LAW AND GLOBAL GOVERNANCE SERIES

Private International Law and Global Governance

Edited by Horatia Muir Watt and Diego P Fernández Arroyo

OXFORD

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DIEGO P FERNÁNDEZ ARROYO

OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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First Edition published in 2014

Impression: 2

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014950811

ISBN 978–0–19–872762–0

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Series Editors

ANDREW HURRELL, BENEDICT KINGSBURY, AND RICHARD B STEWART

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Global governance involves the exercise of power, beyond a single state, to influence behaviour, to generate resources, or to allocate authority. Regulatory structures, and law of all kinds, increasingly shape the nature, use, and effects of such power. These dynamic processes of ordering and governance blend the extra-national with the national, the public with the private, the political and economic with the social and cultural. Issues of effectiveness, justice, voice, and inequality in these processes are growing in importance. This series features exceptional works of original research and theory—both sector-specific and conceptual—that carry forward the serious understanding and evaluation of these processes of global governance and the role of law and institutions within them. Contributions from all disciplines are welcomed. The series aims especially to deepen scholarship and thinking in international law, international politics, comparative law and politics, and public and private global regulation. A major goal is to study governance globally, and to enrich the literature on law and the nature and effects of global governance beyond the North Atlantic region.

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The Relevance of Private International Law to the Global Governance Debate

Horatia Muir Watt

I. Introduction

How relevant is private international law to contemporary debates about global governance that have sprung up within other (legal and non-legal) disciplinary fields? Despite the contemporary juridification of international politics, private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. Under the aegis of the liberal divides between law and politics and between the public and the private spheres, it has developed a form of epistemological tunnel-vision, actively providing immunity and impunity to abusers of private sovereignty. On the other hand, public international law, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place.

Private international law (or the conflict of laws) as generally understood by both courts and scholars, defines the competent court, applicable law, and status of foreign judgments in transnational settings. It is currently an expanding field in the European Union, where it serves as a substitute—either as a second best or as a federalist alternative—for substantive unification of the law of Member States. While such developments have served largely to put the whole field back on a map (in the form of a series of Regulations from Brussels or Rome) from which it had faded during the latter part of the twentieth century, either because it was swept away in the wake of legal realism (in the United States), or because it had become synonymous with commercial dispute resolution (in the English common law tradition), or because of the competition of international arbitration (worldwide), it still—and perhaps increasingly—suffers from a lack of theoretical depth and focus. When formulated, the philosophical underpinnings of private international law still tend to bear witness to Savigny's legacy of private legal scholarship within the Roman law and Catholic tradition, and as such are still linked to the quest for international harmony and predictability, with little regard for contemporary theoretical issues of emerging "global law" beyond the state, for new definitions of community and normativity, and for the urgent distributive issues which haunt the transnational arena.

Much of the problem may be traced to the inadequacies and uncertainties affecting each of the components of the name given to the field by Joseph Story. Although coined outside the civilian tradition, its "private" dimension was initially understood by opposition to "public" international law, and moreover by reference to the public/private legal divide foundational to legal epistemology in the nineteenth century.

A hundred years later, private international law had been irrevocably and dogmatically linked to the domain of private law (within the civilian understanding of the category) where, like procedural law and in opposition to domestic policy, it was supposedly neutral or apolitical, and could not transgress the "public law taboo." Moreover, its "international" reach mirrored the representation carried by public international law of a world of multiple territorial states, so that it dealt exclusively with the consequences of contacts between state laws, ignoring forms of transnational normativity beyond the territorial community. Despite the extent of social, technological, economic, and geo-political changes wrought by globalization, little has been done within the field to think through the issues arising from the decline of territory, the financiarization of the economy, the privatization of adjudication, changing cultures of human rights, or new understandings of the rule of law, nor indeed to link these questions to wider changes in world visions or politics, to current trends in political philosophy or social theory, or to new thinking in economics. Such limits have seriously detracted from the usefulness of private international law doctrine and method as a starting point for thinking about the role, nature, and content of law beyond the state.

