Comparative Law and the Financial Markets

Some Methodological Reflections and Renewals

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1. Introduction

Jan Kleineman was the one who first introduced me to the complexities of comparative law when he was the supervisor of my doctoral thesis. In this article, I have chosen to discuss some methodological issues in comparative law, especially in the field of financial markets law. The former being a topic that Jan has a great interest in, and has continuously encouraged me to further venture into, and the latter a particular research interest of mine. Moreover, financial law, shaped by globalization and an intricate interplay of private and public law, could serve as a central case for some of the most intriguing methodological debates of jurisprudence in general and comparative law in particular in the twenty-first century.

In the discussions in recent years, it has been argued that comparative law has witnessed a revival. Due to the many changes wrought by globalization, in order to ensure its continued survival, the field has had to subject itself to certain methodological adjustments. Arguably, these adjustments are not minor.[1] Voices have even been raised whether they could have an impact on the very core of the discipline. Globalization is however not a new phenomenon. Comparative law has experienced the waves of globalization during its many years of history. The current one is merely the latest one.

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[1] For example, as stated by Twining, "Rethinking comparative law will involve all of the main tasks of legal theory including synthesis, construction and elucidation of concepts, critical development of general normative principles, middle order theories empirical and normative, working theories providing guidance to various kinds of participants, including comparatists, intellectual history, and the critical examination of assumptions and presuppositions underlying legal discourse", Twining, W., Globalization and Comparative Law, Maastricht Journal of European and Comparative Law, Vol 6, No 3, 1999, p. 238 (hereafter Twining, 1999).

Comparative law has been challenged and contested during each of the waves, and it has stood its ground.

So, how exactly has globalization challenged comparative law? In this quest, as an initial step, the relationship between comparative law and the nation state should be discussed. For a long time, the nation state was the prime focus of comparative law. Comparative legal studies were dedicated to the positive law and legal systems of states, and Western ones in particular.[2] Globalization, internationalization, Europeanization, privatization and self-regulation have however changed the modes of norm-making. Today, legal landscapes are more complex and diversified. Due to this reality, comparative law has had to rethink its methodology.

This article is a brief analysis on how comparative law is facing these challenges. Using the regulatory landscape of global finance as a case in point, the remaining part of the article will first explicate the *restraints* of conventional comparative law methodology, especially in relation to fields that transcend traditional jurisdictional and territorial constraints. It is followed by *reflections* on the ways comparative law is responding to globalization, and concludes with discussions on some of the methodological *renewals* in the field of global finance.

The aim is to demonstrate that comparative law is no longer only comparisons between the positive law of Western nation states. Transnationalism, legal pluralism and interdisciplinarity are some of the factors that have contributed to this development. In addition, as seen in the case of the financial markets, and possibly in a number of other fields as well, it could be argued that comparative law has not only adapted to the changes of time to secure its continued survival, but to *thrive* in this era of globalization.

2. Restraints

Indeed, financial markets law is not the only field where globalization has had a profound impact. It serves however as a central case for how sources, other than traditional (Western) nation states, have shaped and reshaped norms affecting lives around the world. In the recent past, the changes of globalization have, among others, given rise to, as referred to in this article, a variety of new sources of normativity in global finance. They include supranational ones such as the European Union (EU), transnational ones such as the Basel Committee on Banking Supervision (BCBS), and private ones such as multinational banks. China, which is now home to four global

[2] Twining, 1999, p. 233.

systematically important banks, serves as an example of a new non-Western source of normativity in the international financial markets.

The regulatory landscape of global finance has thus become diversified, complex and at times fragmented. Since the topic of global finance regulation, as well as the subject matter of comparative methodology, have generated vast literature elsewhere, and the complexities thereof are much too extensive to be captured in full here, the following discussion will only address three key aspects of relevance to the inquiry at hand.[3] The aspects include the post-crisis regulatory reforms, the institute of *lex financiera* and the rise of non-Western markets in global finance.

