Methodological Rebellions: How to Do Global Comparative Law in a Time of Climate Change

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INTRODUCTION

This paper examines how globalisation impacts on legal scholarship. To this end, it draws a connection between two types of impoverished habitats, i.e. legal variety and fragile environments. In so doing, it reappraises the role of comparative legal scholarship within the global-law conversation *in a time of climate change*. It proposes a scholarly paradigm whereby comparative law might contribute to the legal examination of the ecological concerns shared by the whole of humanity. It challenges the legal universalistic approach, through which mainstream comparative law turns out to be servient to the purposes of global law in climate-change-related issues. This means *being subversive* and running counter to the idea of normalisation of ecological and climate concerns in global legal studies. Being subversive also entails reframing our methodological attitude in a time of climate change, revitalising its empirical, and problem-based, approach to transnational concerns, and developing an even more cross-disciplinary attire.

'AN IMPOVERISHED HABITAT'; OR, THE EFFECTS OF GLOBAL LEGAL CULTURE

The way globalisation impacts on legal scholarship is a source of concern for the community of comparative lawyers. As its members, we assume that our discipline extends over, and therefore includes, the 'sustainable diversity' of the legal (as well as constitutional) systems of the world.[1] Despite our attentiveness to such a variety, we are now experiencing ample, and somehow indiscriminate, recourse to the methodological attitude we comparativists term *universalist approach*.[2]

[1] See Glenn, HP (2011) 'Sustainable Diversity in Law' (3) *Hague Journal on the Rule of Law* 39; Glenn, HP (2014) *Legal Traditions of the World. Sustainable Diversity in Law* (5th ed) Oxford University Press. The concept of 'legal biodiversity' is close to Glenn's: see Nicolini, M (2020) 'Law and the Humanities in a Time of Climate Change' (26) *Cardozo Electronic Law Bulletin* 1-32. I shall return to the matter later on in this paper.

[2] For more on such approach see, among others, Mousourakis, G (2007) 'Comparative Law and Legal Universalism: An Historical Perspective' (32) *Journal for Juridical Science* 144; Dodek, A (2009) 'A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review' (47)

We must somewhat be held accountable for such a state of affairs. The widespread application of the universalistic approach has a long pedigree stretching back to the establishment of comparative law as an autonomous discipline. Conceived as a 'translation of diverse legal rules into one language', it has encouraged the search for legal uniformity by way of generalisations.[3] It has also been considered our distinctive 'cultural habit':[4] scholarly comparative law has developed methodological processes whereby legal concepts were (and still are) made applicable irrespective of time and place. This still reflects late nineteenth-century ethnocentric attitudes in the study of the law. Accordingly, only the limited set of civilised, i.e., 'European', systems were considered generalisable and exportable. No wonder, therefore, that legal scholars considered western law 'an absolute given with universal applicability'.[5]

Universalism thus represents our major contribution to the rise of another epistemic community, that of global law. This causes both methodological and substantive legal implications. Comparative law seems to have handed over the idea of producing transnational legal culture, which is now firmly in the hands of global legal scholarship. This means severing universalism as a methodological approach from the comparative-law epistemological community that created it. In encouraging, and therefore *generalising*, the recourse to generalisations, global legal scholarship has converted them into a wide-reaching legal device. Its effects are now apparent on scholars; and 'legal globalisation is […] transforming legal culture on a global scale'.[6]

The ubiquitous presence of global law seems to have relegated comparative legal scholarship to the margins of the legal discourse. Legal uniformity renders

Osgoode Hall Law Journal 287; Husa, J (2015) *A New Introduction to Comparative Law* Hart at 20; Siems, M (2018) *Comparative Law* (2nd ed) Cambridge University Press at 36 and following. On how universalism affects comparative constitutional law see Hirschl, R (2014) *Comparative Matters. The Renaissance of Comparative Constitutional Law* Oxford University Press. For a comprehensive examination of the topic see Nicolini, M (2020) 'Methodologies of Comparative Constitutional Law: Universalist Approach' in *Max Planck Encyclopaedia of Comparative Constitutional Law* Oxford University Press. Available at: <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e50?rskey=BJebA8&result=1&prd=MPECCOL>.

[3] See Mousourakis, G (2019) *Comparative Law and Legal Traditions. Historical and Comparative Perspectives* Springer at 8. On generalisations as constitutive features of comparative law see Merryman, JH (1999) *The Loneliness of the Comparative Lawyer* Kluwer at 491. See also Siems *Comparative Law* supra note 2 at 39; Husa, J (2016) 'The Future of Legal Families' *Oxford Handbooks Online* Oxford University Press . Available at: <10.1093/oxfordhb/9780199935352.013.26>.

[4] See Husa *A New Introduction* supra note 2 at 100. On the historical roots of such habit see Yntema, HE (1958) 'Comparative Law and Humanism' (7) *The American Journal of Comparative Law* 493; Peters, A (1999) 'Universalist Assumptions and Implications of Comparative Law: Should They Be Deconstructed?' (93) *Proceedings of the Annual Meeting (American Society of International Law)* 366; Gordley, J (2003) 'The universalist heritage', in Legrand, P, and Munday, R (eds), *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 31; Legrand P, (2003), 'The Same and The Different', in Legrand, P, and Munday, R (eds), *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 240 at 246; Mousourakis 'Comparative Law' supra note 3 at 149.

[5] See de Jong, M, and Stoter, M (2009) 'Institutional Transplantation and the Rule of Law: How This Interdisciplinary Method Can Enhance the Legitimacy of International Organisations' (2) *Erasmus Law Review* 311 at 313. On the ethnocentric methodological approach to legal systems see Frankenberg, G (1985) 'Critical Comparisons: Rethinking Comparative Law' (26) *Harvard International Law Journal* 411 at 422. The quotation is from Whitman, JQ (2009) 'Western Legal Imperialism: Thinking About the Deep Historical Roots' (10) *Theoretical Inquiries in Law* 305 at 308.

[6] See Husa, J (2018) *Advanced Introduction to Law and Globalisation* Edward Elgar at 32.

comparison 'outdated'.[7] The rise of global law is likely to 'dissipate any need for it' in legal research, as well as to replace its methodology 'with more modern and trendy jurisprudential doctrines and theories of international or global law'.[8] 'We are all comparatists now' has an intellectual allure at the expense, though, of downgrading comparative law from 'a unique distinct method' to 'a mere variant of legal research'.[9]

The undisciplined application of the universalist approach should caution us against the way universalising trends supplant legal variety with homogeneous and global features. Not only do these trends lead to the 'dismantlement' of legal diversity; but, in denying 'unity and plurality', they also foster uniformity through law.[10] And, as Michele Graziadei puts it, a uniform world 'with one legal culture' undoubtedly turns out to be an 'extremely impoverished habitat'.[11]

COUNTERING LEGAL-BIOLOGICAL DECLINE: THE CROSS-DISCIPLINARY AMBITIONS OF COMPARATIVE LAW

There is something intriguing in Graziadei's predicament. In a world refashioned after politico-legal uniformity, he reminds comparative lawyers to resist the fascinating trends of universalism, as well as the erosion of legal diversity it entails. Comparative law, we should bear in mind, aims to preserve 'striations and discrepancies that interrupt [the] monolithic spaces' of globalised normativities.[12] As comparatists, we 'cannot think in terms of some kind of progression towards a unified higher state'; by contrast, we should stand for the

[7] See Demleitner, NV (1999) 'Combating legal ethnocentrism: Comparative law sets boundaries' (31) *Arizona State Law Journal* 737. See also Siems, M (2007) 'The end of comparative law' (2) *Journal of Comparative Law* 133 (on the four challenges to comparative law: 'the disregard', 'the complexity', 'the simplicity', and its 'irrelevance' in a converging/global legal reality). For a critique to Siems's arguments see Watt, G (2012) 'Comparison as deep appreciation' in Monateri, PG (ed) (2012) *Methods of Comparative Law* Edward Elgar 82 at 89-90. The death of comparative law is challenged by Michaels, R (2016) 'Transnationalizing Comparative Law' (23) *Maastricht Journal of European and Comparative Law* 352.

[8] Galdia, M (2009) *Legal Linguistics* Peter Lang at 274.

[9] Siems *Comparative Law* supra note 2 at 121.

[10] See, respectively, Muir Watt, H (2014) 'The relevance of Private International Law to the Global Governance Debate', in Muir Watt, H (ed.) (2014), *Private International Law and Global Governance* Cambridge University Press 1 at 9; and Valcke, C (2004) 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (52) *American Journal of Comparative Law* 713. On the decline of legal diversity see also: Legrand, P (1999) *Le droit comparé* Presses Universitaires de France at 37; Legrand 'The Same and The Different' supra note 4 at 248 (on comparative-law aspiration to a 'uniform law that would be universal'); Husa *A New Introduction* supra note 2 at 242 (*juridiversity* as the degree of 'variation of different forms of law and organised large-scale normativities'); and Hirschl, R (2019) 'Comparative Methodologies' in Masterman, R and Schütze, R (eds) (2019) *The Cambridge Companion to Comparative Constitutional Law* Cambridge University Press at 28 ('Plurality is essential').

