

LEGAL EXPERTISE: ON SOME USES OF LAW IN TRANSNATIONAL REGIMES

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“...The man has come to the law for the first time and the doorkeeper is already there. He's been given his position by the law, to doubt his worth would be to doubt the law.” “I can't say I'm in complete agreement with this view,” said K. shaking his head, “as if you accept it you'll have to accept that everything said by the doorkeeper is true. But you've already explained very fully that that's not possible.” “No,” said the priest, “you don't need to accept everything as true, you only have to accept it as necessary.” “Depressing view,” said K. “The lie made into the rule of the world.”¹

I. INTRODUCTION

Global governance has been one of the major themes of comparative law during the last years. Comparative lawyers have become interested in how transnational regimes are influencing national legal systems and how these cross-border dealings between individuals, international organizations, international courts and States are shaping the current global order.

In this picture, national legal systems are no longer central to comparative legal studies as they are involving more and more in the analysis of those regulations provided by international networks of public entities or by a set of transnational market actors.

Following these relatively new trends, this paper engages with this concentration of sovereignty around new clusters of institutional power. In particular, it deals with the representations of the Global provided by these transnational regimes, the role of legal experts in the development of these representations and the techniques deployed.

Among these techniques, this paper will focus specifically on private law and legal comparison as powerful tools for constructing and re-constructing

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¹ Kafka F. “The Trial”, 1925, 160, available at <http://www.holybooks.com/wp-content/uploads/Franz-Kafka-The-Trial.pdf>.

narratives² and identities, affecting the circulation of legal models and enhancing particular legal political and economic approaches. They also define similarities and differences: what is new and what is old, what is modern and what is not, what is global and what is local, what is exotic and what is not.

II. TRANSNATIONAL REGIMES AS ADVERSARIAL SYSTEMS

The first part of this contribution seeks to provide a concrete illustration of the current global order, focusing principally on the importance of expertise in dealing with the issue of legitimacy of transnational regimes.

In 1956, Philip Jessup used, probably for the first time, the term transnational law, in order to describe this particular phenomenon: “I shall use, instead of 'international law', the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”³

The global legal order is essentially an order of international networks and organizations, a set of transnational regimes connected and intertwined with each other⁴. In this sense, the global legal order and the transnational regimes that sustain it are something different from both public and international law⁵.

It is possible to conceive this complex of transnational regimes as a legal system, or as a set of different and strictly connected legal systems. They stand

² See Marini G. Diritto e Politica La Costruzione delle Tradizioni Giuridiche nell'epoca della Globalizzazione, *Polemos. Rivista di Diritto, Politica, Cultura*, 2010, 31-76.; Costantini C. “Spazialità, geografie politiche e rappresentazioni giuridiche” *Polemos. Rivista di Diritto, Politica, Cultura*, 2010, 97-118.

³ P. C. Jessup, “Transnational Law, Storrs Lectures in Jurisprudence at Yale Law School”, New Haven, 1956, 136.

⁴ See Zumbansen P. “Transnational Law, Evolving” Smits J. Ed. *Elgar Encyclopedia of Comparative Law* (2nd ed., J. Smits ed., 2012), 898-925. Preprint: Osgoode CLPE Research Paper No. 27/2011; “Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order”, 1 *Global Constitutionalism*, 1 (2012)16-52. Preprint: Osgoode CLPE Research Paper No. 24/2011.S

⁵ See Monateri P. G. & A. Somma, *Il modello di civil law*, Torino: Giappichelli, 205; Zumbansen P. “Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism”, 21 *Transnational Law & Contemporary Problems* (2012).

above national legal systems and yet they are still related with them in a functional sense. In fact, these transnational regimes aim at influencing the political action of national governments: their decisions, their legislations and their policies.

As any other legal system, transnational regimes are adversarial orders⁶: they are created against something, in order to protect something else. The goal of these legal systems is essentially to weaken national states and to reduce their sovereign power⁷, so to enhance their particular vision of the Global, their conception of “good functional governance” and their structures of power.

It is important to understand that we are entering a strictly political field. Transnational regimes affected national States on a political ground, they aim at undermining the democratic basis on which states are designed: the relationship between election and fiscal policy. The essence of politics, in the western representation of the state, is democracy. Transnational regimes break the democratic circuit between election, vote and political, fiscal and economic decisions; they erode the nation state as a political system, in order to provide their own structures of power, a diverse type of domination. In the early 80s, scholars were in search of a specific term to describe these emerging forms of legal order and they coined the term “international regimes”⁸.

