Academic Knowledge
Three Views on Global Law and Global Legal Theory (Annelise Riles, Kō Hasegawa, Gilles Lhuilier)

Is there a global legal theory? Not a unique theory on global law, but a global theory of law, a theory made global through its common objects and methods? Such a question represents a kind of ethnological study on the astonishing tribe of global "academics", their uses and practices, that is to say their "local knowledge" to quote the ethnologist Cliford Geertz.

To start with, it is now obvious that contemporary legal thought is undergoing a profound mutation qualified by the French epistemologist Bruno Latour as "a passage from law as an institution to law as an enunciation"[1]. Now, a very strong "coherentist" stream is building legal thought on a unique theoretical pattern, with a semiological origin, in spite of extremely diverse sources, comparisons and established theoretical systems. This new idea shows an evident opening to social sciences ("Law and…"). Concepts are therefore being deeply renewed and, above all, the legal is being widened, no more limiting itself to formulating questions about legal rules, but also questioning their relations to culture or cultures, as well as individual or collective identities.

This slow but now irreversible epistemological break, from a pattern inspired by the sciences of nature to one which is closer to the sciences of language, is linked to the present globalisation of legal thought which, for the past thirty years, has been marked by an increased circulation of these new wide-opened components of legal thought, issued by interdisciplinary theories travelling from continents to continents, and enabling, at last, the rise of a already worldwide, and not only western, point of view. The emergence of this "world legal thought" is linked to new intellectual shifts and journeys.

But can we describe more precisely this emerging global theory, not as a global "substantive" theory, of course, but as a set of common academic practices?

I make the hypothesis that international – global – legal theories are now facing the "refiguration of social thought" described twenty years ago by the anthropologist Cliford Geertz in his 1980 article *"Blurred Genres: The Refiguration of Social Thought".*

[1] B. Latour, La fabrique du droit. Une ethnographie du Conseil d'État, Paris, La Découverte, 2002.

Some of Geertz's tricks are now commonly used by legal academics sometimes without even knowing it: a semiotic /interpretative approach, but also a "microscopic approach" (the small facts speaking to large issues), the assertion that "culture" is context and that theory must be "actor oriented", the emphasis on "words" who are part not only of specific concepts but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality; and – last but not least – a pluralism, neither state centered nor "culture centered", the actor contributing to defining the limits and the meaning of what I called "normative spaces", those local techniques which work on the basis of local shared knowledge…

To quote some old texts of Geertz's allows us to feel the current relevance of his works: "*The concept of culture I espouse… is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning. It is this explication I am after, construing social expressions on their surface enigmatical* »[2].

And the image of cobwebs has nothing in common with "systems" or "order", all the work of Geertz being an escape from the order, a decentring of legal theory: "*Interpretative explanation trains its attention on what institutions, actions, images, utterrances, events, customs, all the usual objects of social-scientific interest, means to those whose institutions, actions, customs, and so on they are. As a result, it issues not in laws like Boyle's or forces likes Volta's, or mechanisms like Darwin's, but in constructions like Buckardt's, Weber's, or Freud's: systematic unpacking of the conceptual world in which Condottierre, Calvinists, or paranoids live* »[3].

Well… But how can Geertz be used today in the academic field of global law studies? Let's take three examples of recent works: the last book by Annelise Riles on the financial markets, the seminal article by Kō Hasegawa on Japanese law as a "creole law", and my current work on international contracts as "normative spaces".

Firstly, Annelise Riles.

Her last book is about the meaning of globalization. But its method is ethnographic, and Annelise Riles quotes explicitly Geertz's 1973 book "*Thick description: toward an interpretative theory of culture"*. And the title of Annelise's book, "*Collateral knowledge"* can also be read as an implicit quotation of Geertz's main work, "*Local Knowledge"*. If she presents a new theory of law and market, it is purposely a "theory close to the ground", building its analytical categories at close proximity to those of market and regulatory practices ant it does so inductively rather than deductively.

She follows this up and goes further in her main idea in her article "*The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the*

[2] C. Geertz, The Interpretation of Cultures, New York, Basic Books, 1973, p. 5.