[11] Graziadei, M (2003) 'The functionalist heritage' in Legrand P, and Munday, R (eds.) (2003) *Comparative Legal Studies Traditions and Transitions* Cambridge University Press 100 at 114.

[12] Carpi, D (2020) 'The Island Metaphor in Literature and Law' (14) *Pólemos* 225. According to Monateri, PG (2018) Dominus Mundi. *Political Sublime and the World Order* Hart, 2018 at 135, islands are vivid examples of 'fractures' of the global maritime space. Similar ideas are in Watt 'Comparison' supra note 7 at 90 ('the closer we approach a totalitarian state of unification the more apparent will become the cultural differences between nations and the cultural interdependence of law and culture').

legal discontinuities *disturbing* the uniform patterns globalisation promises to the whole of humankind.[13]

Take, for example, the notion of 'transnational law'. We shall see that such a lexical item is interchangeably used with global law. Within the current state of affairs, however, it also reinforces the permanent dialectic between geophysical discontinuity (namely, the presence of borders) and the legal connections caused by globalisation. Like the law, our political communities have become 'transnational'. Although globalisation disregards the role territory has traditionally played in organising communities, both communities and territories may be considered striations and discrepancies upon which globalisation produces ostensible effects.

The metaphor of the 'impoverished habitat' also encourages us to fully explore the possibilities and perspectives comparative law discloses to its epistemic community. This, as is evident, deserves further reflection. The metaphor points to the cross-disciplinary ambitions of comparative law, whose potentials provide us with several opportunities of experimentation. As Legrand upholds, comparative lawyers cannot 'ignore the social, economic and historical aspects of positive law'; contrariwise, they must ascertain how, and to what extent, these aspects are really 'meaningful' in law.[14] In so doing, comparative law ceases to be a set of academic speculations; and the dialogue with non-legal disciplines permits us to regain control of the 'deep connection' between that law and its cultural, as well as environmental, contexts.[15]

In suggesting a more disciplined, and critical, approach to legal convergence, Graziadei also draws a correlation between the legal domain and its environmental background. This paper intends to further explore this connection. In particular, it focuses on how comparative law may contribute to grasping the impact of global warming, which acts as the major driver of transformative changes within our communities. Consequently, this also means relocating comparative legal scholarship within the global-law conversation in a time of climate change.

The current state of pandemic has added fuel to the fire of this conversation. Quite ironically, a couple of weeks before the Covid-Sars-19 pandemic broke out in Western Europe, Daniel Kucharski published a book that critically assesses how processes of generalisation make the 'rules of contagion' predictable. Not only there is a variation in how the virus manifests itself in different contexts, but it has also triggered varied global responses to these manifestations. Besides this, it also 'exposed massive inequalities and gradations of relative privilege in the strata of our societies', complementing globalisation with additional disturbing striations.[16]

[13] See Samuels, G (2014) *An Introduction to Comparative Law Theory and Method* Hart at 164. On 'legal differences' as 'inconveniences to be overcome' see Merryman, JH (1978) 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in Cappelletti, M (1978), *New Perspectives for a Common Law of Europe* Sijthoof at 195.

[14] See, respectively, Legrand, P (1996) 'European Legal Systems are not Converging' (45) *International and Comparative Law Quarterly* 52 at 55-6; and Watt 'Comparison' supra note 10 at 82.

[15] Watt 'Comparison' supra note 7 at 84. On the potentials of comparative law in cross-disciplinary research see Curran, VG (1998) 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (46) *American Journal of Comparative Law* 657. Frankenberg 'Critical Comparisons' supra note 5 at 414, terms the process of deep appreciation as 'differencing'.

[16] Wainwright, J, and Mann, G (2020) 'Capital and Climate in Times of Coronavirus: Reply to

In our troubled times, the intertwining of two transnational crises poses new challenges to some common assumptions we make about the law. A methodological change is therefore required if we want to address them. Again, the change is both substantive and methodological. The cross-disciplinary ambitions of comparative law permit us to grasp the truest politico-legal implications of the present ecological crisis. And this paper assumes that it is highly productive *to do comparative law in a time of climate change*.

My arguments run somewhat counter to the current universalist approach in global (and comparative) studies. When examining how our politico-legal arrangements are being affected by global warming, it is impossible to tackle, say, the pandemic or global warming by adopting the global-response strategy proposed by global legal scholarship. These patterns of generalisation are not able to grasp the 'ecological and political devastation' provoked by climate change, which 'promises to transform everything we thought we knew about nature'.[17]

In contributing to this conversation, the paper goes above and beyond the current formalistic approach to climate change. Firstly, it engages in cross-disciplinary investigations with the aim of challenging legal universalism in our time of ecological flux. It then considers how mainstream comparative-law methodologies play the game of global law and universalism in climate-change-related issues. Accordingly, it suggests a new scholarly paradigm be established along three constitutive features: (1) a paradigm shift from transnational law to transnational communities; (2) a reappraisal of our empirical methodological approach; and (3) a renovated legal examination of the ecological concerns which are shared by the whole of humanity.

Within this conversation, I understand that there is room left for comparative law. Its cross-disciplinary ambitions provide us with methodological and substantive arguments which may stimulate a renewed debate on the sustainable foundations of our political communities. In opening up our future in a time of climate change, comparative law stirs the formalistic, as well as universalistic, attitude to the law; in so doing, it acts as a bridge linking our troubled 'reality to an imagined alternative', that is, an open and inclusive future.[18]

OLD METHODS, NEW ISSUES? FORMALISM, GLOBAL SCHOLARSHIP, AND CLIMATE CHANGE

As a field of scientific research, climate change is not a new topic; climatologists, geographers, political scientists, and sociologists have been studying it for at least 40 years. This has supplemented a vast literary production, which explores causes, manifestations, and consequences of global warming for both the earth and the whole of humankind. Likewise, there is a broad scientific consensus on

Critics' (32) *Rethinking Marxism* 451 at 452. The book quoted in the text is Kucharski, A (2020) *The Rules of Contagion. Why Things Spread – and Why They Stop* Profile Books.

[17] Wallace-Wells, D (2019) *The Uninhabitable Earth. A Story of the Future* Allen Lane at 172 and 150.

[18] Alan Watson (1988) *Failures of the Legal Imagination* University of Pennsylvania Press at 36.

climate change; although segments in society are sceptical about it, the consensus also extends over its anthropogenic origins.[19]

By contrast, climate change is a relatively new topic in legal studies. The interest in it has emerged only very recently, often intertwining with other legal sub-disciplines, such as international law, environmental law, global law, and migration law.[20] This adds a flavour of cross-disciplinarity, and supports undertaking innovative research in the area of, say, climate change law.[21] These kinds of disciplinary interactions permit probing the potentials of comparative-law methodology in one of the less explored ambits of climate-change-related studies, i.e. global warming acting as a non-legal variable triggering transformations in the legal spectrum.

Climate change and global warming raise new issues and require innovative responses. On the one hand, both challenge our legal paradigms, which must therefore adapt to environmental changes. For example, the ecological crisis has led scholars to frame new categories, such as 'environmental migration' and 'climate migrants/refugees' which reflect how traditional state policies and legal taxonomies have been adapting to the climate change transformative effects.

On the other hand, climate change is altering how societies perceive the bonds of political communities. Global warming makes us navigate 'an entirely new social and political structure'; 'it will have massive impact on the way human life on Earth is organized'; its effects 'have already eaten into trust in state authority […] igniting a complex bundle of social kindling'. Such a state of flux requires an urgent process of 'adaptation of the political',[22] inasmuch as global warming is disrupting the socio-geographic contexts within which the ties of political communities have traditionally been located.

[19] See e.g. Hulme, M (2009) *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* Cambridge University Press; Whitmarsh, L (2011) 'Scepticism and uncertainty about climate change: Dimensions, determinants and change over time' (21) *Global Environmental Change* 690; Capstick, S et al (2015) 'International trends in public perceptions of climate change over the past quarter century' (6) *WIREs Climate Change* 35; Huber, RA (2020) 'The role of populist attitudes in explaining climate change skepticism and support for environmental protection' (29) *Environmental Politics* 959.

[20] See Novel, A-S (2019) 'Climate Change: A New Subject for the Law' (3) *The UNESCO Courier* 13. See also McDonald, J (2011) 'The Role of Law in Adapting to Climate Change' (2) *WIREs Climate Change* 283. On the impact of climate change on discrete legal disciplines see e.g. Gupta, J (2010) 'A history of international climate change policy' (1) *WIREs Climate Change* 636; Schrijver, N (2011), 'The Impact of Climate Change: Challenges for International Law' in Fastenrath, U et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* Oxford University Press 1278; Ruppel, OC et al (eds.) (2013) *Climate Change: International Law and Global Governance*, vols. I and II Nomos;; Farber, DA, Peeters, M (eds.) (2016) *Climate Change Law* Edward Elgar; Mayer, B, and Crépeau, F (eds.) (2017) *Research Handbook on Climate Change, Migration and the Law* Edward Elgar; Carlarne CP et al (eds.) (2016) *The Oxford Handbook of International Climate Change Law* Oxford University Press ; Bodansky et al (2017) *International Climate Change Law* (Oxford University Press); Mayer, B (2018) *The International Law on Climate Change* Cambridge University Press.

