**Behavioural Comparative Law: Its Relevance to Global Commercial Law-making**

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**This chapter develops a new framework by which to evaluate the making of commercial law on a global level.**
**Cost-benefit analysis is celebrated, and all traffic in the area should be diverted to this form of research whenever possible, argues the author**

behavioral comparative law, but not comparative behavioral

Given our limited time, I will focus on the emerging school of thought featured in Professor Linarelli's chapter, the behavioral comparative law or BCL approach, as distinguished from the rational choice theory and from the law and society approach. The author applies the insights of the BCL school to global commercial law making.

**A.** An important and related subtheme of Linarelli's concern is the role of the lawyer in global commercial law making. Lawyer's professional judgment is key to:

- Project selection and development in international organizations working in the global commercial law making space
- reflected in the project selection are three steps or stages of process:
  - selection of an appropriate subject for study
  - problem preparation- laws to be considered etc
  - drafting stage

Linarelli uses the production of the UN Convention on the International Sale of Goods to illustrate the process.

- Convening of a group of experts
- drafting

- over a long period of time
- notwithstanding the total lack of remits over financial regulation
  - expertise of the group illustrated by their
    - specialized knowledge of finance, markets and institutions

**1.** Welfare economics and law and economics is efficient and pragmatic as a tool for evaluating global commercial law making reform projects, and yet these are almost entirely absent from the process.

**2.** Law and economics scholars are absent from the field as well.
To improve and modernise the law or create new law, Linarelli argues that

we must get beyond 19th century thinking on legislative reform, which focused on lawyers as experts busily codifying legislative enactments, citing Sir MacKenzie Chalmer's commenting on cases and rules as "ripe for codification" when these are "mere illustrations of accepted general rules." Progressive development of law, this is not.

Nevertheless, Roscoe Pound characterised commercial lawyers of his day as "cosmopolitan" and private lawyers as "tribal." Linarelli agrees, as do I. And I'll add that this is a highly developed commercial "law" of the kind found in Swift v. Tyson (1842), a "brooding omnipresence in the sky" Holmes' critical frame in 1917---what's wrong with that?---and not like "laws" in Erie Railroad Co. v. Tompkins (1938).

The author discusses the rise of "Modernisation theory" in the late 50's and 60's that posits that economic development is linked to a change toward liberal democracy, then shifting to mean liberal global market orders.

A functioning legal system was essential to this change, where rule of law would curtail arbitrary state action. (read Cuba?) what is the role of human rights laws and violations in this thesis? Does it matter if a state is in constant and extreme violation of human rights laws? Such as the kabala-slave system in Quatar?

The problem identified:

Merely codifying pre-existing domestic law requires nothing more than expert judgment
the lawyer needs only to be an expert on the "state of the law."

Linarelli then explains that there is a giant divide in the L&E literature between those who espouse a positive political theory view and those who do not.
The example given is the American UCC project.

Private legislatures produce two kinds of rules---
Model I--- specific rules, "bright line."
This is the model adopted when the aim of the project is to "get something done" and get that "adopted."

Model II rules abstract and general relying more on concepts like reasonableness, giving the decision-maker discretion.

the author then discusses the Dissenters II class – labelled the *other* Chicago school.

Halfway into the paper, the focus tightens and the dramatic arc of the thesis really draws the reader in. This is where the author discusses the psychology of legal actors.
rooted in sociological – research methods are generalizable.
The example given is the Model Law on Cross-Border Insolvency.
This study is an ecological method at work and is a rich account of the

- the actors and organizations
- "black box" of transnational commercial law is opened

Linarelli then takes on opening the black box "of the psychology of law-making."

**B.** What is BCL? The BCL approach advocated by the author looks neither to institutions nor to structure to explain the actions of legal entrepreneurs in global commercial law-making.

Instead it examines the psychology of expert judgment. For example, the author explains,
"the behavioural sciences hold promise for discovering why actors in the law-making processes behave in particular ways and how this behaviour influences the law-making process."

Linarelli agues that comparative law cannot be robust unless:
"But for comparative law to be even more robust in its use of the behavioural sciences to explain difference across legal systems, comparativists will have to go further and inquire into the psychology of the actors in the legal systems they study and, for purposes of this chapter, those involved in reforming,

harmonising, unifying, or otherwise making law meant to have authority across a significant number of states. Putting a group of lawyers from different jurisdictions in a deliberative process in an intergovernmental organisation to produce a legal instrument that will be widely accepted across a large number of jurisdictions could be understood as the setting for a natural experiment for comparativists."

The author urges the study of comparative law using the full panoply of behavioral sciences, psychology, and cognitive science to inquire about differences in the law across jurisdictions.

**C.** Why BCL? Because this approach

1. offers tools to aid in comparing rules across jurisdictions
2. offers tools to evaluate legal transplants
3. helps get over epistemological obstacles that 'legal culture' has presented in comparative law

**D.** BCL in action – examples:

- the example Linarelli provides is the study of the American UCC Article 9

and how secured credit affects lending. Here behavioral science is an input into law-making, revealing the role of bias in law making.

- Another example is consumer protection legislation

The author discusses the role of heuristics and biases in expert judgment, such as

- confirmation bias defined by the author as "use of evidence and argument in ways partial to beliefs a person already holds"

In conclusion, the author offers this:

"There appear to be promising lines of research still be done in both areas. Intui-tion informs us that heuristics and biases, as well as other cognitive insights associated with culture and national identity, are in play in global law-making. More generally, behavioural science seems to hold significant potential for understanding how legal problems are solved in different states. Future work would seem to require data-driven and experimental investigation. It is my hope that this chapter serves as a catalyst to instigate further work in the use of behvioural comparative law methods to study global commercial law-making."