The aim of this book is therefore to draw attention to the governance gap left by the insufficiencies of an overly technical, market-driven, or dogmatic private international law, and then to explore the avenues through which, in the absence of traditional forms of government in a global setting, the tools, methods, and underlying axiology of the field could be reinvented to contribute to regulate the transnational exercise of private power by a variety of non-state actors whose cross-border economic activities fall within its traditional remit. There is a clear need for a (both ontological and epistemological) de-closeting of the field; as a domesticated appendage of private law, it has stopped short of addressing the issues of informal power in the global arena. For the past century, it has encouraged transnational private ordering in the name of party autonomy, in areas where the global commons have proved to be the most vulnerable (extraterritorial corporate misconduct; free-wheeling of vulture funds; unchecked expansion of financial markets; land-grabbing in the poorest countries of the third world; abuse of contractual power in the global food supply chain, and much more).

It seems that there is little, if any, existing literature addressing the global governance implications of private international law other than incidentally, on specific topics (such as investment arbitration). This is precisely because, according to the genealogy of the discipline reflected here, private international law became "domesticated" and cut off from the politics inherent in international relations, at the time when public international law emerged as a discipline. The "public law taboo;" circumscribing the focus of the conflict of laws to the regulation of cross-border "private interests" through national "private law," also signaled the avoidance of the political—including, in the European setting, policy analysis. Indeed, like comparative law, which emerged in approximately the same context and shared the same initial, universalist ideal it has remained committed to a foundational myth of methodological neutrality. The contributions in this book attempt to unravel some of the myths long associated with the political innocence of method, in order to uncover the governance implications of the tools with which it addresses the global issues outlined above. Various foundational assumptions are challenged, among which the public/private divide in international law, which has remained surprisingly resilient even when it is no longer descriptively meaningful nor normatively desirable. Furthermore, attention is drawn to the "isolation of private international

law,"[1] which seems to prevent it both from engaging with global policy concerns and from harvesting the theoretical benefits of interdisciplinarity.

While frequently (and legitimately) critiqued as a concept (including by some of the contributors to this book) "global governance" is elastic enough to signify the various means by which the exercise of private power in transnational settings may be disciplined—while avoiding the problematic definition of global law. Admittedly, it may simply provide a loose heading for projects that have little in common, in terms of either ideology or perspective. Some may be world-building through institutional structures, others committed to social forms of normativity beyond or beneath the state; some may entail exercises in comparative public constitutionalism, while others unearth accounts of spontaneous transnational merchant norms; some may believe in universals, others in fragmentation; some may attempt to conceptualize, while others prefer pragmatism; some point to hierarchies, others to networks; some emphasize the economic, others the global good, and so on. However different, all these perspectives involve a turn from traditional portrayals of public international law, either as being too state-centric or too fragmented; none appear to issue from the world of private international law, which seems to feel more challenged by the advent of fundamental rights discourse than by the changing relationship between law and state.

Indeed, much of the splintering of the sovereignty-based "center" of international law through the proliferation of special and often colliding regimes (as theorized by social systems or international relations theory), is due to the intrusion of new actors, the collapse of the public/private divide, novel forms of coercion, and the emergence of normative transnational orders beyond the state. Curiously, therefore, many of the causes of the current crisis of international law fall within the province of its "private" branch. Indeed, some of the new literature, whether in social systems, international relations or comparative constitutionalism, generates a mild feeling of dejà vu (or reinvention of the wheel). Paradoxically, while pre-modern European conflict of laws emerged before the formation of the nation-state and has had to grapple, constantly, throughout its modern history, with forms of social interaction beyond the confines of formal law, it is strangely disempowered today, and unable or unready to apprehend similar phenomena in the global arena. The result is not merely that the discipline is threatened with extinction (which is obviously not in itself problematic, except for its professional practitioners), but that, because it is fulfilling its governance function on the private side, numerous global issues are going unanswered. Indeed, various abuses and disasters linked to the undisciplined exercise of informal power are actually using the private international system as a portal.