[21] See Hollo, EJ et al (eds.) (2013) *Climate Change and the Law* Springer; Mehling, M (2015) 'The Comparative Law of Climate Change: A Research Agenda' (24) *Review of European, Comparative and International Environmental Law* 341; Fermeglia, M (2020) 'Comparative Law and Climate Change,' in Fiorentini, F and Infantino, M (eds) *Mentoring Comparative Lawyers: Methods, Times, and Places.* Liber Discipulorum Mauro Bussani Springer 237.

[22] The quotations are drawn from Wallace-Wells *The Uninhabitable Earth* supra note 17 at 127-28; and Mann, G, and Wainwright, J (2018) *Climate Leviathan: A Political Theory of Our Planetary Future* Verso at ix-xi.

Since such transformation affects the non-legal presuppositions of our politico-legal paradigms, as comparative legal scholars we should encourage 'pluralising the debate' through cross-disciplinary research.[23] Conceiving of, experimenting, and deploying innovative methodologies is crucial as regards the relations between climate change and the law.

Among lawyers, Irus Braverman has shown us how to pursue cross-disciplinary investigations in the field of climate change studies. In order to understand how global warming affects the maritime 'political' communities which are coral reefs, she has undertaken 'a massive research […] that stretched across continents and disciplines' with coral experts, whom she considers 'the vanguard of conservation in the Anthropocene.' Besides this, she has recently co-authored a collection, which probes the ability of cross-disciplinary research in reappraising the role of the law in the governance of marine spaces, resources, and biological conservation.[24]

As is evident, we cannot confront climate change by merely applying our traditional paradigms and legal devices that international, supranational, and domestic orders make available. I term this approach *formalistic*, inasmuch as it does not formulate innovative responses to the interests raised by global warming. By employing it, we do not properly tackle the current state of environmental crisis. Quite the opposite; when we have resort to it, we act strategically, and normalise the very idea of ecological and climate losses. This means adapting 'new' ecological issues to the 'traditional' framework, which is unable to cope with the disruption to societal concerns caused by climate change.

An equation therefore runs between 'ecological' formalistic strategies and universalising trends in global comparative scholarship. To various degrees, both the law and the environment experience a paradigmatic decline. The globalising shift in comparative law is the outcome of an ongoing process of methodological adaptation; state-specific differences are blurred and rearranged after new socio-political cleavages. The ecological threat also bolsters global universalism; indeed, such trend suggests our legal response to such decline be that of accelerating the patterns of uniformity in climate-change-related responses.[25]

In this lies one of the major flaws of global legal scholarship. The possibility that we tackle the challenges posed by global warming demands more than a general commitment to universal responses. This commitment resonates with Hessel E. Yntema's assumption that 'the problems of global [in our case, environmental] justice are basically the same in time and space through the world'. His arguments replicate the patterns of universalism: in climate-change-related issues, handling 'extra-legal circumstances' requires a sort of 'conver-

[23] Baldwin, A (2014) 'Pluralising climate change and migration: an argument in favour of open futures' (8) *Geography Compass* at 516. On the need of pluralising the methodological debate in legal studies in a time of climate change see also Husa, *Advanced Introduction* supra note 6 at 165.

[24] See, respectively: Braverman, I (2018) *Coral Whisperers. Scientist on the Brink* University of California Press at 2–3. Braverman, I et al (eds.) (2020) *Blue Legalities. The Life and Laws of the Sea* Duke University Press .

[25] On unifying paradigms in climate-change-related studies see Young, MA (2011) 'Climate Change Law and Regime Interaction' (5) *Carbon & Climate Law Review* 147.

gence-through-pressure' strategy.[26] It goes without saying, this attitude does not respect local knowledge or conditions, thus insulating, that is, generalising, ecological concerns from the territorial contexts where they take place.

Furthermore, the global approach revolves around a set of circular justifications, where 'arguments […] assume what they seek to justify'.[27] On the one hand, 'convergence through pressure' appears to be the sole legal response to universal ecological threats. On the other hand, it is consistent with the allegedly democratic allure of climate change, which strikes without discriminating among places and individuals.

GENERALISING CLIMATE CHANGE THROUGH PATTERNS OF LEGAL UNIFORMITY

Despite their methodological flaws, universalistic and formalistic approaches to climate change are still fascinating for those who praise global law and support its homogenising effects.

Several reasons explain the enthusiastic support they enjoy among legal scholars. The fascination has to do with the global-business-as-usual pattern: if 'the effects of global warming get more severe, it would be sensible if countries responded in a similar way'.[28] Ultimately, the approach is traceable back to the processes of generalisations with which global comparative law has been oversaturated over time.

Generalisations also trigger *methodological* and *substantive* implications in the field of climate change studies. The former type of generalisations points to a process whereby an idea is, or intended to be, used everywhere, thus favouring the dissemination of allegedly universal concepts, irrespective of their social, cultural, and legal backgrounds.[29] Described in accordance with a narrative of *superiority* and *progress*, methodological generalisations propagate global law. Both narratives lead to an 'impending radiant future for humanity, one that is characterized by open markets', ensures '(sustainable) development and (environmentally friendly) prosperity'.[30] In global comparative law, these generalisations are servient to freedom of trade and commerce. In addition, they advocate new universals in order to facilitate harmonisation of laws displaying a universalistic character comparable to that of Western law, as well as stimulate

[26] Yntema, HE (1956) 'Comparative Legal Research – Some Remarks on Looking out of the Cave' (54) *Michigan Law Review* 899 at 903.

[27] Brown, HI (1994) 'Circular Justifications' (1994) *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association* 406 at 407.

[28] Siems *Comparative Law* supra note 2 at 279.

[29] A typical example of methodological generalisation can be found in Sumner Maine, H [1861] (1908) *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* John Murray. The book presents us with 'a universal historical account of societies that moves from status to contract': Corcodel, V (2014) 'The Governance Implications of Comparative Legal Thinking. On Henry Maine's Jurisprudence and Liberal Imperialism', in Muir Watt, H (2014) *Private International Law and Global Governance* Cambridge University Press 92 at 104.

[30] Xifaras, M (2016) 'The *Global Turn* in Legal Theory' (29) *Canadian Journal of Law & Jurisprudence* 215 at 216. See also Gong, G (1984) *The Standard of "Civilization" in International Society* Clarendon Press.

economic development.[31] Although generalisations are as ethnocentric as traditional comparative law, this approach is prevalent in global law.

When tackling climate change, such legal superiority provides methodological justification to claims which advocate for the convergence towards common universal standards of sustainable development and Western-driven coordinated ecological policies. In assuming mitigation strategies be generalised throughout the world, it would follow that the effects of global warming are roughly the same, say, in the Global North and in the Global South. Certainly, we have realised 'how hard, and how indiscriminately' it 'is hitting'.[32] From such democratic allure, however, we cannot infer that the territorial impact of global warming is likely to be the same around the earth. Climate change is undoubtedly 'a global problem, but it stems from local emissions and its impacts are felt differently in different locations'; it 'spans geographic scales from the rural village or urban neighbourhood to the planet'.[33] And its 'cruelest impacts' will predominantly affect the less-developed countries: groundwater scarcity and decline in biodiversity for food and agriculture, for example, will mainly impact the Global South; and the 'world's suffering will be distributed as unequally as its profits'.[34]

Nor do mitigation policies based on a functionalist approach offer an adequate response to our troubled times. By contrast, climate change is 'an environmental problem that is characterized by extreme heterogeneity'.[35] Even when perused to create contextual responses, functionalism is instrumental to the universalistic approach. Functionally equivalents legal devices indeed reflects a legal theoretical conception, according to which the law is naturally universal and generalisable. Functionally equivalent mitigation strategies, then, tackle climate change in a similar way only superficially. I am not denying that functionalism assumes the presence of multiple 'juridicities'; what I understand is that this 'multi-focal constitutional order' backs is the reflection of a *monistic*, i.e. *universalistic*, *type of cosmopolitanism*. Within this, each legal system inflects the uniform kind of juridicity which is now global law.[36]

This leads us to consider the *substantive* generalisations that the universalistic approach triggers in climate change studies. Global law is supposed to 'offer everyone the benefits of peace, human rights, representative democracy, and

[31] Husa *Advanced Introduction* supra note 6 at 163.

[32] Wallace-Wells *The Uninhabitable Earth* supra note 17 at 171 and 174.

[33] Carlarne, C, and Farber, D (2012) 'Law Beyond Borders: Transnational Responses to Global Environmental Issues' (1) *Transnational Environmental Law* at 19.

