

Comparative Law and International Law: Methods for Ordering Pluralism

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The title of this lecture is not meant to be neutral: by postulating a relationship between comparative law and international law, it suggests (as the subtitle makes clear) a pluralist conception of the world legal order. This conception takes a critical approach to the idea of an *international law* based solely on relations between States and developed outside national legal systems, thus running the risk that normative choices will be inspired by power politics. It also presupposes an encounter between a method (comparative law) and a corpus of positive law (international law). Politically improbable, this encounter may also appear legally questionable, given the extent to which the two disciplines tend to ignore each other, isolated by their own specific languages, rites, dogma and clergy. We propose, nevertheless, to support this hypothesis, after having, by way of introduction, endeavoured to rebut the main arguments against it in a changing world.

Introduction: Legal Disciplines in a Changing World

Why should *international law*, which is limited to organising relations *between* States, take any interest in local laws (national or infra-national) and their comparison? A good deal of international writings imply that it should not¹. For instance, when René-Jean Dupuy entrusted "the imagination of nations" with the task of laying down in law what he described as the "promise of humanity", he considered "probing the imagination of nations to discover their vision of humanity"², but gave precedence to the examination of international law.

This is perfectly understandable given that comparative lawyers, devoted as they are to discovering the specificity of each system, and constrained by their own cultures, show little interest in the study of public international law and interstate relations. Even when they dream of a "common law of civilised humanity" like R. Saleilles during the famous conference in Paris in August 1900³, or support legal unification, like H. C. Gutteridge, who devoted three chapters of his comparative law treatise to this theme⁴, they make hardly any reference to international law as its relationship to comparative law is seen as doubtful, or even fanciful. But in a changing world, law "like a river" is experiencing "currents of change at a dizzying pace"⁵ and the present globalisation is marked by increasing interdependence and accelerating transience. The main legal disciplines have to be reconsidered in the light of both phenomena.

International Law: From Independence to Interdependence

Even the most powerful country ought to consider that the autonomy of legal systems can find itself directly called into question by situations of interdependence born of globalisation, because these situations mark the limits, legal as well as political, of relativism⁶. Today's globalisation is not limited to reaching the level of the precedent, in terms of economic mobility and international financial integration, but is characterized legally by "topsy-turvy

¹ H. Lauterpacht, "The so-called anglo-american and continental schools of thought in International Law", XII *Brit. Y. B. Int'l L.* 31 (1931), quoted by L. Amede Obiora, "Toward an auspicious reconciliation of international and comparative analyses", *The American Journal of Comparative Law*, 1998, vol. 46, pp. 669-682.

² R.J. Dupuy, *L'humanité dans l'imaginaire des nations*, Julliard, Paris, 1991.

³ R. Saleilles, *Congrès international de droit comparé*, Société de législation comparée, 1900; On the Paris Congress, see R. Munday, "Accounting for an encounter", *Comparative Law legal Studies: traditions and transitions*, P. Legrand & R. Munday eds., Cambridge Univ. Press, 2003, pp. 3-28.

⁴ H.C. Gutteridge, *Comparative Law: an introduction to the comparative method of legal study and research*, Cambridge University Press, 1949.

⁵ V. Curran, "Re-Membering Law in the Internationalizing World", 34 *Hofstra L. Review* 2005.

⁶ See 2005 World Summit Outcome, General Assembly Resolution A/60/L.1, 15 Sept. 2005.

borders"⁷. Marked simultaneously by intensified mobility of persons and goods and by the establishment of virtual spaces not linked to territory, "globalisation" takes unprecedented legal forms that no doubt better express the term's dual meaning of spatial-temporal extension and of an integral or total vision.

That is why it is more important than ever to consider the expressive functions of International Law, stressed by Onuma Yasuaki⁸ (the communicative function, the function of embodying shared understandings of international society and finally, the justifying and legitimating function) in order not to reduce international law solely to a repressive function that supposes an obligatory law rendered effective by mechanisms of control and sanction.

Approaching the question of power under its multiple facets also nuances the opposition between private international law, which operates as if inequalities do not exist, and public international law, which labours to demonstrate that, in spite of these inequalities, law does exist in the international sphere. It exists because the subjects of international law are not only nations, but also some private actors, and national law, locked within the frontiers of national territory, even enlarged by clauses of extraterritoriality or by cooperation agreements, no longer provides an adequate legal framework. Because it is a matter of the mobility of cross-border offenders (global crimes), of the circulation at electronic speed, in a space that has become virtual, of a stream of intangibles (a flow of money, but also of data), or still the global effects of dangers observable from one end of the planet to the other, globalisation modifies the landmarks that permit the situation of legal relations in space and time and condition the functioning of legal systems.

It may be argued that successive transformations of international law require a reappraisal of the compartmentalised vision of law in favour of a certain level of interdependence. The first wave of transformations dates back half a century to the emergence of international human rights law, in the wake of the 1948 Universal Declaration. This extended the concept of "subjects of international law" to individuals and private groups, thus allowing States to be condemned for the breach of norms which are no longer simply applicable as between States, but also binding on them with respect to individuals due to the resulting redefinition of the concept of sovereignty. This early example of "supra-national" law is considered by some comparative lawyers as an opportunity for the "reconciliation of comparative law and international law" in favour of human rights⁹. Faced with the criticism of Western hegemony, the legitimacy and effectiveness of human rights were strengthened by a dialogue between cultures. A genuine exchange implying "mutual criticism, fecundation and enrichment of the various formulations of the respective cultures"¹⁰, which explains the potentially enormous functional importance of the comparative method of analysis in the search for what John Rawls calls "overlapping consensus", insisting on the constructivist nature of the method¹¹.