[3] C. Geertz, "Blurred Genres. The Refiguration of Social Thought", *American Scholar*, 1980, Spring, p. 165.

State"[4]. She stresses that the academic discussion about global law is not pertinent when it opposes private international norms build by the merchants to the laws of the states. In her mind there is such a thing as "global law without state" only if the analysis relies on "rules" and institutions, but not if you focus on "norms", a broader and practical understanding of what "law" means. She argues that rather than focusing on how global private law is or is not an artifact of state power, a body of private norms, or a coherent legal system, we should view global private law as a set of institutions, actors, doctrines, ideas, documents, that is, as a specialized set of knowledge, practices.

And in so doing, in her book, with the global market appears a (global) space of shared practices, a common world, a "private constitution", neither entirely private nor public: "Collateral financial governance is also, I argue, *a set of routinized but highly compartmentalized knowledge practices, many of which have a technical legal character"* [5].

She analyses a little financial technique, the Global Collateral ("*sûretés*" in French), which appears to be in fact at the root of the financial market, being the safeguard of swap transactions. No swap without security, without collateral. And, this quote from her article stresses the novelty of her approach: « *In the simple technology of collateral, this nexus of paper documents, legal theories, legal experts, clerical staff, computer technologies, statutes and court decisions, then, are encapsulated some very grand hopes. As a transplanted legal technology, collateralization is paradigmatic of global private law solutions. Although collateral is rooted in multiple bodies of national law, such as bankruptcy codes, it is designed to be in the first instance a tool of self-help. It also is intended to serve as a blueprint for relationships, what I will call a 'private constitution'"*[6].

Secondly, Kō Hasegawa.

Since the publication of his main article – "Incorporating Foreign Legal Ideas Through Translation" [7] – the work of Kō Hasegawa is sometimes assimilated to the "legal polycentricity" movement[8]. The "legal polycentricity" is a post-modern theory of globalization which stresses at the same time the "polycentricity" of law as a law "generated by numerous centers" in a global world, and a law from the point of view of the person, the actors, too often excluded from the theory of law [9]. Called "*Hō no kureōru to shutaiteki hōkeisei*

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[4] A. Riles, « The Anti-Network: Global Private Law, Legal Knowledge, and the Legitimacy of the State ». *American Journal of Comparative Law*, Vol. 56, No. 3, 2008; Cornell Legal Studies Research Paper No. 07-025

[5] *Op. cit.*, p. 10.

[6] *Op. cit.*, p. 7.

[7] In A. Halpin & V. Roeben (eds.), Theorizing the Global Legal order, Oxford, Hart Publishing, 2009, pp.88-89.

[8] Legal Polycentricity: Consequences of Pluralism in Law, Hanne Petersen *et al*. eds., Dartmouth Pub. Group, 1995; Surya P. Sinha, Legal Polycentricity and International Law, North Carolina, Carolina Academic Press, 1996.

[9] H. Petersen, Knitted law: Norms and Values in Gendered Rule-Making, Dartmouth, Aldershot.

no kenkyū" (A Study on the Creole and the Agency Formation of Law), the research programme directed by Kō Hasegawa tries to characterize the normative exchanges between four "regions" (South East Asia, Europe, North America, and Japan)[10].

But Kō Hasegawa builds a very singular theory of law as "interpretation", in order to study the construction of Japanese law under the influence of foreign law, and in so doing he renews the old fashioned concepts of comparative law. He uses the semiotic metaphor of "creole law", maybe as an implicit homage to the "polyglot discourse" of Geertz[11]. And Hasegawa's work stresses the importance of some words, "words" which are part not only of a specific concept but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality, as Geertz did with the Arab words *haqq* or the Sanscrit *dharma*, which came from different "moral worlds" and rely on different conceptions of law[12]. But it is true that his theory of Japanese law as a translation has less to do with the theory of translation than the theory of law, either the American style theory of Dworkin or the Japanese theory which stresses the particular role of the actor – the translator – according to the specificity of Japanese writing[13] : "*I think that Japanese modernization of law is to be characterized as the legal amalgamation through translation: Japanese intellectuals attempted not transplanting European law but rather grapping it for Japanese society. Indeed, they tried to understand and introduce Western ideas and values into Japanese society principally to enlighten and westernize it. But that was a selective incorporation, which made the Japanese legal system an organic unit of heterogeneous legal ideas and values. Here we should ideally distinguish the multi-layered legal system from the organically combined or hybrid legal system as in the case of Japan that I am discussing. This distinction is concerned with the totality of translation in the process of law-making. In the case of Japan, the main legal codes were not simple transplants from European law but rather the reconstruction of various European laws through translation, which includes not only the adaptive modification but also the critical discarding of European legal ideas and values. In addition, the operation of the legal system in Japan is conducted through the traditional sense of justice, ie, of harmony or equitability. Even if the legal provision in question was derived from a similar Western one, the understanding and application of it is curbed with the mind that ordinary Japanese people tend to appreciate by their own valuational sense* »[14].