This term seeks to underline the different nature of these legal systems, in fact, unlike the national states, they are not built around a democratic government, they are based on “abstract arrangements of international governance that appear to be a mixture of norms and functional organizational structure”⁹. So, transnational regimes are indeed different from national states: they are created to serve different

⁶ See Monateri P. G. “Geopolitica del diritto”, Lecce, 2013, 32-33.

⁷ See Somma A. “Scontro tra Capitalismi, crisi del debito e diritti fondamentali” *Diritto pubblico Comparato ed Europeo*, 2, 2013, 462.

⁸ Krasner S. “Structural Causes and Regime consequences: Regimes as Intervening Variables”, 51 *International Organizations* 1,(1982), 1.

⁹ Steffek J. “Sources of Legitimacy Beyond the State: A view from International Relations”, Joerges C., I.-J. Sand, G. Teubner Eds. *Transnational Governance and Constitutionalism*, Portland, 2004, 89.

values (efficiency, transparency, free market) and normally they are task-specific organizations (the EU was born as European Economic Community).

For all these reasons, the whole legitimacy debate regarding the democratic deficit in international organizations seems a bit out of focus. If we take a look at both sides of the problem, it will appear clear that we are stuck in a legitimacy paradox. In fact, the common critiques regarding the weak democratic legitimacy of international organizations are based on the assumption that transnational regimes are not democracies. On the contrary, the answers to these statements are founded on the idea that international institutions derive their (challenged) democratic legitimacy from the relationship with countries and their governments. The debate is quite the same if we look at the sovereignty: transnational regimes seek to undermine states sovereignty, but they are allowed to do so due to the possibility for a state to transfer part of its sovereign power to these institutions.

These comments are weak because they do not get the real core of the issue. The point is not the lack of democratic legitimacy that affects international organizations, but their action against the democratic paradigm represented by the relationship election/political (fiscal decision). So, if it is possible to conceive a sovereign power capable of transferring sovereignty, it is really hard to imagine a democratic power conveying democracy.¹⁰

Transnational law is able to influence national states not only with regard to sovereignty, but also to other fundamental principles and values that are usually protected by the state legal systems like, for example, social rights.

This idea is based on the assumption that there are two different sets of dynamics inside globalization and consequently the global legal order. The first one is characterized by the formation of new global actors and institutions. The second one involves processes and practices that occur inside national states and affect

¹⁰ Monateri P.G. *Ibidem*, 33.

national and local institutions, but they are aimed at realizing new transnational regimes and global agendas.¹¹

This legal order is basically a space “covered in law”¹², characterized by a coordinated network of different international organizations and transnational regimes. In particular, the coordination between World Trade Organization (WTO), International Monetary Fund (IMF) and World Bank (WB) represent the core of this global legal order along with EU, the international courts, NAFTA and the foreground set of dynamics inside globalization. The other set remains in the background, still connected with national and local legal experiences, but it gives a great contribute in order to facilitate the creation of global systems and transnational practices.

III. TRANSNATIONAL REGIMES AND KNOWLEDGE PRODUCTION

I have argued so far that transnational regimes influenced national States: they affected the structure of the democratic power¹³ within national legal systems. In this sense, transnational regimes represent a different form of domination, one that is not based on the democratic paradigm and that derives its authority from an alternative conception of power and a different type of legitimation.

In his study of social power¹⁴, Max Weber clarified that every form of power seeks to establish and develop the belief in its legitimacy and that the specific type of legitimation depends on the specific type of domination exercised. I have described the form of domination of transnational regimes as task-specific organizations, based on abstract arrangements of international governance and functionally structured to serve some pre-determined values. Inside these transnational regimes, power is fragmented into numerous layers of governance and functionally divided into different areas of issues. Due to this framework and

¹¹ Sassen S. “Territory, Authority, Rights: from medieval to global assemblages”, Princeton, 2006, 3.

¹² Kennedy Da. “*Challenging Expert Rule: The Politics of Global Governance*”, 27 *Sydney Law Review*, (2005), 2.

¹³ Monateri P.G., *Ibidem*, 34.