Firstly, during the past decade, the regulatory reforms triggered by the financial crisis of 2008 have left nearly no part of the financial system untouched. The reforms can be observed at the local, regional and global level. In terms of the global reforms, it has been argued that a new order that is "hierarchical, procedurally regular, and politically supervised has emerged."[4] Due to the functioning of this new order, the regulation of the international financial markets has been viewed as "global" rather than "international".[5] Instead of international organizations such as the World Trade Organization and binding treaties, the regulation of global finance centers around networks of experts, so-called transnational regulatory networks (TRNs), which develops soft law standards for states to implement.[6]

The networks are built on membership. The BCBS, which is one of the most leading TRNs in global finance, is for example composed of

[3] For literature on global finance regulation, see among others Buckley, R., Avgouleas, E., and Arner, D. (eds.), Reconceptualising Global Finance and its Regulation, Cambridge University Press, Cambridge 2016, and Wymeersch, E., Hopt, K. J., and Ferrarini, G., Financial Regulation and Supervision: A Post-crisis Analysis, Oxford University Press, Oxford 2012. For literature on comparative methodology, see among others Muarice, A., Husa, J., and Oderkerk, M. (eds.), Comparative Law Methodology, Edward Elgar Publishing, Cheltenham 2017, and Van Hoecke, M. (eds.), Epistemology and Methodology of Comparative Law, Hart Publishing, Oxford 2004.

[4] Zaring, D., 'The Emerging Post-crisis Paradigm for International Financial Regulation', in Bignami, F. and Zaring, D. (eds.), Comparative Law and Regulation: Understanding the Global Regulatory Process, Edward Elgar Publishing, Cheltenham 2016, p. 497 (hereafter Zaring 2016).

[5] Baxter, LG., 'Understanding the Global in Global Finance and Regulation', in Buckley, R., Avgouleas, E., and Arner, D. (eds.), Reconceptualising Global Finance and its Regulation, Cambridge University Press, Cambridge 2016 (hereafter Baxter 2016), and Cranston, R. et al., Principles of Banking Law, 3rd ed, Oxford University Press, Oxford 2018, p. 19 (hereafter Cranston et al. 2018).

[6] The term derives from the field of political science, and more specifically the regulatory network theory, see Slaughter, AM., A New World Order, Princeton University Press 2004. For an overview of the use of the term in legal literature, see Chen, K., Legal Aspects of Conflicts of Interest in the Financial Services Sector in the EU and China – the XYZ of Norm-making, Doctoral Dissertation, Faculty of Law, Stockholm University, p. 65 (hereafter Chen 2018).

national central banks and bank supervisors from twenty-eight jurisdictions, including the EU, China and US. The TRNs are however not supranational organizations or any entity recognized under formal international law. There are of an informal nature. As for the standards, such as the banking regulatory and supervisory standards developed by BCBS, often referred to as Basel III, they hold no legal force. The standards are soft law.[7] In order to obtain legally binding effect, they must be implemented through each jurisdiction's domestic lawmaking process.

An increasing number of financial regulations around the world now derive from these global sources. It should however be noted that the standards are molded to fit into the local context, taken into account the relevant legal, market and political framework, when implemented. In other words, the standards are *localized* during the implementation process and result in national, rather than, global financial regulations.

Secondly, it should be borne in mind that there is a long tradition of private rulemaking in the international financial markets. The International Swaps and Derivatives Association (ISDA), which is an industry association that promote best practices and develop standard contracts for its members, has for example been recognized as a prominent case for transnational private rulemaking. In addition to standard contracts, there is a rich flow of customs and usages, professional codes and self-regulatory rules, all developed by the market participants, in the international financial markets.[8] Private rulemaking should therefor be viewed as an important part of *lex financiera*¸ which is similar to the institute of *lex mercatoria*, in its international character. However, compared to the latter, it could be argued that *lex financiera* is a field that has emerged more recently.[9]

Lastly, another development that have added to the complexities of the regulatory landscape is the rise of developing countries and emerging economies in the global financial system. While these countries have become increasingly important stakeholders in global finance, they remain at the periphery of the regulatory arena. Although the TRNs have expanded the membership in recent years, they are still dominated by advanced economies in the West. The standards are thus often designed to respond to the prerogatives of Western financial markets. It has been noted that elements of Basel III and the current frameworks on shadow banking exemplify a bias towards the largest firms and markets, and fails to consider the different

[7] Cranston et al. 2018, p. 19.

[8] For more on private rulemaking in the international financial markets, see Chen 2018, p. 72–80.

