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Universality and Non-Universality in International Law: Comparative Reflections and Implications

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In January 2023 the Danish Independent Research Fund invited applications for postdoctoral positions to investigate the role that Russia and China "played" in the process of regionalization of international law and the impact that such process exerted on the stability of the international legal order.[1] Fifteen months previously Springer Singapore announced the release of a volume of collected essays devoted to "the international law of the Association of South East Asian Nations".[2] In March 2023 the annual meeting of the American Society of International Law devoted a panel to "Non-Western Approaches to International Law"; the panelists addressed Latin America, Russia, Third World, Pacific islands, and China – a somewhat peculiar perception of "western". Countless other examples could be given of an emphasis on the "Particular", or the "Special", dimension of the law of nations in juxtaposition to the "Universal" or the "General".

THE QUEST FOR UNIVERSALS

"Universals" are not readily identified in human affairs. Given that *homo sapiens* are considered to be distinct from those creatures that preceded us (Neanderthals, Denisovans, and possibly others unidentified); we share universally whatever it is that constitutes our being *homo sapiens* – a determination we reach partly by the application of the comparative method.

Within the category of *homo sapiens*, we are all different; that is, diversity as measured by DNA is universal.[3] The same would appear at this stage to be true of Neanderthals and Denisovans. We need not "create" diversity: we all differ from one another, always have, and, it would seem, always will. Our challenge is not to create diversity, but to manage diversity.

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[1] The Conception of Foreign Policy of the Russian Federation confirmed by Edict of the President of the Russian Federation on 31 March 2023, No. 229, would not appear to pursue a regional thesis, although it signals a different orientation in Russian foreign policy strategies. Paragraphs 20 to 23 are devoted to the "supremacy of law in international relations".

[2] Eric Yong Joong Lee (ed.), *ASEAN International Law* (2021).

[3] Johannes Krause and Thomas Trappe, *A Short History of Humanity: A New History of Old Europe* (2021).

We do not know the origin of law, when it came into being among *homo sapiens*,[4] whether it existed among Neanderthals or Denisovans. This to date is a complete blank in our worldview of the human and pre-human past. Whenever law originated, it was and is an intangible, non-material, intellectual creation. If one accepts or believes in natural law of non-human origin, the human intellect is capable of cognizing, or perceiving, or postulating its existence. Logic usually compels the view that such law, inhering in a non-human source, is universal by definition or by affiliation to a respective religion.

Human or man-made law is associated with communities or polities of humans, prompting the Latin expression *ubi societas, ibi jus*.[5] As a metaphor, this expression is stated as a universal, but one which needs to be proven to be such. A product of the human intellect, whether a single lawmaker (ruler) or collective, we associate the origins of law with the formation of human communities, the capacity to communicate by speech or symbols, later the emergence of writing as a form of communication. We do not know how Neanderthals and Denisovans communicated with one another or between one another, or whether they were unable to do so. We are not confident that the family, even the extended family, qualifies as a human community for these purposes, but groups of families seem to satisfy the threshold. Those who investigate the human physiological capability to utter sound or who trace the origins of language in written form keep pushing back in time what they consider to be the likelihood of humans possessing these abilities.

These considerations have implications for comparative legal studies. Given that law is either of non-human origin but cognized by humans or is created by humans, is intangible, non-material, a product of the mind, a distinction must be drawn between law and non-law. Comparative legal studies do not effectively address this issue, but concentrate instead upon the "Westphalian syndrome" and take, it will be argued below, the path of least intellectual resistance in addressing the subject-matter of comparative legal inquiries.

LAW OF NATIONS: LAW OR NON-LAW

International lawyers who teach the subject in educational institutions commonly begin their course by indulging in contrastive comparison: distinguishing international law from "municipal" law, as domestic national law is often labeled. They are right to do so, for although those laws and legal systems interact, they are quite distinct. There has been a strong legal current in comparative legal circles, however, to exclude international law from comparative legal studies on the grounds that the law of nations, later called international law, was not and/or is not real law; that is, international law is non-law.

[4] A monumental achievement in the application of the comparative method, the hierarchical taxonomy of all organic and inorganic naturalia developed by Carl von Linné (1707-1778) at Uppsala, Sweden, first included the category *homo sapiens* in 1758, when the tenth edition of *Systema naturae* appeared. See Gunnar Brobert, *The Man Who Organized Nature: The Life of Linnaeus*, transl. Anna Paterson (2023).

[5] "A maxim meaning that law may be found in all forms of stable political organization arising from social collaboration". Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (2009), pp. 281-282.

