
BEYOND UNIVERSALISM AND PARTICULARISM IN INTERNATIONAL LAW—INSIGHTS FROM COMPARATIVE LAW AND PRIVATE INTERNATIONAL LAW

RALF MICHAELS*

Anthea Roberts has written a formidable book, and the praise it has garnered, (as far as I can see nearly unanimous) seems well deserved.¹ The book is full of useful insights and fascinating case studies; it provides access to a wealth of scholarly discussions that we are normally not privy to, and it presents a rich sociology of the field of experts in international law. The main thesis of the book—that international law is not uniform, that Schachter’s “Invisible College of International Lawyers”² is characterized by many divergences and miscommunications—seems correct. In fact, it seems more than correct; it seems almost obvious.³ Roberts’ own experience coming to the United States, namely that what is called international law is often really foreign relations law, has been shared by countless others (myself excluded). That Russian international law is different from English international law may not be known by everyone, but it is certainly not surprising. And so, what is surprising about the thesis is not its content itself. What is surprising is the fact that the thesis has been perceived as surprising and challenging by so many observers.

I would suspect that this is so because of an anxiety in the discipline. That anxiety stems from concern about what would be left if universality disappeared. The alternative seems to be relativism, and it would stand for everything that public international law tries to overcome. Public international lawyers appear concerned that the only alternative to universality would be chaos, and that therefore somehow universality must be protected, even against better evidence.

* Arthur Larson Professor of Law, Duke University, and Chair of Global Law, Queen Mary University of London.

¹ ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

² Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

³ Comparative international law, as Roberts acknowledges, is not entirely new. *See, e.g.*, INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE (William Elliot Butler ed., 1980); W.E. Butler, *Comparative Approaches to International Law*, 190 RECUEIL DES COURS 9 (1985); Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385 (2011). *See also* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT’L & COMP. L.Q. 57 (2011); Anthea Roberts et al., *Conceptualizing Comparative International Law*, in COMPARATIVE INTERNATIONAL LAW 3 (Anthea Roberts et al. eds., 2018).

Such anxieties certainly informed the fragmentation debate,⁴ and they may also be at work in the attempts to protect a universal private international law. Anthea Roberts now lays open what everybody secretly knew: this universality is very limited, perhaps unachievable. The question is: what should come in its place?

Perhaps, help can come from elsewhere. Unlike public international law, my own fields—comparative law and private international law—have always dealt with plurality; in fact, plurality is their *raison d'être*. But they have also had to grapple with the challenge of universality and relativism, and perhaps these struggles can be useful to public international law as well. Let me begin with comparative law. Although comparative law presupposes difference among laws, this difference was long felt, by many scholars, as a shortcoming of law. Pascal's puzzlement over law's plurality ("*Plaisante justice qu'une rivière borne! Vérité au-deçà des Pyrénées, erreur au-delà*")⁵ is regularly cited with approval, and the main task of comparative law was, for many, to ease the way towards legal unification. This is no longer so; the widespread pleas for unification have given way to a more differentiated view. Many comparatists now openly endorse difference,⁶ and a considerable discussion is held on whether comparative law should emphasize similarity or difference.⁷

Now, what makes this discussion relevant is not the rather obvious answer to this discussion—comparative law must be about both similarity and difference. It is, rather, the way in which the discipline attempts to transcend the opposition of similarity and difference. One way in which this is done is through the tool of functional equivalence between laws.⁸ Functional equivalence can mean that different laws can perform similar functions: insurance and tort law both provide compensation; punishment, and education both reduce crime rates, etc. It can also mean that similar laws can perform different functions in different countries—international law may be the same everywhere, but may be used to

⁴ Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); see also Paul A. Stephan, *Comparative International Law, Foreign Relations Law, and Fragmentation—Can the Center Hold?*, in COMPARATIVE INTERNATIONAL LAW, *supra* note 2, at 53; Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMPLE INT'L & COMP. L. J. 279 (2013).

⁵ BLAISE PASCAL, PENSÉES 84 (1670).

⁶ Most pronouncedly Pierre Legrand, *The Same and the Different*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240 (Pierre Legrand & Roderick Munday eds., 2002).

⁷ See, e.g., Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 390 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); James Gordley, *Comparison, Law, and Culture: A Response to Pierre Legrand*, 65 AM. J. COMP. L. Supplement 133 (2017); Ruth Sefton-Green, *Compare and Contrast: Monstre à deux têtes*, 54 REVUE INTERNATIONALE DE DROIT COMPARE 85 (2002); Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004).