The silence of private international law on this and other topics which are now covered by global governance debates is all the more remarkable given that the field developed throughout the centuries from cosmopolitan sources, distinguished itself by its open outlook, and carried a sophisticated doctrinal framework. Moreover, even under an uncontroversial definition of its scope, it would appear to have relevance for some of the most central issues of global regulation. Thus it should bear upon the liability of corporate actors, the accountability of rating agencies, the content of special substantive regimes, the working of the private market for judicial services, the relationship of corporate groups and their employees, environmental and toxic torts, the balance

[1] Famously pointed out by Joel R Paul under this very heading; (1988–89) 7 *Wisconsin International Law Journal* 149.

between privacy and freedom of expression on the internet, the reach of intellectual property in a transnational setting, and much more. Yet these questions do not appear to be part of any systematic framework, are often dealt with incidentally, or remain on the periphery of private international law's relentless concern for international divorce, road accidents, or assignment of debt. However important these may be, there is clearly a need for a wider understanding of corporations, finance, markets, environment, and investment, and a more sophisticated account of adjudication and arbitration in a world where theories of state, legislation, public power, or judicial review do not work—not to mention the integration of new thinking in the field of personhood, family, and culture.

The time seems ripe, therefore, to test a hypothesis, according to which the deficiencies of contemporary private international law are linked to its separation from politics and its subordination to public international law towards the end of the nineteenth century. The divide made it unable to address those issues which might have been expected to fall within its scope to the extent that they concern private actors, private norms, the transnational reach of publicly-produced "private" law, or indeed human rights, and which also come under the heading of "global governance" in that they relate to the way in which informal power is exercised in transnational settings. While much of the effect of the liberal disciplinary divisions has been to prevent using the tools of private international law from addressing world problems from environmental damage to human rights abuse or immigration issues, it has also resulted in compartmentalizing the whole private international field, so that international trade and investment law, while using similar legal tools and resting on analogous legal foundations, were also in effect curtained off and became autonomous specialized fields.

The project which unites the contributions assembled in this book is to reach beyond the international legal divide between the private and the political, while reconnecting some of the debates perceived to be peripheral because not belonging to the traditional "private law" sphere. The contributions, authored by private international legal scholars and theorists of global law, are organized according to their focus, which may be either causation (what went wrong?) or remedies (what rethinking is necessary?). While generally subscribing to a critical perspective on traditional content, some may argue, reconstructively, for radical overhaul; several may focus on improving existing frameworks; an alternative stance may be a "post-critical" or skeptical stance. Certain contributions may come from outside the discipline, from a comparative or a public international legal perspective. A few may offer a general explanatory theory, a critical analytic, or new epistemological models; others devote their analysis to specific examples. Whatever the disagreement (and there are many), all have accepted to join in a collective effort of rethinking the boundaries, content, and indeed the raison d'être of the traditional field. Projects may stem from a deeply held—and strongly disputed—conviction as to the "rightness"[2] of novel concepts or arguments, or be linked to a more strategic stance in the light of which the resort to alternative tools may be effective in opening political paths which seemed hitherto closed. All accept that what is at stake is not the survival of the disciplinary field as such, nor the protection of a lucrative resource for a professional caste, but the contribution to closing the governance gap which accounts at least in part for social and economic inequalities in our globalized world.

[2] D Kennedy, A Semiotics of Critique (2001) 22 *Cardozo Law Review* 1147.

II. Behind Closed Doors: The Private Model and its Discontents

The first set of contributions to this book subscribe to the conclusion that private international law as a discipline has not only missed the opportunity to apprehend the transnational exercise of informal power, but moreover and more importantly has been actively complicit in its unregulated expansion.[3] In this respect, current majoritarian conceptions and practices of private international law are based on understandings of the "private" dimension of the discipline which still tend to replicate the political economy of the international sphere as it emerged in the second half of the nineteenth century: "public" concerns were confined to the relationships between sovereign states, while markets, equated with the self-ordering of private economic interests, were supposedly independent from international politics. It is remarkable indeed that despite the blurring of the public/private distinction in the domestic sphere, and the ready availability of the critical potential of comparative law on this point, the liberal creed still holds, that the public good in the transnational field is the sum of private satisfactions, largely assimilated in turn to the reign of free will (redubbed "party autonomy").

The underlying grand narrative is a "smooth" account of transnational governance consensus and spontaneous ordering within various homogenous communities.[4] In keeping with this account, the legal tool used to curtain off large areas of the global economy from the reach of public interests was the simple, liberal concept of contract. In this respect, the only—but significant—specificity of transnational legal sphere is that the market provides the exclusive foundation for an encompassing, parallel normative order, sanctioned by arbitration and theorized as autonomous. The discipline of the conflict of laws has played a significant role in facilitating the privatization of the common weal, sanctifying interests perceived to lie beyond the legitimate reach of any given state regulation. The new institutional infrastructure for trade and finance (WTO, World Bank, etc) was largely dependent upon a supportive consensus among economic actors operating in the global sphere, in favor of market development. To the extent that it provided the conceptual framework for the private actors' "regulatory lift-off,"[5] private international law could hardly be counted upon as a source of discipline, accountability, or mutuality of rights and duties for private actors, or as a means to a fairer governance of the commons.