¹⁴ Weber M., “The Theory of Social and Economic Organization”, New York, 1947, 339.

to the lack of coercive power, transnational form of domination is even more dependent on the support of socially shared legitimacy beliefs¹⁵.

In order to gain this support, transnational regimes represent themselves as rational structures that function according to abstract principles, applied in a strictly bureaucratic way. They cannot rely on democratic discourse, elected government and political discretion¹⁶, so they seek to depict their organization, their decisions and their activities as the product of reasoning¹⁷. This representation is based on the assumption that every act of these transnational regimes is the outcome of an entire system of rationally debatable procedures provided by experts. In this sense, it is true, also for transnational regimes, what Weber said about bureaucracy: "Bureaucratic administration means fundamentally domination through knowledge"¹⁸. In fact, even if modern (state) bureaucracy and transnational regimes come from different background, they both legitimize themselves through rational processes of justification. These processes are actually based on knowledge production, they elaborate information: data, ratings, models, indicators and they develop a proper technical terminology (rationality, expertise, technology, quantifications). At the core of this knowledge production, there are the experts.

Transnational regimes rely on legal experts in order to portrait themselves as technical and neutral institutions compelled by their expertise. These representations are useful to international organizations in order to influence legal traditions, legal systems and jurists.

¹⁵ See Kennedy Da. "The forgotten Politics of International Governance" 2 *European Human Rights Law Review* 2001. Previously published as "Background Noise? - The Politics Beneath Global Governance", 21 *Harvard Int'l Review* 3, 52 (Summer 1999).

¹⁶ See Kennedy Da., Der Derian J. Doyle M. W. & Jack L. Snyder "How should sovereignty be defended? Gourevitch A. Ed. *Politics Without Sovereignty: A Critique of Contemporary International Relations* UCL Press, 2007. 187-204. Goldman D. B., *Globalization and the Western Legal Tradition, Recurring Patterns of Law and Authority*, Cambridge: Cambridge University Press, 2007, 266.

¹⁷ See Žižek S., "The Year of Dreaming Dangerously", London- New York: Verso, 2012,

¹⁸ Weber M., "Economy and Society", London, 1978, 225.

In this portrait, transnational regimes appear as a structured and efficient legal orders dominated by professional and neutral decisions of legal experts.

In the global legal order, the role of expertise has become prominent, because it brings legitimacy and legal certainty to foreground political and economic decisions.

Experts have developed a series of discourses and representations that aims at presenting their process of decision-making as extremely technical and not compelled by ideologies or political considerations. In particular, legal experts' reasoning is supposed to be merely neutral as the models elaborated within these transnational regimes.

In this sense, these legal systems are governed through decisions made by experts. As Professor David Kennedy has already explained, it is possible to separate a foreground level characterized by political decisions made by sovereigns and parliaments and a background level in which expert, as Professor Kennedy said, "stands between the foreground prince and the lay context, advising and informing the prince, implementing and interpreting his decisions for lay people."¹⁹ A similar concept is analyzed in Schmitt's book, *Gespräch über die Macht und den Zugang zum Machthaber*. He takes into consideration the power of those counselors of the sovereign that have access to its corridor.²⁰ They play a major role in defying what *the prince* will decide: they advise him, but they also provide their representations, their discourses that influence the perspectives of *the prince*. Legal experts rule because they connect the foreground level to what social context, but they also influence this connection with their representations, their studies, their pre-comprehensions and, why not, their idiosyncrasies²¹.

¹⁹ Kennedy Da., "Challenging Expert Rule", 5, 9.

²⁰ Schmitt C. "Gespräch über die Macht und den Zugang zum Machthaber", Stuttgart, 2012 (1954).

²¹ See Kennedy Da., "The mystery of Global Governance" 34 *Ohio Northern University Law Review*, (2008), 827-860, 828.

IV. HOW TO DO THINGS WITH PRIVATE AND COMPARATIVE LAW

This third part of the paper seeks to examine the use of private and comparative law discourses within transnational regimes. In particular, this part is divided into two sections.

First section will discuss the use of comparative law within a particular international institution that form part of the project of economic coordination known as Bretton-Woods System. In 1944, the United Nations Monetary and Financial Conference established a set of rules and procedure in order to regulate the international monetary system and created two institutions, the World Bank and the International Monetary Fund and imagined a third one, the future World Trade Organization (1994)²².

