

# Private Law Remedies and Procedures: A Double-Edged Sword?

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## INTRODUCTION

The complexity of the issue of global reach of private law remedies and procedures is evident in the light of the diverse studies assembled in this collection. Several factors are at play, moral, political, social, cultural and economic. Even this classification of the issues itself is arguably controversial. To make sense of the enormous amount of development in this field and prepare for the future, certain pointers of strategy, for active participants as well commentators and other bystanders, are necessary. Any reflection on the law and legal evolution, even more importantly in a context of multi-layered transnational evolution such the one under consideration, must start by being firmly grounded in reality. The following, it is submitted, are important questions that the present realities of the global reach of private law remedies and procedures pose:

- What drives this evolution?
- How are global remedies and procedures validated and what mechanisms are used?
- What is the relationship of this evolution to traditional Western ('abyssal', in the words of Boaventura de Sousa Santos<sup>1</sup>) modes of thinking? In other words, what are the chances of private law throwing away its Western hegemonic shackles and transforming itself into a truly global creature?
- Taking into account MacIntyre's (among others) 'meta-ethical particularism'<sup>2</sup> with important arguments about the moral and cultural relativity undermining

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<sup>1</sup> de Sousa Santos, B (2007) 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' 30 *Review*, also online [www.ces.uc.pt/bss/documentos/AbyssalThinking.pdf](http://www.ces.uc.pt/bss/documentos/AbyssalThinking.pdf) (last visited 8 July 2010).

<sup>2</sup> Meta-ethical particularism condemns impartial moral principles as 'abstract and deracinated', and advocates that moral reasoning flows in narratives provided by the cultural community in which individuals are situated, and that the preservation and defence of such community necessitates different moral status for cultural insiders as opposed to outsiders. See MacIntyre, A (1984) *After Virtue* Notre Dame University Press; Sandel, M (1982) *Liberalism & The Limits Of Justice* Cambridge University Press; Walzer, M (1983) *Spheres Of Justice* Basic Books; Sandel, M (1992) 'The Procedural Republic and the Unencumbered Self' in Avineri, S and DeShalit, A (eds) *Communitarianism and Individualism* Oxford University Press 12; see also Margalit, A (1996) *The Decent Society* Harvard University Press. One of the moral theorists writing in this vain has put this 'particularism' of values

the uniformity of such concepts, what are the perceived goals of social and/or restorative justice that this evolution serves, and how effectively are they achieved? Are private law remedies and procedures part of the problem, rather than the solution, in this regard?

- What are the other, political, social, cultural and economic outcomes of this evolution?

This article attempts to provide some answers to these questions, not necessarily in the order they are put above, while at the same time bringing together and evaluating the evidence presented in individual contributions.

## TOWARDS UNIVERSAL ENFORCEMENT OF PRIVATE LAW NORMS

A pragmatic approach to global justice leads to questions of universality and universal enforcement of legal norms. Intuitively, all law has a claim to universality. On a formal level, as Kelsen has shown, law's normative language does not need to presuppose the existence of a sovereign, although in Kelsen's thought the effectiveness of norms depends on the coercive power of the state. Normativity, like factuality, is actually global. Legal norms can be validated by other legal norms only, and their efficiency does not need always to depend on any sanctions imposed by a sovereign authority, but on the willingness of law officials in different jurisdictions to obey and enforce them. Such law officials, even following Kelsen's traditional analysis, are designated and empowered by norms that are subject to exactly the same tests of validity and efficiency. Thus the legal order, including a global legal order, can come into existence by means of valid and efficient norms, without any need for a global political sovereign to come first into existence; in fact, even in the absence of any such power, in a complete power vacuum (but preferably a vacuum of peace).<sup>3</sup> In a global world environment,<sup>4</sup> such officials may be local officials with global reach,<sup>5</sup> or global law officials designated by treaty, custom or voluntary procedure. What is needed, of course, is the willingness and ability of these officials to employ the coercive power of the jurisdiction, that is, *any* jurisdiction, not necessarily that of the origin of the norm or even that of the forum.

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as follows: 'the question most likely to arise in the minds of the members of the political community is not, what would rational individuals choose under universalizing conditions of such-and-such a sort? But rather, what would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? And this is a question that is readily transformed into, what choices have we already made in the course of our common life? What understandings do we (really) share?': Walzer *Spheres Of Justice* at 5. See more in Banakas, S (2007) 'A Global Concept of Justice: Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World' 67 *Louisiana Law Review* 1021 at 1022f.

<sup>3</sup> One can, although it is not essential, presuppose an International 'Grundnorm', a device that does not affect in the slightest the validity and efficiency of norms.

<sup>4</sup> A useful definition of 'globalisation' in this connection is: 'a multidimensional set of social processes that create, multiply, stretch, and intensify worldwide social interdependencies and exchanges while at the same time fostering in people a growing awareness of deepening connection between the local and the distant.' Steger, MB (2003) *Globalization, A Very Short Introduction* Oxford University Press at 13.

<sup>5</sup> Compare the international law doctrines of extraterritorial and universal jurisdiction. See Colangelo, AJ (2007) 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law' 48 *Harvard International Law Journal* 121.

Social and economic processes that define globalisation can no longer be ruled by old-fashioned political sovereignty and national political institutions,<sup>6</sup> indefinitely postponing the legitimisation of global justice processes.<sup>7</sup> The intuitive global reach of (national) law mentioned above cannot be forever curtailed by national political interest. Globalised capital empowers globalised law enforcement in national courts under traditional national civil and criminal law categories by creating a market of law enforcement that is itself increasingly global,<sup>8</sup> client-driven and funded by the global market's insatiable appetite for innovation and change.

Global enforcement of justice as compensation of harm has acquired a new impressive momentum riding astride globalised capital. Private law in general and tort law in particular, the most effective mechanism of restorative justice, are being used in increasingly ambitious ways as mechanisms of global restorative justice. It is not without foundation that tort law has become the most politically controversial field of contemporary legal debate,<sup>9</sup> being at the same time demonised as capitalism's arch-enemy<sup>10</sup> and hailed as the 'jurisprudence of hope'.<sup>11</sup> Enthusiasts have pointed out that in the quest for 'juster justice and a more lawful law', tort law, being described as public (and, one might add, now international public) law in disguise,<sup>12</sup> is 'a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument

<sup>6</sup> Rawls, J (1999) *The Law of Peoples* Harvard University Press, and Miller, D (1999) *Principles of Social Justice*, Harvard University Press are wrong. As succinctly put by Young, IM (2006) 'Responsibility and Global Justice: A Social Connection Model?' 23 *Social Philosophy and Policy* 102: 'Ontologically and morally speaking, though not necessarily temporally, social connection is prior to political institutions'.

<sup>7</sup> State intervention in several countries to salvage the failing financial institutions in the recent credit crunch appeared, briefly, to point to serious structural failures of financial globalisation but the resurgence of state sovereign power to financial self-determination may be very short-lived, as global markets take their revenge on state sovereign debt, downgrading and speculating on entire so-called 'sovereign' economies with little realistic possibility of regulation or control, as the latest G20 summit in Canada (July 2010) has shown.

<sup>8</sup> No need to labour the point here of the worldwide dominance of so-called 'global' law firms. See eg websites for three of the leading global law firms in the world today: <http://www.cliffordchance.com/home/default.aspx>; <http://www.bakernet.com/BakerNet/Firm+Profile/Welcome/default.htm>; <http://www.lw.com/default.asp>.

<sup>9</sup> On the often heated, highly politicized debate about United States tort reform, see Feinman, JM (2005) 'Unmaking and Remaking Tort Law' 5 *J High Tech L* 61; see also Banakas, S (2006) 'What Is Tort Law for in Today's World?' in *Essays on Tort, Insurance, Law and Society, in Honour of Bill W. Dufwa*, Vol I Jure Voerlag AB 99.

<sup>10</sup> See Schumer, C (2007) 'Tort Epiphany' *Wall Street Journal* 29 January A16 ('we didn't expect to see a leading Senate Democrat declare that tort law abuse is making America less economically competitive'). The cost of the US tort system has risen from 0.5% to 2.3% of GDP during the last three decades. Projecting forward, over 3% of GDP (\$360 billion) could be spent annually on US litigation within the next ten years — the equivalent of total US defence spending in 2002.

<sup>11</sup> See Lambert, TF Jr (1965) 'The Jurisprudence of Hope' 31 *Journal of the American Trial Lawyers Association* 29; also Rustad, M (1994) 'The Jurisprudence of Hope: Preserving Humanism in Tort Law' 28 *Suffolk UL Rev* 1099. Tort law is also accorded 'therapeutic' qualities. See Feldthusen, B (1993) 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' 25 *Ottawa L Rev* 203. In 'Understanding Tort Law' 23 *Val UL Rev* 485 at 526 Weinrib, EJ (1989) goes overboard in his enthusiasm. He states that "Explaining love in terms of ulterior ends is necessarily a mistake, because a loving relationship has no ulterior end. Love is its own end. In that respect, tort law is just like love'.

<sup>12</sup> Linden, AM (2005) 'Viva Torts', 5 *J High Tech L* 139, 142 (quoting Tom Lambert). Thus, in countries in the French legal tradition with highly developed systems of administrative (public) tort liability, administrative courts enforce tort claims for violations of collective rights: see Henao, JC (2005) 'Collective Rights and Collective Actions: Samples of European and Latin American Contributions' in Madden, MS (ed) *Exploring Tort Law* Cambridge University Press 426, on the 'acciones populares', an administrative law remedy that serves functions similar to class actions. For another view of the public function of tort law in the US, see Calabresi, G (2005) 'The Complexity of Torts — The case of Punitive Damages' in id 333, arguing at 337 that the first function of tort law is to enforce societal norms through the use of private Attorney's General.

for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society'.<sup>13</sup>

If there ever was a clear divide between public and private law remedies and procedures, global bottom-up enforcement of restorative justice has made such a distinction even more problematic both at a theoretical and, increasingly, at an empirical level too. It is increasingly difficult to classify individual causes of action as 'private' or 'public', as inventive litigants will try to access jurisdictions globally on either side of the divide. Moreover, these individual causes of action arise from wrongs that themselves defy classification. Remedies are sought as part of broader, comprehensive strategies, and, as the Indian experience of public interest litigation in particular has shown, it becomes increasingly irrelevant whether they were originally private or public in nature. The traditional Western dogmatic distinction between public and private is swept away in modern conditions of global social movement and economic globalisation. Different parts of national, sub-national and transnational legal systems, cultures and traditions are being reshaped and co-opted in the process of financial globalisation; public law remedies acquire new functions as mechanisms of individual, private redress, and, conversely, private law remedies acquire new functions as mechanisms of public order and regulation. For the purposes of this article, 'private' denotes the bottom-up, privately driven, enforcement of restorative justice world-wide, not a Western-style systematic classification of remedies and procedures.