But since the end of the cold war, the pace of transformation has increased. Antonio Cassese shows how in this new stage, which he sees as the fourth, the international

⁷ A.J. Arnaud, *Critique de la raison juridique*, vol. 2 *Gouvernants sans frontières, Entre mondialisation et post-mondialisation*, LGDJ, 2003, p. 31

⁸ Onuma Yasuaki, "International Law in and with International politics: The functions of international Law in International Society," *European Journal of international Law* (2003), vol. 14, no. 1, p. 119

⁹ L. Amede Obiora, *loc. cit.*

¹⁰ L. Amede Obiora, *loc. cit.*, p. 679.

¹¹ J. Rawls, *Political Liberalism*, Columbia University Press, 1993 ; see also "Le droit des gens" in *On Human Rights : the Oxford Amnesty lectures*, New York Basic Books, 1993; Adde Onuma Yasuaki, "In quest of Intercivilizational Human Rights : Universal vs. Relative Human Rights Viewed from an Asian Perspective", D. Warner, ed., *Human Rights and Humanitarian Law*, Kluwer Law International, 1997, pp. 43-78; C. Taylor, "Conditions of an unforced consensus on human rights", in *The East Asian Challenge for Human Rights*, J.R. Bauer and D. Bell Eds., Cambridge University Press, 1999, pp. 124-144. Adde M. Rosenfeld, "Partiality and comprehensive pluralism", in *Just Interpretations*, University of California Press, 1998, pp. 199-234.

community is (at least at the normative level) becoming increasingly integrated through a phenomenon that he describes as the "gradual interpenetration and cross-fertilisation of previously somewhat compartmentalized areas of international law"¹². Yet this phenomenon is not limited to international normative domains such as human rights law and international criminal law. It also appears as a result of dynamic interactions between the national and international spaces. As this dynamic is developing through different processes such as harmonisation and hybridisation, the classification of legal systems into legal families, or legal models, is also challenged by the emergence of new kinds of "laboratories".

Comparative law: From "Models" to "Laboratories"

The difference between models and laboratories is the speed with which legal systems are transformed. On the one hand, models are characterised by their structure; while this does not mean immobility, there must be sufficient stability for the principal forms to remain distinct, such as the famous distinction between common law and civil law. This distinction has been renewed by the "inescapable fact" that in most totally "other" legal systems—those left behind by comparatists—"massive law reform is taking place". Hence the efforts to take into consideration these "extraordinary places"¹³ and, if necessary, to diversify the models of reference, as R. Peerenboom suggests with regard to China (*statist socialist, neo-authoritarian, socialist, communitarian and liberal democratic*) to indicate the various forms the return to law has taken since the end of Maoism¹⁴.

The "laboratory" metaphor, on the other hand, puts greater emphasis on transformative processes and the dynamics of change and innovation without suggesting a definitive evaluation of the forms taken by diverse legal systems, which are still uncertain and evolving. By not freezing history in the here and now, the expression designates neither a model to be followed, nor an ideal standard, but a place where observing social practices over time has enabled us not to predict the future, but at least to imagine different possible futures.

Using *three laboratories* as my example (I), the position that will be developed here is that comparative law is essential to *hybridising* different national systems because it contributes to the elaboration of a common grammar (II) and it fosters the process of *harmonisation* by preserving a national margin of appreciation (III).

I. Three Laboratories

I will use three examples, each from a different normative level, to illustrate the transformations currently underway. Through the jurisprudence of the ICTs and the creation of the ICC, the laboratory of international criminal justice illustrates, at the worldwide level, the difficulty in creating a true hybrid from more than just the two major Western families of law. The European laboratory¹⁵ exemplifies the regional level; its originality lies in its goal of constituting a common law without favouring any one system. Finally, at the national level, the Chinese laboratory, with its goal of modernising Chinese law, will help us understand the

¹² A. Cassese, *International Law*, Oxford University Press, 2nd ed. 2004, p. 45.

¹³ E. Orücü, "Comparatists in extraordinary places", in *Comparative Legal Studies: Traditions and Transitions*, P. Legrand & R. Munday eds., CUP 2003, 467-489.

¹⁴ R. Peerenboom, "Competing conceptions of rule of law in China", in R. Peerenboom, ed., *Asian Discourses of Rule of Law*, Routledge, 2004, p. 113 sq. ; R. Peerenboom, *Chinas's Long March Toward Rule of Law*, Cambridge University Press, 2002.

¹⁵ See M. Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (trans. Naomi Norberg), CUP, 2002, pp. 168-195.

difference between the Westernisation of the early 20th century and globalisation, marked namely by China's entry into the WTO in 2002¹⁶.

The international criminal justice laboratory

Like the Nuremberg and Tokyo tribunals, the creation of *ad hoc* tribunals (ICTY and ICTR) and then a permanent court (ICC) is exemplary, but of a different development. Today's international criminal justice laboratory exemplifies a revised conception of sovereignty and extends the circle of subjects of international law to include those responsible for international crimes, especially crimes against humanity. In particular, this new legal concept implies more than simple co-operation or regulatory relations between States: it illustrates the emergence of what Antonio Cassese sees as a new universalist or cosmopolitan model of international law evocative of Kant, overlaying the traditional model identified with Grotius. It is true that the Rome Convention, which lays down the principle of complementarity in its Preamble and Articles 1 and 17(1)(a), seems to reject this model by preserving the jurisdiction of national criminal courts and limiting that of the ICC¹⁷. But in practice, this complementary system involves *interaction* rather than the absolute autonomy of each sphere of criminal justice, national and international, or a narrow subordination of one to the other¹⁸.

From a political perspective, the consequences are difficult to predict. As the French political scientist Bertrand Badie points out, the creation of the international criminal tribunals provides a glimpse of a new era, which he links to what he calls "the crisis of the idea of sovereignty"¹⁹. The rejection of an international *ad hoc* tribunal to try those responsible for the 11 September attacks²⁰, as well as later American initiatives against the ICC²¹, explain the slowness of these transformations, but this international criminal justice laboratory is leading us to reconsider the role played by comparative law in the interaction between the national and international legal spheres. Combining the sources of international criminal law and the progressive extension of national jurisdiction, it gives us the opportunity to experiment simultaneously with hybridisation (at the supranational level) and harmonisation (at the national level). Both processes can also be observed in the European laboratory, as I have called it.

