

2014

Comparative Law in a Time of Globalization: Some Reflections

Thomas C. Kohler

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Thomas C. Kohler, *Comparative Law in a Time of Globalization: Some Reflections*, 52 Duq. L. Rev. 101 (2014).

Available at: <https://dsc.duq.edu/dlr/vol52/iss1/5>

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Comparative Law in a Time of Globalization: Some Reflections

Thomas C. Kohler*

“Now it seems to some people that everything just is merely legal, since what is natural is unchangeable and equally valid everywhere—fire, e.g., burns both here and in Persia—while they see that what is just changes from city to city. This is not so, though in a way it is so.”¹

“There are, it is said, one hundred and fifty-four customs in France which possess the force of law. These laws are almost all different in different places. A man that travels in this country changes his law almost as often as he changes his horses The Lord pity us!”²

“The simpler the laws and the more general the regulations become, the more despotical, arid and wretched a state becomes.”³

I will use this happy occasion celebrating the work of Mary Ann Glendon for some short reflections on some ancient questions that have appeared in a new guise, and upon which analysis from a comparative perspective can shed some light. The problems strike at the heart of the very idea of law itself. Is law merely conventional, a set of local, customary (and thereby divergent) practices, whose legitimacy or reasonableness is implied from long use? Or,

* Concurrent Professor of Law and Philosophy, Boston College Law School.

1. ARISTOTLE, NICOMACHEAN ETHICS 133 [1134b 25] (Terence Irwin trans., Hackett Publishing 1985) (c. 384 B.C.E.).

2. FRANÇOIS-MARIE AROUET (VOLTAIRE), *A Philosophical Dictionary*, vol. IV (“Customs-Usages”) in VIII THE WORKS OF VOLTAIRE: A CONTEMPORARY VERSION (William F. Fleming trans., 1901).

3. JUSTUS MÖSER, *Der jetzige Hang zu allgemeinen Gesetzen und Verordnungen ist der gemeinen Freiheit gefährlich* [The Current Tendency to Universal Laws and Administrative Regulations is a Danger to Common Freedom] (1772) in 5 JUSTUS MÖSERS SÄMMLICHE WERKE: HISTORISCHE-KRITISCHE AUSGABE IN 14 BÄNDEN 22, 23 (1943).

can only a norm universally recognized and applied enjoy the status of being law?

A brief address given by Professor Glendon at a small conference held in Florence in June of this year, in which we both participated, triggered these ruminations. In the course of her remarks, entitled, "The Adventure of Comparative Law," she noted that, until recently, American lawyers had precious little interest in foreign law. However, with the advance of globalization, the situation has changed. American law schools, she observed, have quickly expanded their international programs. Today, any law school worth its salt has offerings in international business law and public international law. Nevertheless, she remarked, it is not clear what role, if any, comparative law will have in this new atmosphere. Becoming a comparatist, she points out, involves some rather heavy and sustained lifting: "Just as it takes considerable investment of time and effort to acquire a working knowledge of one's own legal system, it takes similar investment, and additional years of study, to become familiar with that of another country, especially if other languages must be mastered."

Of course, the work involved in becoming a comparatist does not stop there. Law mirrors a people's history, values, beliefs, and culture, within and through which it seeks to deal with specific problems and crises in some normative way. As students of our own law, we begin our work as beings steeped in our culture. Even if not well examined, as "natives" we bring to our undertaking at least some aboriginal sense of the history and the shared meanings within which our legal system developed. Perspectives from the human sciences, and perhaps particularly intellectual history and philosophy, play a crucial role in informing and deepening our understanding of our own legal system, and assist us in developing a critical framework by which to evaluate the evolution and trajectory of our law and its specific doctrines. No one, absent such work, could be considered a well-formed lawyer, but at best, a severely myopic technician.