Harold Cooke Gutteridge (1876-1953), who devoted a chapter of his treatise on comparative law to the law of nations, wrote that "so far as it exists at all, any relationship or kinship between comparative law and the law of nations must … be of a very shadowy nature"; by law of nations Gutteridge understood "… the *principles* of justice, which, by the common consent of mankind, *should* govern relations between states or nations" (emphasis added).[6] Analogous doubts were echoed by Konrad Zweigert (1911-1996) and Hein Kotz: "At first sight there is little in common between comparative law and public international law, for public international law, or the law of nations, is essentially a supranational and global system of law".[7]

The view that there is "little in common", of course, is a comparative legal conclusion of sorts, largely achieved by definitions, but one that far from exhausts what comparative analysis might contribute.

Whether law is perceived as non-human natural law or manmade law, it regulates interpersonal relations at various levels of organizational hierarchy: interpersonal relations directly between or among human beings; relations between corporate entities formed directly or indirectly by human beings, including juridical persons established under national or international law, up to and including States or other polities or international organizations. All have a human foundation, and all rely on human beings, directly or indirectly, to create them and the rules under or by which they function. States are no exception.

No State or pre-State formation is known to have denied or rejected as matter of State practice the existence of rules governing their relations *inter se*. Disagreements exist between communities as to whether a particular norm may exist, or what the substance of a rule is, but the absolute denial of the existence of norms, if this occurred in the past, has not been demonstrated and, in any event, has not endured. Insofar as such denials may occur, they emanate from exclusory definitions of law advanced by legal thinkers rather than analyses of State practice.

COMPARISON AS UNIVERSAL

"Comparison" as a "method" of perception and identification is, however, a "universal" characteristic at its highest level of *homo sapiens*. We are "hard wired" to perceive, identify, and distinguish among phenomena with all of our sensory mechanisms. Visual, auditory, touch, smell, taste, and intellectual classification are among the characteristics of humankind that are expected to be present; if some are absent or truncated or disabled, that is considered to be impairment. Some may excel in their command or possession of these senses.

At the level of groupings (families, clans, tribes, etc.) or polities, or communities, at some point in our remote past we began to articulate abstractions, orally expressed and later in writing, called rules or laws. Increasingly complex, these rules or laws were subjected to internal ordering and systematization,

[6] H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (1949), p. 60: Gutteridge, "Comparative Law and the Law of Nations", in William E. Butler (ed.), *International Law in Comparative Perspective* (1980), pp. 13-24.

[7] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, transl. Tony Weir (2d ed.; 1992), p. 7.

operating both within polities and between polities. The universal component is that apparently *homo sapiens* did become aware of the need for regulation of their affairs, but the substance, nomenclature, vocabulary, and most other components of this need were expressed differently – a form of regionalism or fragmentation.

The classifications, categories, definitions, and systemic differences identified or used in comparative legal analysis should not be overstated. The science of comparative law, for example, has devoted considerable attention to classifications of national legal polities into families or clusters of legal systems based on, usually, legal criteria. These classifications should be treated as perspectives, or angles of vision, and not as factual realities. They are intellectual creations, and they offer valuable insights into the factors that make national legal polities similar and different. The question is whether the same approach applied to regional or fragmentary systems of international law works in the same way. Is one dealing with intellectual doctrinal distinctions, as is the case on some occasions, or the assertion by some subjects of international law of the existence of separate and distinct systems of international law as a matter of State practice, and/or differences in approaches to international law embedded in concepts of national law.

Nothing is by definition beyond the comparative method, which is as interested in contrasts as in similarities. The fact that the comparison of two objects/ideas/concepts shows that they may differ in absolutely every respect is nonetheless a comparative finding. The proposition that the law of nations cannot be compared by definition with aspects of national legal system is anti-scientific and untrue.

UNIVERSALISM AND FRAGMENTATION

Distinctions were drawn between the regulation within the polity or community and that lesser degree of regulation between polities or communities. Or so we restructure our past when we attempt to identify the origins of the history of the law of nations back to its earliest times. The dispersions and migrations of mankind dictated over eons of time a transition from the Particular or Special to a larger awareness of the human community and a greater appreciation of, if not the Universal, then of multiple polities or communities and the formation of empires which were larger Particulars.

Regionalism or fragmentation dominated as polities or communities nurtured and developed their own cultural, linguistic, and ethnic coalescences and differentiations, accompanied in each case by the generation of rules of behavior for inter-polity or inter-community relations. Advances in the natural and social sciences enable us to identify and document individual polities or communities, many unknown to our history, trace migrations and other interactions, commerce, diplomacy, wars, armistices and peace, exploration, treaties, alliances, the formation or disintegration of regional empires – what at a minimum may be considered human-created institutions and practices for inter-polity or inter-community contacts and relations.

