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The New Normative Spaces of Globalization

On International Commercial Arbitration in Asia

and the Principles of Asian Contract Law

OF BENTŌ AND BAGELS: GLOBALIZATION AND NEW NORMATIVE SPACES

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The terms "normative" and "normativity" have been associated with "spaces" by numerous authors in a wide variety of disciplines (e.g., O'Shea 2010, DeOliveira et al. 2007, Berman 2006, Maleuvre 1999), including law (Lixinski 2008, Ruiz Fabri 2003, Delmas-Marty 1994; cf. Berman 2007, "hybrid legal spaces"). No one can deny that suggestive ambiguity may be stimulating (Empson 1947), perhaps least of all those who organize academic conferences. Nonetheless, the purpose of the present conference and workshop is to try to consolidate a more concrete notion of "normative space" in the context of legal studies, and to explore in what ways it might be a useful unifying notion for scholars, law-givers and practitioners.

What is a "normative space"?

Some earlier legal writers have used the term "*éspace normatif*" to generalize the notion of a national legal system. For example, Girard 2003 cites the following as examples of national spaces: English public law, French criminal procedure, French administrative law, French private international law, and Russian law (as such); and the following as examples of international spaces : the International Court of Justice, the International Criminal Court, the WTO and its dispute resolution procedure, and the European Convention on Human Rights and its juridical organs. In her view, and those of the authors of a volume on due process in normative spaces to which she was writing an introduction, the concept of normative space permits more complex types of comparison than had been traditional. While she also declared that normative spaces are "open" and "can communicate with each other," the mechanisms and examples of this were not so fully fleshed-out.

Including in presentations at recent seminars at the Maison Franco-Japonaise (2011, 2009), Gilles Lhuilier has used the term "normative space" in a somewhat more radical sense, to capture what he observed while negotiating project finance transactions in Africa. The various parties, who could mostly be grouped dichotomously as representing the interests of China or of an African nation, were actually organized under the laws of several different jurisdictions. The several contracts in a deal were also

governed by the laws of different jurisdictions, not all of which were domiciles of parties. Within the same contract, specific contract provisions or issues might be governed by separate choices of law. The texts of some provisions themselves were often based on foreign models, such as English or American contracts, originating outside the jurisdictions whose laws will apply. The governing language might be one in which none of the parties' representatives are native. And even when the national laws of the home jurisdiction of one party or another did apply, those national laws were very likely to have been influenced by the legal systems of former colonial occupiers.

In this context, the four corners of each contract bound a "normative space." Lhuilier emphasized the way in which this space gets filled: the laws and other norms that apply (i) come from a **mixture of** national (and possibly other) legal systems, and (ii) are **selected** by the parties in an eclectic (though not at all arbitrary) fashion. Whereas for Girard (2003) the notion of normative space seems to serve as a way of identifying domains where law "happens," Lhuilier's notion shifts attention to the space as a locus of mixture and choice. In this view, the "communication" between different systems and domains of law is the most salient feature of the space.

A culinary analogy can be found in the humble *bentō*, or Japanese box lunch. This usually consists of as assortment of small dishes placed within a frame (*bentōbako*) of lacquered wood, or more recently, of plastic. Subdivisions may be "hard" (of wood, and either removable or integrated into the box itself), "soft" (such as little paper cups or wrappers, or pieces of greenery) or nonexistent. The contents could in principle be one main dish, such as grilled fish on rice, but more usually are a selection of small dishes that the buyer can choose. Japanese and "Western" style dishes can easily be mixed – though whether these dishes are of Japanese or "Western" provenance isn't always so clear anyway.

For example, *tonkatsu*, a "typically Japanese" lunch dish consisting of a fried breaded pork cutlet, is derived from Portuguese cuisine. It may be alongside along a piece of grilled fish, some rice and Japanese pickles – as well as potato salad, spaghetti and a small green salad. Yet in this last triad, the recipes will be distinctively Japanese, and the greens will be inscribed with intricate swirls of mayonnaise according to the local art.

Where do normative spaces arise?