If such perspectives represent an important aspect of the study of one's own law, they stand as an absolute requisite to even the most basic understanding of a foreign system. By its very nature, comparative law constitutes an interdisciplinary undertaking, and one that is so at several levels. As Lord Wedderburn has remarked of comparative work in labor law, "the language of a labour law system can be learned only from its social history, above all the history of its labour movement. Without a smattering of

that vocabulary comparative conversation is impossible.”⁴ His comments hardly restrict themselves to the labor field. Successful comparative investigation in any area involves a wide and deep familiarity with another culture, and an ability to see how various aspects of the law and its historical development come together. The advice given by the great medieval scholar, Hugh of St. Victor, to students generally applies with special force to would-be comparatists. “Learn everything,” he counseled, “you will see afterwards that nothing is superfluous.”⁵

So, what distinguishes a comparatist from an internationalist? Perhaps one goes not too wide of the mark by answering, detail, and a lively sensitivity to and respect for the experiences, ideas and cultures of others. International law constitutes, more or less, a closed and self-referential system. By and large, it represents the creation of elites. It tends to serve the needs of large, transnational organizations that want uniformity and predictability and that typically have only tenuous particular or local ties, even to the increasingly powerless nation-states. International law has developed its own norms at an abstract level, generating universals and prescinding from the creative if messy diversity of indigenous rules, doctrines and practices. As a result, Glendon notes, “public international lawyers, international civil servants, and international NGOs are often impatient with, or even dismissive of, national differences.” That from which an internationalist typically abstracts or ignores constitutes the core of the comparatists’ work.

The tension between local ordering and the demand for a universal scheme based on “rational” principles is an old one. In large degree, it congeals the arguments between the champions of the Enlightenment project who both proposed and imposed a new order, and its critics, such as Edmund Burke, Alexis de Tocqueville, and Justus Möser, who is quoted at the start of these reflections.

In response to the “geometrical and arithmetical” plans of “mechanics of Paris,” for example, Burke demanded of their authors, “do you seriously think that the territory of France, upon the republican system of eighty-three independent municipalities (to say

4. Lord Wedderburn of Charlton, *The Social Charter in Britain—Labour Law and Labour Courts?*, 54 MOD. L. REV. 1, 1 (1991).

5. HUGH OF SAINT VICTOR, *THE DIDASCALICON OF HUGH OF SAINT VICTOR: A MEDIEVAL GUIDE TO THE ARTS* 137 (Jerome Taylor trans., 1991). “A skimpy knowledge,” he continues, “is not a pleasing thing.”

nothing of the parts that compose them), can ever be governed as one body, or can ever be set in motion by the impulse of one mind?"⁶ How could it be, he insisted, that "three or four thousand democracies should be formed into eighty-three, and that they may all, by some sort of unknown attractive power, be organized into one?"⁷ Not only do these small and varied institutions enable grassroots self-determination. They also, Burke observed, generate the glue that binds people both within and across borders: "to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country and to mankind."⁸

In *The Old Regime and the Revolution*, Alexis de Tocqueville notes that sometime during the middle of the Eighteenth Century, "a certain number of writers appeared who specialized in treating questions of public administration and to whom several similar principles have given the common name of *economists* or *physiocrats*." They may have had less renown than the philosophes, Tocqueville states, but "it is in their writings above all that we can best study the Revolution's true nature." "All the institutions that the Revolution was going to permanently abolish," he continues, "had been the particular objects of the physiocrats' attacks; none had found grace in their eyes."⁹ "Whatever hinders their plans," he observes, "is worthless" and "diversity itself is odious to them." These theorists showed "themselves hostile to deliberative assemblies, to local and secondary powers, and in general to all the counterweights which had been established in different times, among all free peoples, to balance the central power." They demanded the abolition of anything "that disturbed the symmetry of their plans." "They were," Tocqueville points out, "very favorable to the free exchange of commodities, to *laissez faire* or *laissez passer* in trade and industry, but as for political freedoms proper," they demonstrated little or no concern.¹⁰

6. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 142 (Conor Cruise O'Brien ed., Penguin Books 1986) (1790).

7. *Id.* at 144.

8. *Id.* at 135.

9. ALEXIS DE TOCQUEVILLE, 1 THE OLD REGIME AND THE REVOLUTION 209 (François Furet & François Mélonio eds., Alan S. Kahan, trans., Univ. of Chicago Press 1998) (1856). Tocqueville also notes that one of the physiocrats "proposed to eliminate at once all the old territorial divisions and to change all the provinces' names, forty years before the Constituent Assembly did it." *Id.* at 210.