[9] Lastra, R., Do We Need a World Financial Organization, Journal of International Economic Law, Vol. 17, Issue 4, 2014, p. 796.

economic and regulatory environment in emerging economies.[10] As a result, the standards are poorly implemented in these markets, and it has been observed that the implementation of Basel III in developing countries and emerging economies is often shallow and highly selective.[11]

Due to these developments, there has been a growing awareness of fair representation and inclusiveness in global financial regulation. In this regard, the emergence of China as a major actor in international trade and finance could be of relevance. In recent years, it has been debated upon whether China has assumed a more active role in the regulatory sphere. This can for example be seen in the field of sustainable finance, where China has been instrumental in introducing several initiatives at the global level.[12] China was a key player in the launch of the Sustainable Banking Network, which is a network of financial regulators and banking associations from emerging markets committed to advancing sustainable finance in line with international good practice. Due to its avid support to promote green and sustainable finance, it had been discussed whether China has become a "rule-maker" and "global leader" in the field.[13]

In sum, albeit crudely, the regulatory landscape of global finance has evolved into a field shaped by global, transnational, private and/or non-Western norm-setters, in which pluralistic regulatory processes exist alongside and interact with each other. Although the nation state continues to be an important part of the regulatory landscape, it is no longer the only and primary source of normativity. Hence, when conducting comparative research in the field, it could be argued that the state-centric view of

[10] Jones, E. and Knaack, P., The Future of Global Financial Regulation, GEG Working Paper 127, University of Oxford, 2017, p. 5.

[11] Jones, E. and Zeitz, AO., The Limits of Globalizing Basel Banking Standards, Journal of Financial Regulation, Vol. 3, 2017. See also Identifying the Effects of Regulatory Reforms on Emerging Market and Developing Economies: A Review of Potential Unintended Consequences, Prepared by the Financial Stability Board in Coordination with Staff of the International Monetary Fund and the World Bank, 19 June 2012, available at https://www.fsb.org/wp-content/uploads/r_120619e.pdf [last viewed 1 February 2021].

[12] See e.g. The Need for A Common Language in Green Finance: Towards A Standard-Neutral Taxonomy for The Environmental Use of Proceeds, Joint White Paper by European Investment Bank (EIB) and Green Finance Committee (GFC) of China Society for Finance and Banking, 11 November 2017, available at https://www.eib.org/attachments/press/white-paper-green-finance-common-language-eib-and-green-finance-committee.pdf [last viewed 1 February 2021].

[13] For more about the network, see Global Progress Report of the Sustainable Banking Network: Innovations in Policy and Industry Actions in Emerging Markets, October 2019, available at https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/SBN_2019+GlobalProgressReport [last viewed 1 February 2021].

For more on this topic, see Chen, K., China and the Global Initiatives towards Sustainable Finance: Shifting from Norm-Importer to Norm-Exporter?, Working Paper, Faculty of Law, Stockholm University, 2020.

mainstream comparative methodology falls somewhat short. The question raised thus is how can comparative law better facilitate comparisons in a post-nation, and possibly post-Western, era?

3. Reflections

While why global finance could serve as a central case for the methodological debates in comparative law might seem rather obvious, the evolutionary road ahead is perhaps less straightforward. Considering the impact of globalization has had on comparative law, it is necessary to take a closer look at the relationship between the two. Only two main points will however be addressed. The first one focuses on the methodological adjustments that comparative law has undertaken in recent times, and the second one on the meaning of comparative research as regional, national and local differences are being increasingly blurred by globalization.

In terms of the relationship between globalization and comparative law, it could be viewed as multileveled. As seen in the financial markets, globalization has altered the working of the financial system by integrating financial markets around the world. Globalization has also reshaped the regulatory landscape of global finance. As the legal landscape in the financial markets, as well as of a considerable number of other fields, has given rise to new challenges and inquiries to explore, it has also called for new methodological approaches of law in general and of comparative methodology in particular.

Hence, there has been a revival of comparative methodology and discussions on new directions in comparative law. In this regard, as emphasized by Siems, the "new" mainly refers to the trends that have taken place during the past ten to fifteen years.[14] The changes include a broadening of the substantive scope of comparative law as well as renewal of its methods. It should be borne in mind that the two are interconnected, new methods often point to new topics and new topics may require new methods.[15] The expansion of the substantive scope has for example resulted in more comparative research in topics outside of the private law core. These include, among others, constitutional law, family law and subjects of inquiry that cut across disciplinary boundaries such as human rights and rule of law. This has, in turn, pointed to the renewal of the comparative methods, such as

[14] Siems, M., 'New Directions in Comparative Law', in Reimann, M., and Zimmermann, R. (eds), The Oxford Handbook of Comparative Law, 2nd ed, Oxford University Press, Oxford 2019, p. 852 (hereafter Siems 2019).