The European laboratory

It is not by choice but by necessity and chance that Europe is becoming a space with variable geography and geometry, partially orderly and partially chaotic, as methods remain confused²².

In fact, one of the problems with European construction is that the process of internationalisation uses all available techniques simultaneously: supranational law derived from treaties, but also international law, with all that it entails (negotiation, compromise and,

¹⁶ See M. Delmas-Marty, "Le laboratoire chinois", in *La tradition chinoise, la démocratie et le droit*, M. Delmas-Marty and P. E. Will eds., to be published, Fayard 2006.

¹⁷ See "The Rome Statute: a tentative assessment", in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the ICC* (Oxford University Press, 2002), at 1901.

¹⁸ See M. Delmas-Marty, 'The ICC and the interaction of national and international legal systems', in *The Rome Statute of the ICC op. cit.*, at 1915.

¹⁹ B. Badie, *Un monde sans souveraineté*, Fayard, 1999, p. 260.

²⁰ M. Delmas-Marty, "Global crime calls for global justice", *European Journal of Crime and Criminal Justice*, Vol. 10, April 2002, pp.286-293.

²¹ Notably the withdrawal of its signature from the Rome Convention; the "American Service members Protection Act" of 3 August 2002 aimed at deterring other countries from ratifying the Convention; and finally the agreements based on Article 98 of the Convention, exempting American nationals from transfer proceedings.

²² M. Delmas-Marty, *Towards a Truly Common Law*, op. cit. p. 168; adde M. Delmas-Marty, "Towards an integrated European Criminal law", *Cambridge Year book 2005*, pp. 17-31.

finally, ambiguity). Rather than disappearing, the latter has recently been enriched by new instruments, such as the "joint action" and the "framework decision", that go beyond the traditional techniques of multilateral conventions. The "pillars" instituted by the Maastricht treaty were supposed to clarify the situation by separating *supranational* community law (1st pillar) from the *international* law of the European Union (2nd and 3rd pillars). However, rather than simplifying Europe's image, they have blurred it, while the use of "bridging measures" has weakened the distinction. Moreover, the Amsterdam treaty has "communitised" some domains and provides for ECJ jurisdiction over the domains included in the third pillar. The constitutional Treaty (Rome 2004) was supposed to simplify everything by eliminating the pillars, but it has not yet been ratified and its rejection in France and the Netherlands has slowed the ratification process.

More recent developments have contributed further to this blurring effect by introducing harmonisation measures in the 3rd pillar (for example the Framework Decision on the "European arrest warrant", which was reviewed by the constitutional courts of Belgium, Germany²³ and Poland²⁴) and by communitising the rules relating to the recognition and execution of judgements within the European Union in commercial, civil and matrimonial matters (see the two regulations that replaced Brussels Conventions I and II), and even by communitising criminal environmental law²⁵.

In sum, while States tend to display a political preference for cooperation over integration, the opposite may be observed in legal reality, where integration is sometimes disguised as cooperation. In order to ensure that the growing complexity of law in Europe does not result in the incoherence of written law and arbitrary decisions by judges, comparative law may contribute to the phenomenon of internationalisation. That is why, whatever comes of the ongoing *jus commune* activities, the present debates within Europe, *pro* and *contra* a European civil code, European prosecutor, or European Constitution, could contribute to the conception of a more innovative form of internationalisation, neither relativist nor universalist, but pluralist, at the meeting point of international law and comparative law²⁶. And the complexity of European construction requires warnings from both sides to be taken seriously²⁷. With the optimists, I would agree that comparative law is essential to pluralist integration because it underlies the elaboration of truly common norms, founded on a sort of hybridisation of different national systems, much as the Lando Commission tried to do for the law of contracts, or the *Corpus Juris* group for criminal law. From the pessimists, I would borrow the second function, resistance, which leads either to the refusal of integration altogether, or to the recognition of a State margin of appreciation, by replacing unification with harmonisation.

One might therefore think that the European experiment—including the current crisis, which may signal a return to politics in a construction heretofore dominated by economic and legal processes—will result in renewed legal formalism as new forms of integration develop

²³ H. Satzger et T. Pohl, "Cryptic signals from Karlsruhe – the Judgement of the German Federal Constitutional Court of European Arrest Warrant Act", in JICJ forthcoming 2006. See the press release of the decision (in english) http://www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/text/bvg05-064e

²⁴ S. Manacorda, *Chronique de droit communautaire*, RSC 2005, n°4, p. 940 sq.

²⁵ Commission v Council, C176-03, Court of Justice of the European Communities, 13 Sept. 2005.

²⁶ See M. Delmas-Marty, *Le relatif et l'universel*, Seuil, 2004; L. Amede Obadia, op. cit. p.669; B. Fauvarque-Cosson, "Comparative law and conflict of laws: allies or enemies? New perspectives on an old couple", *The American Journal of Comparative Law*, 2001, vol.49, p.407.

²⁷ M. Delmas-Marty, "Comparative law and the internationalisation of law in Europe", in Mark Hoecke (ed.), *Epistemology and methodology of Comparative Law*, Hart publishing Oxford, 2004, pp. 247-258; K.H Ladeur, "Methodology and European Law – can methodology change so as to cope with the multiplicity of law?", *Ibidem*, pp. 91-122; J. Husa, "The tip of the iceberg or what lies beneath the surface of comparative law", *Maastricht Journal*, I (2005), 73-95;

through interactions on both the vertical (between national and international law) and horizontal (between international economic law and international human rights law) planes.