The early evidence of inter-polity practice seems to be universal in the sense that there (a) was such practice or experience; (b) patterns of practice appear to have emerged that we can identify with the presence of what in modern terms

we call the law of inter-polity or inter-community relations; and (c) the surviving evidence demonstrates a high level of fragmentation or "regionalization" but a certain resilience over time. We may be at the stage of scientific discovery where we think in terms not of the discovery of material evidence that such inter-polity relations and interaction existed, but that we should assume such and look for evidence to the contrary. In short, we work from the presumption rather than the assumption.

WORLDVIEW OF THE PLANET

A challenge of the search for "universals" in international law is the question of when conceptions emerged of systemic laws regulating a planetary community of inter-polity relations.

This is partly a question of determining when the human consciousness became aware of the desirability of the existence or the actual existence of values, principles, or concepts of some form of international community bound together by "Universals" whose importance or magnitude exceeded that of the "Particulars". These were found in notions of the unity of mankind, religious beliefs, mythologies, ideologies, natural laws, or other ideas that posited or emphasized the generality of Universals. Most such notions were rooted in perceptions of overriding Particularity, a limited perception or understanding of the spatial dimension of polities extant on the planet. Even the most far-reaching conceptions of natural law distinguished between the elect and the non-elect, conceptions rooted in the "Particular".

Whatever appeal to conceptual "Universals" may have existed, the realities of polity or community interaction reflected understandings of hierarchy usually based on power but reinforced by related notions of cultural, religious, ideological, philosophical, or other primacy or priority. The presumption is that ideas and actual policies nearly always flowed from the Particular (individual polity-level as polity-practice or individual thinkers, jurists, philosophers, statesmen, rulers, and so on) rather than from the general level downwards. This pattern is inherently "anti-Universal"; it rests on the power and influence of a fragmented planetary community and is reflexively sceptical of "Universals" or "generalizations".

TRENDING TOWARDS UNIVERSALS

To a significant extent, the practice of States-polities since the adoption of the United Nations Charter has moved in the direction of establishing or accepting more, rather than fewer, "Universals". This is evident in the number of States-parties to the United Nations Charter and several near-universal multilateral treaties, resolutions of the United Nations General Assembly that have become declaratory of customary international law, the emergence and acceptance of the principle of *jus cogens*, concepts of general international law, a higher degree of State comfort with customary international law generally, the expansion in the concept of "subjects of international law", the greater degrees of protection afforded by international law to polities which are not subjects of international law and to natural persons.

But these are steps towards "near-Universality", not "actual Universality", and they have proceeded at their own pace. It is entirely possible that complete Universality in international law will never be achieved, and need not be – that the world community will live with "approximate Universality", which, of course, is not Universality at all but rather "large-scale participation". The aspiration for Universality in international law may come at the cost of less flexibility, innovation, and suppleness that often can be used to advantage in reaching arrangements acceptable to the parties.

Powerful anti-Universalist forces and influences continue to operate within and among polities. These sometimes undermine or reconfigure Universals and remain the major component affecting the achievement or failure to achieve the formation of Universals in the domain of international law. In the views of some, they represent residual fragmentation of the international order, whereas others see them as the primary feature of the international order and whatever Universals may exist as minor and fragile exceptions.

Regional international laws or approaches to international law have always been characteristic of the planetary interaction of polities. It could not have been any other way, given the historical patterns now known of human migration and human limitations of knowledge of the spatial dimension of the planet. All communities existed within spatial boundaries with limited awareness of others. Whatever sense of "otherness" existed was subject to limitations on travel, hostility, communication, literacy, and the like; although modern archaeology and archeo-genetic research is documenting far greater interaction among polities than known or assumed in the past, the pattern is nonetheless regional rather than global. This means that regional laws of nations were the norm rather than the exception. "Universals" are the exception, and a "Universal" or general international law is a new phenomenon.

THE COMPARATIVE METHOD AND INTERNATIONAL LAW

Given the regional origins and nature of the law of nations and its continual powerful impact upon theoretical conceptions and State practice, the comparative method is a primary method for the study and analysis of international law. It could not be otherwise. An understanding of the past of the law of nations is inherently an exercise dependent upon a perception of similarities and differences over time, between regions, of concepts and languages, of distinctions between international or inter-polity law and municipal or domestic law, and the like. One cannot work with international law absent the application of the comparative method.