[15] Siems 2019, p. 853.

the functional method(s), and interdisciplinarity that integrate comparative law and other approaches.

The changes have also led to a redirection of the functions of comparative law. It has been noted that a main purpose of comparative law was constructing the state law.[16] The emergence of new regulatory orders, such as the one composed of transnational regulatory and private networks in global finance, has however given rise new aims and purposes of comparative research. Comparative legal studies have for example been used to analyze the functioning of supranational legal orders such as the EU for some time. It could now also serve as a useful instrument for the analysis of global and transnational legal orders. The research includes vertical comparisons, i.e., between a transnational legal order and a national one, and horizontal ones, i.e., between different global and international orders.[17] Why comparing thus is no longer confined to constructing the state law, but to reforming transnational and global legal orders as well.

Possibly, considering the multitude and overall nature of the transformations, it could be questioned whether globalization is challenging the discipline in a fundamental manner. This evokes the relationship between comparative law and the nation state, as well as the essential question of what is comparative law. In terms of the former, indeed, since the inception of the modern nation state, it has dominated and defined law, lawmaking and legal systems. Comparative law was no exception. As a result, the discipline has been viewed as state-centric.[18] The realm of comparative law is however much wider, dating back to Ancient Greece, the practice and use of comparisons was introduced long before the birth of the modern nation state.[19] Comparative law has since adapted to the changes of time, and dealt with phenomena such as legal pluralism and transnationalism.[20]

[16] Glenn HP., 'A Transnational Concept of Law', in Tushnet, M and Canem, P. (eds), The Oxford Handbook of Legal Studies, Oxford University Press, Oxford 2005, p. 841–842 (hereafter Glenn 2005). However, as further developed by Glenn, this state-centric view is in decline, Glenn 2005, p. 839 and 842–846. See also Sacco, R., Legal Formants: A Dynamic Approach to Comparative Law (Installment I and II), The American Journal of Comparative Law, Vol. 39, Issus 1, p. 1–34 (Installment I) and Issue 2, p. 343–401 (Installment II), 1991.

[17] See e.g. Zaring 2016.

[18] For the development of comparative law and the state during the nineteenth century, see Husa, J., Law and Globalisation, Edward Elgar Publishing, Cheltenham 2018, p. 38 (hereafter Husa 2018). For examples of critics that have been raised against the traditional state-centered bias of comparative law and calls for renaissance, see Glenn 2005, p. 844.

[19] Donahue, C., 'Comparative Law before the Code Napoléon', in Reimann, M. and Zimmermann, R. (eds), The Oxford Handbook of Comparative Law, 2nd ed, Oxford University Press, Oxford 2019.

[20] For more on these topics, see e.g. Zumbansen, P., 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance', in Maurice, A. and Jacco, B.(eds), Practice and Theory in Comparative Law, Cambridge University Press,

And there should be no constraints on how it can follow, and flourish in, current wave of globalization.

So, as globalization is diminishing the state in law and lawmaking, it is also changing the methodology of comparative law. Globalization should however not be viewed as a threat to the discipline. This leads to the second question raised above. In this regard, while the matter has been subject to considerable scholarly debate, most comparatists would agree that comparative law is comparing and analyzing similarities and differences between various legal systems.

Arguably, notwithstanding which law to be compared, the prime focus of comparative law is to *identify and explicate the similarities and differences between various legal systems*. And the purpose is to *generate systematic thinking of why there are differences and similarities between these different legal systems*. In other words, as the state is no longer the only or primary source of normativity and defining point for legal systems, comparative law is also shifting its focus from the state. Here, it should be emphasized that the article at hand is not built on any idea that the state and state law is vanishing, but that comparative law is expanding its scope to include non-state law as well.