Some internationalists consider that the European Union is a subject of law like any other and that European construction, of a federal nature, does not call into question the traditional interstate nature of international law. At least they acknowledge the originality of its methods, which they somewhat condescendingly call “*bricolage*”²⁸ (tinkering). But this is precisely what we need to overcome the implacable logic of hegemony, whether it be European or American. But first we must be able to test these methods in a non Western observatory.

The Chinese laboratory

I proposed this expression to make clear the long march of China towards modernisation of its legal system, that is, its effort to re-evaluate its tradition with the help of historians and to think prospectively with the help of jurists, both comparatists and internationalists, working to clarify the passage from westernisation to globalisation.

Re-evaluating tradition does not betray it. The Chinese tradition, like other great Asian traditions (beginning with the Japanese tradition, from which China took inspiration in the early 20th century²⁹), may foster hybridisation as a response to interdependence and contribute to fertilising the political field in a more openly “intercivilisational”³⁰ spirit.

This being said, can globalisation succeed where westernisation failed? Rather than fulfilling the dream of a perfect rule of law through a strict balance of powers, globalisation seems to alternate between two unsatisfactory approaches, one authoritarian, in the grip of political powers that resist democracy, the other liberal, marked by the progressive autonomisation of economic powers. The danger is that the legal order will become doubly impotent, enforceable against neither public nor private actors. We must therefore not continue to believe that economic integration and its legal corollaries will ineluctably draw China towards a democratic regime. But this warning does not mean that the political regime should be totally independent and therefore able to escape legal integration and to cabin globalisation to the market alone. To dispel both the globalist and sovereigntist illusions, we should recall the distinction raised by Lu Jianping³¹ between three types of globalisation: economic globalisation, which the Chinese leaders accept; political globalisation, which they reject; and legal globalisation, about which, according to him, they are undecided. If they are undecided, it is no doubt because it is difficult to dissociate transforming a legal system from economic globalisation: the effects of interactions between political and economic, as well as legal and cultural fields are already perceptible, even if not very predictable.

The Chinese laboratory illustrates these effects, from westernisation to globalisation via a modernisation that has not only led from dependence to *independence*, but that already makes clear the *interdependence* characteristic of contemporary society that may help China’s legal integration into the world legal order under construction. One of the trajectory’s constants is the modernisation of Chinese law, particularly the training of lawyers in the West. There remains nonetheless a major difference: the westernisation of law began in 1902 under

²⁸ A. Pellet, with P. Lamy and M. Delmas-Marty “Droit commun, gouvernance mondiale et laboratoire européen”, to be published, *Le Débat*, 2006.

²⁹ See J. Thoraval “Sur l’appropriation du concept de ‘liberté’ à la fin des Qing En partant de l’interprétation de Kant par Liang Qichao”, in *La tradition chinoise*, op. cit.) (emphasising the “vertiginous slide” in the translations of Kant’s works from German to French (in the 18th and 19th centuries), then to Japanese (late 19th) and finally to Chinese (by Liang Qichao in 1903).

³⁰ Onuma Yasuaki, op. cit.

³¹ Lu Jianping, “La réforme du droit chinois dans le contexte mondial”, in *Acteurs et méthodes d’une internationalisation pluraliste*, Seminar, Collège de France, 6 June 2005, unpublished.

pressure from outside, China being “a semi-colony with incomplete national sovereignty”³², while the globalisation that accompanied its entry into the WTO in 2002 is based on its having recovered its sovereignty, which puts China on equal footing with the world’s greatest powers. This is why the predominantly unilateral, non reciprocal relations that characterized westernisation have progressively become interactions, growing more multilateral and pluralist as the law becomes global. But this does not mean that Chinese law is free of all constraints. The political constraints of the treaties concluded with the great powers at the beginning of the 20th century have been replaced by the legal constraints that globalisation imposes on even the most powerful States via a law that is becoming *supranational*. This is why globalisation might succeed in changing the Chinese trajectory; but this does not mean that to do so, strictly identical legal rules must be imposed. On the contrary, to take root in a re-evaluated tradition, transition towards democracy presupposes common but fuzzy³³ principles that admit a national margin and promote durable democracy by not calling for uniformity. Today, no one would dare suggest the “fusion” of different systems that Shen Jiaben did in the early 20th century when proposing modernisation to the emperor, even on a regional scale as in Europe, and certainly not on a global scale.

Having looked at the different practices in different laboratories, it now seems possible to demonstrate how comparative studies accompany both processes of internationalisation of law, hybridisation and harmonisation. Their function is not the same: as far as hybridisation is concerned, comparative studies facilitate integration by elaborating a common grammar, but where harmonisation is concerned, they may, on the contrary, limit integration by contributing to the definition and variation of a national margin of appreciation.

II. Hybridisation: Comparative Law and Common Grammar

The concept of hybridisation can help clarify the difference between westernisation and globalisation. Typically, westernisation refers to the unilateral transplantation of concepts taken from foreign legal systems, namely European or American, while globalisation calls for hybridisation, that is, cross-fertilisation³⁴. Reality is of course more complex, as globalisation can mean extension of a dominant system over the entire planet and westernisation can make room for hybridisation, as it seems was the case in Japan. In either case, hybridisation remains the key to pluralist integration.

In the Chinese laboratory

Turning now to the Chinese laboratory, we can see that since there was no true hybridisation, the “fusion” of Chinese and western law announced at the beginning of the 20th century became the mere transplantation—and a not very effective one—of certain western concepts into Chinese law. And the reform movement that followed in the early years of the Republic was not any more convincing: “a fur coat for the summer” is what historians Li Guilian and Wang Zhiqiang called the 1930 Civil Code, 95% of which was copied directly from the German and Swiss codes³⁵.

At the same time, however, Sun Yat Sen’s theory of five powers offers an illustration of the process of hybridisation. In the 1930s, a Chinese doctoral student used a table³⁶ in his thesis to compare the Chinese and western constitutional models. On one side, he put the

³² Li Guilian and Wang Zhiqiang, “1902 (la 28^{ème} année du règne de Guanxu) Centenaire du droit chinois”, *Les sources du droit et la réforme juridique en Chine*, Litec, 2003, p. 131.