Global private law remedies can be financed by the markets themselves, and can arguably be part of the answer to the apparently insoluble problem of extreme deprivation and global social welfare. As has been pointed out by market insiders, business is vulnerable to new forms of 'legal activism' or 'legal entrepreneurship'. This reflects three trends: the shift by NGOs away from attacking to exploiting legislation; the emergence, particularly in North America, of a highly profitable class actions industry; and the arrival of a new generation of lawyers, many of whom put correcting social and environmental injustice ahead of salary and career development. 'Many forms of traditional corporate shelter from liability ... separation by geography, incorporation or time ... have been attacked and, in some instances, undermined'.<sup>14</sup>

## PRIVATE LAW REMEDIES AND GLOBAL LEGAL CULTURES

David Nelken's multi-patterned approach to legal culture(s)<sup>15</sup> points to a need to consider the effect of dominant patterns of global legal cultures on the actual enforcement globally of private law rights, in the private pursuit of social justice. Global patterns of legal cultures and ideologies crisscrossing from north to south and west to east are evident. The 'diffusion of economic and legal models from the global North to the global South'<sup>16</sup> is combined

<sup>13</sup> Linden, 'Viva Torts' supra n 12.

<sup>14</sup> 'SustainAbility, the Changing Landscape of Liability: A Director's Guide to Trends In Corporate, Environmental, Social and Economic Liability' (2005) available at [http://www.sustainability.com/downloads\\_public/insight\\_reports/liability.pdf](http://www.sustainability.com/downloads_public/insight_reports/liability.pdf).

<sup>15</sup> See Nelken, D (2004) 'Using the Concept of Legal Culture' 29 *Australian Journal of Legal Philosophy* 1.

<sup>16</sup> de Sousa Santos, B and Rodríguez-Garavito, CA (eds) (2005) *Law and Globalization from Below: Towards a Cosmopolitan Legality* Cambridge: Cambridge University Press at 1. This is true only if it is reversed for the southern hemisphere where, for example, Australia or New Zealand are the origin rather than the destination of such a diffusion.

with an increasingly cosmopolitan mix of Western legal traditions and others, such as religious or far eastern traditions. Legal cultures and socio-economic patterns interface in complex ways. Western-style private law remedies and procedures may transmute into something alien to Western lawyers' cultures,<sup>17</sup> as they are used and perceived in non-Western societies and legal cultures.

'Society is the primary realm of social experience ... what's immediately and truly important to people, like desire and its fulfilment or frustration, goes on there ... the realm of production, commerce, the market, the family'.<sup>18</sup> Whatever else it might be, law is a system of behavioural control in society; indeed, it is the most important system of behavioural control, an aspect of government or authority, enforced by state power against individual will. Private law remedies and procedures cannot, therefore, be properly known and understood, unless their role in a given society and their use by the people living in it are identified. How the law, and the legal system with all its various components and sub-divisions or sub-structures, are perceived by the members of each society, determines both their role and use. Looking at China, because of its obvious global importance as an emerging superpower, in the traditional Chinese conception of law, the law is 'only for the barbarians, who have not had the advantage of being civilised in the manner of the Celestial Empire'.<sup>19</sup> There is no tradition of respect for the rule of law as the foundation of social co-existence, similar to that in traditional Western legal thinking; indeed, in the history of Chinese legal culture, the rise of law and legalism has been linked with the decline of civilisation and personal dignity and honour. After 1949, this old tradition was replaced to a large extent by a particularly Chinese brand of Marxism-Leninism, with a further crucial transformation in the wake of the collapse of the Cultural Revolution in the late 1970s, introducing a post-socialist era in which, however, the socialist foundations of the constitution are retained, together with an evolved notion of quasi 'messianic' Communist Party leadership. Three of the studies in this collection show the importance of all this for understanding the emerging role of private law remedies and procedures in China today.

Deeply rooted historical, ideological and political attitudes and beliefs about the nature, role and use of law in society are part of the general legal culture of every society. The law itself may or may not spring from legal culture so defined; in the case of legal transplants, it may even be originally alien to the broader legal culture in the receiving society. Law-givers or law-makers, laying down or creating legal rules, issue artefacts that penetrate social life, though to an extent that varies in different societies. Legal rules are indeed, as has been observed,<sup>20</sup> 'what most people think of as law', and a lawyer's job is to understand, describe, apply and evaluate such rules. Before social scientists, laymen or anybody else can even start reflecting on law and society, they need to turn to the lawyer trained in translating the meaning of these rules in their inner systematic, semantic context. But if, as another prominent scholar has pointed out,<sup>21</sup> the importance of law in society lies more in what

<sup>17</sup> An almost ubiquitous example is the innovative and complex financial products in Islamic finance: see eg Yunis, H (ed) (2009) *Islamic Finance* Oxford University Press.

<sup>18</sup> Gordon, R (1984) 'Critical Legal Histories' 36 *Stanford Law Review* 57 at 60

<sup>19</sup> Young, TL (1991) 'Bentham Meets Confucius' 44 *Current Legal Problems* 261 at 265.

<sup>20</sup> Merryman, JH (1978) 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Cappelletti, M (ed) *New Perspectives for a Common Law of Europe* Sijthoff 195 at 222.

<sup>21</sup> Jolowicz, JA (1978) 'New Perspectives of a Common Law of Europe: Some Practical Aspects and the Case for Applied Comparative Law' in id 238 at 239.

it does than in what it says, then it must be true that 'legal culture ... determines when, why, and where people use law, legal institutions or legal process; and when they use other institutions, or do nothing'.<sup>22</sup>

'Culture' as a general concept can be understood as meaning people's work on their environment or people's creations, as contrasted with God's or nature's creations and natural processes. Thus, one can talk of a 'cultural heritage' or 'ways and techniques' of culture, as well as of different kinds of cultural activity, such as industrial or rural culture, national, regional, local or family culture, class culture and so on. Culture in the broader sense is everything that is not nature,<sup>23</sup> 'the osmosis of the real and the imaginative, across symbols, myths, norms, ideals and ideologies'.<sup>24</sup> But in a narrow sense, culture may mean not all the human works or products but 'the residue ... of everything that is not politics, or economics, or religion'.<sup>25</sup> Culture is indeed a characteristic of the evolution of the human species, an evolution which is purposeful beyond strictly natural-biological boundaries. The great legal anthropologist Bronislaw Malinowski has accordingly described all culture as 'normative'.<sup>26</sup> This important aspect, especially of legal culture, implies that a group's or a community's conformity to aspired aims and goals serves the function of providing answers to normative problems.

Social scientists tend to emphasise the importance of individual and collective values, attitudes towards the legal system and behavioural patterns in society in shaping the legal culture of that society.<sup>27</sup> Members of the general public's 'lay' legal culture is distinguished from legal professionals' 'internal' legal culture. The former, far from being uniform, can exist on several different levels: the lay legal culture of a whole country or nation, or that of a social class, or of a regional or local or other (religious, for example) group of people, including the lay legal culture of socially excluded communities. In most contemporary societies there is more than one social class or culture group in one or more of these senses, and, therefore, also several legal cultures (cultural pluralism). In the current conditions of financial globalisation, when, as Santos puts it, the economy is disembedded from local society<sup>28</sup> and when massive movements of people, authorised as well as clandestine, take place, the gap between legal enforcement and lay legal culture is widening and increasingly diversifying, with different parts of societies and communities responding differently to legal regimes. By contrast, internal legal culture is, under the force of financial globalisation, converging, with one

<sup>22</sup> Friedman, LM (1977) *Law and Society* Prentice-Hall 76.

<sup>23</sup> 'Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of a human group, including their embodiments in artifacts; the essential core of culture consists of traditional (ie historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other hand as conditioning elements of further action': Kroeber, AL and Kluckhohn, C (1952) *Culture, A Critical Review of Concepts and Definitions* Harvard University Peabody Museum 181.

<sup>24</sup> *Ibid.*

<sup>25</sup> Definition given by Edgar Morin (1968), in the rubric of the article 'Culture de masse' in the *Encyclopaedia Universalis* Paris.

<sup>26</sup> In his 1945 book *The Dynamics of Cultural Change: An Inquiry into Race Relations in Africa* Yale University Press 44-45.

<sup>27</sup> An approach best represented by Lawrence Friedman, whose classic definition of legal culture starts with a number of questions: 'Do people feel and act as if courts are fair? When are they willing to use courts? What parts of the law do they consider legitimate? What do they know about law in general?' Friedman, LM (1975) *The Legal System, A Social Science Perspective* Russell Sage 193-94.

<sup>28</sup> de Sousa Santos, B (2005) 'The Counter-Hegemonic Use of Law in the Struggle for a Globalization from Below' in Escamilla, M and Saavedra, M (eds) *Derecho Y Justicia En Una Sociedad Global* 401 at 435.

particular variety, the Anglo-American common law, acquiring prominence on both an international and transnational level.<sup>29</sup>

Despite the criticisms of this rather simplistic distinction between lay and internal culture, it seems to offer a rather more useful tool of analysis of the effect on the ground of the global reach of private law remedies than other notions such as legal tradition<sup>30</sup> or style of legal systems.<sup>31</sup> American Legal Realists of different persuasions<sup>32</sup> use style to denote the social, psychological and political factors of judicial law-making in superior appellate courts. But the distinct 'pragmatic' physiognomy of judicial style has been under fire from modern cultural theories of law, aiming at tipping the balance over to the interpretational value of legal culture in Western communities, not only in understanding but also in making the law (Ronald Dworkin)<sup>33</sup> or even 'trashing' it (critical legal studies).<sup>34</sup> Be that as it may, there is ample evidence in the studies in this collection of the importance of judicial style driven by political agenda in the process of creating new remedies and procedures for global wrongs. Alan Watson also deserves a mention here. His work on the organic integration of legal transplants<sup>35</sup> shows that 'inner' legal culture is a powerful and autonomous factor either of legal change or of resistance to change in the face of changing social and political conditions, and distinguishes between the legal culture of lawyers and lawmakers,<sup>36</sup> arguing that comparative legal history shows beyond dispute the extent to which the lawmakers' culture is not only distinct but also most powerful and not to be confused with the culture of other lawyers. Social or economic pressure for legal change starting with lawmakers operates only within their own culture, whereas if such pressure starts with the lawyers, their culture is involved and the pressure must be directed against the culture of the lawmakers.<sup>37</sup> The existence of a distinct culture of lawmakers explains, first, the historical phenomenon of

<sup>29</sup> Defined by Friedman *Law and Society* supra n 22 at 76 as the process of law-making and law-finding, the methods of legal reasoning of judges, the structure of the legal system and the administration of justice in a given jurisdiction, and the training and organisation of the legal profession.