On this basis, these transnational regimes have grown and prospered through the work of experts: elaborating rules, standards, alternative dispute resolutions, codes of conduct and rankings of the different legal systems.

This section is dedicated to the study of comparative law in relation to the frequent use of indicators and quantifications as instruments of global governance to rate and rank legal systems and their performances.

Comparative law has become an instrument to enhance the power and the influence of transnational regimes. The idea of classification that stands behind the deployment of indicators is closely related to the conceptions of efficiency and objectivity that pervade these transnational systems. The representation provided by these networks is based on an apolitical, strongly functional and not policy-oriented framework, in which ratings and rankings are powerful devices to influence and redirect the behavior of individuals and governments. The narrative created around pseudo-scientific data, objectivity and the rejection of any kind of policy-oriented discourses struggles with the highly ideological project that aims at informally replacing democratic legitimation with a network

²² Monateri P. G., Somma A., *Ibidem*, 206.

of transnational legal systems based on expert knowledge as alternative source of legitimation.

Second section aims at highlighting the connection between a certain representation of private law, the main development of new types of transnational institutions and the circulation of legal models between national legal systems and transnational regimes. In this section, I will analyze the use of particular representation of private law as a tool to vehiculate specific legal models from transnational regimes to national legal systems. Within transnational regimes, it usually circulates a specific type of private law, strictly tied to neo-liberal conceptions regarding property, contracts or the public/private divide and extremely functional to the implementation and the legitimation of these regimes.

V. COMPARATIVE LAW BY COLUMNS AND RANKING INDICATORS

I have argued in the introduction that comparative law is a really powerful tool for constructing and re-constructing identities, for elaborating similarities and differences between legal families, legal systems or legal traditions. This ability is even more powerful within the global legal order, where comparison is used to classify according to specific aspects like more or less efficient, more or less suitable, best or worst.

Within transnational regimes, legal experts²³ usually employ, among the various comparative methods, an approach that simply describes the positive law of different legal system²⁴. This method does not imply in any particular historical, philosophical or sociological background, it strictly compares legal rules: whether they are case law, statute law or an article of a specific code. This approach is usually called comparative law by columns, because the comparative lawyer, at the end of his inquiry on the different legal rules, creates a chart filled

²³ Comparative lawyers started to adopt this approach, currently it is employed also by different kind experts, see Monateri P. G. "Globalizzazione e diritto europeo dei contratti", Somma A. Ed. *Giustizia sociale e mercato nel diritto europeo dei contratti*, Torino:Giappichelli, 175-176.

²⁴ Marini G. "Taking comparative law lightly. On some uses of comparative law in the Third Globalization", 3 *Comparative Law Review* 1, (2012), 18.

with the information gathered from the research and divided into columns, each representing a specific country.

This comparative law by columns approach is really common²⁵ within international organizations like the World Bank or the IMF because it is the usual method to generate and deploy indicators²⁶, which are set of collected data often used to rate and rank legal systems, based on particular analysis: “the data are generated through a process that simplifies raw data about a complex social phenomenon”²⁷, such as competitiveness or efficiency. These processed data “are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.”²⁸

A main example of the use of these indicators is represented by the Private Sector Development “Doing Business” reports of the International Finance Corporation (IFC), one of the World Bank’s Institutions. These reports have underlined the inefficiency of those legal systems of the civil law tradition, especially in relation to the legal systems of the common law tradition. Civil law legal models, according to these studies, are characterized by the presence of a more interventionist state that affects the attraction of investments and the development of a free market.

Comparative lawyers have widely analyzed Doing Business reports²⁹, so I would like to focus my attention on a different set of indicators, employed to

²⁵ “Comparisons are essential to better understand world phenomena, and indicators are a convenient way to penetrate different legal, social, and economic systems.” Casini L. “Public Regulation of Global Indicators” *Governance by Indicators Global Power through Quantification and Rankings* Davis K. E., A.Fisher, B. Kingsbury, and S. Engle Merry Eds. Oxford: Oxford University Press, 2012, 466.

²⁶ “An indicators is a named collection of rank-ordered data that purports to represent the past or projected performance of different units” Davis K. E., B. Kingsbury, and S. Engle Merry “Indicators as a technology of Global Governance” 46 *Law and Society Review* 1 (2012): 73-74.