10. *Id.* at 210.

Examples of the tension that Burke and Tocqueville describe can be multiplied many times over. The widespread displacement of local laws and customs through the “reception” of the Roman law throughout much of Europe during the late middle ages,¹¹ or the imposition of the *Code Napoléon* in the Western German territories after the French-imposed reforms in the wake of 1806¹² provide just two further instances. As Aristotle instructs us, however, diversity in laws and customs does not imply that all law is merely conventional or simply an expression of power and lacking in reason. In the tradition that he represents, law constitutes an expression of practical wisdom, of what we might call prudence. As he also points out, prudent action depends on the circumstances, which vary just as reasonable responses to those circumstances may vary. A number of approaches to a common problem may be equally sensible. Circumstances change. What does not is the operation of the normative person in being attentive, intelligent, reasonable, and responsible in making judgments about what to do in concrete situations. The patterns of human experience vary, but the operations of human reason do not. The old “internationalism,” as it were, focuses on the invariant operations of the person in deliberating, valuing, and choosing. The modern, in contrast, shifts the focus from persons and their reasonable operations to the rules themselves, emphasizing their abstract universality and uniformity.

Of course, none of this denies the significance or the role of international law. It has assumed a quickly growing role, and its higher profile seems with us to stay. Local does not necessarily mean good, and some matters, *e.g.*, environmental concerns, often cannot be treated effectually on a local or even a national basis alone. Moreover, efforts like the creation of the European Union inspire admiration and bear real promise, despite the various difficulties and complications that have attended it. I simply want to point out that in a time of globalization, where the drive to uniformity and homogenization threaten to uproot and displace local orders and indigenous responses to problems, not to mention entire cultures, insights from comparative law can play a usefully corrective role. Comparative perspectives not only leave us with a

11. On this theme, see GERALD STRAUSS, *LAW, RESISTANCE, AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY* (1986).

12. For a thorough and insightful treatment, see ELISABETH FEHRENBACH, *TRADITIONALE GESELLSCHAFT UND REVOLUTIONÄRES RECHT: DIE EINFÜHRUNG DES CODE NAPOLÉON IN DEN RHEINBUNDSTAATEN* (1974).

greater appreciation for the strengths and weaknesses of our own legal schemes. Such perspectives also highlight the unique aspects and institutions of other systems, thereby alerting us to the costs of their being supplanted by transnational norms.

One could undoubtedly pose a long string of examples of this sort of displacement and supplanting, but I find the decisions of the European Court of Justice in the highly controversial *Viking*¹³ and *Laval*¹⁴ cases particularly poignant and illustrative. Both cases deal with the collision between private, grassroots-level lawmaking between the parties through collective bargaining, as protected and structured by national law and the transnational legal scheme erected through the European Union. These are somewhat complicated cases that raise a number of issues, and any extended discussion or analysis of them would be out of place here. A short recitation may give a sense of threats and potential problems, however.

In *Viking*, a Finnish company operated a ferry, the *Rosella*, which sailed under the Finnish flag and travelled between Finland and Estonia. The crew of the *Rosella* were members of the Finnish Seamen's Union and covered by a collective bargaining agreement. Because Estonian labor costs were significantly lower, the company proposed re-flagging the *Rosella* in Estonia and entering into a collective agreement with an Estonian union. The Finnish union, with the support of the International Transport Workers Federation, which opposes re-flagging when the company's seat would remain in another country, took fully legal steps under Finnish law to boycott the *Rosella* and to employ other legally sanctioned economic pressure. As a result of this collective action, the company withdrew the proposal to re-flag its ship, but sought an injunction in an English court on the grounds that the unions' actions breached Article 49 of the European Union treaty, which guarantees the "freedom of establishment," *i.e.*, the freedom to carry on business in EU member states.¹⁵

13. *Viking Line ABP v. Int'l Transp. Workers' Fed'n, the Finnish Seaman's Union*, Case C-438/05, [2007] E.C.R. I-10779 [hereinafter *Viking*].