<sup>30</sup> Merryman's definition of 'legal tradition' includes 'historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught'. This definition obviously does not distinguish between 'lay' and 'internal' legal culture. Merryman, JH (1969) *The Civil Law Tradition* Stanford University Press 2. Compare, however, the more complex approach of Glenn, HP (2004) *Legal Traditions of the World* Oxford University Press.

<sup>31</sup> Rather more exciting is the view of legal culture as embedded in the idea of 'style' of legal systems, in Zweigert, K and Kötz, H (1984) *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, Band I, 2e Auflage* JCB Mohr 80f. The crucial stylistic factors of legal systems according to these writers are: (a) their historical background and development; (b) their predominant and characteristic modes of thought in legal matters; (c) especially distinctive legal institutions; (d) the kinds of legal sources acknowledged by them and the way they are handled, and (e) their ideology. 'Style' is, however, an inward-looking concept, very much a lawyer's tool, that could, if applied as evolved in Western legal thinking, distort the picture of non-Western laws. 'Style' is an important concept if law is supreme in society, if the rule of law is viewed with the importance attached to it by Western legal cultures, a hermeneutical concept heavily biased towards a 'plain-fact' view of the law.

<sup>32</sup> Most famously Llewellyn, K (1960) *The Common Law Tradition, Deciding Appeals* Little, Brown & Co. See earlier Holmes, OW (1897) 'The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law' (The 'bad man's' view of the law): 'The Path of the Law' 10 *Harvard Law Review* 457.

<sup>33</sup> See Dworkin, R (1986) *Law's Empire* Harvard University Press esp 410f.

<sup>34</sup> See the good account of the movement in Kelman, M (1987) *A Guide to Critical Legal Studies* Harvard University Press.

<sup>35</sup> Watson, A (1974) *Legal Transplants* Scottish Academic Press.

<sup>36</sup> Watson, A (1983) 'Legal Change: Sources of Law and Legal Culture' 131 *University of Pennsylvania Law Review* 1121 at 1152f.

<sup>37</sup> Id at 1154.

jurisdictions borrowing socially and economically 'dysfunctional' legal transplants. 'To a considerable degree, the lawmakers of one society share the same legal culture with lawmakers of other societies'.<sup>38</sup> Secondly, the legal culture of lawmakers can be responsible for their positive disinclination to change formally the rules, institutions and especially the sources of law when the law is out of date.<sup>39</sup> Watson's views of a separate culture of lawmakers are, however, based on historical observations and conclusions assuming the existence of a group of lawmakers that is clearly and significantly distinct from the larger group of lawyers. This distinction is often not sustainable in today's environment of globalised legal practice and proliferation of soft law normative regimes.

Lay legal cultural pluralism is flourishing under conditions of financial and media globalisation. How true is it in these conditions that what the law *does* is determined by 'internal' legal culture and what it *should be* by 'lay' legal culture? And how true is it that: 'Society is not based upon law; this is a juridical fiction. On the contrary, the law must rest on society. It must be the expression of its common interests and needs arising from the actual methods of material production against the caprice of the single individual.'<sup>40</sup> The Marxist conception of law is based on the belief that the relationships of production determine what the law is.<sup>41</sup> The question here is whether culture in general, and legal culture in particular, are significantly autonomous from the aims and goals of the socio-political and economic model in which the law also operates.<sup>42</sup> The fact that economic materialism cannot explain why 'dog is not eaten in the United States' or why 'women wear or wore ribbons in their hair'<sup>43</sup> does not prove that culture is significantly autonomous. It is true that legal culture(s) originating in historical and transcendental practices, values and beliefs about law and its place in social life may be swept aside by the winds of political and economic change. This is clearly what happened, for example, in Stalinist and post-Stalinist Russia, and in Maoist and post-Maoist China. It is also what is happening now, with financial globalisation. It is, however, also true that legal culture(s) may successfully resist such change, and slow down or distort social engineering. Law reform must often take legal culture into account, even if only in order to suppress and transform it into a new kind.

As demonstrated by Kelsen's exposition of the contradictions in Marxist legal thought,<sup>44</sup> it is not always easy to identify legal culture as a cognisable social reality separate from the social and economic goals pursued through law. 'Although the careful study of a single legal culture can yield valuable insights, only the analysis of a variety of legal cultures will

<sup>38</sup> Id at 1157.

<sup>39</sup> Id at 1151.

<sup>40</sup> Marx, K (1895) *Vor den Koelner Geschworenen* Hottingen 15.

<sup>41</sup> 'The law is only a symptom, expression of other relationships, on which the power of the state is based', Marx, K (1867) *Das Kapital*, Vol. I, p. 307. The old English Factory Acts were, according to Marx, 'just as much the necessary product of modern industry as cotton yarns, self-actors, and electric telegraph'. Engels added that 'the jurist imagines he is operating from a priori principles, whereas in reality they are really only economic reflexes'. (1935) *Marx-Engels Correspondence 1846-1895, A Selection*, Foreign Languages Publishing House 482. But, subsequently, in communist legal thought, the adoption of select aspects of 'bourgeois culture with respect both to law and to the court' was considered useful for engineering the progress of Soviet socialism. See Smirnov, VV (1985) 'Law, Culture, Politics: Theoretical Aspects' in Butler, WE and Kudriavtsev, VN (eds) *Comparative Law and Legal System: Historical and Socio-legal Perspectives* Oceana 23, 24. Ditto, in Chinese communist legal thought.

<sup>42</sup> See my paper (1982) 'Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited', 67 *Archiv fuer Rechts- und Sozialphilosophie* 289-309.

<sup>43</sup> Examples given in Watson, 'Legal Change' supra n 36 at 1155.

<sup>44</sup> Kelsen, H (1955) *The Communist Theory of Law* Praeger ch. 1.



recognise what is accidental rather than necessary, what is permanent rather than changeable in legal norms and legal agencies, and what characterises the beliefs underlying both.<sup>45</sup> As with everything else perceived and understood, law and legal culture is perceived and understood comparatively; comparison is the basis of all knowledge. But does comparison not presuppose a separate identity? Can a thing be compared to itself?<sup>46</sup> How culturally specific can the law be? Is it true that 'the modern world makes a strong case against cultural specificity'?<sup>47</sup> Often it is the existence of diverse (or similar) social structures and economies, rather than 'cultures' in the sense of values and attitudes of lawyers and lay-persons, that accounts for diversity (or convergence) in the laws of different countries. Montesquieu's view of law as a product of national and cultural forces has been repeatedly challenged by more modern views underlining the importance of the social and political environment.<sup>48</sup> But is this only true for societies in the hegemonic West? It appears that the more societies advance in their political, economic and social structures, the more powerful these structures themselves become over cultural specificity in shaping the law's real identity, behind its symbolic or ritual image. There is also evidence that legal transplants of 'official' law are more likely to affect the social or economic environment than the receiving community's legal culture. But beyond the hegemonic West, things may be different. The introduction of English procedural law into Indian courts led to a 'clash of ... values ... the Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them'.<sup>49</sup>

Legal rules and legal institutions, uprooted from their original cultural soil, can be used as tools for engineering social goals in foreign climates. But it ought to be kept in mind that indigenous legal culture functions as an immunity system, and the survival of the transplant often depends on cultural suppression or mutation. Indeed, suppression or mutation of indigenous legal culture is generally the desired aim of a transplant. A fascinating case study is Japan, whose economy has long been integrated into financial globalisation. Traditional Japanese values and cultural attitudes were overwhelmed by the post-War constitution introducing the supreme authority of the principles of the rule of law and due process over any legal act of the legislature or executive.<sup>50</sup> As these two principles are fundamental elements of traditional Western legal culture, they can be better understood in the light of the 'internal' legal culture of the West, and, in particular, Anglo-American common law. But the cultural context refuses to go away.<sup>51</sup> It has been observed that there are relatively few civil cases in Japan: ordinary people are said to find it difficult to have access to attorneys.<sup>52</sup>

<sup>45</sup> Ehrmann, HW (1976) *Comparative Legal Cultures* Prentice-Hall 11.

<sup>46</sup> With all due respect to Glenn's provocative thoughts in this connection. See Glenn, HP (2004) *Legal Traditions of the World* (2nd ed) Oxford University Press.

<sup>47</sup> Friedman *The Legal System* supra n 27 at 195.

<sup>48</sup> Eg Kahn-Freund, O (1974) 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* 1; Seidman, RB (1970) 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law' 5 *Law and Society Review* 161.

<sup>49</sup> See Cohn, BS (1967) 'Some Notes on Law and Change in North India' in Bohannon, P (ed) *Law and Warfare, Studies in the Anthropology of Conflict* The Natural History Press 139 at 155.

<sup>50</sup> See Oda, H (1992) *Japanese Law*, Butterworths 35f.

<sup>51</sup> See Wren, HG (1968) 'Legal System of Pre-Western Japan' 20 *Hastings Law Journal* 217 at 221: 'the emphasis is on the *relations* between men, not individuals'; contrast the Western idea of law and justice as rational and impersonal, described by a Japanese scholar as the 'law of the geometric mind': Noda, T (1971) 'The Far-Eastern Conception of Law' in *International Encyclopedia of Comparative Law* Vol II, ch. 1 at 120.