In terms of the second point that should be raised concerning globalization and comparative law, it relates to the exercise of identifying and analyzing similarities and differences between various legal systems. As pointed out by Glendon, due to unprecedented global interdependence, the differences between regional, national and local are becoming increasingly blurred. To proponents of standardized and universal norms, the comparative enterprise can seem unnecessary or obstructive.[21]

However, as further clarified by Glendon, in today's globalized world, while there is a force towards universalism, there exists also an opposing inclination towards regional, national and local autonomy. Each seeking to protect the values that they firmly believe in and represent.[22] Transposed to the realm of law, considering the emergence and influence of fields such as global law in recent years, legal universalism could seem conceivable. It has however been argued, and rightfully so, that despite the agenda of global law to create a world law of universal application, it still has its limits.[23]

Cambridge 2012, and Catá Backer, L., Multinational Corporations as Objects and Sources of Transnational Regulation, ILSA Journal of International and Comparative Law, Vol. 14, No. 2, 2008, p. 499–523.

[21] Glendon, MA., 'Reflection on the Comparative Study of Law in the 21st Century', in Boele-Woelki, K. and Fernàndez Arroyo, D. (eds), The Past, Present and Future of Comparative Law – Ceremony of 15 May 2017 in Honour of 5 Great Comparatists, Springer International Publishing, Cham 2018, p. 3 (hereafter Glendon 2018).

[22] Glendon 2018, p. 8.

[23] Husa 2018, p. 47. While global law has generated much discussions, the notion remains

The effects of globalization include both convergences and divergences, producing similarities in certain areas and generating variations and local adaptions in others.[24] Possibly, comparative research in its dedication to both similarities and differences can be valuable in either direction, serving as a useful tool for creating legal harmonization and unification in one, and as a powerful reminder of the differences that still exist in the other.[25]

Hence, comparative law, in the current era of globalization, stands at the intersection of the global and local. It is not only devoted to identifying the differences and similarities between various legal systems, notwithstanding at the supranational, regional or national level, it also reveals the legal, political, economic and cultural context that have shaped them. Comparatists must have a thorough understanding of the trends towards the homogenies and universal as well as the diversity and particularity of the local.[26]

4. Renewals

In many ways, intersection is at the heart of comparative financial law. Since the financial crisis of 2008, there have been even stronger efforts towards developing global regulatory standards, and a variation of local adaptions has also arisen during the domestic implementation process. Moreover, as mentioned at the outset of the article, the regulation of financial markets is shaped by an intricate interplay of private and public law. And increasingly, global finance is becoming another arena where the West meets the East.

In recent years, regulation in general, and financial regulation in particular, has been recognized as a new topic in comparative law.[27] As discussed

elusive, see among others Walker, N., Intimations of Global Law, Cambridge University Press, Cambridge 2015.

[24] Global law and globalization of law are two interconnected but different matters, see Husa 2018, p. 33, and Berman, PS., From International Law to Law and Globalization, Columbia Journal of Transnational Law, Vol. 43, 2005, p. 487–488. The distinction, as well as interdependence between the two, can be observed in the financial markets as well. For more on globalization and financial law, see Gorton, L., Globalization and the Law Related to Credit and Finance, Scandinavian Studies in Law, Vol. 57, 2012. For the distinction between global financial regulation and globalization of financial regulation, see Chen, K., Financial Regulation and Globalization of Law, Working Paper, Faculty of Law, Stockholm University, 2019.

[25] Husa 2018, p. 46–47. See also Watt, MH., 'Globalization and Comparative Law', in Reimann, M. and Zimmermann, R. (eds), The Oxford Handbook of Comparative Law, 2nd ed, Oxford University Press, Oxford 2019 (hereafter Watt 2019).

[26] Cf. Glendon 2018, p. 8–9.

[27] Bignami, F., 'Introduction. A New Field: Comparative Law and Regulation', in Bignami, F. and Zaring, D. (eds), Comparative Law and Regulation: Understanding the Global Regulatory Process, Edward Elgar Publishing, Cheltenham 2016, p. 3.

above, new topics often point require new methods and vice versa. Since the topic of comparative financial law is analyzed in-depth elsewhere, only two aspects of the methodological rethinking of comparative law and the financial markets will be discussed here.[28]

The first one relates to the broad variety of sources in the financial markets and comparative methods.[29] Arguably, one of the most well-known methods is the functional one. It has, among others, been recognized as a useful method in law reform, in the domestic context as well as in regional and international harmonization projects, for quite some time. Over the years, the functional method has received considerable criticism, including the dominating position of private law and emphasize on so called black letter law. Another main point is against the concept of *praesumptio similitudinis*.[30]