14. *Laval un Partneri Ltd. v. Svenske Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11767 [hereinafter *Laval*].

15. Consolidated Version of the Treaty on the Functioning of the European Union art. 49 (ex EC Treaty art. 43), May 9, 2008, 2008 O.J. (C 115) 47, 67 [hereinafter TFEU]. Article 49 is supplemented by TFEU art. 56 [ex E.C. Treaty art. 49] 2008 O.J. (C 115) 47, 70, which guarantees the freedom to provide cross-border services. It is not always clear under which Article activity might be protected or affected.

The much commented upon and criticized decision¹⁶ of the European Court of Justice (“ECJ”)¹⁷ in this matter points in two directions. The Court first brushed aside contentions that questions dealing with workers’ associational freedoms, the right to strike and the right to impose other forms of economic pressure fall without the scope of EU law, in part because the extension of Community-protected economic freedoms would interfere with national social policy as embodied in national legal schemes.¹⁸ Citing cases dealing with matters such as social security and taxation, the Court noted that even while legislating in areas that lay outside Community competence, enactments and regulations in these areas promulgated by member states had to comply with Community law. The Court further made clear that the Treaty on the Functioning of the European Union (“TFEU”) provisions guaranteeing freedom of movement for workers,¹⁹ as well as freedom of establishment and the right to provide cross-border services, applied to unions as well as to state actors—the so-called “horizontal effect.”²⁰ As Catherine Bernard points out,²¹ this ruling places unions—private associations charged with the duty of protecting their members’ interests—in the same position as states and with

16. See, e.g., CATHERINE BERNARD, *EU EMPLOYMENT LAW* 202 n.75 (4th ed. 2012) (collecting sources); A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 *INDUS. L.J.* 126 (2008). For a concise analysis and critique from the perspective of German law, see Bertram Zwanziger, *Arbeitskampf- und Tarifrecht nach den EuGH Entscheidungen “Laval” und “Viking,” DER BETRIEB*, Feb. 8, 2008, at 294.

17. Renamed by the Treaty of Lisbon and now known as the “Court of Justice of the European Union” (CJEU). Consolidated Version of the Treaty on European Union art., May 30, 2010, 2010 O.J. (C 83/01) 13, 22.

18. TFEU, art. 153, ¶ 5, May 9, 2008, 2008 O.J. (C 115) 47, 114 provides that “[t]he provisions of this Article [dealing with the power of the Community to legislate or impose standards concerning the social rights of workers] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” These matters are reserved to national regulation.

19. TFEU, art. 45 (ex EC Treaty art. 39), May 9, 2008, 2008 O.J. (C 115) 47, 65-66.

20. The Court stated that “according to settled case-law,” TFEU Articles 45, 49 and 56 “do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provisions of services . . .” *Viking*, Case C-438/05, [2007] E.C.R. I-10779, ¶ 33. “Since working conditions in different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons,” the Court explained, “limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application . . .” *Id.* ¶ 34.

21. BERNARD, *supra* note 16, at 204.

the same responsibilities, but leaves them unable to rely upon the defenses to decisions provided to states by TFEU Article 52.²²

Having ruled that unions would be governed by the same duties as states, the Court proceeded to recognize the right to strike “as a fundamental right which forms an integral part of the general principles of Community law,”²³ but then required that it be limited by the other economic rights stated in Community law. As a result of this ruling, employers may challenge a union’s use of otherwise legal economic pressure as infringing on an employer’s free movement rights. Community law now trumps the underlying ordering scheme established by national law, at least in transnational settings. That point raises the question of threshold: in an integrated economy, the parties to a dispute cannot confine the economic impact of strikes, boycotts, or other permissible economic pressure tactics solely to themselves. How much economic impact does it take to turn a “local” dispute into one that has impermissible effects on another’s freedom of establishment or rights to offer cross-border services? Could a third party, disadvantageously affected by a strike or other union economic pressure, but not the primary object of it, nevertheless claim that its freedom to conduct business or to offer services across borders has been interfered with unlawfully?