<sup>52</sup> Hayashiya, R (1988) 'Minji-sosho no Genkyo no Nichidoku Hikaku' ('Comparison of the Current State of

Rule of law and due process, constitutionally super-imposed, are bound to have acquired a special flavour and identity in a legal culture that detests the sharp distinction between legal rights and wrongs, rejects the planning of legal acts and argument in anticipation of a judicially contested dispute, and endorses a principle of 'common' or 'shared' blame as the basis of resolution of conflicts between parties.<sup>53</sup> A Japanese scholar, Hayashiya, seems to have suggested that the difficulty in finding a lawyer in Japan is the reason for scarce civil litigation in that country.<sup>54</sup> But two other writers have argued that the reverse is true: because of the infrequency of litigation, as a result of the aspects of lay legal culture pointed out above, Japan can afford to have such a comparatively small number of lawyers.<sup>55</sup> It is possible that neither of these views is wrong: social and economic factors and legal culture interact in a way that is hard to identify. 'Legal culture is difficult to research, and there is little systematic data on comparative culture'; this seems to still be the case, almost 40 years after these comments were first made.<sup>56</sup>

In a complex cultural environment, how can private law remedies and procedures, primarily Western-designed legal devices, emigrate and be used globally? It would help if one could establish the existence of any universal characteristics of legal devices and techniques rendering Western private law remedies and procedures more user-friendly in alien cultures. Separate cultures, separate communities within and outside these cultures, and the more or less cosmopolitan societies in which they co-exist must all be taken into account. Maurice Merleau-Ponty, the French philosopher, forcefully argued that 'the perceived world is the always presupposed foundation of all rationality, all value, all existence'.<sup>57</sup> Law is understood as perceived; and its origin is perceived as rooted in chiefly political power relations.<sup>58</sup> Legal culture is not only an empirical reality but also a basis of meaning, that is, of talking about the law. As pointed out by the American pragmatist philosopher Dewey, all description of social and cultural phenomena by language is itself purposeful; as he put it, social and cultural phenomena are never 'over and done with' but remain always open, are 'goings-on'.<sup>59</sup> The German anthropologist Richard Thurnwald argued for the law to be perceived and understood 'functionally out of the cultural system'<sup>60</sup>; this is confirmed by the pioneering legal anthropologist Bronislaw Malinowski: his experience in studying primitive laws taught him the importance of perceiving culture as an instrumental reality, in which law does not work automatically, but functionally. He notes that 'there exist even in the simplest forms of culture types of debate and quarrel, mutual recrimination, and readjustment by those in authority — all of which correspond to the judicial process in more highly developed cultures ... even in primitive communities norms can be classified into rules of law, into

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Civil Procedure between Germany and Japan') 10 *Hosojihō* 36, quoted by Oda *Japanese Law* supra n 50 at 102.

<sup>53</sup> Noda 'The Far-Eastern Conception of Law' supra n 51 at 133.

<sup>54</sup> As quoted by Oda *Japanese Law* supra n 50 at 102, who appears to endorse this view.

<sup>55</sup> Kim, C and Lawson, CM (1979) 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' 28 *International & Comparative Law Quarterly* 491 at 509 n 167.

<sup>56</sup> Friedman, *The Legal System* supra n 27 at 209.

<sup>57</sup> See 'Le primat de la perception et ses conséquences philosophiques' (1947) 41 *Bulletin de la Société Française de Philosophie* 120.

<sup>58</sup> See Hamrick, WS (1987) *An Existential Phenomenology of Law: Maurice Merleau-Ponty* Springer 116; translations of Merleau-Ponty's French writings are borrowed from this book.

<sup>59</sup> See Ryan, A (1998) 'Pragmatism and Property' in Harris, JW (ed) *Property Problems* Sweet & Maxwell.

<sup>60</sup> In Thurnwald, R (1934) *Werden, Wandel und Gestaltung des Rechts im Lichte der Volkerforschung* Berlin & Leipzig Vol. II 6.

custom, into ethics, and into manners'.<sup>61</sup> We have here an observation which, if valid, could go some way towards explaining the effectiveness of Western legal devices globally.

But Malinowski's view of normative similarities between developed and primitive systems of conflict resolution contradicts what has been described as the developing countries' resistance to the rule of law in today's world.<sup>62</sup> This resistance varies according to whether these countries are closer to open access social orders or limited access (natural) social orders.<sup>63</sup> Additionally, contemporary legal anthropologists have established patterns of alternative legal consciousness in communities across the West-East spectrum, rejecting recourse to the rule of law and rejecting the use of the courts. Groups of conscientious objectors to the state-run legal process and the private law remedies and procedures on offer have, of course, always existed, but they appear to have been given fresh momentum by the financial globalisation process.<sup>64</sup> What is, however, more difficult to conceptualise is the apparent lack of overall global effect of any such resistance to the Western hegemonic 'rule of law' culture before the advance of global private law practice and migration of private law remedies and procedures. But, as I have explained elsewhere in more detail,<sup>65</sup> global market forces also lead a drive towards global legal norms to the extent that such norms are necessary for the proper enjoyment of financial gains on a global scale. Such norms are expeditiously and efficiently introduced globally, with or without the consent of national governments and national legal orders that have no choice but to succumb to their jurisdiction if they do not want to remain excluded from globalised capital, or, in other words, regardless of any resistance of developing countries to the rule of law. Developing countries often have little alternative but to accept Western-style private law mechanisms of dispute resolution and enforcement.

#### PRIVATE LAW REMEDIES, DISPERSED LOSSES, COLLECTIVE REDRESS AND THE DYNAMICS OF GLOBALISED LEGAL PRACTICE

Private law remedies other than tort remedies have been crossing state jurisdictional borders for some time, especially after the surge in legal, financial and cultural globalisation following the collapse of the communist empires. These include remedies for breach of contract, breach of statutory duty and international treaty violations, and even divorce awards, custody awards, and procedures such as ADR procedures, arbitration and settlement procedures, pre-nuptial agreements and discovery and secrecy orders.

<sup>61</sup> Malinowski, B (1945) *The Dynamics of Culture Change: An Inquiry into Race Relations in Africa* Yale University Press 44-45. First proposed by Max Rheinstein in 1937 in his article 'Teaching Comparative Law' 5 *University of Chicago Law Review* 617f, functionality has been generally accepted as a sound methodological principle of comparative law, adopted in the classic work by Zweigert, K and Kotz, H (1984) *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* Band I, 2nd ed 34.

<sup>62</sup> See Weingast, BR (2010) 'Why Developing Countries Prove So Resistant to the Rule of Law' in Heckman, JJ et al (eds) *Global Perspectives on the Rule of Law* Routledge 28.

<sup>63</sup> See North, DC, Wallis, JJ and Weingast, BR (2009) *Violence and Social Orders: A Conceptual Framework for Understanding Recorded Human History* Cambridge University Press.

<sup>64</sup> See eg Merry, S (1990) *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* University of Chicago Press; Engel, D and Engel, JS (2010) *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* Stanford University Press; Engel, D and McCann, M (2009) *Fault Lines: Tort Law and Cultural Practice* Stanford University Press.

<sup>65</sup> Banakas, S (2007) 'A Global Concept of Justice: Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World' 67 *Louisiana Law Review* 1021 at 1022f.

Legal globalisation — especially global law firms with an ability to inject new dynamism into local jurisdictions by importing Anglo-American techniques of pro-active pursuit of individual rights empowered by contingency fee agreements, availability of punitive damages and possibilities of forum shopping — has resulted in a transformation of the global legal landscape, in which sovereign state borders are failing to provide security against liability exposure in a foreign forum. Global private law remedies may include transnational procedures of collective redress and class actions. On the bright side, global law firms are sometimes working pro bono in the case of the most serious and high profile violations of human rights, empowering disadvantaged individuals while exploiting the huge long-term gains in public opinion recognition.

Additionally, audacious steps are made in several jurisdictions to expand the doctrine of universal jurisdiction, either on the basis that the original forum offers inadequate relief or on the basis of the wrong being 'global'. First, with the advent of the class action and other collective redress mechanisms, lawyers can act as private attorneys general to victims of mass global wrongs and international mass torts, independent from national political pressure, hence enforcing standards of protection of basic human rights equally on a local as well as a global basis.<sup>66</sup> Second, private law can internationally empower individual victims of violations of basic human rights, including family and employment rights, to gain not only compensation but also closure and restored dignity.<sup>67</sup>

But even beyond basic human rights, global private law remedies can arguably be part of the answer to the apparently insoluble problem of extreme deprivation and global social welfare. Social welfare, controversial as it is on a national level, becomes a moral conundrum if transposed on to the global field.<sup>68</sup> As the United States experience has shown, US tort law sometimes offers a safety net when social welfare is inadequate.<sup>69</sup> Whether private law litigation should or should not, in terms of economic efficiency, be used as a mechanism of wealth distribution on the local level — where tax laws might do the job better<sup>70</sup> — on the global level there is no such alternative.

For corporations across the world, 'hard' legal liability (defined as obligations under local, national or international regulation or law) and 'soft' moral liability (defined as the violation of stakeholder expectations of ethical behaviour in such a way as to put business value at risk) are converging. The hard legal liability of global corporations has increased

<sup>66</sup> Potential claimants are also recruited on the internet. See eg <http://www.classaction.com/>. Milder versions of the aggressive US model of class actions are now contemplated in Europe. See Fleming, C (2004) 'Europe Learns Litigious Ways — Union's Tactic Spotlights Trend Toward US-Style Lawsuits' *Wall Street Journal* 24 February at A16; Fairgrieve, D and Howells, G (2009) 'Collective redress procedures — European debates' 58 *International and Comparative Law Quarterly* 379. In countries in the French legal tradition with highly developed systems of administrative (public) tort liability, administrative courts enforce tort claims for violations of collective rights: see Henao, JC (2005) 'Collective Rights and Collective Actions: Samples of European and Latin American Contributions' in Madden, MS (ed) *Exploring Tort Law* Cambridge University Press 426 on the '*acciones populares*', an administrative law remedy that serves functions similar to class actions. For another view of the public function of tort law in the US, see Calabresi, G (2005) 'The Complexity of Torts — The case of Punitive Damages' in id 333, arguing at 337 that the first function of tort law is to enforce societal norms through the use of private Attorney's General.

<sup>67</sup> See *Filártiga v Peña-Irala* 630 F.2d 876 (2d Cir 1980).

<sup>68</sup> See Takikawa, H (2005) 'Can We Justify the Welfare State in an Age of Globalization? Toward Complex Borders' in Escamilla and Saavedra *Derecho Y Justicia En Una Sociedad Global* supra n 28 at 723.

<sup>69</sup> It has been noted that the weakening of Europe's welfare state has caused a dramatic increase in tort litigation in the Old Continent, leading people to seek their own self-help remedies, often through legal action.

<sup>70</sup> See Weisbach, DA (2003) 'Should Legal Rules Be Used to Redistribute Income?' 70 *U Chi L Rev* 439.

by the rise of phenomena such as so-called 'foreign direct liability litigation' for human rights violations in distant geographical locations.<sup>71</sup> Criminal and civil liability arising from securities litigation has been transformed into a trans-border, global phenomenon, as globalisation of corporate capital carries with it the jurisdictional sting and influence of the most demanding national regulatory regimes.

Global jurisdiction for civil liability suits is being tested not only in the US, under the old Alien Tort Claims Act of 1789,<sup>72</sup> but also in Europe. In the case of *Lubbe et al v Cape Plc*,<sup>73</sup> the United Kingdom House of Lords opened the English courts to foreign plaintiffs injured overseas as a consequence of the operations of British companies or their subsidiaries. And the European Court of Justice in *Group Josi Reinsurance Company SA v Universal General Insurance Company*<sup>74</sup> held that a plaintiff domiciled in a state that was not a contracting party to the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters could still invoke the rules of the Convention. It is a safe bet that the trend is likely to continue, with other countries, such as Japan and Belgium, experiencing lawsuits testing universal jurisdiction for civil liability.