³³ Preface, *Le flou du droit*, PUF, 2nd ed. 2004 ; *Le relatif et l’universel*, *op. cit.*, pp. 53-120.

³⁴ See D. Nelsem, “Comparatists and transferability”, in *Comparative Legal Studies*, *op. cit.* 437-466 (discussing the shift from legal transplants to legal transfers).

³⁵ Li Guilian and Wang Zhiqiang, *op. cit.*, p. 133.

³⁶ Tcheng Chao Yuen, *L’évolution de la vie constitutionnelle de la Chine sous l’influence de Sun Yat Sen et sa doctrine*, Paris, Librairie générale de droit et de jurisprudence, 1937, p. 126.

“constitution” of ancient China, traditionally divided into three powers: the sovereign (which includes the legislative, executive and judicial powers); the examiner (independent magistrates charged with recruiting functionaries); and the censor, or controller³⁷. On the other was placed the “constitution of foreign countries”, that is, the western model, which was considered sufficiently uniform to be presented as one. This constitution also set out three powers, but not the same: the legislative power included the power to control; the executive the power to examine; and the judicial power stands alone. By moving from comparing to synthesizing the five powers (incarnated in the “five courts” *yuan*), the table presents a sort of hybridisation. Thinking that “the powers of the sovereign, simultaneously legislative, executive and judicial, represented absolute monarchy, that is, a tyranny that would be impossible in our democratic period, [...] Sun Yat Sen consequently wanted to reform the first power of the constitution of ancient China, taking inspiration first from Montesquieu for our democratic period, but he wanted to keep the other two as being the best elements of our ancient institutions”³⁸. This hybridisation could have led China (at a time when constitutional control was hardly practiced in Europe) to invent a *sui generis* control, associating control and judicial *yuan*. We know that the political disturbances of the time altered the Chinese trajectory and that the project of 1937, perhaps because of its Taiwanese version, seems to be mentioned little in the current debate on the constitutionalisation of Chinese law.

Another example of Sino-western hybridisation is the inclusion, at the initiative of the Chinese representative, of “conscience” with “reason” in article 1 of the Universal Declaration of Human Rights³⁹. But the impact is more philosophical than legal, and “conscience” does not fully translate the notions of “moral conscience” and “inner goodness” underlying the Chinese characters *liang* and *xin*. Moreover, using “conscience” in article 1 (human beings “endowed with reason and conscience”) creates confusion, at least in the French and English versions, with the “freedom of conscience” in article 18. The Chinese version, on the other hand, uses *liangxin* in article 1 and *yishi*, which implies intent and discernment, in article 18.

In the “international criminal justice laboratory”

At the meeting point of diverse systems, hybridisation requires methods more elaborate than the simple juxtaposition of different concepts. At the global level, these methods are suggested by article 38 of the statute of the International Court of Justice, which includes the “general principles of law recognized by civilized nations” among the sources of applicable law. But these methods should be explored more systematically in the “international criminal justice laboratory”, as article 21 of the ICC statute explicitly cites, as applicable law, “general principles of law derived by the Court from national laws of legal systems of the world . . . provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”.⁴⁰ This goal is still largely utopian because there are not sufficient means to carry out the research necessary to distil such a synthesis of various states’ criminal laws and their compatibility with international law, but the trail towards hybridisation has been blazed by the *ad hoc* tribunals.⁴¹

³⁷ Pierre-Etienne Will, “Le contrôle ‘constitutionnel’ de l’excès de pouvoir sous la dynastie des Ming”, in *La tradition chinoise*, op. cit..

³⁸ Tcheng Chao Yuen, *op. cit.*, p. 126. Adde Herbert Han-Pao-Ma, Law and traditions in contemporary Chinese society, Nat. Taiwan Univ. Legal Studies, 1999, pp. 60-94.

³⁹ Pierre-Etienne Will, “La contribution chinoise à la Déclaration universelle des droits de l’homme”, in *La tradition chinoise*, op. cit.

⁴⁰ For an analysis of the different aspects of the sources of the criminal international law, see M. Delmas-Marty, E. Fronza and E. Lambert (eds.), *Les sources du droit international pénal* (SLC, 2005)

⁴¹ For the consideration of the cultural relativism and alternatives forms of justice in the decision to prosecute according to art 53 ICC see Prosecutor Office, *Interpretation and Scope of ‘Interests of Justice’ in art. 53 of the*

The *ad hoc* tribunals (ICTY and ICTR) were established more than ten years ago and have already adopted over twenty revisions of procedural and evidentiary rules⁴² that have contributed significantly to the hybridisation that, in part, inspired the ICC statute. The subject of hybridisation was broached by the judges from the very beginning. In an early dissenting opinion, President Cassese insisted that “[i]nternational criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle... [I]nternational criminal proceedings ... combine and fuse” the accusatorial and inquisitorial approaches, and that “mechanical importation” of concepts drawn from one nation’s law “may alter or distort the *specificity* of these proceedings” resulting from the inter-state context and the absence of autonomous means of coercion⁴³. The danger of domination remained strong, however, because there were many rules drawn from the common law tradition (the guilty plea, for example), so most judges tended to base their interpretation on common law principles. In a second very early case, however, the court declared that “the general philosophy of the criminal procedure of the International Tribunal aims at maintaining a balance between the accusatory procedure of the common law systems and the inquisitorial procedure of the civil law systems, whilst at the same time ensuring the doing of justice”⁴⁴.