These questions aside, the union’s defense in situations like that in *Viking* will depend upon a judicial determination that its actions were justified and were proportionately exercised. In other words, employee associations—unions—bear the burden of justifying the use of any form of economic pressure. Although a fundamental right, a strike appears to begin with the presumption of invalidity, and the unions bear the risk in employing it. The standards for legality are rather hazy and the potential costs of misjudging how a court retrospectively will view the application of economic pressure are potentially high. Nevertheless, the ECJ’s judgment betrays no sense of concern with the chilling effect its ruling may have on the exercise of what it recognized as fundamental rights. It also ignores the fact, long recognized by the United States Supreme Court, that the ability to control the tim-

22. TFEU, art. 52, May 9, 2008, 2008 O.J. (C 115) 47, 69. For a roughly analogous situation that placed a union in an invidious position by legally requiring it to represent a minority interest against the majority of its members, as embodied in the application of the neutral principle of seniority, see *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1980).

23. *Viking*, Case C-438/05, [2007] E.C.R. I-10779, ¶ 44.

ing and the rationale for the use of economic pressure leads to the ability to control the outcome of industrial disputes.²⁴ The ruling threatens to juridify considerably a process originally conceived of as autonomous norm-setting, one described by Gunther Teubner as a scheme of “reflexive” lawmaking.²⁵

In the *Laval*²⁶ case, Laval, a Latvian contracting firm, won a contract to perform construction services on a school building in Sweden. Laval posted thirty-five of its own workers from Latvia to work on sites operated by “Baltic,” a firm incorporated under Swedish law whose entire share capital was owned by Laval.²⁷ The posted workers were paid at rates substantially lower than Swedish construction workers.

To protest Laval’s payment of sub-standard wages, and with the goal of having Laval adopt standards established by Swedish collective agreements, Swedish construction trade unions picketed the worksite and employed other economic pressure tactics, all of which were in accord with and protected by Swedish law. With the backing of the Swedish employers’ association, Laval successfully challenged the unions’ actions as a breach of the freedom to provide cross-border services under TFEU Article 56. Confirming that Article 56 applied to unions as well as to states,²⁸ the Court ruled that since Laval had paid its posted workers in accord with standards applicable in Latvia, any attempt to impose the standards applicable in a host state violated Article 56.²⁹ The judgment

24. Nat’l Labor Relations Bd. v. Ins. Agents’ Int’l Union, 361 U.S. 477 (1960).

25. See, e.g., Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 229 (1983). Reflexive law refers to a scheme intended only to erect procedural and organizational norms within which private ordering can occur. The goal of such ordering is “regulated autonomy.” Such a scheme also represents an expression of the subsidiarity principle. Subsidiarity emphasizes self-administration by putting authority for decision-making at the lowest possible social or political level. It also requires larger bodies to supply assistance (subsidiary) where required to support the smaller body or take over tasks they cannot perform.

26. *Laval*, Case C-341/05, [2007] E.C.R. I-11767.

27. The Court dismissed arguments that because:

the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

Laval, Case C-341/05, [2007] E.C.R. I-11767, ¶ 43.

28. *Id.* ¶ 95.

29. For further analysis of this case and its implications under EU law, see sources in *supra* note 16.

also analyzed the provisions and applicability of the Community's Posted Workers Directive.³⁰

Laval and *Viking* illustrate the enormously strong undertow embedded in transnational schemes that act to de-tether and supplant both national and more localized, grassroots systems of ordering. They also exemplify the elevation of concern for the functioning of efficient markets over political freedoms and self-governance that Tocqueville had warned of in the plans of the physiocrats.³¹ In this, *Laval* and *Viking* do not stand alone.