In response, governments all over the world are rushing in measures to enhance national sovereignty in private law claims, such as curbing forum shopping, or the so-called 'mosaic principle',<sup>75</sup> in all areas of private law, from divorce to product liability and libel. What has made forum shopping so attractive is the possibility of lawyers pursuing redress for dispersed and sometimes even trivial individual or collective losses on behalf of transnational, individual or collective claimants. Two papers presented at the London workshop in 2009 were dedicated to this significant effect of global wrongs. In his thorough review of European Union rules on dispersed individual losses, Lubos Tichy<sup>76</sup> critically assessed European rules, culminating recently in the EU regulation on the law applicable to non-contractual obligations (known as 'Rome II'),<sup>77</sup> and the latest EU regulation on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters.<sup>78</sup> His paper showed the complexity of the issue of adjudication of claims for globally dispersed injuries caused by one single act or omission, from the point

<sup>71</sup> See Peter Muchlinski's paper in this volume

<sup>72</sup> Resurrected from the dead in *Filártiga v Peña-Irala* supra n 67 and endorsed by the US Supreme Court, albeit only for a 'modest' class of suits based on violations of the traditional law of nations or other offences 'on a norm of international character accepted by the civilized world': *Sosa v Alvarez-Machain* 542 US 692 (2004). See also the US Torture Victims Protection Act of 1992, providing a private law remedy in a tort action for 'official torture' and 'extrajudicial killing' committed under the colour of foreign law on behalf of any individual, including US citizens, but only after the plaintiff has exhausted all domestic remedies, wherever they are.

<sup>73</sup> (2000) 4 All ER 268 (HL) (appeal taken from Eng) (UK). The decision allowed the claim for damages of 3,000 South African plaintiffs, who alleged that they were made ill while working with asbestos in the employment of a subsidiary of a UK company. In *Berezovsky v Michaels and Others; Glouchkov v Michaels and Others* (2000) 2 All ER 986 (HL) (appeal taken from Eng) (UK), the House of Lords was challenged by inventive counsel to decide whether an internationally disseminated libel constituted a number of separate torts in each country of publication or whether it should, at least for some purposes, be viewed as a 'global tort'.

<sup>74</sup> [2000] ILPr 549 (ECJ); [2001] QB 68 [Group Josi]. See Ibili, F (2006) 'At Last: The EC Court of Justice on Forum Non Conveniens' 53 *Neth Int'l L Rev* 127.

<sup>75</sup> See the ECJ Shevill Judgment (C-68/93).

<sup>76</sup> This paper is not published in this collection and will be included in a future larger collection of essays presented at the London Workshop. Manuscript available on file.

<sup>77</sup> EU Regulation (EC) No 846/2007 of the European Parliament and of the Council; this Regulation, however, and rather significantly, does not apply to claims from alleged violations of personality and privacy rights (art 1 para 2 f).

<sup>78</sup> EU Regulation (EC) No 44/2001 of 22.12.2000 of the European Parliament and of the Council.

of view of private international law rules and rules on enforcement of foreign judgments, a point of view critically relevant when issues of restorative justice are concerned. Criticising the first path of the European Court of Justice's Shevill judgment, he suggested that instead of the court in the country of establishment of the claimant having jurisdiction to decide on the entire dispersed damage in all the other countries, one of the courts (at the discretion of the claimant) in one of the countries of occurrence of the damage should have such jurisdiction, preferably in the country where the damage caused was the most significant. However he retained the second path of Shevill, which limited the jurisdiction of the court in each of the different countries where the damage was dispersed to adjudicate only on local damage. Tichy's painstaking analysis exposed the degree to which national sovereignty issues embedded in traditional private international law rules are re-emerging to create new obstacles to an effective transnational pursuit of dispersed damage claims. His paper offered plenty of up-to-date evidence of the continuing hegemonic role of regionally consolidated private international law rules, but his position, *de lege ferenda*, is very much on the side of progress to a less tethered transnational pursuit of such claims.

The collective dimension of dispersed trivial losses was the focus of Willem H van Boom's contribution to the London workshop. His comprehensive review of doctrine and practice in several jurisdictions was triggered off by a disappointingly retrograde provision in the recently published European Draft Academic Common Frame of Reference (DACFR).<sup>79</sup> His look at the long list of collective redress remedies and procedures in several countries reveals the degree to which innovative collective redress practices are gaining ground in jurisdictions other than the common law ones, changing traditional private law thinking in so-called civil law countries and beyond. In the light of this, van Boom rightly concluded that contemporary private law needs to change its traditional view of dispersed trifle losses. He also agreed that an issue of such complexity should not be decided by diktat of a regional hegemony, such as the EU,<sup>80</sup> preventing natural evolution of private law remedies and procedures in each jurisdiction. But the EU's DACFR represents one of several recent efforts in a number of major domestic jurisdictions that led the first wave of legal globalisation to reassert legal sovereignty under international law and international private law, and curb the erosive expansion of private law remedies and procedures in the pursuit of out-of-jurisdiction claims. In this context, global legal entrepreneurship and judicial activism is viewed by certain governments and domestic law-makers as a potent enemy to political sovereignty and indigenous legal culture. In this they often find powerful allies in multinational corporations that are exposed to an increasingly aggressive and imaginative trans-border assault by private law litigants. The outcome of this contest, especially in the light of the experience of the recent global financial crisis, is unclear.

<sup>79</sup> 'Trivial damage is to be disregarded': ADCFR art VI-6:102 (*De minimis* rule). More on ADCFR in Banakas, S (forthcoming) 'Harmonization of European Private Law: Out of Date, Out of Time?' *Oxford Comparative Law Forum*.

<sup>80</sup> On the retrograde 'neo-colonial' strategy of the EU as a regional (Western) hegemony that goes against the grain of globalisation, see more in *ibid*.

## PRIVATE LAW REMEDIES: AVAILABLE TO ALL?

What is clearer, however, is that in the wake of the enthusiasm about the potential of private law remedies and procedures to empower individuals against powerful state authorities and even more powerful public and private corporations worldwide, and to enforce individual rights, not enough attention is paid to the fact that private law remedies and procedures are, like a harlot, available to everyone.<sup>81</sup> Governments and public and private corporations can also be plaintiffs in private law suits, and can maximise to their interests the use of remedies and procedures. Thus, mighty pharmaceutical corporations can use an avalanche of discovery orders to debilitate press investigations into their products and intimidate journalists and private victims of their actions, by intruding into journalists' private sources or even into their private lives. Corporations can sue for libel and get punitive damages. So, too, can individuals suspected of human rights violations that have been exposed or prosecuted unsuccessfully. Torturers and tortured, both have private law rights.

But, to what extent are private law remedies and procedures truly available to all? Again, not enough attention is paid to the legal status of the large, almost impossible to calculate, numbers of individuals who belong to non-legitimised immigrant communities all over the globe, part of the so-called clandestine global population movement. For them, living in legal and social exclusion and legally not existing in the country in which they find themselves, private law remedies and procedures are only a threat, never an option of empowerment, and private law, especially property law, has become one of the faces of what Boaventura de Sousa Santos has called 'financial fascism'.<sup>82</sup> Indeed, the globalisation of Western-designed private law remedies can be easily criticised as spearheading the task of advancing a hegemonic, neoliberal, almost neocolonial, 'top-down' legal globalisation. For people living in social exclusion, seeking to enforce private rights implies emerging from lawlessness to self-destruction. Non-legitimised migrant groups only ever encounter private law, especially property law, as an external threat rather than a possible recourse. Such groups often turn inward to forms of self-legitimising, counter-hegemonic,<sup>83</sup> tribal or communal justice.

Indeed, so-called 'global' private law remedies, as exclusively Western-produced devices, can potentially overpower other private law cultures or genetically modify them (so-called Islamic finance devices is an example<sup>84</sup>), thus perpetuating and consolidating Western legal 'neo-colonialism' and a monistic, neoliberal, Western-Westphalian legal thinking. The national, monistic Westphalian sovereign state becomes a transnational one, in which, even for liberal, enlightened social scientists like Thomas Nagel<sup>85</sup> or iconic multi-cultural celebrities like Amartya Sen,<sup>86</sup> the best hope for global justice is still placed in emerging institutions and processes of an exclusively Western-Westphalian design,

<sup>81</sup> Expression borrowed from Ross, A (1959) *On Law and Justice* University of California Press 261: 'Like a harlot, natural law is at the disposal of everyone'.

<sup>82</sup> de Sousa Santos 'The Counter-Hegemonic Use of Law' *supra* n 28 at 405.

<sup>83</sup> See the powerful account in *id* at 435.

<sup>84</sup> See *supra* n 17.

<sup>85</sup> Nagel, T (2005) 'The Problem of Global Justice' 33 *Phil & Pub Aff* 113 at 146-47.

<sup>86</sup> Sen, A (2001) 'Global Justice Beyond International Equity' *Polylog* available at <http://them.polylog.org/3/fsa-en.htm> (last visited 8 July 2010).

driven by Western initiatives, and all arguments about justice and fairness must engage with Western liberal or neo-liberal thinking, such as that of John Rawls or Robert Nozick. Other legal cultures, old, rich and potentially rewarding, must submit to Western legal superiority to be accepted into global legal and financial networks. In Western jurisdictions, any initiative towards legal pluralism in private law is resisted by worried politicians reacting to increasing xenophobia in the wake of mass population movements, cultivated by the mass media (another Western hegemonic tool exported globally).

Recent debates in the UK on the right of Islamic private law to exist as a modest alternative for consenting Muslims, supervised by the courts, in matters of divorce and inheritance, show very little tolerance for legal pluralism,<sup>87</sup> and the situation is similar in France, Germany, Italy and the US. Religious personal status private law is used by ethnic communities in Western, and sometimes also non-Western, countries in a clandestine, unregulated way, and the contrast with the power of the official law is used to undermine its authority. Resentment and conflict follow. Furthermore, non-Western societies and states are obliged to learn and adopt Western legal practice, or use Western lawyers, to service their participation in global legal and financial networks, as shown by the vast amounts of GDP spent by developing countries to service their membership of the World Trade Organisation and other global organisations. Legal globalisation, spearheaded by Western private law rights and remedies can thus appear as a new Western legal colonialism.<sup>88</sup> The recent European DACFR is a worrying example of Western naked ambition in this direction.<sup>89</sup>

Despite all this, it is important to acknowledge the reality on the ground: Western-inspired remedies and procedures, used by a willing judiciary, remain a realistic means of enforcing individual and community rights. Public interest litigation for example, a Western-inspired procedure, has proved an effective way of promoting social justice in legally pluralist countries such as India,<sup>90</sup> or for marginalised and excluded communities such as the Roma in Central and Eastern Europe.<sup>91</sup> But as pointed out by Boaventura de Sousa Santos,<sup>92</sup> courts of law can only be galvanised into action if driven by various kinds

<sup>87</sup> See Tahir, A 'Revealed: UK's First Official Sharia courts' at <http://www.timesonline.co.uk/tol/comment/faith/article4749183.ece> (last visited 8 July 2010). See also the official site of the UK Islamic Sharia Council at <http://www.islamic-sharia.org/> (last visited 8 July 2010).