International law consists of rules interpreted and applied differently by the subjects of international law, and one would not expect otherwise; the same applies to rules generated by national legal systems. But arguably until recently international law has never been a universal body of rules, but rather a fragmentary, incomplete system generated primarily by various species of "regions" or of regional application. A refusal to acknowledge the comparative dimension of international law has been intellectually disingenuous on the part of international and comparative lawyers.

The application of the comparative method to the law of nations and the notion of comparative international law are two different matters. So far as can be

determined, the term "comparative international law" dates from 1850 and first appeared in the French language.[8] The comparative method has been applied in international legal doctrine and inter-polity practice since earliest times but seldom recognized as comparative analysis. The essence of the comparative method is the perception, identification, description, analysis, and generalization of similarities and differences. The law of nations by its very nature cannot avoid the application of the comparative method.

"Comparative international law" is used in a multitude of meanings. Some understand by this expression simply the application of the comparative method to international law in what may be an infinite number of situations. Others use the term to indicate the study of multiple systems of international law: some based on ideological affinities (socialist); some based on theology (Islamic); some based on geographical location (Latin America); some based on alliance structures (Russia/China); some based on philosophical principles (natural law); among others. Other structures include the Universal (general international law) and the Particular (regional in some form) on the basis that the Particular may be local elaborations which are consistent with the general principles.

INSIGHTS AND CHALLENGES OF COMPARATIVE INTERNATIONAL LAW AND COMPARATIVE NATIONAL LAW

The proper subject-matter of comparative law is all law (as opposed to non-law). This statement is a Universal, but so general as to be close to meaningless. Comparative Law needs itself to be sub-categorized into as many subdivisions as desirable: at a minimum, Comparative International Law, Comparative National Law, and Comparative Sub-National Law. What of Comparative Canon Law (those who are occupied with canon law seem to be preoccupied with the role of the Vatican and to ignore the Protestant and Eastern Orthodox churches and the canon law of non-Christian religions)? Comparative Natural Law (multiple natural laws are posited, each claiming to be Universal)?

All jurists are comparatists. They cannot fail to be. The terminology and science of law are based on abstractions expressed in symbols and/or words and can be meaningful only if distinctions are drawn between them; that is, differences and similarities. An international lawyer can no more distance himself/herself from the process of comparison than any other jurist, irrespective of whatever disciplinary distinctions or subdivisions may be erected.

If international and comparative law are viewed as two fields, they are united by the extensive use of a single method: the comparative method. But beyond that, comparative national lawyers have developed knowledge and experience over past centuries upon which international lawyers can usefully draw to enhance their understanding of the international legal system. Do comparative international and comparative national lawyers confront common issues whose resolution can draw upon one another's experience? We venture to offer some candidacies for consideration:

[8] See the present writer's review of Anthea Robert, Paul B. Stephan, Pierre Verdier, and Mila Versteeg (eds.), *Comparative International Law* (2018), in: *The Journal of Comparative Law*, XIII (2018), pp. 242-249; *Ukrainian Journal of International Law*, no. 2 (2018), pp. 148-153.

Legal pluralism. Notions of legal pluralism, so trendy in national comparative legal circles for the analysis of multiple legal systems within national polities, may be useful in understanding the international legal system. On this basis, there is a general or Universal (?) international legal system originating at some time in the past which constitutes an aggregate of more or less coordinated and entangled "pluralist" international legal systems of more limited range or jurisdiction. Sometimes the pluralist international legal systems are solitary, isolated (early China); on other occasions they coexist or overlap (general international law/Islamic international law). This would seem to be a domain where pluralist legal thinking in general might have something to offer the international lawyers.

Comparative legal inquiries into the interfaces between international and municipal laws, or into the seemingly infinite ways in which the comparative method and comparative legal knowledge can enrich our understanding of the nature, substance, and processes of law, are at best secondary or auxiliary approaches and not themselves, under the existing system, rule-creative or law-making.

The emphasis on pluralism and diversity leads to "relativism" in law. The international human rights documents are a good example. As noted above, having been adopted before the discovery of DNA and long before archaeo-genetic research, the major postwar human rights documents could not take into account the scientific finding that the human species is characterized by absolute diversity: no human being ever has been or is identical to another. The principle of the "natural rights" of humankind as determined, for example, in the 1948 Universal Declaration of Human Rights is ceding place to exceptions to universalism on the grounds, *inter alia*, that alternative cultural patterns long established within particular groups should be deemed consistent with the Declaration and treaties. In some quarters relativist considerations are being applied to international investment protection treaties. What passes for some as a legitimate accommodation of diversity becomes for others a violation of the treaty.