In its *Schmidberger*³² judgment, for example, the ECJ suggested that a duty could exist on the part of Member States to restrict constitutionally protected freedoms of expression and assembly when their exercise would disproportionately burden the fundamental right to the free movement of goods. The *Schmidberger* Court stated that, "unlike other fundamental rights enshrined" in the European Convention on Civil Rights ("ECHR"), "such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose."³³ Having concluded that rights to the free movement of goods stand on an equal footing with rights of expression and assembly, the Court balanced the interests.³⁴ It found, on the facts of the instant case, that Austria had not infringed Community law by failing to enjoin a citizen demonstration that closed the roadway through the Brenner Pass for about twenty-eight hours to protest the danger to public health posed by increasing heavy goods traffic through the Pass, and to persuade authorities to reduce traffic and pollution in that environmentally sensitive region. Once again, it appears that any restriction on commercial activity such as the free movement of goods presumptively enjoys protection against interference, even if that interfer-

30. Directive 1996/71/EC, of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, 1997 O.J. (L 18) 1.

31. See text accompanying *supra* notes 9-10.

32. Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria, Case C-112/00, [2003] E.C.R. I-5659.

33. *Id.* ¶ 80.

34. While observing that "competent authorities enjoy a wide margin of discretion," the Court stated, "Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights." *Id.* ¶ 82.

ence comes through the means of protected speech and assembly. The burden is on the Member State to demonstrate that its “failure to ban can be objectively justified.”³⁵ If nothing else, the case spurs some interesting speculation, if not dark concerns, about the way the Court may strike the balance in the future.

Manfred Weiss sagely but undoubtedly controversially observes that criticism of the Court for these decisions is unfair.³⁶ The creation of the European Economic Community in 1957 aimed at the establishment of a common market. Consequently, he points out, it comes as no surprise that the free movement of goods and capital and the freedoms of services and establishment constituted the cornerstones of the Treaty and its successors. The Court, he argues, has little wiggle room, and out of considerations for its own legitimacy, it must work within the strict confines the Treaty establishes for it. The question for the Court in *Viking* and *Laval* “was merely whether national law on industrial action was an unlawful restriction of the market freedoms of establishment, as guaranteed in the EC Treaty.”³⁷ The Courts’ authority to balance rights or account for equities is, Weiss points out, quite limited: “the Court took the market freedoms and the fundamental rights as conflicting entities of equal value, trying to find a balance between them.”³⁸ “The two judgments show the general dilemma resulting from the construction of the EU,” he states. “Since the Treaty [TFEU] . . . is still shaped according to the philosophy of promoting market freedoms as much as possible,” the Court has limited ability to engage in balancing, which in any event “only can be done by the Court incrementally.”³⁹ Even if the Court’s “interpretation of public policy derogations is rather restrictive,” Weiss observes, the Court finds itself confined by the “architecture of the Treaty.”⁴⁰ Perhaps Tocqueville would not have been surprised.

We hear a great deal today about multiculturalism, but the trends associated with globalization appear headed much more

35. *Id.* ¶ 64.

36. Manfred Weiss, *The Potential of the Treaty has to be Used to Its Full Extent*, 2013 EUR. LABOUR L.J. 24 (2013). In light of the decisions in *Viking*, *Laval*, and some companion cases, Weiss states, “court-bashing has become a favourite sport of all those who do not like the outcome of these Court rulings.” He states that “[t]his court bashing is based on a very narrow-minded and ill-founded perspective.” *Id.* at 25-26.

37. *Id.* at 26.

38. *Id.*

39. *Id.*

40. *Id.* at 27.

strongly in a monocultural direction. Just over a century ago, Max Weber resignedly warned that a deracinated and instrumental version of reason had come to dominate modernity, confining us within an “iron cage” wherein all aspects of social life have been progressively bureaucratized, and where relentless economic calculation has flattened and displaced all previous “irrational” patterns of living, while squeezing out all of the humane pleasantries that once characterized them.⁴¹ Caught between the large structures of market or state, human possibilities limit themselves to living, as Weber so pungently put it, as “specialists without spirit, sensualists without heart.”⁴²