[34] Wallace-Wells *The Uninhabitable Earth* supra note 17 respectively at 45, 34 and 121. On the large-scale varietal uniformity in agriculture practices see Street, P (2003), 'Space of Diversity in Diverse Spaces' in Holder, J and Harrison, C (eds.), *Law and Geography* Oxford University Press 323 at 332-3. See also Pilling, D et al. (2020) 'Declining Biodiversity for food and agriculture needs urgent global action' (1) *Nature Food* 144. A territorial approach to climate change is adopted, inter alia, by the UN Development Programme (UNDP) 'Climate Change Adaptation'. Available at: <https://www.adaptation-undp.org>.

[35] Carlarne and Farber 'Law Beyond Borders' supra note 34 at 19.

[36] Valcke, C (2018) *Comparing Law. Comparative Law as Reconstruction of Collective Commitments* Cambridge University Press at 168.

moderate government'.[37] No wonder, therefore, if these types of generalisations have saturated the field of human rights. Derivatives of the English, American, and French revolutions, they are now considered 'a common standard of achievement for all peoples and all nations'.[38] In the opinion of those supporting the global legal order, generalisations of these 'basic principles of constitutional law' have allegedly made them 'the same around the world.'[39] Over the past few decades, to quote just a few examples, we have been experiencing a considerable degree of legal convergence, which is inflected after constitutional taxonomies: constitutional 'transplants', 'borrowing', and so on.[40]

As global warming goes hand in hand with economic inequalities, the consequences of climate change are unevenly distributed among states and communities. This represents further striations encroaching upon the universalising taxonomies forged by global legal scholarship. Even when we try to adapt fundamental rights, such as water rights, to a 'changing Climate' and to non-Western constitutional contexts, these are still 'constructed as a Kantian civilisation good'.[41] I understand that it is impossible to discard the 'Western origin' underpinning their universalistic narrative. Their denial would probably lead us to consider the narrative a 'genetic fallacy' in the *universalistic type of cosmopolitanism* we undertake when fighting against climate change.[42]

Thirdly, the use of quantification in comparative law allows us to measure, inter alia, 'global-transnational influences on constitutional human rights', in general, and the impact of climate-change mitigation policies, in particular.[43] Quantitative methods allow scholars to assess the 'quality' of the legal systems

[37] Xifaras 'The *Global Turn*' supra note 31 at 216.

[38] See Arnold R (2013) 'Reflections on the Universality of Human Rights', in Arnold, R (ed.) *The Universalism of Human Rights* Springer 1 at 12-13; Bingham, T (2010) *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* Cambridge University Press; Gearty, C (2019), 'Human Rights Law', in Masterman, R and Schütze, R (eds), *The Cambridge Companion to Comparative Constitutional Law* Cambridge University Press at 291. On how modern normative systems and institutions of human rights has become a source of universalism see Sajó A (ed) (2004) *Human Rights with Modesty: The Problem of Universalism* Springer.

[39] Beatty, D (1995) *Comparative Law in Theory and Practice* University of Toronto Press at 10. See also Beck, CL et al (2019) 'Constitutions in World Society: A New Measure of Human Rights' in Schaffer, G et al (2019) *Constitution-Making and Transnational Legal Order* Cambridge University Press 85 at 95 (constitutions are now 'global-transnational documents as much as national ones'). See also Jackson, V (2010) *Constitutional Engagement in a Transnational Era* Oxford University Press .

[40] See, respectively, Hirschl *Comparative Matters* supra note 2 at 205; Halmai, G (2019) 'Constitutional Transplants', in Masterman, R and R Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* Cambridge University Press ; Friedman, B and Saunders, C (2003) 'Symposium: constitutional borrowing: editors' introduction' (1) *International Journal of Constitutional Law* 177; Tebbe, N, and Tsai, RL (2010) 'Constitutional Borrowing' (108) *Michigan Law Review* 459; Dixon, R, and Posner, E, 'The Limits of Constitutional Convergence' (2011) 11 *Chicago Journal of International Law* 399; Choudhry, S (2006) 'Migration as a New Metaphor in Comparative Constitutional Law,' in Choudhry, S (ed.), *The Migration of Constitutional Ideas* Cambridge University Press .

[41] See, respectively, Caleb, H (2015) 'Water, Water, Nowhere: Adapting Water Rights for a Changing Climate' (16) *Sustainable Development Law & Policy* 24; Baxi, U (2003) 'The colonialist heritage', in Legrand, P, and Munday, R, (eds), *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 46 at 50.

[42] See Siems *Comparative Law* supra note 2 at 297-8.

[43] Beck 'Constitutions' supra note 40 at 95.

and rank them, say, on how they actually implement global indexes, such as the 'Climate Change Performance Index' (CCPI), the MSCI Climate Change Index, and the Common Sense Climate Index.[44]

Like numerical comparative law, however, climate change indicators resonate with universalism, inasmuch as they reconcile scientific objectivity and measurement with real-world tests.[45] But, as it has been correctly argued, 'through numerical representation, one always loses some aspects of the reality'.[46] Climate change indicators might also deliberately omit data and variables, notwithstanding their relevance in real-world assessments. And such omissions may also trigger a strabismus in metrics, which unavoidably affects the reliability of their outlook. Odd as it may seem, this type of strabismus may prevent them from scratching the surface of the data and realise that there are concrete signs of dangers, if not of an irremediable ecological catastrophe.

A RADIANT FUTURE FOR HUMANITY? PROGRESS AS ECOLOGICAL ADAPTATION

From a methodological point of view, two further arguments uphold the recourse to generalisations in climate-change mitigation strategies. The first argument regards the role played by the English language as the global language of the scientific community. This also holds true in the realm of the law: transnational legal modules are the derivatives of a process of legal enculturation promoted by the world-wide dominant common-law legal profession.[47] Accordingly, English conveys the universals of legal globalisation; following in the footsteps of, say, Austin, von Feuerbach, and Hart, the shift embeds a new legal 'Universal Grammar', which encompasses the 'foundational concepts' of the global legal order.[48]

The second argument accounts for how global English encroaches upon our politico-legal taxonomies. As it is the language of the broader scientific

[44] See the 'Climate Change Performance Index' (CCPI). Available at: <https://www.climate-change-performance-index.org>. MSCI Climate Change Index. Available at: <https://www.msci.com/climate-change-indexes>. The Common Sense Climate Index. Available at: <https://data.giss.nasa.gov/csci/>. The last one was originally proposed by Hansen, J (1998) 'A common-sense climate index: Is climate changing noticeably?' (95) *Proceedings of the National Academy of Science of the United States of America* 4113.

[45] Davies, W (2015) 'Spirits of Neoliberalism: "Competitiveness" and "Wellbeing" Indicators as Rival Orders of Worth', in Rottenburg, R et al (eds.) *The World of Indicators. The Making of Governmental Knowledge through Quantification* Cambridge University Press 282 at 285.

[46] Rottenburg, R and Merry, SE (2015) 'A World of Indicators: The Making of Governmental Knowledge through Quantification' in Rottenburg, R et al (eds.) *The World of Indicators. The Making of Governmental Knowledge through Quantification* Cambridge University Press 1 at 8.

[47] See e.g., Pistor, K (2019) *The Code of Capital. How the Law Creates Wealth and Inequality* Columbia University Press at 158. On the Anglo-American centrism and the rule of law see Rajah, J (2015) '"Rule of Law" as Transnational Legal Order' in Halliday, T and Shaffer, G (eds.), *Transnational Legal Orders* Cambridge University Press 340 at. 361. On English as the global (legal) language see, among others: Mattila, HES (2016) *Comparative Legal Linguistics* (2nd ed) Routledge at 331 and following; Husa *Advanced Introduction* supra note 6 at 147-60.

[48] See Muir Watt, H (2012) 'Further Terrains for Subversive Comparison: The Field of Global Governance and the Public/Private Divide,' in Monateri, PG (ed.) *Methods of Comparative Law* Edward Elgar 270 at 272; Fletcher, G (1998) *Basic Concepts of Criminal Law* Oxford University Press.

community, global English infiltrates the legal sphere causing a shift within the precincts of the legal lexicon. The latter adopts patterns typical of hard-science parlances, such as in the case of climate change and sustainable development. In tackling global warming, for example, our mitigation strategies now have to do more with the concept of *governance* than with that of *government*. The former has indeed a wider scope than the latter, inasmuch as it engages in a dialogue with political and societal actors, and therefore '[impacts] across all the conventional areas' usually covered by institutional decision-making processes.[49]

The third argument considers how governance has noticeable repercussions on how to tackle climate change. The time has come to contain the effects triggered by both 'big emitters' – i.e., nations, the largest CO_2 contributors – and non-country actors, such as international aviation and shipping. Despite being big emitters, the latter are located outside the scope of the Paris Agreement.[50] The Agreement still resonates with the idea of tackling climate change after an institutional allure and through uniform patterns, which reflect transnational legal derivatives. As Zumbansen puts it, the 'methodological architecture that allows for both a conceptual and a socio-legal engagement with law in this, irreversibly and irreducibly global, context'.[51]

No wonder, therefore, that universalism does not offer a real, and viable, alternative to the institutional frame laid forth in the Paris Agreement. This agreement is indeed part of the 'construction of a nominally "global" frame' that is the 'political and geographical extension of the rule of the extant hegemonic bloc', which, in Mann and Wainwright's opinion, coincides with 'the capitalist global North [together] with its allies and, sometimes, China' and India.[52] Odd as it may seem, this assumption strikingly resonates with the 'World Series' syndrome in comparative constitutional studies. Only a small set of constitutional contexts, usually located in the Global North, have traditionally set the benchmark in relation to which all systems must be measured. Quite unsurprisingly, the capitalist block (namely the United Kingdom, the United States, and France) is paired with China and India.[53]

This equation, however, discloses several methodological flaws. As a form of generalisation of domestic legal systems, it still considers that the problems of global environmental policies are basically the same in time and space through the world because China possesses a 'model of state capitalism' which shares the same contradiction that lies at the heart of Western capitalism, that

[49] Schwella, E (2015) 'Conceptual and contextual perspectives' in Schwella, E (ed.) *South African Governance* Oxford University Press (Southern Africa) 9 at 13.