The image of Japanese potato salad is a good reminder that the notion of a normative space as a locus of mixture and choice doesn't apply only to contracts. The modern Japanese system of civil law born in the 19th Century consciously modeled itself on the example of German law. Even today, German law serves as a relational common law (Glenn 2007) available to fill in gaps in Japanese law, though judges may look to additional sources and models, such as American law, as well. Relational common laws, "reception" of foreign law, postcolonial law and other phenomena of interest to scholars of national legal systems all rest on the elements of mixing and choice similar to those in contract-based normative spaces.

Transnational regimes of private international law and private ordering are additional contexts in which choice and mixing of legal norms come into play. The two main presentations to the present seminar provide vivid illustrations. Naoki Kanayama's contribution describes the efforts of a multi-national group of Asian contracts scholars to develop a private convention of contract law principles, drawing from multiple national traditions. And Yoshihisa Hayakawa's contribution describes the roles of choice and mixing in developing the infrastructure for private commercial arbitration in Asia.

Although not represented at the present conference, public international law is another area in which similar phenomena occur. Here the work of Amartya Sen in combining philosophical notions of justice from Western and South Asian sources (Sen 2009) might be an exemplary case.

So national legal systems, as well as private, transnational and public international ordering regimes, all can serve as *bentōbako*. It remains to be investigated whether other structures can be added to this list.

What good is the category of "normative space"?

So far, scholars of legal systems and of comparative law have been getting along quite well without the "normative space" idea. Indeed, it's a commonplace among comparativists that "all legal systems are mixed systems." And the shapers of transnational legal and private ordering regimes, as well as globe-trotting legal practitioners, have been happily

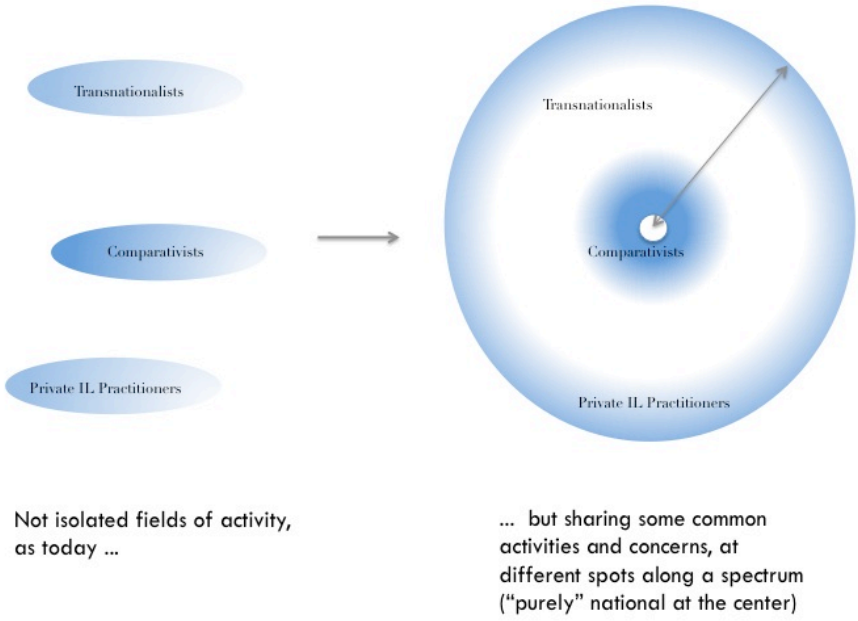
mixing and choosing law without perhaps reflecting much on it or on how their activities relate to those of judges and legislators who import foreign legal concepts into their own national systems. Occam's Law counsels that we shouldn't multiply entities without necessity – so what added insight can we gain from a category of "normative spaces"?

A hasty reply is that it's a unifying concept. All of these activities and phenomena involve mixing and choice from a variety of national legal regimes. Unfortunately, this reply runs the risk of being as facile as it is obvious, if we allow "normative space" to be simply an amorphous catch-all term for a wide range of heterogeneous phenomena.