Therefore, what might be seen as a form of apathy or academic conservatism in internationalist doctrine finds a more credible explanation in the demands of post-war capital expansion, which needed to enlist the support of the law in order to secure the sanctity of direct investment in post-colonial states, the domination of emerging markets, and the promise of space for industrial relocation. Indeed, far more plausibly than under the received "smooth" version, the private governance model was essentially adversarial, contested, and conflictual. However, in the evident absence of any institutional or cultural form of global democracy, the celebration of the private was

[3] See H Muir Watt, Private International Law beyond the Schism (2011) 2(3) *Transnational Legal Theory* 347–427.

[4] In the terms of Robert Wai in his contribution to this volume, "Private v Private: Transnational Private Law and Contestation in Global Economic Governance."

[5] The term is also Robert Wai's: Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization 40 (2002) Columbia *Journal of Transnational Law* 209.

made to seem to be the only alternative to parochialism, imperialism, or indeed despotism of (new) global rulers. Judicial dicta from the era of trade liberalization, justifying the various expressions given to party autonomy in private international law—choice of forum, choice of law—bear out the terms in which the choice was perceived or presented. It appears, then, that the "private" label given to the discipline covers two distinct orientations, that converge to immunize informal power both from the democratic checks to which government is generally subject, and, more surprisingly, from the private law leverage of liability. As seen through the following set of contributions, the three distinct challenges facing this model of private law regulation concern epistemology (A), ideology (B), and design (C).

A. Epistemological challenge: the meaning of "private" in private international

An epistemological focus calls into question the "private" dimension of private international law through a critical comparative law perspective. While, as pointed out by Benoît Frydmann in his contribution to this book,[6] "global law" develops for a large part interstitially, or through interaction between local laws, comparative lawyers who might therefore be at the forefront of debates on the deficiencies of global governance, are generally as mute as their private international counterparts. This may be because of their own post-war trauma, which favors a technical focus;[7] by reason of their commitment to forms of knowledge of the law that are essentially rule-based, or judge-based, "private" law; or perhaps because, at least in Europe, much of the best energies are currently committed to fighting the intra-European battle against the rising tide of the uniform and the technocratic, in the name of cultural diversity and holistic approaches to law in social context. Whatever the reasons for this silence, comparative legal studies as framed within the Western legal tradition undoubtedly carry the same epistemological baggage, and subsequently the narrow focus, which characterizes traditional private international law. A shared tunnel-vision has, at least until very recently, prevented comparative law—still predominantly private and Euro-or Western-centric—from integrating the various critical visions of world governance developed (largely through the social sciences), particularly in the third world, in reaction to similar characteristics of modern international law. But while the latter are gradually gaining purchase within a renewed approach to comparative legal studies,[8] private international law is little prone to similar introspection; it would certainly benefit, therefore, from a dose of interdisciplinarity within the legal field. Hence the epistemological critique from the comparative law perspective, which gives rise to two different strands of reflection in this book. Each constitutes a significant challenge to the assumptions underlying the current model of governance through private law, whether it takes the avenue of resistance or subversion.

Thus, as *Geoffrey Samuel* points out in his chapter on "Comparative Law as Resistance," dominant private international and comparative legal disciplines share "the structure and language which absolutely dominates trade and commerce and from which escape, at least for any nation wanting to trade on the international scene, seems

[6] B Frydmann, "A Pragmatic Approach To Global Law."

[7] See D Kennedy, "The Methods and the Politics" in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 345.