⁸ See Ralf Michaels, *The Functional Method of Comparative Law*, in OXFORD HANDBOOK, *supra* note 7, at 345.

control government in one state and to restrict the opposition in another. What we have, in such cases, is neither similarity nor difference, neither universality nor relativism. Instead, we have what I have called *similarity in difference*⁹—a combination and mutual enabling of similarity and difference.

This process of comparative law—to bring different laws into connection with each other without denying their difference—is a way to transcend the opposition of similarity and difference. We see such developments in the trend from comparative law to transnational law.¹⁰ Transnational law, once defined by Jessup as a combination of public and private, international and domestic law, has become a discipline in which law is understood as universal and plural and the same time. Presumed universal (international) law is always partial—because it remains distinct from domestic law, but also because it interacts with domestic circumstances in site-specific ways. Global law is always plural but interconnected: local law transcends boundaries and interacts with law elsewhere in complex ways.

Such conflicts are the domain of my other discipline, private international law (or conflict of laws). Private international law, like comparative law, has sometimes been viewed as a necessary but unwelcome way of dealing with legal plurality, as a second best to substantive law unification. At the same time, the nature of private international law itself has been the object of much discussion. Historically, for a long time we could distinguish two schools. According to the internationalist school, private international law is really genuinely international law (albeit formally domestic)—a kind of meta-law that allocates, with universally binding force, the jurisdiction of courts but also questions of the applicable law. Private international law is then neutral as between different states' regulatory interest. In contrast to this stood the so-called nationalist school, according to which conflicts of laws are matters of domestic law, and that means, especially, domestic substantive law. Laws emerge from sovereign command, and therefore the sovereign's political interest determines both the scope of its laws and the resolution of conflicts with foreign laws.

Both schools still exist, but they are now supplemented by a “third school of private international law.”¹¹ This school combines considerations from the other two. Like the nationalist school, it conceives of private international law as domestic law, but like the internationalist school, it separates this domestic private international law from domestic substantive law. Like the nationalist school, it sees private international law as informed by values and policies, but

⁹ *Id.* at 377.

¹⁰ Russell A. Miller and Peer C. Zumbansen, *Introduction: Comparative Law as Transnational Law*, in *COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL* 3 (Russell A. Miller & Peer C. Zumbansen eds., 2011); Ralf Michaels, *Transnationalizing Comparative Law*, 23 *MAASTRICHT J. EUR. & COMP. L.* 352 (2016).

¹¹ See Ralf Michaels, *Comparative Law and Private International Law*, in *I ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 417, 423-24 (Jürgen Basedow et al. eds. 2017).

unlike the nationalist school, it views these values as different from domestic values. Like the nationalist school, it views law as actually particular, but like the internationalist school, it views it as potentially universal.

It should be easy to see the parallels between the internationalist school and a presumed universal international law on the one hand, the nationalist school and foreign relations law on the other. Both the internationalist school and the presumed universal international law seek a universality that transcends domestic politics and interests—and are plausibly criticized as naïve, anti-political, and ideological. Both the nationalist school and foreign relations law are criticized as parochial, subservient to power interests, and incapable of properly conceiving of relations with foreign sovereigns.

Does that not suggest that a third school of public international law could move beyond this chasm? This school would openly acknowledge that much public international law exists in domestic, not universal, settings, that it is influenced by domestic interests that may differ, and that it is therefore not universal. But it would also acknowledge that this domestic international law is separate from a mere foreign relations law that merely allocates competences between the branches of one state's government, that unilaterally determines the scope of its own law without serious engagement with the positions of other countries. It would acknowledge that public international law, like all law, is always political. But it would also demonstrate how the politics of that public international law are not merely the amalgam of the politics of the nation states.

Would such a transnational public international law be possible? Does it perhaps already exist, albeit undoubtedly under a different name? Anne Peters has recently made a suggestion in the fragmentation debate that seems to be widely in line with what I have in mind here¹²—although she still puts more emphasis on the strife for universality than would appear necessary for this outsider to her discipline.¹³ And so something may still stand in the way of such a third school. I have no better proposal than that at this stage. It just appears to me that the end of universality need not be the end of public international law, and that other disciplines create reasons for optimism—and material for further work.

¹² Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONST. L. 671 (2017).

¹³ Anne Peters, *Multiperspectivism In and On International Law*, VÖLKERRECHTSBLOG (Jan. 15 2019), <https://voelkerrechtsblog.org/multiperspectivism-in-and-on-international-law/>; see also Anne Peters, *Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus*, 67 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 721 (2007).