<sup>88</sup> See Silvia, SJ and Sampson, AB (2005) 'The Acquis Communautaire: An Extension of European Colonialist Values?' *Annual Meeting of the American Political Science Association, Washington DC*, 1-4 September.

<sup>89</sup> 'Europe is the home continent of private law. We as a Union should have something on offer not only because so many of our own national private law systems are hopelessly outdated, but because other parts of the world are looking at us as well and wondering whether we can convincingly contribute to their needs to modernize their private law systems. Europe had not much to say when Russia looked for something non-American; Africa is suffering from a lack of justice; China is working on a Civil Code. Lawyers from Korea, Japan, China and other countries in that region are thinking of founding a Commission on East Asian Contract Law aiming at the formulation of Principles of East Asian Contract law': Chr V Bar (2008) 'A Common Frame of Reference for European Private Law — Academic Efforts and Political Realities' in *Electronic Journal of Comparative Law* Vol. 12.1 (May).

<sup>90</sup> See Baxi, U (1985) 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Dhavan, R, Sudarsan, R and Khurshid, S (eds) *Judges and the Judicial Power, Essays in Honour of Justice V R Krishna Iyer* Sweet & Maxwell 289.

<sup>91</sup> See Goldston, JA and Adjami, M (2010) 'The Opportunities and Challenges of using Public Interest Litigation to secure Access to Justice for Roma in Central and Eastern Europe' in Ghai, Y and Cottrell, J (eds) *Marginalized Communities and Access to Justice* Taylor & Francis.

<sup>92</sup> de Sousa Santos, B (1995) *Towards a New Common Sense-Law, Science and Politics in the Paradigmatic Transition* Routledge.



of assorted political action, not only, one might add, by lawyers' ambition and greed. The legendary Indian Justice Krishna Iyer, who was the protagonist in the surge of Indian public interest litigation, admitted as much in a striking comment: 'The avant-garde jurists ..., the "robed" radicals who claim through judicial surgery and epistolary lancet, to liberate bonded labor, terminate social injustice and accelerate economic egalite through writs of court ... are playing the game within the bourgeois parameters. The great issues of meaning and moment are in the streets, on the hills, on the city pavements....'<sup>93</sup> It is not impossible, therefore, as both the Indian experience of radical public interest litigation, and also that of Brazil, have shown, to transform through combined legal and political action an essentially hegemonic institution like that of Western-style courts into a counter-hegemonic tool.

#### PRIVATE LAW REMEDIES, PUBLIC WRONGS AND THE GLOBAL DIMENSIONS OF THE LOCAL: A NEW COMPLEXITY

Global wrongs are not only caused by Western hegemonic forces in non-Western countries; they are also caused in Western countries themselves. Hegemonic patterns of access to justice and dispute resolution have been applied indiscriminately in Western and non-Western societies, and this can be directly linked to the rise of public law doctrine (both national and international) in the last two centuries, as a necessary corollary to the Westphalian state sovereignty model. Hegemonic uses of the rule of law are not restricted to a Western over non-Western, rich-North over poor-South, variety. A measure of a person's liberation from the shackles of modern hegemonic public law doctrine<sup>94</sup> is the advance of private law remedies and procedures into territory traditionally considered as the reserve of public law. Maria Frederica Moscati's article in this collection illustrates how public law hegemony can restrict the access to justice of minorities in fully developed Western legal cultures, by looking at the issue of the lack of direct access of Lesbian, Gay, Bisexual and Transgender individuals (LGBT) to the Italian Constitutional Court for violations of their constitutional rights. Her article shows the Italian legal system, with its fully entrenched procedural acceptance of the rule of law, lagging seriously behind even some non-Western jurisdictions, often accused of an ambivalent position on rule of law issues. As she points out, some non-Western legal cultures like India, South Africa and Nepal offer effective protection to minorities such as LGBT by allowing direct access to the Supreme Constitutional Court. The struggle of LGBT people for direct access to Italy's Constitutional court is, of course, as much of a wrong, as any such discrimination in a non-Western, limited access society. As she says: 'Individual autonomy can be an important resource for the development of remedies against public wrongs. Unfortunately, individual autonomy is often limited by the absence of a legal framework supporting civil rights, or by political influence on the courts.'

The global dimensions of local public wrongs, the exploitation of the hegemonic nature of Western concepts of the rule of law not only by majorities but also by dictatorial minorities, and the redeeming potential of these features in a complex, post-modernist

<sup>93</sup> Krishna Iyer, Justice VR (1987) *Our Courts on Trial* BR Pub Corp 136.

<sup>94</sup> To paraphrase Rousseau, J-J (1762) *The Social Contract* Book I, ch 1: Man is born free, and everywhere he is in chains.

global environment are shown in Elisa Nesossi's paper on Falun Gong members' claims in the US under the Alien Tort Claims Act (ATCA) for human rights violations in China. Public international law often provides for criminal sanctions for violations of human rights, but does not explicitly sanction civil law suits. Civil suits for violations of human rights, primarily tort actions that are, moreover, primarily a US creation, often exist in conflict with public international law that adopts such violations from a top-down, public law position, because, obviously, they challenge this position and the doctrine of state sovereignty, which remains sacrosanct as far as public international law is concerned.

But Nesossi also asks a further question: are tort remedies marginal in terms of their global impact, an imperfect *sui generis* creation of the US legal system? It is true that they come with all the unique features of American tort law culture and process, conveniently summarised in a comparative analysis of ATCA litigation<sup>95</sup> as class actions,<sup>96</sup> contingency fees, the possibility of award of punitive damages by juries, default judgments, simple discovery rules and the residual jurisdiction of US Federal courts to adjudicate on disputes that fall within the subject-matter of the US Constitution regardless of their country of origin. But American tort law has long ceased to be an insular phenomenon and its global importance is enhanced by the American-dominated global legal practice. Criticisms advanced against the use of tort law in cases of serious violations of human rights, referred to in Nessossi's article, include 'an affront against all of humanity has been reduced to an issue of money and financial compensation', 'the defendant does not face imprisonment and does not face the wrath of the entire community, as represented by a government prosecutor',<sup>97</sup> and 'tort law prices, while criminal law prohibits'.<sup>98</sup> These criticisms overstate the case for state-led criminal prosecutions and public international law regimes of international criminal proceedings. Apart from underestimating the very important prohibitive function of damages awards, especially potentially hefty punitive damages awards, such criticisms ignore the fact that in national or international criminal proceedings victims have no control over, or input in, the process, and their personal vindication is not on the agenda. And often such proceedings are not available to them, precisely because they depend on national or international political expediency. Private law remedies are often the only protectors of human dignity. Nessossi's research backs this up. As she points out:

The ATCA lawsuits have brought into the spotlight individual victims of human rights violations, whose voice would not have been heard in any other legal forums. In the cases brought by the Falun Gong followers, as in many other similar cases, the victims did not look at civil actions only with the object of obtaining compensation. Civil action has often had a symbolic rather than a compensatory objective. Not being able to confront the governmental authorities in China and get any kind of

<sup>95</sup> Stephens, B (2002) 'Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' 27 *Yale International Law Journal* 1 at 14.

<sup>96</sup> No longer an American exclusive: see eg Fairgrieve, D and Howells, G (2009) 'Collective Redress Procedures – European Debates' 58 *International and Comparative Law Quarterly* 379; Note (1997-98) 'Class Action Litigation in China' 111 *Harvard Law Review* 1523; Gidi, A (2003) 'Class Actions in Brazil – a Model for Civil Law Countries' 51 *American Journal of Comparative Law* 311. See also Willem van Boom's paper in this volume.

<sup>97</sup> Stephens 'Translating Filártiga' supra n 95 at 12.

<sup>98</sup> Coffee, JC (1991) 'Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law' 71 *Boston University Law Review* 193 at 194.

formal admission of gross wrongdoing by the PRC authorities, the victims saw the enforcement of civil remedies as the only available procedural avenue for securing self-respect, vindication and recognition as victims of human rights abuses.

Francesco Schiaffo's article on the reform of self-defence in Italy in 2006 shows an example of creative ways of outsourcing core public law functions to private action, opening up the intriguing question of privatising the right of punishment in a traditional Western jurisdiction. Other legal traditions, such as the Shari'a, have always accepted the private right of the victim to demand retribution or forgive.<sup>99</sup> As Professor Hassan Ko Nakata puts it, in Islamic law there is no distinction between public and private law, but a distinction between laws concerning acts of worship (*ibadaat*) and laws concerning human affairs (*muamalat*). And he adds that in Islamic law, 'murder is a civil case rather than a criminal case'.<sup>100</sup> In my view, an imaginative interpretation of the Italian legislation could serve to open the debate, long overdue, of the lessons that could be learned by Western legal traditions from other traditions, such as that of Islam, in managing wrongs against individuals and achieving restorative justice. Be that as it may, Schiaffo's article shows how contemporary social and economic challenges can lead to expanding the reach of private law rights into domains traditionally governed by state-enforced criminal (public) law.

Michael Palmer's article offers an important, if different, dimension of the phenomenon of privatisation of traditional public law jobs, informed by alternative dispute resolution developments in a non-Western legal tradition of enormous significance in a globalised world: the Chinese legislation and practice of mediation in administrative proceedings. As he points out, this 'reflects more than simply the influences of traditional Chinese culture, lax procedural rules, the self interest of the parties and a general shift in development policy', but is also the product of present political reality, the decision of the current paramount leader Hu Jintao 'to pursue ... the developmental goal of a "harmonious society", with Party and state joined at the hip'.

Private law remedies always existed in tension, and sometimes in conflict, with public laws, aiming at serving the sovereignty of states. They have always been in every tradition more or less independently available to individuals and, and more importantly, judges. The latter always saw themselves as primary guardians of individual private rights, but have also always been restricted by constitutional principles of separation of powers and doctrines of judicial review and legality of executive action in applying public law. Sometimes, as the experience of legal traditions as diverse as those of Western civil law systems, modern Chinese law, Islamic law and the PIL jurisprudence in India, shows, private law remedies empower courts to defy not only national but also international sovereignty. But Palmer also provides important evidence and makes a strong and very important argument that the privatisation of public wrongs will also throw issues into the ADR arena in many jurisdictions around the world today. ADR offers a private law-

<sup>99</sup> See among others, Dien, MI (2004) *Islamic Law: From Historical Foundations To Contemporary Practice* University of Notre Dame Press.

