Comparing Essential Components of Transnational Jurisdiction: A Proposed Comparative Methodology

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Professor Conley identifies the problem of how to reconcile/harmonize two or more different regimes or approaches at play and at odds in transnational cases in private international law. The paper focuses on the divide in approaches for purposes of personal jurisdiction, but her proposed "essential components" methodology for harmonization can be applied in any context. Her paper answers the question of how to harmonize wildly different legal regimes— examine the essential components of each regime

1. by first, tracing the legal rules' historical roots;
2. second, comparing the cultural values, aspirations and mentalities impounded in the legal institutions, its players, and their legal behavior;
3. third, examining the ideological and philosophical roots of the state's legal institutions, and its legal traditions as evidenced in its social and economic landscape and its legal reasoning structure.
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She explains how common law— aimed at providing fact-specific justice with maximal flexibility— clashes with the predictability expected in civil law regimes. Consequently, these two approaches operate at odds, reverse thrusting the much ballyhooed promise of harmonization of transactional jurisdictional rules, while litigants are caught in the crosshairs of the battling approaches.

I wonder if the harmonization movement understood this foreseeable clash, and went with the harmonization model anyways, figuring, let the more powerful approach win. Professor Conley concretizes the problem in

harmonization of transnational jurisdictional rules by discussing the fractured negotiations and eventual withdrawal of the US from the Choice of Court Convention, as one example of the failure of negations in the area. Perhaps, Professor Conley offers a solution where both sides win by explaining how the reconciliation process broke down.

She offers the map to the minefield for future negotiators by specifically identifying the core or essential components of each approach as rooted in its deep legal traditions.[1]

Professor Conley suggests taking down the metaphorical "borders" that divide the approaches by considering these essential components more as guides, and not as binary classifications that operate as a zero sum, either/or plus/minus inaccurate classification. The author urges the reader to understand these systems more as mosaics of normative information, and not as closed entities.

She offers a "synthesis" of the existing methodologies, but I wonder about the "synthetic" qualities of this new entity. In my view, will this new entity, the Frankenstein-reassemblage-of-disparate-parts once unmoored from the cultural, sociological, political and legal traditions within which each "part" emerged, war against itself, as in LeGrand's "primordial cleavage." And if integrated, these parts might be experienced as "legal irritants." Like a pebble in your legal shoe. No doubt, it would be very interesting to see how the new entity would operate in unexpected ways, yielding new "radical differences" and dynamisms that would then require further harmonization and so on, *ad infinitum*. As soon as one synthetic solution is reached it would succumb to the phenomenon of "pastness" (H. P. Glenn's word) even as "pastness" is an essential component of legal tradition that might be transmissible to the future.[2]

In discussing cultural values as an essential component of law, reference is made to the view that law is a "*general consciousness* or experience." I am intrigued by the notion that law is a "general consciousness." That statement suggests that

1. Interestingly, the legal systems have been referred to as "families." What is sought is to mix the families — but how to effectively accomplish that has been the challenge.

2. The author overviews the long history of the common law, dating back to the Norman conquerors of ye olde England in the 11th century.

subjectivity, as we know it in law, which describes a personal, individual and specific perspective, can be collectivized and shared by large groups. That is the opposite of subjectivity in the pre-21st -century US common law sense. This is subjectivity in the chaosmosis sense— a general consciousness shared by a global population as a result of indoctrination by mass media.

In the main section titled, "when things fall apart," Conley cites the "choice of court convention" negotiations and the "deep and pervasive" disagreements that emerged between the US and other as a chief example of how the clash of fact-specific jurisdiction analyses and discretionary doctrines with civil law's use of categorical bases for jurisdiction and lis pendens renders an unavoidable fail. The US attempted to "blend" the two regimes by developing a supplemental basis for jurisdiction, a so-called "gray list" of grounds for jurisdiction which would be white-list adjacent, because these were not expressly black-listed, but that would allow non-prohibited bases for jurisdiction important to the national law of the state, read personal jurisdiction based on the US "doing business" model, and forum non coveniens framework. So, the US-generated "white list" included non-controversial items such as —the defendant's domicile as a basis for jurisdiction, but the gray list might include the US system's discretionary "doing business" analysis and allowed a forum non coveniens framework.

The European and Latin American delegates balked. Without recounting the whole back-and-forth here— the short story is that the 2021 draft convention failed to reach agreement on these significant provisions.

In my view it is the negotiators' contingent inter-relationship within this international legal-environment that results in this foreseeable stalemate. That is, until the global social and economic order is disrupted, the negotiator-actants in this specific environment will not break out of the black box of the past and forge a bridge to a different future allowing a new hybrid-regime argued for in Conley's paper.