In 2017, one of the authors to the standard reference work on functionalism shared his view on the criticism that functionalism is "outdated, *démondé*, antiquated and out of touch with the challenges comparative law is facing today".[31] In the reply, Kötz explained that in the functional approach, the comparatist should take into account whatever molds or affects human conduct, such as statute law, case law, customary law, legal writings, standard-form contracts, trade usages and the availability of informal techniques of dispute resolution etc.[32] In some cases the comparatist may come to the conclusion that different legal systems have by different means reached the same practical solution, i.e., the principle of *praesumptio similitudinis* would apply. If the opposite conclusion were reached, however, it would not be incompatible with the functional approach since it has no difficulties in accepting the diagnosis of deep-seated differences between

[28] For more on comparative financial law, see Wood, P., Maps of World Financial Law, Sweet & Maxwell, London 2008, Wood, P., Comparative Law of Security Interests and Title Finance, 3rd ed, Sweet & Maxwell, London 2019, and Dalhuisen, J., Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, 7th ed, Hart Publishing, Oxford 2019.

[29] There is no single method of comparative law, but a collection of methods. The selection of method is guided by the aim of the specific comparative study. For more on different methods of comparative law, see e.g. Van Hoecke, M., Methodology of Comparative Legal Research, Law and Method, Issue 12, 2015, p. 1–35, and Palmer, V., From Lerotholi to Lando. Some Examples of Comparative Law Methodology, Global Jurist Frontiers, Vol 4, Issue 2, 2004, p. 97–126.

[30] Which is a presumption that the practical results identified in the legal systems compared should be similar, Zweigert, K. and Kötz, H., An Introduction to Comparative Law, 3rd ed., Clarendon Press, Oxford 1998, p. 40.

[31] Kötz, H., Comparative Law: A Veteran's View, in Boele-Woelki, K. and Fernàndez Arroyo, D. (eds), The Past, Present and Future of Comparative Law – Ceremony of 15 May 2017 in Honour of 5 Great Comparatists, Springer International Publishing, Cham 2018, p. 25 (hereafter Kötz 2018).

[32] Kötz 2018, p. 27.

the solutions of different jurisdictions. The comparatist should take into account all factors that may explain the similarities and differences of the different solutions.[33]

This clarification supports the idea that functional method is not as limited as the critics thereof have argued.[34] Moreover, it could be especially useful in legal landscapes that are diversified and pluralistic. In the regulatory landscape of global finance, the emergence of new sources of normativity and the interaction therebetween has given rise to a wide range of norms, such as public (administrative) regulations, private law principles, self-regulatory rules, and professional codes deriving from private, national and/or transnational sources. The comparatist cannot, and should not, be limited to the black letter law, but examine and compare all norms that are of relevance, including those of quasi-binding and soft law nature.[35] So, as the functional method is shedding the past limitations (or misconceptions), it could play an instrumental role in evaluating and providing normative arguments for reforms in various legal orders, such as the one in global finance. Functionalism thus is not limited to reforming state law, but normative orders of national or international, formal or informal, state or private nature as well.

The second example of how comparative methods are moving away from the state-centric focus is the use of legal transfers to analyze the diffusion of today's legal norms.[36] As discussed above, comparative analyses can explicate the functioning of different legal orders, including those other than state legal systems. In addition, comparative research, and more specifically legal transfer analysis, can reveal how legal norms do not always follow the traditional paths of transplant and reception, i.e., state to state transplants, but can migrate through the routes of new global regulatory processes as well.[37]

[33] As expressed by Kötz, if he were to publish a new book about comparative law, a lot would have to be changed or put in a form less amenable to misunderstandings, Kötz 2018, p. 29.

[34] As noted by among others Michaels, R., The Functional Method of Comparative Law, in Reimann, M. and Zimmermann, R. (eds), The Oxford Handbook of Comparative Law, 2nd ed, Oxford University Press, 2019.

[35] For more on the different norms and sources in the financial markets, see Chen 2018, p. 289 ff.

[36] Cf. Bignami 2016, p. 14.