<sup>100</sup> Preface to Introduction to *Public and Private Law of Islam — Part of Public Law* (in Japanese, published by Japan-Saudi Arabia Society 2008) available online at <http://homepage3.nifty.com/hasankonakata/hassanpdf/characteristicofpubliclawinislam2.pdf> (last visited 8 July 2010). See also Mallat, C (ed) (1993) *Islam and Public Law (Arab and Islamic Laws)* Springer Verlag.

driven alternative to the autocracy of justice by state-appointed judges. It is to aggrieved citizens what tort law is to the victims of a crime. Heroic as it may be, the contribution of official courts in certain developing societies (such as in Brazil or India), is questionable, as Michael Palmer points out:

In well-established democracies, with securely institutionalised political party systems, firmly embedded rule of law values, a free press and a strongly autonomous and vibrant civil society, judicial review may be seen as something of a double-edged sword. While it may bring benefits in holding powerful public institutions to account, it also raises a fundamental question about the legitimacy of the courts' decision-making authority. Why should an unelected body such as a court possess the right to challenge definitively the decisions of a legislature or a government that is popularly elected and which may be readily criticised or held to account in other ways?

And as Antonio Lazari points out in his essay 'The Ulysses' Intertwined Ropes: the European Law Remedies and the New Cross-Fertilisation Paradigm',<sup>101</sup>

After the birth of the European Communities, the state did not change its attitude, as Jean Monnet had hoped. Its approach to the European Communities is traditionally internationalist. It is through private law remedies that the Court of Justice brings the political will of an ever-closer union among the peoples of Europe within a legal framework by virtue of its first sentences from the 1960s.

Lazari's article offers an important example of considerable transnational impact of private law's emergence as a powerful 'third way' in transnational legal relations, in conflict with national constitutions and international treaties, an example of the outcome of what he calls the 'fruitful conversation' of ordinary (private law) courts in EU member states with the European Court of Justice (ECJ). The outcome has been an original and quite important development for the future of Europe, the direct applicability of EU Treaty provisions in defence of private rights, and the doctrine of state liability in tort for failure to implement properly European harmonisation measures,<sup>102</sup> and, most recently, also core treaty provisions on competition wrongs.<sup>103</sup> As Lazari points out, although the ECJ has denied 'direct effect' to provisions of GATT and WTO law, it has extended the judicial conversation to the WTO tribunals in Geneva. Most important of all is the broader

<sup>101</sup> This paper is not published in this collection and will be included in a future larger collection of essays presented at the London Workshop. Manuscript available on file.

<sup>102</sup> *Francoovich and Bonifaci v Republic of Italy* (Cases C-6 and 9/90) [1991] ECR I-5375; *Brasserie du Pêcheur v Federal Republic of Germany and R v Secretary of State for Transport ex parte Factortame Ltd* (Cases C-46 and C-48/93) [1996] ECR I-1029.

<sup>103</sup> *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04), *Nicolò Tricarico v Assitalia SpA* (C-297/04) and *Pasqualina Murgolo v Assitalia SpA* (C-298/04), Joined Cases C-295/04 to C-298/04 (2006). The EJC held that 'article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm'. See more in Mackenrodt, M-O, Gallego, BC and Enchelmaier, S (eds) (2008) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Springer Verlag. See also EU Commission (2008) *White Paper 'Damages Actions for Breach of the EC Antitrust Rules'*, COM 165 final at 1ff.

significance of such developments: this ‘conversation’ between courts and tribunals in (horizontally as well as vertically) different juridical orders, National, transnational and international, and across different political ideologies, legal cultures and languages, a conversation about individual private law remedies, is in fact changing the world in a way that cannot be controlled by traditional structures of national and international sovereignty.<sup>104</sup> In its *Kadi* judgment, the ECJ, overturning the judgment of the court of first instance,<sup>105</sup> defended the private right to property against the EU Commission’s regulation<sup>106</sup> enforcing UN Security Council anti-terrorism resolutions, and adopting a blacklist, periodically updated, of persons alleged to be linked to terrorist organisations. In accordance with resolutions of the Security Council, all state members of the United Nations must freeze the funds and other financial resources controlled directly or indirectly by such persons or entities. *Kadi*, a resident of Saudi Arabia, and the *Al Barakaat International Foundation*, established in Sweden, were designated by the Sanctions Committee of the United Nations as being associated with Usama bin Laden, Al-Qaeda or the Taleban. Their names were added to the summary blacklist of the UN, and then placed in the similar list annexed to the Community regulation. The ECJ held that the freezing of his funds constituted an unjustified restriction of Mr *Kadi*’s right to property,<sup>107</sup> and annulled the Council regulation insofar as it froze Mr *Kadi* and *Al Barakaat*’s funds.<sup>108</sup>

Chris Wadlow’s contribution re-launches the same inquiry beyond Europe, into a global perspective, looking into issues of interface between private law rights, human rights and intellectual property transnational legal regimes. His article illuminates the new complexity created on a global level by the inventive use of private law remedies in areas of grievance and conflict that sometimes appear to be squarely governed by international law. His article looks into the possible function of the International Centre for the Settlement of Investment Disputes (ICSID) as adjudicator of private claims against sovereign states, arising from the control and allocation of intellectual property rights in bilateral (or regional) investment treaties (BITs). Provided, as he says, one can see intellectual property rights as investment, the ICSID could be engaged by private parties to resolve disputes arising from BITs. As he points out, ICSID could well be a ‘magic word’ that opens a ‘portal’ or ‘wormhole’ between the public international law of states and the private law of persons. One might add ECJ or ATCA as other potential portals or wormholes. In any case, regardless of spaces of an alternative legal order or legality, private law offers the possibility of a new global language of entitlement in the form of self-legitimising action channelled through courts inspired by radical political movements, defying the Babel of separate sovereign legal orders, legal cultures and languages, contributing to the invention

<sup>104</sup> ECJ Joined Cases C-402/05 P and C-415/05 P (2008).

<sup>105</sup> Judgments of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council* and Case T-315/01 *Kadi v Council and Commission*.

<sup>106</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139 p 9).

<sup>107</sup> Protected by the European Convention of Human Rights, article 1 of Protocol No 1.

<sup>108</sup> ‘The imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list ..., constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it’: ECJ Joined Cases C-402/05 P and C-415/05 P (2008), paras 368-70.

of a new grammar of space and time for a new global political culture.<sup>109</sup> To expand on Wadlow's allegory, private law could become itself a portal wide open, a bottomless wormhole.

Ting Xu's paper on the right to private property and its enforcement in the People's Republic of China also shows the power of private law and the seductive appeal of private entitlement to penetrate political space dominated in China by the powerful post-Mao party and state ideology. As Xu points out, in China the private (*si*) has long been considered inferior to the public (*gong*). It has taken a long gradual development of a notion of private ownership, necessitated by China's decision to join unequivocally financial globalisation and to welcome foreign investment, to reach the Property Law Act that came into effect in 2007.<sup>110</sup> This Act defines private ownership as an absolute and supreme right in China, equally protected as public property, and seemingly offers the possibility of providing ordinary people with civil law remedies for infringements of private property rights. But as Xu points out, such remedies are still not available when the public power requisitions privately owned land on grounds of 'public interest' (*gonggong liyi*), a concept the meaning of which is not clear, in either the Chinese Constitution<sup>111</sup> or the Property Law Act. However, and despite Xu's reservations as to the present state of enforcement of private property rights in China, her thorough and perceptive account of the development of private property law in China reveals more than a glimmer of hope that such enforcement may soon be fully institutionalised. As she says in her conclusion: 'The process of lawmaking in China shows a pattern in which "reality" pushes the law to reform, and it struggles to strike a balance between party policy and law as well as between central and local law-making'. This yielding to reality rather than faithfully adhering to the institutional status quo is exemplified in a remarkable way by events in 1987, when a party-approved auction of land use rights took place in Shenzhen despite this being against the Constitution at the time; this was duly amended to legitimise the practice four months later. Xu's article does illustrate that this post-legitimation culture is complex, and it needs to be seen in the context of the relationship between law and party policy, as well as the relation between the central and local governments in the process of lawmaking. Nevertheless, financial globalisation and China's perceived goal to be in the centre of it as an emerging financial superpower is a very powerful reality driving on party policy on private property rights.

The enforcement of private property rights, so essential in Western neo-liberal thinking, and a sine qua non condition of financial globalisation, offers a sharp illustration of the double-edged nature of private law remedies, especially, but not only, in non-Western societies, and it is at the centre of what Boaventura de Sousa Santos calls 'abyssal thinking', the modern Western thinking driving globalization.<sup>112</sup> Historically, as shown by, among others, Pagden,<sup>113</sup> Western colonial powers were more concerned with legitimating

<sup>109</sup> See de Sousa Santos, B (2006) *A Gramática Do Tempo: Para Unha Nova Cultura Política* Edições Afrontamento.

<sup>110</sup> Passed by the National People's Congress on 16 March 2007 and in force since 1 October 2007.

<sup>111</sup> Article 13 of the Chinese Constitution (amended in 2004) states: 'The lawful private property of citizens may not be encroached upon. By law, the state protects citizens' rights to own private property and the rights to inherit private property. The state may, for the public interest, acquire or requisition citizen's private property for public use, and pay compensation in accordance with law'.

<sup>112</sup> de Sousa Santos 'Beyond Abyssal Thinking' supra n 1.

<sup>113</sup> Pagden, A (1990) *Spanish Imperialism and the Political Imagination* Yale University Press.

property rights than sovereignty over the New World, and one might add that this is also true in the process of financial globalisation. Santos goes as far as suggesting that underneath contemporary globalisation is the continuing existence of an invisible division between metropolitan societies and colonial territories, two different political paradigms, the former resting on a tension between social regulation and social emancipation, the latter on a tension between appropriation and violence.<sup>114</sup> Appropriation and (or through) violence is at the heart of property rights, private or public, causes social and legal exclusion, and is therefore also in the heart of the global justice debate.

#### PRIVATE LAW REMEDIES, CORPORATE WRONGS AND THE LOCAL DIMENSIONS OF THE GLOBAL

The reason for which private law remedies cross frontiers in the case of corporate wrongs, in the form of what has been described as ‘foreign direct liability’,<sup>115</sup> is different from that in the case of public wrongs. Unlike sovereign states and governments, multinational enterprises (MNEs) do not have sovereign power nor are they normally covered by any public international law immunities. But, as Rachel Chambers succinctly observes, business-related human rights abuses are primarily enabled by the misalignment between economic forces and governance capacity in the host country. Moreover, global corporate activity often challenges local legal resources,<sup>116</sup> even supposing that governments of host countries are willing to go after human rights violations, and are neither corrupt nor impotent before global corporate might. So there are two important issues here: first, the ability of global corporate might to dictate favourable local terms to impotent or corrupt host governments; and second, the absence of legal and technical resources in developing countries.