Can the term steer us toward any synthetic insights about what all these diverse activities might have in common? For Ruiz Fabri (2003) and her collaborators, the idea of normative space facilitated a comparative analysis of due process (*procès équitable*) across the heterogeneous range of spaces cited above. But if we broaden this idea to include contracts and other objects, and focus especially on the mixing and choice that occur within a space, what do we gain?

That we can gain something is the working hypothesis of this workshop.[1] Further research may falsify or substantiate this hypothesis, but for the time being, the evidence is tantalizing. Consider Figure 1:

[1] Proposing a category as an hypothesis to be investigated empirically might not be so common in law practice or legal studies, but there are plenty of examples in other fields. A microbiologist Carl Woese (2004; 179) has pointed out, "conjecture is necessarily the mainstay of defining and understanding issues" in the study of biological evolution. This approach isn't without perils. Woese describes with some irony how the category of "prokaryote" was used for several decades as a shortcut by which "the concept of a bacterium could be gained without having to know the natural relationships among [the various phylogenetic groups of] bacteria" (177) – i.e., the category masked a certain complacent ignorance. Economics provides another unfortunate object lesson. When first describing an inverted-U curve relationship between income inequality and a continuous increase in a country's per capita GDP, now known as "the Kuznets curve," Simon Kuznets (1955; 26) called it "5 per cent empirical information and 95 per cent speculation, some of it possibly tainted by wishful thinking." Nonetheless, developmental economists almost immediately reified it into a "law," and designed aid programs that deliberately targeted funds to the wealthiest residents of poor countries, with unfortunate results (Moran 2005). As Woese puts it, "it is not guesswork per se that is anathema; it is guesswork, conjecture, and the like that masquerade as problem-solving, interest-ending fact" (2004; 179).



The left side of the figure presents various activities of practitioners and scholars as they are without the "normative space" concept – i.e., as fairly autonomous fields.

Suppose we map these fields to the circular object on the right side of the figure. Along the radius of the circle let's posit a gradient from a "pure" national legal system at the center to a maximally mixed (whatever that might mean) set of applicable laws at the boundary. [2] Since the comparativists are right, that all legal systems really *are* mixed, the exact center of this circle is missing. That is, the diagram is topologically equivalent to a bagel (in two dimensions, at any rate).

This mapping suggests that comparativists studying the "reception" of foreign legal concepts and similar phenomena have been focusing their attention relatively close to the center of the bagel. Those formulating transnational legal schemes have been engaged relatively closer to the boundary. Locating their activities along a continuous radial gradient

[2] An argument might be made that, say, private and transnational mixing activities should be along different axes; I ask the reader's indulgence to let me to use a simpler heuristic for now.

instead of within entirely distinct domains is a way of saying that all these phenomena and activities are examples of the same kind of thing.

Again, this is a working *hypothesis*, which future research will substantiate or falsify. But if it holds up, it could be unifying in more than a superficial sense. For one thing, it could mean that scholars and practitioners working in hitherto separate fields might be able to learn from each other's discoveries.

One important class of potential discoveries concerns possible constraints on mixing – i.e., about types of mixing that don't work so well. It's not hard to find a simple illustration of such a constraint in what we might call brute-force transposition. If you take a chunk from another jurisdiction's statute and incorporate it into your own legal system without modification, it probably won't work out so well. You run into similar problems if you dump it into your own transnational private ordering system without trying to harmonize it with the other bits and pieces and new ideas you are mixing in. And again if you copy a chunk of someone else's contract and paste it into your own without modification, you'll probably regret it (all the more so if the source and the target are governed by different jurisdictions' laws).

Of course, few people actually would take such a simplistic approach. Yet it illustrates a mixing technique that is a bad idea *in multiple contexts* – at various spots along the radius in our diagram.

Perhaps there are other techniques that are similarly awful in many contexts. Or others that are particularly successful. Then the notion of normative space will have helped us to identify some facts about the mixing of laws that can be useful guides for those focused on national systems, as well as for those framing transnational or other systems for public or private ordering. With any luck, we might even be justified in calling these facts (roughly) "universal" principles for mixing laws.

Does this make sense? Is this worthwhile? The first step toward an answer is to sharpen the notion of normative space, so that it can become a productive seed for future study.

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