[50] Art. 17 of the 1997 Kyoto Protocol. On big emitters, aviation and shipping, see Larkin, A et al (2018) 'What if Negative Emission Technologies Fail at Scale? Implications of the Paris Agreement for Big Emitting Nations' (18) *Climate Policy* 690.

[51] Zumbansen, P (2020) 'Transnational Law: Theories & Applications', *TLI Think! Paper* 15/2020 at 5. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601385#>.

[52] Mann and Wainwright *Climate Leviathan* supra note 16 at 31; Zumbansen, P (2020) 'Transnational Law: Theories & Applications', *TLI Think! Paper* 15/2020 at 5. Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601385#>.

[53] Hirschl *Comparative Matters* supra note 2 at 192-193. See also Pillay A (2019) 'The Constitution of the Republic of India' and Zhang, Q (2019) 'The Constitution of China' in Masterman, R and Schütze, R (eds) (2019) *The Cambridge Companion to Comparative Constitutional Law* Cambridge University Press at 141 and 171.

is, an incredible ability to produce health and, at the same time, to commodify everything 'at the expense of the natural environment'.[54]

This pattern of generalisation also fails to recognise that China represents a striation within the global fight against climate change. Searching for China's support for climate change global policies means engaging with a model of state capitalism which is completely different from the Western one. Michael Palmer's characterisation of Chinese authoritarianism as a 'fragmented authoritarianism' is particularly instructive, as it reflects the varieties of approaches that these kinds of systems adopt as regards climate change.[55] Having replaced the United States as the leading carbon emitter in the world, the People's Republic is a leading player internationally in driving forward the struggle against climate change.[56] Domestically, it often undermines its international position a fact which is partly related to and disguised by its authoritarian character and the lack of transparency in its governance system.[57] Furthermore, its authoritarian decision-making offers a 'capitalist' model alternative to the Western 'discredited neoliberal variety that is associated with many of the world's […] environmental problems'.[58] And such authoritarian decision-making may indeed appeal to those living in the Global South, which are likely to bear the costs of a Western-driven ecological disasters.

Finally, scientific research is 'crucial for calibrating our understanding of the future'; yet we should be careful about 'expecting too much from science politically'.[59] Generalisations suggested by scientific research revolve around the concepts of mitigation and adaptation. As the Intergovernmental Panel on Climate Change (IPCC) stipulates, both concepts point to the 'adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities'.[60] Quite unsurprisingly, adaptation reflects the formalistic approach the law exhibits when confronting climate change. In normalising the idea of ecological and climate losses, it promotes a process of generalisation which makes adaptation the narrative of 'progress' of our time.

This also explains the resilience capitalism exhibits in climate-change-related legal studies. Adaptation and normalisation allow for a strategic use of the law when nation states confront global warming. By virtue of *strategic formalism*, the forces of capital seek a connection with the public sphere and code, i.e. generalise,

[54] Beeson M (2020) *Environmental Populism. The Politics of Survival in the Anthropocene* Palgrave McMillan at 25 and 29.

[55] Fu, HL, Palmer M, and Zhang, XC (2017). 'Introduction Selectively Seeking Transparency in China' (12) *Journal of Comparative Law* 203 at 204.

[56] Beeson *Environmental Populism* at 25.

[57] Fu, Palmer, and Zhang 'Introduction' at 206.

[58] Beeson *Environmental Populism* at 38.

[59] Mann and Wainwright *Climate Leviathan* supra note 16 at 13.

[60] IPCC (2018) 'Annex I: Glossary' [Matthews, JBR (ed.)] in Masson-Delmotte, V et al. (eds.) *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* In Press. Available at: <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_AnnexI_Glossary.pdf>.

their own interests through the law. Evidently, the prospect of benefitting from capital gains is 'more likely to find [its] blessings than claims that assert self-governance or seek to ensure environmental sustainability.'[61] In seeking such connection, the forces of capital provide political communities with a renovated foundation on which the latter might 'organise [their] practical affairs'.[62] In so doing, the forces of capital generalise their own interests, which become the new organising themes within communities. These processes of generalisation also have some bearing on our ecological commitments. They have indeed also resulted in a *commodifying state of mind* within our communities and favoured a change in our perception of spatiality. Living, as we do, in a 'buyosphere', or sphere of purchase, we practice *ecopiety*, which is a 'contemporary practice of environmental (or "green") virtue through daily, voluntary works of duty and obligation.' These practices, however, 'reflect and perpetuate the logics of global capitalism and market ideology.'[63]

THE GLOBAL 'HEALTH ORDER'. IS THE PANDEMIC 'BUSINESS AS USUAL'?

As already noted, the outbreak of the Covid-Sars-19 pandemic has added fuel to the fire of our ecological crisis. Like in the case of climate change, thenceforth, we must remain vigilant; as regards the current health crisis we must be careful of expecting too much from science politically.

A quick browse of journal articles and legal blogs discloses how legal scholars tackle the coronavirus outbreak subsequent to the 'global-business-as-usual' strategy. The *Coronavirus Government Response Tracker* holds this assumption.[64] Its *Stringency Index* confirms that the measures adopted throughout the world do not differ from those taken, say, in the Global North. These range from marginal responses to the implementation of the WHO guidelines, which, in constitutional terms, are usually implemented through declarations: depending on the case, these are inflected in different forms, such as states of disaster, emergency, and alarm. Several countries have therefore joined the WHO global scheme and adopted restrictions to fundamental rights by way of legally binding or soft-law measures.[65]

[61] Katharina Pistor *The Code of Capital* supra note 47 at 23.

[62] Mullender, R (1997) 'Context, Contingency and the Law of Negligence (or from Islands to Islands of Time)' (29) *Bracton Law Journal* 23 at 25. See also Pistor, K (2020) 'Theorizing Beyond "The Code of Capital": A Reply' *Accounting, Economics, and Law: A Convivium* < https://doi.org/10.1515/ael-2020-0101>. The connection with the public sphere also extends over the enforceability of private interests, thus giving 'capital its comparative advantage over other objects'.

[63] McFarland-Taylor, S (2019) *Ecopiety. Green Media and the Dilemma of environmental Virtue* NYUniversity Press at 3 and 5.

[64] Available at: <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>. On numerical comparative law in a time of pandemic see Nelken, D, Siems, M, Infantino, M, Genicot, N, Restrepo Amariles, D and Harrington, J (2020) 'COVID-19 and the social role of indicators: a preliminary assessment' *EUI Working Paper LAW* 2020/17. Available at: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725986>.

[65] See e.g., Stephen Thomson, EC (2020) 'COVID-19 emergency measures and the impending authoritarian pandemic' *Journal of Law and the Biosciences*, lsaa064. Available at: <https://doi.org/10.1093/jlb/lsaa064>.

The consequences of this transnational strategy are threefold. Firstly, the business-as-usual strategy is a variant of the processes of global convergence that have saturated the realm of constitutional law. A further derivative of global transnational law, the management of the pandemic advocates new universals in order to facilitate harmonisation of mitigation and containment measures, which, at the same time, stimulate economic development. In so doing, the way that nation States and the WHO are tackling the pandemic seems to reflect the same universalistic attitude we have already encountered in scholarly global law.

Secondly, the WHO has aligned itself along such universal standards. The compliance with the WHO guidelines has stimulated a process of generalisation in how to tackle the public health emergency. Its governance has paved the way to what has been termed as a 'pandemic democracy'.[66] Not only do the restrictions of fundamental rights reflect the WHO's 'Health Order', but they are also replicable everywhere irrespective of societies and territories.[67] Like in quantification, the WHO Scheme and mathematical models 'help us to understand what might happen in a given situation' and 'give us the ability to examine outbreaks without interfering with reality'.[68]

Finally, such governance will have long-lasting consequences on constitutionalism. Such homogenising trends will be particularly apparent within non-western legal contexts, such as Sub-Saharan Africa. Like the rest of the globalised world, not only is the continent experiencing the slow, albeit constant, acceleration of the pandemic. As Kucharski puts it, statistical models make the 'rules of contagion' predictable; however, we should confront the pandemic by considering the legal 'biodiversity' of the world. As for Africa, therefore, we should inflect our global response to the pandemic after its *legal and environmental contexts*.

