shares with me is not that we should deny the utility of comparative law, that we should deny its utilitarian dimension, but that we should labor with extreme effort to preserve that which is not utilitarian about comparative law.

And that's why I don't quite understand some of the remarks made earlier in the conversation to the effect that we on the panel are questioning the utility of comparative law for the discharge of a variety of functions. Comparative law is expected to deliver different goods according to the function it is meant at any given time to serve. Some functions may call for a high degree of sophistication, while others demand law in more easily digestible form. Frankly it's the variety of our missions that's presenting us with the biggest challenge.

The final comment I want to make is not unrelated to Professor Adrien Wing's. I think it's related. I think that every one of these conferences should focus less on, or not focus exclusively on, the utilitarian value of comparative law, and instead the focus should be on the more cosmopolitan and more inclusive and more spacious concept of the community in which we're investing ourselves. I think we are trying to move in that direction, but I would be the first to agree with Adrien that conferences such as these have done a great deal to make up ground in regard to the cosmopolitan composition. The degree of cosmopolitanism within the constituency is relatively high. I don't think we need to belabor the problems in conceiving of

comparative law in terms of families of law. When we organize and classify legal systems into families of law, we necessarily attach ourselves to certain criteria, and those criteria drive the composition and the structure of the families.

What we need to do is begin rethinking the suggestion that was made. We need to rethink what the relative criterion is for classifying those systems if we are inclined to classify. Some of us are not inclined to classify. But I think that the fundamental question is—what criterion is relevant? And it's no longer whether Roman law serves as one of the intellectual arches of the legal system that divides one family from another. Thank you very much.

DAVID SNYDER: Thank you. When I put this panel together as I told you in the introduction, my hope was that it would make me feel better. Now let me just say that when I put together a list of the problems—and Professor Glenn, yes, I did write that little polemic in the program, as you guessed—I didn't want to set all the categories because I realized I might not be seeing everything myself. In doing that, it had not occurred to me that you were going to give me all kinds of other things to worry about, in addition to the ones that had already occurred to me.

Nevertheless, after having heard all of the problems or challenges, I think one thing we heard from the panel is about the promise of comparative law. So much of it resonated for me, but I need to be quick. So let me just say that something that makes me happy is to think explicitly about comparative law as a humanistic discipline—a particularly humanistic discipline, within the larger discipline of law, which is itself humanistic, as well as many other things.

Regardless of the promise of comparative law, the panel has convinced me of the necessity of comparative law. It is unavoidable. And I think Professor Glenn teaches us that we ought to accept what is unavoidable with a smile.