²⁷ Davis K. E. B. Kingsbury, and S. Engle Merry, *Ibidem*, 73-74.

²⁸ Davis K. E. B. Kingsbury, and S. Engle Merry, *Ibidem*, 74.

²⁹ See Monateri P. G. “Globalizzazione e diritto europeo dei contratti”, 175; Nicita A. & S. Benedettini, “Towards the economics of comparative law: the Doing Business debate” Monateri P. G. Ed. *Methods of Comparative Law*, Cheltenham: Edward Elgar Publishing Ltd. 2012, 291-305.

realize another World Bank report: “Women, Business and the Law: measuring legal gender parity for entrepreneurs and workers (2012)”³⁰.

World Bank legal experts have “collected a massive amount of positive law on marriage and inheritance rules worldwide through a country-by-country report”³¹. According to the World Bank, these data helps to better understand the legal treatment in specific sectors affecting women’s participation in the economy of 141 different legal systems.

The report establishes six major indicators of gender differences: accessing institutions, using property, getting a job, providing incentives to work, building credit, going to court.

The comparative approach is the same I have examined at the beginning of this section. This is a classic example of comparative law by column: “The first three indicators (...) capture mainly those laws having direct gender dimensions and are based on a reading of such laws from the perspective of individual women. (...) In addition, going to court now captures laws that have explicit gender differentiations regarding accessing legal services”³². Consequently, the report examines only the positive legislation regulating the matter in each country; customary law is not taken into account, only the constitutional treatment of customary law is.

The report shows the importance of comparative law in constructing identities and differences. Despising its focus on women and workplace gender equality, the report fails to analyze the struggle between the power of men and the power of women as they are framed by the different legal systems; None of the indicators I just mentioned succeeds in describing the substantial conflict between men and women.

³⁰ World Bank, “Women, Business and the law: measuring legal gender parity for entrepreneurs and workers (2012)”, available at <http://wbl.worldbank.org/reports>.

³¹ Frankenberg called it “Encyclopaedic Comparison” Frankenberg G., “Critical Comparisons: Rethinking Comparative Law, 26 HARV. INT’L L.J. 411, (1985), 427, 429. See also Nicola F. G., “Family Law Exceptionalism in Comparative Law” 58 *American Journal of Comparative Law* 777, (2010), 786.

³² World Bank, “Women, Business and the law: measuring legal gender parity for entrepreneurs and workers (2012)”, 5.

For example, they do not take into account gender violence: murder, rape, battery, abuses usually influence the balance of power between men and women³³.

The actual presence of these elements within each legal system affects women's behavior as a group "because it defines the possibilities of male behavior in a particular way, within a particular structure"³⁴ (workplace in this case). These indicators fail to contemplate all the legal rules that actually influence women's bargaining power within workplace. They do not engage with rules governing sex discrimination, sexual abuses or regulations regarding subsidies to low or no income families, or also formally neutral rules defining women's participation in the governance of corporations, unions and public entities. Every rule has a different impact on women's power as a group, but also on each woman as an individual, depending on her class, race, sexual orientation. So, it is extremely dangerous to exceed in formalist legal comparisons regarding how is women's participation in economy going under different legal systems, because, according to these frameworks, it is easy to forget that within each legal regime, rules have distributive effects that structure the conflicts between groups (men and women, employers and employees, straights and homosexuals, etc...) and these effects continuously modify the balance of power, with different consequences on every member of each group.

All the six indicators are depicted as neutral and technical products of expertise, instead they aim at framing a specific representation of women, enhancing some specific aspects and despising others.

In particular, the report underlines the detriments of an early age for marriage³⁵, which often represents an obstacle to women's ability to enter the marketplace or the restrictions on women's work regarding working hours or participation in certain industries.

³³ See, obviously, Kennedy Du. "Sexy Dressing etc. Essay on the Power and Politics of Cultural Identity", Cambridge: Harvard University Press, 1993, 103-104.

³⁴ Kennedy Du, *Ibidem*, 104.

³⁵ Nicola F. G., *Ibidem*, 787.