Catherine Jenkins’s article on litigating South African apartheid claims against multinational companies in US courts strongly supports this, especially in her conclusion that ‘US courts may often be the last hope of redress for the victims of abusive pasts’, although, she adds, ‘it remains to be seen whether they will prove able to write “good history”.’ But her article clearly shows the potential of private law remedies and procedures in general, and tort law in particular, not only to achieve restorative justice but also to establish facts, important for healing and global human rights progress. The ‘jurisprudence of hope’<sup>117</sup> may now become also the ‘jurisprudence of truth’. The creative use in the US by certain federal jurisdictions of the Alien Tort Claims Act has allowed transnational lawsuits to vindicate violations of human rights in other jurisdictions.<sup>118</sup> This development compares very favourably with the creative use in other jurisdictions of procedures such as the PIL procedure in India, discussed above. But the South African experience as presented in

<sup>114</sup> de Sousa Santos ‘Beyond Abyssal Thinking’ supra n 1 at 2.

<sup>115</sup> Ward, H (2001) ‘Governing Multinationals: The Role of Foreign Direct Liability’ *The Royal Institute of International Affairs, Briefing Paper* New Series No 18 February, [http://www.chathamhouse.org.uk/files/3028\\_roleoffdl.pdf](http://www.chathamhouse.org.uk/files/3028_roleoffdl.pdf) (last visited 8 June 2010).

<sup>116</sup> In *Lubbe v Cape* [2000] 1 WLR 1545 (HL), the House of Lords, applying the principles on *forum non conveniens* laid down in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL), accepted jurisdiction on a dispute arising from events in South Africa on the grounds that a case of that magnitude required expert legal representation and experts on technical and medical issues that could not be funded in South Africa.

<sup>117</sup> Quoting Lambert, ‘The Jurisprudence of Hope’ supra n 11.

<sup>118</sup> See more in my paper ‘A Global Concept of Justice’ supra n 65.

Jenkins's article reveals a number of collateral issues that show the limits and, conceivably, also potential drawbacks of transnational private law suits for the effective protection of human rights. Perhaps conveniently, the South African government refused to support the apartheid litigation, conscious of the fact that multinational corporations complicit in past wrongs would be needed in the post-transition reconstruction of the country's economy and society. Furthermore, no South African multinationals were included in the lawsuits and banks were granted immunity from liabilities. Jenkins makes the important point that transnational lawsuits create a lot of difficulties, material as well as cultural and moral, for often poor and uneducated plaintiffs represented by foreign lawyers in alien jurisdictions, where officials may have little or no understanding of the background. But to what extent do these difficulties limit the potential of such lawsuits to be an effective form of 'restorative' justice, and achieve real 'closure' besides monetary compensation? Often tort suits are brought with a clear aim of reaching an out-of-court settlement, which may provide monetary reparation and pay the lawyers' expenses but will certainly not lead to any kind of 'truth' or 'closure' for the victims. Jenkins's article leaves the question open of whether or not the availability of transnational private remedies is a curse rather than a blessing, preventing the states and communities affected, as well as the international community, from addressing the issue of gross and systematic human rights violations globally and holistically, and putting in place an international scheme of reparations under the auspices of public international law. This is a point of major, broader significance for the debate on the contribution of private law remedies and procedures to global justice. But she also is right in drawing a mildly optimistic final conclusion: transnational private law suits may be all we have and can realistically expect in the near future.

Rachel Chamber's article on home state litigation as a way to fill the lacuna in corporate legal accountability for human rights violations perpetrated in host states demonstrates that home state litigation, or, as it is also known, 'foreign direct liability', remains one of the few tools for vindicating human rights violations and therefore, despite its limitations, it could be an important step towards filling the lacuna in corporate legal accountability for human rights violations perpetrated in host states. But her research also reveals the broader significance of home private litigation for corporate abuses of human rights in host countries: scarce as it may be, it could lay the seeds for the development of a principle of universal jurisdiction for human rights violations based on the avoidance of a denial of justice.<sup>119</sup>

However, as Peter Muchlinski shows in his review of foreign direct liability cases, the prospect of denial of justice does not always tip the balance in favour of claimants. Claims arising from the Bhopal disaster in India, resulting from the activities of the US-owned MNE, Union Carbide, were denied a hearing in the US.<sup>120</sup> One is tempted to take a rather cynical view of the future of foreign direct liability in US courts when the MNE is primarily

<sup>119</sup> A natural law principle magnificently articulated in the Code Napoleon in 1804: 'Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice'. See also *Lubbe v Cape* [2000] 1 WLR 1545 (HL) at 1560.

<sup>120</sup> Unlike in the UK in *Lubbe v Cape*, the US *Bhopal* case was unsuccessful on grounds of *forum non conveniens*, as India was seen as the more appropriate forum for the claims against Union Carbide for the Bhopal Gas plant disaster: see Muchlinski, PT (1987) 'The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors' 50 *MLR* 545. At the time of writing, after 25 years, an Indian court has finally passed short terms of imprisonment on Indian cadres of Union Carbide for criminal offences that led to the tragedy, a final act that can only be described as an effective denial of justice for the thousands of innocent victims of the disaster.



American-owned and not, as in the South African litigation, foreign. Nevertheless, foreign direct liability continues to be primarily a common law phenomenon, but, as Muchlinski's article also shows, it has started, inevitably, to spread also to non-common law countries such as France, Belgium and Italy. Muchlinski argues that: 'The development of foreign direct liability litigation ... can be seen as a development involving a cultural position on the responsibility of corporate actors that is increasingly transnational and shared across national legal and social boundaries'. It remains true, however, that structural and cultural differences between national legal orders remain and can make an important difference in the progress of this development, as the French case of *Lipietz v SNCF*,<sup>121</sup> discussed by Muchlinski, shows. The decision of the Conseil d'Etat in that case, declaring the administrative courts incompetent to adjudicate a compensation claim against the French National Railway Corporation (SNCF)<sup>122</sup> for the forced transportation of French Jewish citizens to Germany at the time of the German occupation of France during the Second World War, indicated that claimants could still in principle address their claims to the private law courts, something they never actually did as their chances of succeeding were considered very poor. This is mainly because in civil law countries the divide between civil and criminal proceedings is not as sharp as in common law jurisdictions, and claims for human rights violations need to be tested, first, in criminal courts that will also deal with any tort claims by victims (participating as 'partie civile' in the criminal process, a procedure unknown in common law countries). Criminal courts are not able, however, to manage claims of compensation as well as civil courts, as the French practice has shown, especially when the evidence is buried in the distant past. The combination of a strict jurisdictional divide between administrative and private law competences<sup>123</sup> and the practice of adjudicating victims' compensation claims in criminal courts, is likely to cause direct foreign liability to remain an almost exclusively common law phenomenon for the foreseeable future. From a global perspective, Muchlinski's article shows that 'style' of legal orders still matters, and that the chances of private law acting as a portal or wormhole leading to a brave new world of fusion between the private and the public are considerably slimmer in so-called civil law jurisdictions.

## CONCLUDING COMMENTS

The role of private law remedies and procedures in the present conditions of globalisation cannot be exhaustively captured and analysed in a single collection. This is very much work in progress, and a significant number of important types of wrongs such as bio-genetic or environmental harm still need to be addressed. Nevertheless, the studies assembled here show the extent to which the use of private law remedies and procedures

<sup>121</sup> Conseil d'État, 21/12/2007, No 305966 (Recueil Lebon); see Grosswald Curran, V (2008), 'Globalization, Legal Transplantation and Crimes against Humanity: The *Lipietz* Case' 56 *American Journal of Comparative Law* 363.

<sup>122</sup> The SNCF was held to have been obliged to comply with the state deportation orders at the time and could not be liable for administrative malpractice, only potentially for a separate private fault which, however, would fall under the jurisdiction of private justice ('justice judiciaire'). See, for further analysis, Peter Muchlinski's paper in this volume.

<sup>123</sup> This division of jurisdiction required the defendant to be acting primarily as a public enterprise for administrative courts to have competence, and not merely as a 'mixed economy' enterprise as the SNCF did during the war years in France.

in diverse contexts results in a 'bottom-up' drive to legal globalisation, defying at the same time traditional classifications and divisions; and the extent to which private law remedies and procedures are the means of a transnational pursuit of restorative justice for individuals and communities, and catalysts of legal pluralism. Not contingent on national or international politics and linked to private interest, they benefit from the profit-driven financial globalisation, tools in the hands of global multi-million law firms turning claims into multi-lateral private investments.

Financial globalisation has turned private law claims into a separate asset class, through third-party funding of private litigation.<sup>124</sup> Transjurisdictional conversations between courts are increasing. Restorative justice has entered the financial markets, and private law litigation, often trans-border and often outside the investor's jurisdiction, is enabled by the pursuit of profit. And the increasing use and popularity of ADR mechanisms and practices in many jurisdictions across the world amounts to a significant alternative private law empowerment of victims of global wrongs, especially in developed Western countries but also, as Michael Palmer shows in his article, in important transitional democracies, most importantly China.

The global use of private law remedies and procedures is not without its enemies (sovereign states and others, such as MNEs), and does not come without undesirable collateral effects, as I have tried to show. But curtailing global private law litigation by erecting new national jurisdictional firewalls looks, at the time of writing, as unattractive as curtailing the global economy by means of national isolationist measures. Let global capitalism fund the pursuit of justice for at least some of its victims. He who wounds has also the power of healing.<sup>125</sup>

<sup>124</sup> Typically, an investment fund pays all or part of the claimant's legal fees, then takes a share of the damages won, say 10-40%. The London-managed hedge fund MKM Longboat revealed in 2007 plans to invest \$100million (£50.5million) to finance European lawsuits: see <http://business.timesonline.co.uk/tol/business/columnists/article3080766.ece> (last visited 9 July 2010). As reported in the *New York Times*, at least one major global financial corporation, Credit Suisse, has a unit devoted to investing in one side of a lawsuit in exchange for a share of any winnings. Juris Capital, a Chicago firm backed by two hedge funds, also does this, together with several other hedge funds: Glater, JD (2009) 'Investing in Lawsuits, for a Share of the Awards' *New York Times* 3 June. Third-party funding is also well-established in Australia. In the UK the Civil Justice Council, which advises the Lord Chancellor on civil legal issues, considers such funding arrangements an 'acceptable option for mainstream litigation'.

<sup>125</sup> As in Richard Wagner's *Tristan und Isolde*.