[8] See eg PG Monateri, *Geopolitica del diritto. Genesi, governo e dissoluzione dei corpi politici* (Rome: Editori Laterza, 2013).

impossible," Samuel envisages intellectual resistance which "might operate to challenge... some fundamental structures of Western legal thought and the embedded distinctions that such a structure appears to assert as a matter of epistemological *vérité*." The resistance he contemplates is "not so much to a 'Western' notion of law but to an epistemological model that continually asserts itself with the mention of law." In this respect, comparative law's ability to resist is to be found in "the plurality of schemes of intelligibility and program orientations that are available." Highly significant for private international lawyers, is the observation that "method needs to be approached as a complex interaction of reasoning types (induction, deduction, and analogy), schemes of intelligibility (functionalism, structuralism, hermeneutics, and so on) and program or paradigm orientations (holistic versus individualistic approaches, nature versus culture and so on)." This is a meaningful lesson in view of the dogmatism which characterizes so much of private international law's methodological scholarship. The latter still largely adheres to a grand narrative leading from the pre-modern, obscurantist political version of the conflict of laws to an enlightened (Kelsenian) *vérité*, which does much to foster the private law model.

This explains why, for many decades, private international law has been grappling with recurring problems linked to the public/private divide. *Robert Wai's* chapter takes on this challenge by considering regimes of transnational private ordering and private law as venues of contestation and regulation in the complex contemporary architecture of plural legal regimes of international economic law. The chapter distinguishes between private ordering regimes and transnational private law regimes—largely the combination of domestic private law and private international law. It argues that transnational private ordering is particularly vulnerable to limitations as governance if one focuses only on private ordering generated in the name of facilitating private relations of cooperative benefit. In contrast, however, it may be that that transnational private law regimes contain within them both concrete venues for contestation and models of the transnational governance of private ordering that better account for the full range of private ordering as well as its embeddedness within regimes of state law. In the end, the governance potential of private law is pervasively connected to, but always potentially compromised by, the function of such regimes in the facilitation of global transactions and the protection of property.

In contrast to this private law ontology, or esthetic, of contestation and doubt, *Ralf Michaels* offers a wholly different outlook in his chapter entitled "Post-critical Private International Law: From Politics to Technique," when he suggests a "dialogue of politics and theory through technique." His starting point lies in the conviction that the challenges from globalization to which public law approaches rise with difficulty (crisis of a certain conception of state, fragmentation, problems of global dimension), are actually the daily bread of private international law, whose specific expertise addresses these very issues (the management of legal pluralism). Why then is it seen as not handling these governance issues adequately? Ralf Michaels suggests that while contemporary critical theory has identified some of the causes, which are rooted in the Pre-Critical era (formalism, essentialization, excessive malleability), it has not itself done more than collapsing the whole field in to domestic public law. According to Ralf Michaels, a Post-Critical approach should therefore seek to rehabilitate this specific space, by taking seriously the technical tools developed within in it. Such a rehabilitation would present both an epistemological advantage (better capturing the problems which arise in the real world) and a normative advantage (as being less intrusive and absolutist than a public law approach, substituting case-by-case applicability for ex ante assessments of legitimacy). Moreover, taken seriously, private international law's technical tools lend

themselves to a deeper philosophical reading. Thus, for instance, characterization is a way of making sense of the world, while *renvoi* reminds us of a form of what anthropology calls "lateral thinking." This account by an author who has indisputably been a pioneer in the search for the various meanings of the private in post-national context[9] is highly interesting. Meanwhile however, it certainly remains open to debate whether a Post-Critical faith in the virtues of traditional technical tools would be adequate to rise to the eminently political challenges of global governance.

B. Political critique: privatization as homogenization

But the ideological critique tends to focus on the second meaning of the private, which emphasizes the phenomenon of rule-making by non-state actors, rather than the virtues of the part of the law which facilitates or regulates their inter-relationship within a state or public institutional governance framework. While the *lex mercatoria* is the internationalist's preferred example of spontaneous normative ordering,[10] a less known, and certainly more sinister breed, can be found in the field of financial markets. The crucial governance function of sovereign borrowing has recently shifted from governments and international financial institutions to private entities. Many countries now borrow under the law of a few important financial centers, such as London or New York. And indeed, national courts in these financial centers adjudicating cases arising out of sovereign defaults often limit themselves to enforcing debt contracts, as if the interests involved could be properly contained within a private, bilateral, agreement. In recent years, three transnational agents—ICSID arbitral tribunals, determinations committees of the International Swaps and Derivatives Association (ISDA), and rating agencies—have moved to center-stage. This privatization of decision-making authority risks creating a system for resolving sovereign defaults that is uncoordinated and insufficiently protective of the public interest. Unlike in the inter-war period, private international law is a bystander, leaving it to these private bodies to set policy and legal parameters for how future sovereign defaults are resolved.