Globalization *in its present guise* carries precisely this danger for human societies, since its illumination springs from just the ideas, forces, and embedded tendencies that Weber described. The classic or pre-Enlightenment understanding described law as “an ordinance of reason made for the public good,”⁴³ or in its form as the law embodied in the *Corpus iurus*, as representing “an unrivaled model of natural and civil rationality, if not an expression of an authentic and immutable juridical metaphysics.”⁴⁴ A growing demand for uniform, homogeneous international norms, justified by claims of their rationality (in the Weberian sense), predictability, and as representing “best practices,” has accompanied the rise and spread of globalized trade, and transformed these understandings fully. Rather than acting as an autonomous architectonic structure designed to order social relations and to secure some rough version of human flourishing and the common good, law as we now know it increasingly functions simply as the handmaid of economic efficiency. We regard norms that obstruct such “efficiency” as irrational and illegitimate (and one should keep in mind that goodness and legitimacy are, at bottom, entirely different criteria).

The demotion and restriction of reason as representing merely the ability to calculate the most effective and economical means to an end necessarily has had a substantial impact on our under-

41. On this point, see JOACHIM RADKAU, *MAX WEBER: DIE LEIDENSCHAFT DES DENKENS* 32-33 (2005) (discussing Weber’s views concerning the effect of competition and market structures on family relationships).

42. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 124 (Talcott Parsons trans., Routledge 1992) (1905).

43. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. Ia-IIæ q. 90, art. 4 (Treatise on Law) (1274).

44. ALDO SCHIAVONE, *THE INVENTION OF LAW IN THE WEST* 15 (Jeremy Carden & Antony Shugaar, trans. 2012)

standing of the significance and role of the law. It has other costs and carries with it other long-term tendencies as well. “Instrumental reason,” Charles Taylor observes:

has also grown along with a disengaged model of the human subject, which has a great hold on our imagination. It offers an ideal picture of human thinking that has disengaged from its messy embedding in our bodily constitution, our dialogical situation, our emotions, and our traditional life forms in order to be pure, self-verifying rationality.⁴⁵

In a world increasingly fascinated with and dominated by “virtual reality,” where many spend much of their lives in a sort of parallel existence, we easily can forget that we are embodied intellects, conditioned by our moods and emotions, and the state of our “lower conjugates,” our biochemical, cellular, neural, and other physical systems that support and become sublated into our conscious life. Since the time of Descartes, the tendency has existed to regard ourselves as pure mind, disengaged reason that exists apart from our scruffy clay shells. However, as Eric Voegelin reminds us, our bodily existence forms the basis for our social existence. “Human consciousness,” he observes, “is not a free-floating something but always the concrete consciousness of concrete persons.”⁴⁶ Voegelin warns that when we attempt:

to liberate consciousness from man’s corporeality, there arise symbols of order like the realm of the spirits, or the perfect realm of reason to which mankind is approaching, or the withering away of the state and the coming of the *Third Reich* of the Spirit, or the realms of perfection that are expected as the result of the metastasis of man to a *homo novus* or a superman, be it that of Marx or of Nietzsche.⁴⁷

We forget what we truly are only at great peril.

Comparative approaches represent no panacea to these trends and dangers. There is no magic about them. Comparative law, however, offers an approach that puts the person back at the center, in a cultural and historical context, one subject both to development and decline, to intelligent responses as well as silly or

45. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 101-02 (1992).

46. ERIC VOEGELIN, *The Concrete Consciousness, in ANAMNESIS* 200 (Gerhart Niemeyer, ed. & trans., University of Missouri Press 1978).

47. *Id.* at 201.

short-sighted regimes. By paying attention to the diverse ordering solutions that communities have mounted, comparative law also can encourage an appropriate sense of intellectual modesty, one that warns us of the dangers inherent in attempts to erect model regimes that pay scant attention to the experiences of humans over time, and that ignore the cultures and concrete circumstances of others. Done correctly, comparative approaches can help to shift the focus of our work from concerns with mere efficiency, from abstraction, from a forgetfulness of our full humanity. In other words, by focusing our attention on the whole, it can help us re-engage with ourselves, and remind us that the real subject of the law is the human. Today many celebrate “disruption,” the Rousseauian-tinged motto of the moment, and use it as something of a programmatic theme. What could be more disruptive, at least of typically unexamined trends and ideas, than seeking to make law more human? That task constitutes the role of comparative law in a time of globalization.