A balance was thus struck over time, with various reforms strengthening both the equality of arms (accusatory grammar) and the active role of the judge (inquisitory grammar). A typical example of how a “hybrid grammar” was adopted through successive adjustments and readjustments is that a pre-trial judge was first instituted in practice, then established in an amendment to the ICTY rules (art. 65 ter) adopted in July 1998 to ensure the proper application of admissibility rules. This judge thus plays a hybrid role: “[t]he purpose of Rule 47(E) ... is in effect to equate the confirming judge to the grand jury (or committing magistrate) in the common law system or to the *juge d’instruction* in some civil law systems”⁴⁵. In creating a pre-trial chamber (art. 15, 56, 57, 58), the ICC statute thus expands and strengthens the ICTs’ institution of a pre-trial judge.

The same is true for the sensitive issue of the case file: successive reforms to the general rules of evidence managed eventually to give judges the power to receive oral or written depositions “if the interests of justice allow” (ICTY Rules of Procedure and Evidence, Rule 89(f)) and eliminated the prohibition on hearsay. The ICC Statute approves this hybrid model in article 64, which makes it clear that the judges, not the parties, direct the proceedings (particularly with regard to witnesses, art. 64(6)(b)). The ICC Statute goes even further in other respects, such as the participation of victims (art. 68(3)), which provides they may be represented by counsel and thus assimilates them to the “*parties civiles*” of some Continental systems, even though their intervention does not automatically trigger criminal proceedings.

But other areas, such as bargaining between prosecution and defence, have not yet stabilized. At first glance, plea-bargaining seems to have been excluded due to the gravity of international crimes, but it may become necessary for practical reasons, as the experience of the *ad hoc* tribunals shows. The 2001 revision introducing a “plea agreement procedure” (art. 62ter) states, however, that “[t]he Trial chamber shall not be bound by any agreement” and “shall require the disclosure of the agreement”.

The ICC Statute provides for pleading guilty (art. 64(8)), but this is defined more along the lines of the Continental confession (art. 65) than as a guilty plea in the Anglo-American sense,

Rome Statut, Memorandum ICC, 7.05.2004 ; M. Delmas-Marty, *La CPI et les interactions entre droit international pénal et droit pénal interne à la phase d’ouverture du procès pénal*, RSC, 2005, p. 473-481.

⁴² See the symposium “The ICTY 10 Years On: The View from Inside”, 2 *JICJ* (2004) 353-597.

⁴³ ICTY, *Erdemovic* case, (Cassese, J., dissenting), 7 October 1997, paras. 4 and 5 (emphasis in original).

⁴⁴ ICTY, *Delalic et al* case, *Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence*, dated 24 May 1998, 4 February 1998, para. 20.

⁴⁵ ICTY, *Brdjanin* case, *Decision on the Motion to Dismiss Indictment*, 5 October 1999, para 13.

and the Statute gives no indication as to possible negotiation between prosecution and defence. Noting the confusing complexity of today's legal landscape and describing criminal law specialists as 'mariners on the ocean without compass, star or landmark'⁴⁶, the American comparatist Mirjan Damaska states that in different models, plea-bargaining obeys different and apparently irreconcilable rules, namely as to the role of the judge and the publicity given to bargaining⁴⁷. He concludes that we must innovate, both because of the hybrid nature of the Statute and the pedagogical function proper to international criminal justice. He suggests specific rules to avoid judicial bias and to make bargaining transparent, but leaves open the question of the judge's role, suggesting either a public hearing of the primary witness, according to the Anglo-American model, or questioning of the accused by the judge, as in the Continental model.

The problem is that a simple transposition of national principles governing the rights of the accused (presumption of innocence or right to confront witnesses) is not enough to guarantee the effectiveness or the legitimacy of international criminal justice, considering its specificities. Instead of defining the elements of systemic coherence on a case-by-case basis as technical questions arise, it is better to start by working out a common grammar that will guide the process of hybridisation via both legislation and judicial interpretation. That is why a hybrid, necessarily distinguishable from its national "parents", will progressively become autonomous. In other words, this is why hybridisation goes hand in hand with autonomisation⁴⁸.

In the "European laboratory"

Therefore the system's coherence cannot be pre-established and cannot simply be borrowed from a pre-existing one, but must be built, step by step, as I had first-hand experience doing in the "European laboratory" as the coordinator of the project called "Corpus Juris"⁴⁹. The first step was comparative research. While limited to five countries (Germany, England, Belgium, France and Italy), it enabled us to develop the 'analysis grid'⁵⁰ that we used to analyze the criminal procedure of each country. This grid was our common language: it liberated criminal procedure from the confines of national systems, and thus allowed the project to identify the 'actors' and the 'powers' that determine how a trial unfolds.

It was then possible to identify, in a second step, how each system links actors and powers – its legal "grammar", *i.e.*, the guiding, or meta principles that structure the system around general international law principles, human rights instruments and the comparison of the main national criminal justice systems. In Europe, one can observe two contradictory grammars: accusatory grammar, which assigns most of the powers to private parties, from reporting the offence to disposing of the case via gathering evidence; and inquisitorial grammar, which

⁴⁶ M Damaska 'Negotiated Justice in International Criminal Courts' (2004) 2 *Journal of International Criminal Justice* p. 1019.

⁴⁷ See Máximo Langer, "From legal transplants to legal translations: the globalization of Plea bargaining and the Americanization thesis in Criminal Procedure", *Harvard International Law Journal* (2004) 1-64. For a critical approach concerning the introduction of the guilty plea in France see C. Saas, *De la composition pénale au plaidier coupable/ le pouvoir de sanction du procureur*, RSC 2004, 827.

⁴⁸ J. Hemptinne, "Hybridité et autonomie du règlement de procédure et de preuve du TPIY", in M. Delmas-Marty, E. Fronza and E. Lambert (eds.), *Les sources du droit international pénal* (SLC, 2005).