Indicators, like “going to court” or “using property”³⁶, strategically seek to depict specific rules and consequently particular legal systems as exotic, primitive, neither “normal” nor developed³⁷: for example the indicator “going to court” includes some data on whether married women have the legal capacity to file cases on their own or require husband’s permission or on whether women’s testimony is given the same evidentiary weight as that of men. The main goal of this representation is to orientalize specific legal systems, to portrait them as static, irrational, undeveloped or still developing. Implicit in this assumption, is the idea that Western legal systems are far more developed, rational and adaptable.

On the other hand, the same indicator does not mention any information regarding access to the legal system regarding fundamental issues, such as sexual harassment in the workplace or pregnancy discrimination.

The report seeks to portrait a representation of women according to neo-liberal perspectives, women are agents in the free market: their actions, their behaviors, even their life choices must be always functional to maintain the existence of the market or to fix its failures. The indicator “using property” takes into account only formal property rights, customary land tenures are not mentioned in the research, although the report significantly stated that: “Customary law can exist in parallel with formal legal regimes. Where such legal systems exist together, customary law can determine a woman’s rights in marriage or to property and inheritance. (...) However, the actual application of customary law is not covered.”³⁸

³⁶ See Kennedy Da. “Some caution About Property Rights as a Recipe for Economic Development” 1 *Accounting, Economics, and Law* 1 (2011), 1-62.

³⁷ See Said E., W. “Orientalism” Penguin:London, 2003 (1978), 1. The author defines orientalism as “a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience. The Orient is not only adjacent to Europe; it is also the place of Europe's greatest and richest and oldest colonies, the source of its civilizations and languages, its cultural contestant, and one of its deepest and most recurring images of the Other.”

³⁸ World Bank, “Women, Business and the law: measuring legal gender parity for entrepreneurs and workers (2012)”, 7-8.

VI. "OLD" PRIVATE LAW IN GLOBAL LEGAL DISCOURSE

In this context, private law is usually associated with spontaneous orders, cross-border transactions and independence from public authorities, but private law is also deeply connected with the creation of new systems³⁹, characterized by different structures⁴⁰, hierarchies and instruments of legitimacy⁴¹.

In this sense, there is a particular kind of private law that is allowed to circulate among legal systems: a formalistic type of private law, that had characterized the first of Duncan Kennedy's three globalization: the Classical Legal Thought⁴². This "old"⁴³ private law is related to a highly formalistic rhetoric, neutral to constitutional values and policy-oriented discourses that applies to formally equal individuals and their relations among each other, without taking into account any kind of social considerations⁴⁴.

The circulation of this kind of private law, within transnational regimes, is due to two major⁴⁵ factors: the spread of neo-formalist and neo-liberalist approaches among legal scholars in the last thirty years and the rise of a cross

³⁹ See Di Robilant A. "Genealogies of Soft Law", 54 *American Journal of Comparative Law* (2006), 499.

⁴⁰ See Slaughter A.-M., A Global Community of Courts, 44 *HARV. INT'L L.J.* 191 (2003).

⁴¹ Kennedy Du. "The Rise and Fall of Classical Legal Thought", Cambridge: Afar, 1998, 266.

⁴² Kennedy Du. "Three Globalizations of Law and Legal Thought: 1850-2000" Kennedy Du ed., *The New Law and Economic Development* Cambridge: Cambridge University Press, 2006, 19.

⁴³ Daniela Caruso explains "In this part of the globalization picture, traditional private law – understood as a coherent set of rules for the adjudication of contracts, torts and property disputes – is by no means prominent. The re-definition of state sovereignty resulting from the legal growth of numerous free trade areas and regional human rights regimes is mostly studied as a subject of political theory and constitutional or international law." *Private Law and State-Making in the Age of Globalization*, 39 *New York University Journal of International Law & Politics*, (2006) 1.

⁴⁴ See Marini G. "Distribuzione ed Identità nel diritto dei contratti, Note preliminari per la costruzione del diritto europeo dei contratti". *Riv. Crit. Dir. Priv.* 2010, 63-97 Rittich K., "Re-characterizing Restructuring: Law, Distribution and Gender in Market Reform" Dordrecht NE: Wolters Law International, 2002.