By contrast, African national governments have joined the global response to the pandemic. The continent is therefore tackling the outbreak by adopting global standards. This will have some bearing on African communities, which scarcely fit into the global health scheme.

This also reflects another flaw of the universalistic approach to concrete transnational concerns, such as the pandemic. Not only are there 'different strains of [the] virus,' but, like climate change, 'outbreaks hit some places harder than others.' These concerns are extremely concrete, inasmuch as 'one outbreak won't necessarily look like another.'[69] In addition, the universal legal approach to the pandemic 'lacks effective means to intertwine those understandings with normative empirical elements', which means grasping the 'deep appreciation' of legal rules in comparative-health legal studies.[70]

[66] Landman, T, and Di Gennaro Splendore, L (2020) 'Pandemic democracy: elections and COVID-19' *Journal of Risk Research.* Available at: <10.1080/13669877.2020.1765003>.

[67] See Mason Meier, B, and Kastler, F (2018) 'Development of Human Rights through WHO' in Mason Meier, B and Gostin, LO (eds.) *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* Oxford University Press at 111.

[68] See Kucharski *The Rules of Contagion* supra note 16 at 20.

[69] Ibid at 12.

[70] See, respectively, Fermeglia 'Comparative Law' supra note 21 at 247, Watt 'Comparison' supra note 7 at 82.

How the pandemic is being managed does not reflect the needs of African societies. 'Conserving water' is essential when fighting 'against SARS-CoV-2 virus'[71]– but Sub-Saharan Africa suffers from endemic poor sanitation. It also has an 'immunocompromised population', which imposes both access to vaccines and narrowly tailored policies when fighting against the virus.[72] Its social, religious, and cultural practices hardly square with mainstream WHO guidelines.[73]

This means arranging the response by adopting inclusive policies, which reflect not the generalised, abstract commitment to human rights and development, but the desired futures of African societies. And this entails adopting a real Sub-Saharan perspective when tackling its societal concerns in a time of pandemic.

COMMON CONCERNS OF MANKIND? TRANSNATIONAL LAW V. TRANSNATIONAL COMMUNITIES

When pondering the way comparative law is currently practised, we consider nineteenth-century universalism 'naïve and self-deceptive'. Our global legal response to the pandemic, though, confirms the opposite; our globalised environment assumes that, in dealing with transnational issues, legal systems adopt common strategies, and 'become more universally like'. To put it differently, the 'evolutionary orientation' in comparative (and global) legal scholarship is still thriving.[74]

This stance finds fertile ground in transnational law, a concept which is closely related to the rise of global law and extensively studied by comparative scholars.[75] Apparently, transnational law seems to depart from the universalistic approach of global law, inasmuch as it creates contextual responses to legal issues surpassing state borders (such as environmental policies, mobilisation of goods, services, and capital). Therefore, transnational law has to do with communities (especially commercial communities) whose activities transcend borders and state-related law-making. Yet, the idea of 'transnational legal ordering' resonates with the above-mentioned processes of globalisation.

No wonder, therefore, if comparative lawyers assume that global law and transnational law are closely intertwined; in several cases, they are indeed used interchangeably. In particular, transnational law is considered servient

[71] Haddout, S et al (2020) 'Water Scarcity: A Big Challenge to Slums in Africa to Fight against COVID-19' (39) *Science & Technology Libraries* 281.

[72] See Editorial (2020) 'An African plan to control COVID-19 is urgently needed' (396) *The Lancet* 1777. Ahmad Lone, S and Ahmad, A (2020) 'COVID-19 pandemic – an African perspective' (9) *Emerging Microbes & Infections* 1300.

[73] Festus Jaja, I et al (2020) 'Social distancing: how religion, culture and burial ceremony undermine the effort to curb COVID-19 in South Africa' (9) *Emerging Microbes & Infections* 1077.

[74] Rosen, L (2003) 'Beyond Compare' in Legrand, P, and Munday, R (eds.) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 493.

[75] See, among comparative lawyers, Siems, *Comparative Law* supra note 2 at 305 and following; Husa *Advanced introduction* supra note 6 at 32. See also Maduro, M et al. (eds.) (2014) *Transnational Law: Rethinking European Law and Legal Thinking* Cambridge University Press; and Zumbansen, P (ed.) (2020), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* Cambridge University Press.

to the processes of globalisation,[76] which ultimately means reinforcing legal universalism. Precisely because it surpasses national jurisdictions, it replicates Jerome Hall's assumption that comparative law is nothing but a 'transnational theory of what is common in all legal systems'.[77] At the same time, transnational law is a derivative of legal globalisation, inasmuch as integrated economies and communities 'necessitate legal systems that are more transnational'.[78]

Transnational law has been forged by the same forces of capital that, as noted above, have traditionally sought a connection with the public sphere, tending to influence and shape its decision-making processes. Evidently, the connection with the public sphere is functional to promote interests that lie at the heart of commercial communities, such as 'freedom of contract and alienability of property'.[79] Concerned, as they are, about their own transnational economic interests, they suggest the political community adopt legal devices through which their practical affairs might be organised. To this extent, transnational legal derivatives are the outputs of further processes of legal generalisations functional to the protection and enforcement of their own interests. Thus, the holders of global capital utilise the law and create cross-border regulatory systems that are suitable for their 'private ordering in the name of party autonomy'.[80]

Through generalisation, transnational law undergoes a process of 'objectivisation' which denies the relevance of local legal variations. In so doing, however, it practises a variety of legal universalism, which is aimed at protecting sectional interests lurking 'behind the façade of universalist values'.[81] Such a universalist gesture ignores the contexts within which transnational law is applied. Firstly, it replaces former local, i.e. territorial, legislation with new legal devices that possess universal substance because of their conveying the universally accepted values of economic sectionalities. Secondly, it denies the relevance of the interests of several other discrete sectionalities that lie beneath local legislation. In addition, transnational law also shares the features of functionalism; indeed, it leaves out of the picture the striations that may disturb the application of transnational derivatives wherever economic interests deem it fit to do so.[82] As a result, the interests of economic sectionalities are turned into

[76] See Husa *Advanced Introduction* supra note 6 at 49 (both items are 'based on legal dimensions of globalisation'); Walker, N (2014), 'Rethinking aloud' in Maduro, M. (eds.) *Transnational Law: Rethinking European Law and Legal Thinking* Cambridge University Press 381 at 385 (global law is 'one particular subset of transnational law embracing *any endorsement of or commitment to the universal*').

[77] Hall, J (1963) *Comparative Law and Social Theory* Louisiana State University Press at 62.

[78] Rosen 'Beyond compare' supra note 74 at 502.

[79] Husa *Advanced Introduction* supra note 6 at 79.

[80] Muir Watt 'The relevance' supra note 12 at 9.

[81] Khilnani, S, et al. (2013) 'Introduction. Reviving South Asian Comparative Constitutionalism', in Khilnani, S, et al. (eds), *Comparative Constitutionalism in South Asia* Oxford University Press India 11. 'A transnational imagined community' is 'implicit to the production' this façade: see Rajah '"Rule of Law" as Transnational Legal Order' supra note 47 at 368.

[82] See Graziadei 'The Functionalist Heritage' supra note 11 at 109-10 (functionalism 'brackets whatever is found in between the 'facts' and their' legal consequences' as reconstructed in operative terms); Ward, I (1995) 'The Limits of Comparativism: Lessons from UK-EC Integration' (2) *Maastricht Journal of European and Comparative Law* 23 at 31 (on comparative law being used as 'a means of effecting sameness and suppressing difference'); Michaels, R (2019) 'Beyond Universalism and Particularism in International Law—Insights from Comparative Law and

the organising theme of political communities, and count as the interests of the whole.[83]

In a time of climate change, this kind of legal functionalism inevitably encroaches upon what Wainwright and Mann term *social functionalism*. What is now considered 'functional' is a further generalisation of sectional economic interests. Among the others, there is 'entrepreneurialism', which has 'become an almost universally celebrated quality in capitalist societies'. According to Wainwright and Mann, this type of *social fitness* is the ultimate form of 'individual [i.e., sectional] adaptation to the contemporary moment'. And as we have already noted, the concept of adaptation perfectly fits into the narrative of 'progress' of our time.[84]

The progress of social adaption thus revolves around the idea of sectionalism, i.e., the 'confinement of interest to a narrow sphere, narrowness of outlook, undue accentuation of minor local, political, or social distinctions'.[85] Within adaptation, therefore, sectional interests compete with other global concerns, such as ecological issues; like striations, the latter are shared by communities that lie across borders. This means, it goes without saying, that our political communities have become 'transnational' communities.