[37] It has been noted that the terms legal transplants and legal transfers can be used differently. The latter has been viewed as more generic and neutral. For more on legal transplants, see Watson, A., Legal Transplants, 2nd ed, The University of Georgia Press, 1993. For criticism against it, see e.g. Legrand, P., The Impossibility of 'Legal Transplants', Maastricht Journal of European and Comparative Law, Vol 4, Issue 2, 1997, p. 111–124. For more on the transferability of law, see Nelken, D., 'Comparatists and Transferability', in Legrand, P. and Munday, R. (eds), Comparative Legal Studies: Traditions and Transitions, Cambridge University Press, Cambridge 2003 (hereafter Nelken 2003).

This can for example be observed in the "new" regulatory order of global finance, where the standards are developed by transnational networks composed of regulators from different member states. The standards result thus from cooperation between them. Notwithstanding the standards incorporate or reject the practice of a certain member state, they are the outcome of collaboration, including convergence and divergences, among the national regulators.

In the aftermath of the financial crisis of 2008, the regulatory order in global finance was further institutionalized and gave rise to a more vertical, *top-down*, regulatory process where the global standards are implemented in various local markets. However, it has also been noted that in these networks, the national regulators do not only attempt to shape how their domestic markets should be regulated, they also seek to promote their own regulatory approaches as the ones that other states should follow.[38] Thus, a vertical, *bottom-up*, analysis could reveal how financial regulatory principles and practices can migrate from local sources to transnational networks and developed into global norms. Financial regulatory standards can thus migrate horizontally, via state-to-state transfers, as well as vertically, downwards and upwards, within new global legal orders.

And perhaps more importantly, legal transfers analysis can explain why certain norms can be transferred into other legal systems and others cannot. As raised above, while many emerging economies and developing countries are subject to the "global" regulatory standards, they have played a limited, if any, role in the shaping thereof. Since the standards are designed for advanced economies and do not cater for the conditions of emerging economies and developing countries, they have been poorly implemented in the latter. By analyzing the transferability of the regulatory standards, it can explicate *whether* and *how* the standards can be transferred.[39]

It should be noted that although the regulations in an increasing number of financial markets are now deriving from these common global sources, they remain deeply embedded in the domestic setting. In seeking to develop regulatory standards that can be implemented in different legal systems, it is necessary to take into account the local market, institutional and regulatory context. Since many of the world's financial centers are located in advanced economies of the West, the international financial markets, and the regulation thereof, have also been dominated by a Western-centric view. However, as emerging economies and developing countries are becoming increasingly important stakeholders in global finance, there is a need to shift from this Western-focus. In this regard, comparative research, by revealing the local context of financial regulation, could provide in-depth analysis of how

[38] Brummer, C., Soft Law and the Global Financial System: Rulemaking in the 21st Century, Cambridge University Press, Cambridge 2012, p. 66.

[39] This is indeed closely linked to the discussion on legal culture, see e.g. Nelken 2003.

regulatory standards can be designed and function in a broader variety of financial markets, and contribute to the pursuit towards more inclusiveness and fair representation in the regulatory arena of global finance.

5. Concluding Remarks

It could be argued that after decades of comparatists discussing, debating and arguing over it, the methodology of comparative law remains contested. It opens up for different paths to be pursued, including a wide range of research questions to be posed and methods to be employed. Possibly, comparative methodology could be viewed as a maze, composed of a collection of paths, each leading from the entry point to the end. As a result, no two comparative studies are completely identical. And as challenging, and at times confusing, this methodological maze can be, it could also be claimed that it is equally captivating.

Comparative law thus is dynamic and creative, inviting changes and renewals. This short article was written to discuss how it is responding to the current wave of globalization. The methodological rethinking of contemporary comparative law is not limited to an expansion of its substantive scope and renewal of methods, but as well its functions in a post-nation era. In terms of the governance and regulation of global finance, it should be borne in mind that many issues in the financial markets are shared by regulators worldwide. These include, but are certainly not limited to, matters concerning cybersecurity, climate change and geopolitical uncertainties. Innovations in financial technology (FinTech) are changing nearly all aspects of the financial system, ranging from new ways of payment in our daily life to the introduction of cryptocurrencies.[40] In seeking to understand and enhance the regulation of these common concerns, the systematic thinking of why certain differences or similarities might exist between various financial regulatory frameworks, and how to develop legal solutions that can be applied in different frameworks could make a valuable, if not crucial, contribution to the global community.

[40] Allen, JG. and Lastra, R., Border Problems: Mapping the Third Border, Modern Law Review, Vol. 83, Issue 3, 2020, p. 506.