⁴⁵ Of course, there are many other factors, among them, Caruso highlighted "the necessary impoverishment of private law methodology resulting from its wide transnational circulation" Caruso D., *Ibidem*, 19. When legal models (interesting the comparison made by Caruso with migrants) circulates, they are caught in stereotypes and distortions, so when private law entered transnational regimes, it regained its classical representation as a source of apolitical, non-policy oriented arguments.

border private-rule making by business actors, that caused the decline of Westphalian sovereignty and the consequential dispersion of authority of national-states⁴⁶.

The revival of neo-formalism is a significant phenomenon in global legal discourse, especially in relation with transnational regimes. Neo-formalism is strictly related to the rhetoric of Classical Legal Thought, it is completely indifferent to public policy and social engineering. Neo-formalists strongly believe in the restraint of state regulation and judicial discretion, they promote a form of adjudication based on deduction, through a simple syllogistic procedure. They contribute to the representation of a neutral and mere technical transnational law. This approach aims at opposing an efficient and spontaneous (private) global market to an ineffective and static (public) local government, in order to demonstrate that the public level of the regulatory state and the private level of the global commerce are disconnected and isolated from one another.⁴⁷

The limitation of judicial discretion and the deductive application of legal principles to facts are two fundamental elements of legal formalism that are also instrumental to the legitimation of transnational regimes. They are central to the representation of transnational regimes as apolitical, efficient, market-based legal systems, in which private actors are free to interact with each other without any transaction costs due to social consideration or public policies.

This conception clearly characterizes the recent attempts to elaborate a European private law. An international group of scholars was asked by the UE Commission to draft a European contract law⁴⁸, focusing on clarifying the existing *acquis* and developing “a modern body of rules”⁴⁹ in order to facilitate the

⁴⁶ McBarnet D. “Transnational Transactions: Legal Work, Cross-border Commerce and Global Regulation” Michael B. Likosky ed. *Transnational Legal Processes: Globalisation And Power Disparities*, Butterworths, 2002, 105-06.

⁴⁷ Caruso D. *Ibidem*, 19 – 23.

⁴⁸ See Communication from the Commission to the European Parliament and the Council. A more coherent European Contract Law – An Action Plan, COM (2003) 68 final (feb. 2, 2003).

⁴⁹ See Communication from the Commission to the European Parliament and the Council. A more coherent European Contract Law – An Action Plan, at 23, COM (2003) 68 final (feb. 2, 2003), 23.

establishment of an internal market, one of the Union's aims, according to article 3 of Treaty on European Union⁵⁰. These efforts culminated with the publication of a Draft Common Frame of Reference: an array of rules articulated around the freedom of contract, main principle that may be restricted only "to prevent market failures by functionalizing economic behavior in order to enhance its consistency with a free competition-based market order"⁵¹.

The narrative that stands behind this attempt to create a European private law is coherent with the representation of transnational regimes as neutral and efficient system. The Draft Common Frame of Reference is presented as a completely apolitical and highly technical product of an International network of scholars. The focus is on the technical characterization of these rules⁵², there is no room for policy-oriented arguments or social considerations because scholars, as legal experts, are indifferent to ideology, politics or social goals⁵³. Also, the reference made by the communication of the UE commission to a "modern" set of rules is in line with the modernization/tradition discourse that characterizes the circulation of legal models. The CFR is modern in the sense that it represents the next step of the evolution of private law, it is a better version of the "traditional" private law elaborated within national legal systems⁵⁴. According to this representation, the latter is modern because it is the product of scientific efforts based on merely technical considerations, on the contrary, the former is presented

⁵⁰ Treaty on European Union, art. 3 c. 3 "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

⁵¹ Somma A. "Private Law as Biopolitics: Ordoliberalism, Social Market Economy, and the Public Dimension of Contract", 2 *Law and Contemporary Problems* 105 (2013), 110.

⁵² Marini G. "La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione", *Comparazione e diritto civile*, 2010, 16.

⁵³ Kennedy Du. "The political stakes in "merely technical" issues of contract law, 10 *European Law Journal*, (2002), 7. See, critically R. Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society", 46 *HARV. INTL. L.J.* 471 (2005).

⁵⁴ See, on the modernization/tradition discourse, Marella M.R. Critical Family Law, 19, *American University Journal of Gender Social Policy and Law* 2, (2011), 736 – 746.

as a legal model too much compromised with social goals and public policy⁵⁵; state regulation and judicial discretion have operated focusing on enhancing constitutional values and policy-oriented discourses and not just on curbing economic freedoms⁵⁶ only when they opposed competition.