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[10] Japan). www.juris.hokudai.ac.jp/~hasegawa/lcreole/en_index.html

[11] Geertz, *op. cit*. 1986, p. 226.

[12] *Op. cit.*, p. 230.

[13] Especially Kitamura Ichiro (1987), Noda (1966), etc. See Isabelle Giraudou, « Droit Japonais et Traduction. Une rupture épistémologique dans le comparatisme juridique? » (Japanese Law and Translation – An Epistemological Shift in Comparative Law?), in *Ebisu-Revue d'Études Japonaises*, to be published (n. 46, 2011).

[14] Kō Hasegawa, « Incorporating Foreign Legal Ideas through Translation », in A. Halpin & V. Roeben (eds.), Theorizing the Global Legal Order, Oxford, Hart Publishing, 2009, pp.88-89.

Thirdly, Gilles Lhuilier (myself!).

I'm currently interested in the common knowledge of lawyers and heads of Transnational corporations that they use in the elaboration, writing and implementation of international contracts[15]. This knowledge obviously tends to organize the obligations between the parties but moreover to chose the law binding the parties, to shape a group, to organise a supply chain.... But international legal practices are very far from the classical presentation of the conflict of law concept, made from the state perspective, the perspective of the judge who tries to « localise » the contract. On the contrary, the private actors now « localise » themselves on singular « normative spaces ». The old concepts of international law, which were all "state centered", are now questioned by the globalization of law. The "mobility" of the private actors is changing the concept of territoriality of law, the concept of choice of law, of public order or even the concept of legal order. To be able to describe their practices we have to find some new definitions or to twist the old definitions of the choice of law theory.

I have called this new set of practices "law shopping" in a broad sense[16].

- One: *the incorporation.* The *lex societatis* – but also the law applicable to the board – being the law of the incorporation, the transnational corporations have many ways to use the "Delaware effect", often for escaping tax law, bankruptcy law, freezing asset action…or simply the identification of the shareholders. This old « law shopping » which has no limits in some regional areas (such Europe), is the conceptual model of all the other techniques.
- Two: *subsidiaries*. The creation of subsidiaries is also a common form of law shopping, an easy way to escape public order law such as criminal law, transnational companies not being a legal person as a « group », subsidiaries allowing "groups" to hide under the corporate veil.
- Three: *joint ventures*. To draw the limits of a group with a joint venture between a subsidiary and a company incorporated in a so-called « tax haven » (which are also "secret havens") is an easy way to make a soft choice of the law, the joint venture having no existence from a tax point of view. And the remaining cash can be used for « non-conventional commercial practices ».
- Four: *the sub-contracting*. Outsourcing can be defined as an operation to close a production site and transfer it abroad to enjoy better legal systems for the employer. Outsourcing is less an act of management than a technique of choice of law, a technique of "law shopping". This new legal technique is a reaction against the "publicising" of the rule of conflict of law. For in all industrialized countries *favor laboris* has significantly limited the scope of the choice of law. The desire to protect employees has realized what the

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[15] GLOBEX (Recherches pluridisciplinaires sur la mondialisation : Contrats globaux et nouvelles régulations sociales) ». See : http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publiques_et_privees/globex)