Here, I argue, lies a further flaw in global (transnational) legal scholarship. Like cross-border economic interests, ecological concerns are shared by transnational communities; but, unlike economic interests, these concerns are extremely concrete. Beyond the global law, there are usually 'a relatively small numbers of global law firms and advocates, nationally ranked global law schools and academics, and globally networked judges'; but there are also communities.[86] Climate change is certainly an international, cross-border, and domestic phenomenon. As a transnational phenomenon, it transcends borders; as a concrete concern, it strikes indiscriminately on a territorial basis. *Transnational Climate Law*, therefore, must be 'multi-scalar, and its responses 'multi-jurisdictional' so as to reflect our troubled reality.[87]

From the perspective of comparative law, legal responses and mitigations strategies must adopt a twofold methodological approach. On the one hand, transnational strategies and responses must acknowledge that legal diversity is our strength when it comes to considering how our ecological concerns and distressed habitats are affected by climate change on a territorial basis. Understanding legal diversity allows us to contextualise our mitigation strategies

Private International Law' (99) *Boston University Law Review* 18 at 20 (transcending 'the opposition of similarity and difference' is visible 'in the trend from comparative law to transnational law').

83 On objectivisation see Arnold 'Reflections' supra note 39 at 7. See also Pistor *The Code* supra note 47 at 154; Muir Watt 'The relevance' supra note 12 at 2.

84 Wainwright and Mann *Climate Leviathan* supra note 16 at 70.

85 *Sub vocem* 'Sectionalism' *Oxford English Dictionary*. Available at <http://www.oed.com/view/Entry/174596?redirectedFrom=sectionalism#eid>.

86 Walker, N (2015) *Intimations of Global Law* Cambridge University Press at 42. On transnational law as the derivative of a 'depeopled scholarship' See also Affolder, N (2019) 'Transnational Environmental Law's Missing People' (8) *Transnational Environmental Law* 463 at 466.

87 See Etty, T et al (2018) 'Transnational Climate Law' (7) *Transnational Environmental Law* 191 at 200.

so as to adequately consider how global warming is affecting our concerned communities.

On the other hand, we should not reduce our concrete transnational concerns to abstract academic exercises in futility. This means revitalising one of the well-established features of comparative methodology, which assume its empirical, 'problem-based approach […] as the starting point of a comparative analysis'.[88]

In facing how climate change impacts on the law, we need 'the flexibility of comparative [legal] methodology'. Not only is this an 'asset in today's transnational legal world', but its empiric approach to legal issues is also particularly apt to explore the connections between legal systems, their environmental contexts, and the concrete concerns of transnational communities struck by climate change.[89]

GLOBAL CONSTELLATIONS. THE PITFALLS OF TRANSNATIONAL LAW

Whatever form they take, transnational and global legal approaches may be still addressed through the lenses of comparative law. To this extent, our discipline discloses a methodological toolbox which is well suited to tackle the legal implications of our ecological concerns. As we saw in the previous section, the demise of our formalistic attitude to globalisation requires more than a general commitment to abstract universal principles. By contrast, the shift from transnational law to transnational communities demands the revitalisation of our empirical methodological approach.

In this section, I will consider a further issue, which is again methodological and substantive. It is methodological, as it involves considering the cross-disciplinary potentials of comparative law; it is substantive, since it relates such an interdisciplinary approach to the governance of both our transnational communities and their ecological issues.

The admixture of cross-border legalities which is transnational law forces us to re-examine the network of relations between state and non-state actors of legal globalisation. Firstly, and owing to the segmented nature of transnational law, private sectionalities propagate, and therefore generalise, their own interests at several scales and in different legal orders. Secondly, processes of generalisation permit sectional interest to apply what Günter Frankenberg terms 'strategic comparison'. In turn, strategic comparison allows us to do 'comparative law by numbers'.[90] In applying global legal derivatives, transnational actors locate themselves in the 'mature' and 'rationally superior' *Western legal tradition*; and, within its precincts, the *common law* prevails over the *civil law*. In numerical comparative terms, indeed, the common law matches the criteria adopted

[88] See Siems *Comparative Law* supra note 2 at 32. On such an approach in climate change-related legal studies see Fermeglia 'Comparative' supra note 21 at 249; Wanwright and Mann *Climate Leviathan* supra note 16 at 54 and 177.

[89] Husa *A New Introduction* supra note 2 at 55.

[90] See, respectively, Frankenberg 'Critical Comparisons' supra note 5 at 423; Michaels, R (2009) 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (57) *The American Journal of Comparative Law* 765.

by the forces of capital, which revolve around the idea of elevated economic performances measured through numeric indicators.

Thirdly, sectionalities seek connections with several transnational legal orders in an attempt to code their own interests through the law. As is evident, they code these interests in a coordinated way through the constellation of legal orderings which is transnational law.[91] How the connections work is far from being dysfunctional; in a case of conflict between economic and non-economic interests, the former interests prevail by virtue of their coding through transnational law. Indeed, 'transnational law's alleged private-law bias is hardly surprising'.[92]

Not only do the forces of capital impact on, and therefore reduce, states' ability to control how multinational corporations operate, but they may also influence how our transnational communities organise constitutional arrangements. This consequence is a further output of legal generalisations. The paradigm transnational actors propose usually coincides with that of liberal democracy: 'the one thing that has been almost completely absent from the 50 or so cases of attempted democratization since 1974 is experimentation beyond the basic institutions of liberal democracy.'[93]

Liberal democracy perfectly fits the new universals of transnational law. Indeed, 'Western liberal democracies have acted together to construct the current system that enables the global economy to operate.'[94] Liberal democracies are thus 'the only viable societal model left, for only they are compatible with economic success and [the] rapidly integrating information-intensive world economy.'[95] The mutual support for capitalism and for the nation-state opposes the 'production of useful scientific knowledge' in environmental issues and oftentimes bars 'democratic participation' in related decision-making processes.[96] The argument is indeed persuasive because it arranges the different sectionalities of our transnational communities around a power-sharing organising principle. It assumes that there is an uneven distribution of wealth; and yet, this does not prevent each member of the community from gaining access to it.

Although it does not reflect an egalitarian commitment, the argument is egalitarian in its commitment, because it gives us all the illusion of taking part in the global distribution of wealth. In addition, Ruth Houghton has identified how processes of decision-making can give the illusion of democratic legitimacy,

[91] See Schaffer, G, and Coye, C (2020) 'From International Law to Jessup's *Transnational Law*, from Transnational Law to *Transnational Legal Orders*' in Zumbansen, P (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* Cambridge University Press 126.

[92] See Siems *Comparative Law* supra note 2 at 311. The quotation is from Zumbansen 'Transnational Law' supra note 52 at 6.

[93] Schmitter, PC (1995) 'More Liberal, Preliberal, or Postliberal' (61) *Journal of Democracy* 15 at 16.

[94] Bohman, J (2007) *Democracy across Borders: From* Dêmos *to* Dêmoi The MIT Press 28.

[95] Kurki, M (2010) 'Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion' (12) *International Studies Review* 362 at 366.

[96] Howkins, H (2017) *Frozen Empires. An Environmental History of the Antarctic Peninsula* Cambridge University Press at 8.

when in fact they are exclusionary and little decision-making power is given to the constituents.[97]

'SYNOPTIC DELUSIONS': THE DEMOCRATIC ALLURE OF LEGAL DECLINE

As we saw in the previous sections, strategic formalism assumes that our legal, and biological, decline is consistent with the assumption that adaptation is the progress of our time. Quite evidently, the predicament totally departs from what comparative legal studies presuppose, i.e. the sustainability of legal variety and diversity.

When examining how our politico-legal arrangements are being affected by global warming, I understand that it is impossible to confront, say, the pandemic or climate change by adopting the global-response strategy proposed by global legal scholarship. The application of generalisations and 'global-business-as-usual' strategies, indeed, are unlikely to 'produce predictable outcomes as laboratory experiments might'.[98]

Making this assumption may lead us to be fall prey to Hayek's 'synoptic delusion'. Universalism gives us the illusion that, from a central standpoint, we can access all the information we need to respond effectively to our ecological problems. In Hayek's opinion, this is the 'characteristic error' of those who underestimate 'concrete facts', such as the complexities of our environmental crisis. Besides this, the 'synoptic delusion' replaces the social reality we seek to regulate with 'a surveyable whole of all data' complemented by transnational (universal) legal derivatives.

Firstly, we must recognise that complexity is an admixture of forces that beset us and, at the same time, also create opportunities for us. Secondly, the complexity which is legal variety (as well as other forms of pluralism: political, economic, cultural) allow us to tackle climate change with a contextual approach. This prevents us from remaining intoxicated by 'the sense of unlimited power' that arises from universalism and its process of ecological adaptation.[99]

Such a synoptic delusion, I assume, reflects a kind of egalitarian misery which is the paradigm of adaptation promised to us by processes of generalisation.[100] Tackling the decline is indeed a misery—it has a democratic allure and sounds so egalitarian in how it will consume our lives. But, as the eulogisers of consumerism would argue, this democratic misery is also our strength. Our progress is caused by our adaptation to such an egalitarian decline—during which, however, the wealthy will decline in better spirits than the lowly and marginalised. In times

[97] Houghton, R (2019) 'Looking at the World Bank's Safeguard Reform through the Lens of Deliberative Democracy' (32) *Leiden Journal of International Law* 465.

[98] Carlarne and Farber 'Law Beyond Borders' supra note 34 at 19.