The rise of cross border private law-making made by international institutions or business actors and the consequential decline of the national-states is based on one of the major assumption made by neo-formalism: the strict separation between a private sphere and a public sphere, between market and government. Private law has been the regime of those cross border transactions between private actors indifferent to state regulation and governments. The proliferation of this cross-border commerce has enhanced the role of transnational private networks and international organizations. This process has become a major element of neo-liberal representations focusing on depicting a private space of international commerce completely disentangled “from national mechanisms of social and democratic control”⁵⁷.

This representation is used in order to affect the circulation of models: only selected models may circulate among legal systems and usually from core to peripheries, where core is one of the different international institutions or transnational networks that form part of these transnational regimes (international courts, international organizations, *lex mercatoria*) and peripheries are mostly developing and some developed⁵⁸ countries.

⁵⁵ See Von Bar C., “From Principles to codification, Prospects for European Private Law” 8 *Columbia Journal of European Law*, 379.

⁵⁶ Somma A. “Towards a European Private Law? The Common Frame of Reference in the Conflict between EC law and National Laws”, Micklitz H.-W. & F. Cafaggi eds. *European Private Law After the Common Frame of Reference*, 2010, 1-23.

⁵⁷ Caruso D., *Ibidem*, 24.

⁵⁸ A perfect example of this situation is what has happened with the transnational regime composed of EU, ECB and IMF has asked Greece and the other countries affected by Europe’s sovereign debt crisis to introduce in their legal system, legal models in order to obtain financial aid. These models, supposedly neutral and apolitical, are represented as the only possible approach to the situation. See, Somma, *supra* note 7, 465.

VII. CONCLUSION

The relationship between knowledge production and law is one of the major points of this study. It seems quite obvious that, through the production of knowledge, is possible to affect our representations of law and also to provide different representation of it. On the other hand, the use of indicators demonstrates that also law influences knowledge production.

In this sense, knowledge is one of the products of the deployment of power structured by legal rules. Law empowered certain groups or individuals by defining their bargaining power, these subjects are able to influence the production of knowledge⁵⁹. Consequently knowledge affects both future conflict of powers and future knowledge production. It is a circular process that involves lawmaking, empowerment and knowledge production: legal rules condition the deployment of power, which affects the production of knowledge. These knowledges will affect future representations and portraits of law, altering the perceptions of empowered groups and individuals and consequently the conflicts of power⁶⁰.

Transnational regimes are indeed new types of domination, extremely different from national-states. These entities derive their legitimation from a system of rational processes of justification that stands behind their acts. This form of power provides a representation based on the production of a supposedly neutral and purely technical knowledge, at the core of this production there are experts.

Experts employ different legal tools in order to perform their task, recently comparative law has gained importance due to its ability to construct and re-construct identities and to define and re-define similarities and differences. Legal comparison is a perfect instrument to provide representations and portraits based on a particular perspective, or a determined factor.

⁵⁹ Kennedy Du., *supra* note 33, 124.

⁶⁰ Kennedy Du., *supra* note 33, 124-125.

Within transnational regimes, comparative law shows its lowest point (comparative law by columns) and its full formalistic potential. This kind of comparison disguises the subjective nature of this process enhancing a managerial and technocratic approach that aims at “concealing real political choices”⁶¹ to show the neutrality and inevitability of the legal models proposed by these regimes.

Finally, through the role of legal experts, legal comparison has become a powerful instrument to define and re-define the relationship between law and space: what has been called geopolitics of law⁶².

Comparative law allows to attach and detach, to connect and disconnect legal representations; depending on the comparative approach deployed and the subjectivity of the observer, law changes according to its particular nomos, narratives and legitimation. Consequently, it is correct to say that legal comparison is at the core of transnational regimes strategy of cultural domination, aimed at influencing national legal systems, affecting their political structure and promoting a certain vision of the Global.

⁶¹ Kennedy Da. “The Forgotten Politics of International Governance”, 117.

⁶² See Monateri P.G. “Geopolitica del diritto”, 4. Costantini C. “L’anima apologetica della comparazione e la ‘geopolitica’ del diritto. Riflessioni in margine alla fondazione della Tradizione Giuridica Occidentale”, *Rivista critica diritto privato*, 2005,1, 183 – 190.