⁴⁹ M Delmas-Marty (ed.), *Corpus juris: introducing penal provisions for the protection of the financial interests of the European Union* (Economica, 1997); M Delmas-Marty and J Vervaele (eds.) *The implementation of the Corpus juris in the Member States* Volumes I – IV (Antwerp, Intersentia, 2000 and 2002). For a critical approach see B. Schünemann (ed.), *Alternativentwurf Europäische Strafverfolgung*, Carl Heymanns Verlag Köln, 2004.

⁵⁰ See J Spencer and M Delmas-Marty (eds) *European Criminal Procedures* 2nd ed (Cambridge University Press, 2005).

favours public actors, in particular the emblematic investigating magistrate who fulfils both police and judicial functions, from pre-trial investigation and compiling the file for the trial court to deciding whether or not to detain the accused.

Such strong divergence made hybridisation seem impossible, but the comparative study showed a movement toward convergence under the influence of repeated reforms and of the European Court of Human Rights, whose jurisprudence reveals that each system has its weaknesses. Most countries on the Continent have progressively done away with the investigating magistrate and have given a more active role to the defence: criminal procedure in Italy is now partially accusatory, and France has instituted a judge of freedoms (2000) and the guilty plea (2004)⁵¹. In England, meanwhile, a Public Prosecution Service was introduced in 1985 and the Serious Fraud Office in 1987, and, as in the United States though by different means, it is now more difficult to exclude hearsay evidence (2003)⁵².

As John Spencer put it very clearly⁵³, this movement has not entirely overcome divergence, but has lessened it, paving the way for the third step, drafting the *Corpus Juris*⁵⁴ as a new hybrid procedure. Unlike a traditional code, the *Corpus juris* combines six guiding principles, thirty-four articles unifying rules concerning the conduct of investigations, rights of the parties and submission of evidence, and a final article that provides for the complementarity of national law. The novelty lies in the fact that these rules derive their coherence from three guiding principles from the European Convention on Human Rights that characterize a new, hybrid “grammar” called *contradictoire*⁵⁵. To be more precise, *Corpus Juris* creates two institutions - a European public prosecutor (EPP) (from the inquisitorial model) and a judge of freedoms without investigative powers (from the accusatorial model) - and a set of evidence rules, combining a written file (from the inquisitorial model) with strict exclusionary rules (from the accusatory model). A comparative study, undertaken for each of the thirty-five articles in each Member State (fifteen at the time) and candidate states, was synthesized into a comparative table that shows quite precisely the points of agreement and disagreement with regard to procedure⁵⁶. The draft then became the subject of debates in different countries, which resulted in an amended version. The debate was then reopened in 2001 when the European Commission issued a Green Paper focusing on the EPP.

The fourth and final, more political, phase of adopting the project was well underway, as the European constitutional treaty provides that a European law of the Council may establish a European Public Prosecutor (Article III-274(1)). The French and Dutch rejection of the treaty slowed this process, and even if the EPP is created, it is clear that criminal procedure will not be entirely unified: on the one hand the EPP’s jurisdiction is limited to the Union’s financial interests, which are supranational by nature; on the other, hybridisation is limited to the pre-trial phase. In the judgment phase, the EPP will “exercise the functions of prosecutor in the competent courts of the Member States” (III-274 (2)), but the precise relationship between the national and European institutions is left to a future European law, which will have to provide for a minimum of harmonisation of national rules. New comparative studies will be needed to determine which differences are compatible with the implementation of the *Corpus juris* and which are not. This is where the resistance function of comparative studies becomes important.

⁵¹ See D. Charvet ‘Réflexions autour du plaider coupable’ (2004) *Dalloz*, Chr. 2517.

⁵² See *Crawford v. Washington*, 124 SCt 1354 (2004).

⁵³ See J Spencer ‘Introduction’ in *European Criminal Procedures*, op. cit., at 1- 75.

⁵⁴ *Corpus juris* op. cit.

⁵⁵ Or “participatory” model, as J. D. Jackson puts it in “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment”, *The Modern Law Review*, (2005) 68 (5) MLR 737-764.

⁵⁶ *The implementation of the Corpus juris* op. cit., Volume I at 142-185.

III. Harmonisation: Comparative Law and the National Margin of Appreciation

Harmonisation can be distinguished from hybridisation because it does not impose absolutely identical rules on every state and leaves room for a “national margin of appreciation”⁵⁷. This concept was explicitly created in the European laboratory by the Strasbourg court in interpreting the European Convention on Human Rights in cases where the Court allowed restrictive or even derogatory State measures in the name of public order. In view of “the subsidiary nature of the international machinery of collective enforcement established by the Convention”⁵⁸, the Court held that the States are in a better position than international judges to determine whether limitations based on public order are appropriate.

This concept of a national margin is the key to ordered pluralism. It is pluralist because it allows for national resistance to integration, and ordered because resistance is limited by a set of shared principles. The margin then works to organise national differences according to a threshold of compatibility with those principles⁵⁹ and to make harmony possible. Harmonisation is the result of the oscillations between the resistance of national law and the progress made by processes of integration.

The concept of national margin of appreciation

This concept is not limited to Europe; legal scholars are increasingly making reference to the national margin in varying contexts.⁶⁰ In the international criminal justice laboratory, for example, States seeking to keep jurisdiction over a particular case also invoke a national margin, but it is “inverted”⁶¹ as compared to the European example. That is, the margin is not used to justify State limitation of fundamental international rights in the name of public order, but to allow the State to limit, by reference to the national conception of fundamental rights, the repression sought to be imposed by the international order.

In the context of the WTO, the implicit use of a national margin has been reproached, it being pointed out that it might be “clearer to state that in this area [sanitary and phytosanitary risks], States enjoy a ‘national margin of appreciation’ that is not unlimited but that may vary depending on the interests involved”⁶². World trade law brings us back to the Chinese laboratory because the entry of China into the WTO on December 11, 2001 set off an avalanche of reforms in China, not only in the various areas of commercial law (corporate law, contract law, intellectual property, insurance, antitrust, foreign trade, etc.), but also, in a broader perspective, in the principles of harmonisation imposed by the accession protocol: transparency, and uniform application and effective control of administrative acts⁶³.