[99] See Hayek, FA (1973) *Law, Legislation and Liberty*, Vol I, *Rules and Order* Routledge & Kegan Paul, respectively 14, 8, 14-5. I owe this set of reflections on Hayek's predicaments to Richard Mullender. See Mullender, R (2009) 'Negligence, Public Bodies, and Ruthlessness' (72) *Modern Law Review* 961 at 973.

[100] For more on the concept of 'egalitarian misery' see Mullender, R (2020) 'On the French Revolution and the Programmatic Imagination: Hilary Mantel on Law, Politics, and Misery' in Mullender, R et al (eds.), *Law and Imagination in Troubled Times: A Legal and Literary Discourse* Routledge 133 at 153.

of political and environmental crisis, however, the conveyancing of the political obligation should seek an innovative, and equitable, balance of bargaining powers and conflicting interests.

Again, a methodological change is required if we want to do comparative law in a time of climate change. Such a change is also supported by legal comparativists. Mathias Siems, for example, advocates for 'a more interdisciplinary approach than under traditional comparative law' when it comes to comparing and assessing 'rules of transnational and global law.'[101] I understand that this implies a change in our mood, as we cannot deal with transnational concerns by maintaining our current positivistic approach in climate-change-related studies. To put it bluntly: we must discard it and engage in cross-disciplinary investigations.

Comparative lawyers may contribute to the conversation in several ways. Take, for example, how this cross-disciplinary shift takes place within the context of law and the humanities. We may indeed resolve to address the politico-legal consequences of climate change by focusing on how literary outputs convey our transnational ecological concerns. Among these, there is a non-fictional literary genre which has arisen only very recently. It is the 'climate-change pop-science:' prompted by the insurgent ecological crisis, it comprises essays, pamphlets, letters, and other writings related to the outcomes of our burning the planet. Although it encompasses a variety of approaches and styles, climate-change pop-science conveys a convincing 'callout to the public […] in response to climate and ecological emergency.'[102] Furthermore, it assists legal scholars in evaluating how global warming is concretely altering the organising themes within political communities.[103] When referring to the threats posed by climate change, our non-fictional texts share a common feature. In avoiding generalisations and 'one-size-fits-all' mitigation solutions, they point to our insurgent ecological crisis with the aim of capture the broadest range of striations disturbing the radiant future universalism promises to the whole of humankind.

This alternative pattern of cross-disciplinarity runs somewhat counter to the 'paradigm of biological decline' which is predominant 'among ecologists, environmentalists and conservationists'. This is not to deny the ecological threat. Despite the changes caused by anthropogenic drivers, not only does ecological biodiversity respond 'by evolving', but it also proposes a new biological organising theme whereby 'the biological diversity of the Earth may be increased'. Like biology, comparative law helps us to delve into the ecological concerns which are shared by the whole of humanity. We should shake off the 'pessimism-laden, loss-only view' of our future, which is reflected in how, in

[101] See Siems *Comparative Law* supra note 2 at 311.

[102] Thompson, E (ed.) (2019) *Letters to the Earth. Writing to a Planet in Crisis* Collins.

[103] In addition to *Letters to the Earth*, see Wallace-Wells *An Uninhabitable Earth* supra note 17; McFarland-Taylor *Ecopiety* supra note 59; Extinction Rebellion (2019) *This Is Not A Drill. An Extinction Rebellion Handbook* Penguin; Thomas, CD (2017) *Inheritors of the Earth. How Nature is Thriving in an Age of Extinction* Allen Lane; Aronoff, K et al. (2019) *A Planet to win. Why We Need a New Deal* Verso); Attenborough, D (2020) *A Life on Our Planet: My Witness Statement and a Vision for the Future* Ebury Press; Pettifor, A (2019) *A Planet to win. Why We Need a New* Verso; Klein, N (2019) *On Fire. The Burning Case for a Green New Deal* Penguin; Wainwright and Mann *Climate Leviathan* supra note 16.

a time of climate change, universalising trends manage legal complexity by simplifying it.[104]

This kind of cross-disciplinary engagement in climate-change-related studies is practised throughout a variety of legal responses. For example, cross-disciplinary commitment entails continually '[stirring] up what the law' and its universalistic approach set down.[105] It is no accident that 'stirring the law' is a typical Anglo-British legal device, which describes the relation between equity and its formalistic counterpart, i.e. the more 'classical' common law as it had been moulded in Westminster Hall. To this extent, equity offers us a paradigm applicable to cross-disciplinary research in this ambit. How it stirs the law reminds us that it is 'a door having one side within the law and one side without,' whilst strategic formalism prefers 'to keep the door closed and to see only their side of it'.[106]

OUR CROSS-DISCIPLINARITY COMMITMENT: STIRRING THE GLOBAL LAW

In examining how globalisation impacts on legal scholarship, this paper has drawn a connection between two types of impoverished habitats, which are legal variety and our fragile environment.[107] Whereas the demise of the former is caused by the enthusiastic support global law enjoys among legal scholars, the decline of the latter is caused by our *commodifying state of mind*. Both strands of impoverishment intertwine, because global warming acts as a driver triggering transformative changes within our communities. Bearing this in mind, the paper intended to reappraise the role of comparative legal scholarship within the global-law conversation *in a time of climate change*.

To this extent, it has proposed a scholarly paradigm, which revolves around the following constitutive features: (1) the paradigm causes a shift from transnational law to transnational communities; (2) it leads us to reappraise our empirical methodological approach when tackling the concerns of our transnational communities; finally, (3) comparative law may contribute to the legal examination of the ecological concerns shared by the whole of humanity.

As the paper has disclosed, these features cannot be assessed separately as if they were in watertight compartments. Quite the opposite; they mutually interact. The shift from transnational law to transnational communities, for example, has meant challenging the legal universalistic approach, through which mainstream comparative law turns out to be servient to the purposes of global law in climate-change-related issues. As regards transnational law, this has also meant *being subversive*, inasmuch as it has disclosed the ideological presuppositions of processes of generalisation. Transnational devices possess universal substance

[104] Thomas *Inheritors of the Earth* supra note 99 at 30, 117, and 9 respectively.

[105] Watt, G (2009) *Equity Stirring. The Story of Justice Beyond Law* Hart at 1.

[106] Ibid.

[107] According to Jaakko Husa, like alien species impoverish endemic habitats, legal transplants have some bearing on legal systems, each of which is an 'ecosystem of law that contains species that may become threatened by invasive legal species'. Husa, J (2020), 'Language of Law and Invasive Legal Species – Endemic Systems, Colonisation, and Viability of Mixed Law' (9) *Global Journal of Comparative Law* 149 at 155.

because they convey the generalised, and therefore universally accepted, values of economic sectionalities. At the same time, this has revealed that we cannot propose innovative responses to the concerns raised by climate change by merely adapting 'new' ecological issues to 'traditional' legal frameworks. Being subversive, then, runs counter to the idea of normalisation of ecological and climate concerns in global legal studies.

Such a subversive approach has entailed reframing our methodological attitude in a time of climate change. Comparative legal studies must change their mood: our approach must discard the narrative of legal decline, as well as the idea that adaptation is the sole type of progress of our time. Comparative law has to revitalise its pristine empirical, and problem-based, approach to transnational concerns; at the same time, it should become more pragmatic, and therefore develop an even more cross-disciplinary attire. We must remain vigilant, and, like equity, we should keep the door of the law open to a constant conversation with the world and its environmental concerns. Being cross-disciplinary indeed involves unceasing conversations with the forces within our societies, whose callouts to the public in response to climate and ecological emergencies stretch our thinking into the future.

In this paper, I have termed such conversation 'stirring up' the global law. This type of legal mobilisation does not mean breaking legal rules, but merely bending them. The comparison with equity assists us in redeeming the bonds, interests, and organising themes within our communities and in challenging strategic formalism incrementally. By progressively introducing a set of 'comparatively novel legal principles', we might therefore 'override the older jurisprudence' that advocates transnational legal derivatives as the new organising themes within societies 'on the strength of [their] intrinsic ethical superiority.[108] In so doing, we give rise to a new organising principle, which reflects 'the view that, as conceptions of justice change over time, so too should' our legal rules in a time of climate change.[109]

And this, I argue, may forestall the inception of new forms of comparative law in a time of climate change, which, like equity, should be able to stir the law and open the 'side of door' to the plurality of forces and interests which populate our communities. Assisted, as we are, by unceasing exercises of comparative legal imagination, we stir the law and explore it with a subversive, empirical, and critical gesture. In this lies our commitment; the law might effectively 'be interpreted and applied in a manner that responds to changing conditions' and challenges that climate change and global law are likely to pose in the foreseeable future.[110]

[108] Sir Henry Sumner Maine *Ancient Law* supra note 30 at 45.

[109] Mullender, R (1997) 'Context, Contingency and the Law of Negligence (or from Islands to Islands of Time)' (29) *Bracton Law Journal* 23 at 27.

[110] Wenta, J et al. (2019), 'Enhancing Resilience and Justice in Climate Adaptation Laws' (8) *Transnational Environmental Laws* 89 at 108.