Decolonization. Reference is sometimes made to "decolonizing comparative international law", a characterization that is temporally inconceivable and historically inaccurate.

"Colonization" and "decolonization" are phenomena that reach far back into human history and may prove to be linked with many patterns of human migration. Arguably, all patterns of human migration may constitute "colonization" – movements and settlements. Hunters and gatherers were supplanted by sedentary agricultural populations. However, one defines Comparative International Law as a concept in temporal terms, it did not precede patterns or practices of colonization via migration. But, to be sure, the comparative method is applicable to and may be productive of useful insights in the study of colonialism in all its forms and manifestations. Colonization did not originate in Europe. It is appropriate for Comparative International Law to ask where and when versions of colonization did originate in relations among legal polities.

TRANSMISSION OF LEGAL CONCEPTS AND NORMS

Law is an intangible routinely expressed in verbal form and commonly in writing. Comparative national lawyers are absorbed in a discussion of the impact of language on legal comparison: whether the substance of law in one language is capable of being accurately and fully expressed in another language. A negative conclusion not only renders comparison impossible; it also nullifies the accuracy of legal translation and most of the assumptions underlying proof of foreign law in courts and arbitrations. The present writer has been outspoken in the view that legal translation is the foundation of comparative law.[9] Language would also appear to be a Universal of law, which reveals itself or is created in the form of language,

Our ignorance still of the origins and migrations of the human species and the predecessors thereof, the emergence of inter-polity contacts and of usages or rules that emerged in consequence of such contacts, the terminology developed to describe or characterize such usages and rules, the patterns of movement of such terminologies, and their respective nuances in national legal terminologies are all matters that can be profitably understood through the application of the comparative method.

The notion that rules within polities would have been unknown to other polities, would not have been borrowed, or adapted, or rejected by other polities, or evaluated by other polities for their respective worth or lack thereof (comparative advantage) is simply implausible. Pure "intra-polity" legal orders, untouched by the ideas of others, are unlikely. This proposition suggests that our periodization of the development of comparative law understates human awareness and knowledge of the law of other polities and implies that what we understand by the fruits of legal comparison were addressed earlier than the mid-eighteenth century.

But this is an observation based on the movement of legal principles, norms, institutions, ideas, and concepts from one national legal system to another – a question comparative national lawyers are asking, which is curious because a more interesting example, and perhaps more insightful, is available. International lawyers commonly say that they "speak a common language". They do not, but they share a substantially uniform terminology in their respective national languages. This is the real test for the question of language and the law: to what extent do the respective numerous languages approximate identity of concepts when addressing legal issues in what they consider to be a shared legal system, whether Universal or fragmented?

Approached historically, when, whence, and how did the vocabulary of international law move about the globe, in what languages did such terminology originate, and what is the evidence. What comparative international law needs – and such an undertaking would be of immense interest to comparative national law – is a historical dictionary, multilingual, based on evidence of State practice

[9] See W. E. Butler, *Russian-English Legal Dictionary* (2d rev. ed.; 2023), p. viii. When the present writer as a 2L at the Harvard Law School applied by invitation to act as Research Assistant to Professor Harold J. Berman (1918-2007), the interview was conducted in the Russian language. Berman closed the interview by pulling from his bookshelf the Russian language text of the just adopted Civil Code of the Ukrainian SSR and set as my first task to prepare an English translation. No one, he said, is a legal comparatist unless and until they have translated a foreign code.

and appropriate doctrinal works, of international law. Follow the words, and you simultaneously follow the transmission of legal concepts from earliest recorded history at the inter-community level and with it, legal consciousness and legal change.

CONCLUDING OBSERVATIONS

The comparative method is a neutral method. The quality and objectivity of its application depends upon the sophistication of the questions being investigated, the quality of the data being considered, and the quality of the analysis. Sometimes comparison is described as much art as science. The inability to accommodate the "art" dimension of comparison is a weakness of the machine translation of legal materials and likely to be a significant drawback of artificial intelligence in its early stages, if not forever.

The goals and ultimate quality of comparison are another matter. These lie with the comparatist and may be as distorted and value-laden as the comparatist may choose. Therein lie the differences between valid or insightful comparison and mediocre comparison, between a scientific and unscientific result. Given the intangible and abstract essence of law, this comparatist has repeatedly suggested that legal translation is the foundation of comparative law. This is so irrespective of whether municipal law, regional law, international law, sub-State or other law is being examined. The comparison of law is not impossible because of language differences, but language differences are the challenge of valid comparison that have to be recognized and appropriately dealt with.

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