⁵⁷ See M Delmas-Marty and M-L Izorches ‘Marge nationale d’appréciation et internationalisation du droit’ (2000) *RIDC* 753 and (2001) 46 *McGill Law Journal* 5.

⁵⁸ Case “Relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, ECHR, A6, 23 July 1968.

⁵⁹ See namely H. Ch. Yourow, *The Margin of appreciation doctrine in the dynamics of European human Rights Jurisprudence*, Kluwer, 1996; P. Mahonney, “Marvellous Richness of Diversity or Invidious Cultural relativism”, *HRLJ*, pp. 1-5, Engel 1998; J. Sweeney “Margins of appreciation: cultural Relativity and the ECHR”, *International and Comparative Law Quarterly*, vol. 54 (2005), pp. 459-474. For a more general discussion of the formal validity of a pluralist common law, see M. Delmas-Marty and M.L. Izorches, “Marge nationale d’appréciation et internationalisation du droit”, *RIDC* 2000. 753 sq.

⁶⁰ For its insufficient application in the frame of OHADA, see P. Dima Ehongo, *L’intégration juridiques des économies africaines à l’échelle régionale ou mondiale*, in M. Delmas-Marty (ed.), *Critique de l’intégration normative*, PUF, 2004, 194.

⁶¹ E. Fronza and E. Malarino, *L’effet harmonisateur du Statut de la Cour Pénale Internationale*, in M. Delmas Marty, S. Manacorda, M. Pieth, U. Sieber, L. Arroyo Zapatero (eds.), forthcoming.

⁶² Chr. Ruiz Fabri and P. Monnier, à propos des mesures sanitaires et phytosanitaires, *Organe d’appel OMC*, 26 nov 2003 (United States v. Japan), *JDI* 3. 2004, p. 1025.

⁶³ See L. Choukroune, “Les conséquences juridiques de l’entrée de la Chine à l’OMC”, in *La tradition chinoise, op. cit.*

If the national margin of appreciation benefits national law by giving States room to manoeuvre, it also requires transferring a certain amount of power to an international control body to avoid “renationalising” international norms. Whether this be a European judge, an international criminal judge or a WTO judge, this international control body works as an adjuster, or fine tuner, contributing to structural stability while injecting flexibility. So that flexible does not become synonymous with arbitrary, however, international judges must respect two imperatives: transparency, which requires that they elaborate the criteria that determine marginal variation, and rigor, which means applying the same criteria to each case.

The jurisprudence of the ECHR shows that the margin’s variation is related to three factors or sets of factors: first, “the circumstances, demands and context”⁶⁴; second, the “legitimate interest” espoused by the State in justifying its limitation of rights (public order or morals or the rights of others); and third, a comparative law factor (similarities and differences in states’ laws). The underlying idea is that the extent of the margin should vary, *on the one hand* according to international law and the relative or absolute nature of the principle concerned (*i.e.* subject to derogation, exception or restriction); and *on the other hand* in accordance with comparative analysis of the degree to which national systems differ, that is, the presence or absence of a “common denominator”, to borrow the expression often employed by ECHR judges and, less often, by their ECJ colleagues.

The “common denominator and the role of comparative law

Reference to a common denominator does not completely exclude the risk of manipulation by a judge who is tempted to invoke a so-called common denominator to mask divergences and to legitimate a decision based, in reality, on vague, general considerations, without any serious comparative study. That is why recourse to comparative law should be systematized, as a means of resisting judicial arbitrariness. Procedural democracy is not sufficient, especially for international judges, who are trusted much less than national judges, even in Common Law countries which are generally favourable to judicial creativity. A substantive rule is needed and comparative law could help define it, thus illustrating, a hundred years on, the role described by Saleilles (for a judge whom he could not imagine being other than national): “The judge may only apply ideas of absolute justice if those concepts have some external objectivity”. He added that “the closest thing to the data of the positive sciences and experimental method is the comparative law method”⁶⁵. A century later, the internationalisation of law is a reality and bits and pieces of a global common law are appearing, teaching us to appreciate the virtues of systems having variable geometry functioning at multiple speeds. Interdependency does not require unifying our different systems, nor dissipating every misunderstanding as to the meaning of common principles. Legal hybridisation is necessarily imperfect, but paradoxically, it may benefit from weak but pluralist harmonisation, the effects of which have a greater chance of being accepted than those of a unification that is perceived of as hegemonic. In other words, pluralism is both the source of the problem and the key of the solution⁶⁶. This is why comparative law, formerly reserved to scholars, has become such an important tool for national and international judges alike. To preserve a pluralism ordered by this subtle game of differentiated application of common guiding principles, judges must, as I mentioned earlier, employ methods involving transparency and rigor, such as writing reasoned decisions in which criteria are applied with intellectual discipline. Taking this path is a way of showing that the community of peoples is

⁶⁴ See M Delmas-Marty, *Towards a Truly Common Law*, op. cit., pp. 120-122.

⁶⁵ R. Saleilles, “Ecole historique et droit naturel” [The historical School and natural law], *Revue Trimestrielle de Droit Civil*, 1902, p. 105.

⁶⁶ See M. Rosenfeld developing the same idea, at the national level, through his theory of “comprehensive pluralism”, in *Just Interpretations, Law between Ethics and Politics*, Univ. of California press, 1998, pp. 8; 199-234.

not necessarily a synonym for uniformity and that the universalism of values can adapt to the curves of space and time.

In conclusion, let me come back to the starting point: associating comparative law and international law is not neutral: it means ordering pluralism in the sense of combining pluralism *and* integration. By facilitating review of how margins of appreciation are used, comparative law enables harmonisation and sows the seeds for hybridisation, and thereby contributes to transforming pluralism into a truly common law that overcomes the opposition between relativism and universalism.