Does this mean, therefore, that some issues should remain resolutely outside the reach of private international arbitration and its toolbox of party autonomy? In this respect, international investment law clearly raises specific concerns. It paradigmatically crosses the public/private divide, illustrating in various ways both the dangers of privatization of adjudication in sensitive areas of national public policy, and the extreme consequences to which the claim to autonomy of a specialized regime may lead. However, it is also the area in which the deepest disagreements may be found among the various contributions to this volume over the way in which private international law instruments have migrated to the field of regulatory policy; there are diverse views here on the extent to which the private law model impacts upon the impartiality of the arbitrators, or indeed induces a focus on investor protection rather than opening the horizons of arbitration to the wider values attached to the common good—whether the latter be understood as representing the global commons, or more modestly the interests of (public or private) communities concerned by the outcome of the dispute. Thus, a radical critique is formulated by *Tomaso Ferrando* in his "Tale of Three Legal Homogenizations," which uses

[9] See eg R Michaels & N Jansen, "Private Law Beyond The State? Europeanization, Globalization, Privatization" (2006) 54 *American Journal of Comparative Law* 843.

[10] The *lex mercatoria* example is dealt with by Gilles Cuniberti, "The Merchant who would not be King. Unreasoned fears about Private Lawmaking."

the example of the global land-grab to point to the ways in which the investment regime serves to plaster over the black holes of the global economy.

Starting from the assumption that there is no global issue that is not locally rooted, Ferrando claims that post-world war economic globalization has consistently been coupled with a process of "legal homogenization." According to Ferrando, this process has taken place through several phases in which, although not teleologically related, each creates the legal background for the other. As illustrated by the land-grab (the recent surge in land acquisitions in the third world by public and private foreign investors), this process involves the local enforcement of a specific legal model based on a sharp distinction between public and private, and legal and illegal, and at the same time contributes to its consolidation. As a consequence, legal diversity is undergoing a progressive dismantlement, which in turn smoothes the path for the universal expansion of capital. International law is seen to be complicit in this enterprise, in both its public and private components. That the concept of sovereignty plays a crucial role in such complicity is hardly surprising, but has generated little attention on the "private" side of the schism running through international law. Indeed, as Marty Koskiennemi has shown on the "public" side, sovereignty is an avatar of Roman law's *dominium*, by means of which the informal empire of trade and finance initially expanded under the umbrella of the law of nations to unchartered territory, in the wake of the Spanish conquistadores.[11]

Veronica Corcodel further enriches this picture by emphasizing another form of violence wrought by the same embedded schemes of thought, through which the epistemological model channels and excludes alterity. In her chapter entitled "The Governance Implications of Comparative Legal Thinking," Corcodel analyzes the jurisprudence of Henry Maine and its connections with British imperialism in India. Through this carefully researched example, she points to discourses that structure the largely ethnocentric perspectives on the Other in mainstream comparative law ("communities," "customary law," "religious law," etc). The methodological implications of her critical approach for private international law are significant to the extent that ethnocentric approaches to the foreign, constructed on a certain understanding of law/society divides, are common ground between the two disciplines. Drawing on existing critical comparative and international law scholarship, to which she adds further interdisciplinary insights from philosophy and the social sciences, she argues that comparative law should do more than take the Other as a mere resource for rethinking the Western Self—which is usually taken to be the critical function of comparison. In this perspective, her work provides a sharply critical lens through which to view the current state of private international law. For not only does she deconstruct the neutrality (or political innocence) of method, but she warns against the essentialist reading of cultural difference which tends to plague both the traditional idea of *ordre public* and the more contemporary appeal to human rights within the conflict of laws. Indeed, in either context, as Corcodel also suggests, there must be a space "in-between" West/non-West. As Edward Said says in the citation from his work on *Orientalism* which opens Corcodel's piece, "What is perhaps more relevant (to a propensity to imperialism) is the political willingness to take seriously the alternatives to imperialism." It is largely this little explored "in-between" with which several contributions to this book are concerned, when they attempt to rethink existing schemes of private governance and suggest alternative models of law beyond the state.

[11] M Koskenniemi, "Empire and International Law: The Real Spanish Contribution" (2011) 61(1) *University of Toronto Law Journal* 1.