[16] G. Lhuilier, « Le concept de « Law shopping ». (Droit international privé, droit social, droit de l'environnement), in Droit du travail et droit de l'environnement. Regards croisés sur le développement durable, Paris, édition Lamy-Wolters Kluwers, 2010 ; « Law shopping (La redéfinition du choix de la loi par la pratique du droit international des affaires)», in Les groupes internationaux de sociétés: nouveaux enjeux, nouveaux défis, sous la direction de Xavier Boucobza, Paris, Economica, 2007.

internationalists called a "coloring" of the rules of conflicts of law that has ended their so-called "neutrality". But outsourcing can be reached by some other very simple legal action: either the incorporation of a subsidiary abroad or – more simply – outsourcing by subcontracting, as Nike does for example.
-Five: *The contract as a law*. In the recital or the operative part of the contract, professional definitions, rules or obligations are often longer than the international convention on sale of goods.
-Six: *the choice of law, « dépeçage » and the « contract without law »*. International contracts have nowadays sometimes some very sophisticated choice of law clauses, such as those choosing an international convention like ICSID, and a soft law text, a professorrecht as the Unidroit Principles in order to fill the gap of the international convention. In so doing, they build an international code of sales contracts mixing international convention, soft law, and the principle of the choice of law by the parties.
-Seven: *Contractual public order*. This concept is used to build the "supply chain" and to introduce clauses, from the end of the chain to the beginning, through labelling and the certification of the supply chain, to make sure that some mandatory law is really binding."
-Eight: *the forum shopping*. Very classical !
-Nine: *contractual mediation order*. The international contracts organise several negotiations, transactions, mediations inside the contract itself, often through *ad hoc* or permanent dispute board.
-Ten: *the choice of the site of the arbitration*. To choose the site of the court of arbitration is a way to choose the procedural law of arbitration.
-Eleven: *freedom or the arbitrator*. To quote Berthold Goldman's well known sentence: *"l'arbitre n'a pas de for / arbitrator has no for",* is enough to reminds everyone that the rules of conflict of law are mandatory for the arbitrators who are free to chose the law applicable to the contract. To choose arbitration is to choose to stay away from public judges but also from the rules of conflict of law.
-Twelve: *mobile public order*. International arbitrators are now practicing what I call the concept of "mobile" public order, the unique public order taken into account by the arbitrator being the public order of the place –the state- of the *exequatur*. The significance of public order is then deeply renewed if it depends only on the place of the assets of the parties…

All those practices (the so-called "law shopping") constitute what I called "normative spaces". Normative spaces have two significations. Firstly, normative spaces are a *set of* "norms". These set of "norms" is constituted by practices of law shopping which allow merchants to designate the "rules" binding their relations, that is to say – to use Annelise Riles's terms - of routinized but highly compartmentalized knowledge of practices, many of which have a technical legal character. Secondly, normative spaces are also a set of "rules" designated by lawyers, that is to say national laws, international treaties and conventions, soft laws…

Each international contract is then a "web" – to use Geertz's terminology. Each "normative space" refers at the same time to the ability to spin the web – that is to say, the boundaries of the applicable chosen law – and the web itself,

that is to say, the chosen law. It is neither a private commercial order (a new *lex mercatoria*), the applicable laws being mainly national laws; nor a legal order, national or international, the boundaries of the law being drawn by the merchants themselves.

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Between theses three works, some obvious differences appear, sometimes stressed by the authors themselves[17]. These differences obviously lie sometimes in "tribal knowledge", some academics being closer relatives to the ethnologists' tribe, some to the philosophers' tribe, others to the tribes of internationalists or commercialists. But all these works are nevertheless representative of the merge of a global legal theory that realises a "decentring" of the theory of law[18].

Questions rise however: the importance of the legal technicalities as an autonomous language, the fall of the theory, the local dimension of the theory, the signification of the renewed concept of culture, or such elaborations as "private constitution" or "normative spaces" and their many uses – for example in order to renew legal comparative legal studies…

Gilles Lhuilier

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See http://www.mfj.gr.jp/agenda/

[17] Kō Hasegawa, "How Can Law Hold Hope in Cultural Complexity? – Critical Comments on Professor Annelise Riles' View of Law and Culture" Working Paper.
[18] See http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/ or http://www.glsn.eu