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# Harmony of Laws in the Americas

H. Patrick Glenn

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## ARTICLE

### HARMONY OF LAWS IN THE AMERICAS†

H. PATRICK GLENN\*

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#### I. INTRODUCTION

Plato, in *The Timaeus*, spoke of the need for the good and the rational to overcome “discordant and unordered motion,” thereby bringing about a harmony.<sup>1</sup> Yet in the theory of music, harmony has been understood as a simple “reconciliation of opposites, a fitting together of disparate elements,” and harmony is rather, here, a process of discovery, based on the “inevitable” order of notes and the place of music in the “cosmic pattern.”<sup>2</sup> There are therefore different concepts of harmony in the world although, given different degrees and modalities of human intervention, there can be no clear line between them.

In law, the first, Platonic, concept of harmony has been perhaps the most evident in recent centuries and is most clearly evi-

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2. G.L. Finney, *Harmony or Rapture in Music* in II DICTIONARY OF THE HISTORY OF IDEAS 388, 389 (Charles Scribner's Sons ed., 1973).

denced by the widespread use of the verb “harmonize” as a transitive verb. Harmonization is therefore something which is *done*, to an object of the harmonization process. The second, cosmic or musical concept of harmony, prevailed in earlier times but appears implicit in much contemporary thinking about informal processes of legal change at a regional or global level.<sup>3</sup> Legal harmony here is not imposed, but is instead expected to appear as a result of various, natural forces of both convergence and divergence. To harmonize would be here an intransitive verb, an indication that various laws *are* in harmony, in the sense of coexisting in a non-conflictual mode in spite of possible differences. In this perspective, there would be no need for more affirmative, formal measures of reform, or harmonization in a transitive sense. There is much to indicate that this second, natural concept of harmony is one which already prevails in the Americas and one which should continue to prevail. This conclusion can be reached, however, only after examining the different concepts of harmony and the methods or techniques of their realization.

## II. CONCEPTS OF HARMONY

The different concepts of harmony in law have been developed in different places and in different circumstances, and it is important to place each of them in their historical contexts. The process of Platonic, affirmative or formal harmonization has been largely the product of European thinking since the Enlightenment, and has been given renewed vigour with the development of the European Union. More informal concepts of harmony have prevailed in the Americas since the time of European colonization, in spite of the great influence of European legal thought. In both Europe and America, however, the prevalence of either concept of harmony has been a matter of degree, and both have been present in some measure in the European and American experience.

### A. *Formal Harmonization*

The clearest examples of formal harmonization in legal history have been the European national codifications of the 19th and 20th centuries. It is even appropriate here to speak of unification, though there is ongoing debate as to the extent of local diver-

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3. For a discussion of North America as an example of this “new medievalism,” implying less centralized and more diffused forms of governance see H.P. Glenn, *North America as a Medieval Legal Construction*, 2 GLOBAL JURIST ADVANCES, No. 1, Article 1 (2002) available at [www.bepress.com](http://www.bepress.com).

sity still underlying the national codes.<sup>4</sup> The codifications were fundamental to the creation of national identities and were an integral part of the assertion of central political authority over an expanding geographical territory. The creation of the European nation states and the process of colonization occurred simultaneously, and both were the result of this process of territorial expansion. Law was then used to bind the new territory together, so the process of affirmative harmonization was necessary, from the perspective of central authority, to overcome the "discordant and unordered" nature of pre-existing laws. The same process occurred in some measure in the Americas, as new states extended their authority to their frontier territories.

Subsequent developments are well known. Law became conceived, in European doctrine, in exclusively national terms. Resort to transnational forms of law, Roman law, general principles of law, or "persuasive authority" declined to the point of non-existence in most European judicial practice. The new sciences of public international law and private international law came into great prominence. Both assumed the plenitude of national law. Public international law thus could not trespass into the domestic sphere, and viewed states (and not individuals) as the exclusive subjects of international normativity. Private international law had no substantive content and took as its function the assignation of all private international cases to the determination of a given national law. The international case had to be regulated as a domestic, national case, since there was no other law available in the world.

The nationalization of law in Europe accentuated European diversity. National laws emerged in many languages and in diverse and detailed written form. Germanic codes differed greatly in structure and content from the codes of the Latin countries. The distinction between the civil and common laws was seen as insurmountable. In France the *Société de législation comparée* was created to study differences amongst the codified jurisdictions; comparison with the common law was not contemplated. Differences between the national laws were seen as so significant that in many European countries the rule developed that rules of private international law were of obligatory application by the

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4. See, e.g., H.P. Glenn, *The Use of Computers: Quantitative Case Law Analysis in the Civil and Common Law* 36 INT'L & COMP. L.Q. 362, 366 (1987) (for computer tracking of regional jurisprudence within France, historically overlooked in the absence of extensive case reporting).

judge, such that parties could not simply rely on the law of the forum in litigating a case with a foreign dimension. An underlying concept of global disunity of laws thus gave rise to a generalized presumption of conflict, necessitating complex, expensive and time-consuming processes of allocation of cases amongst states.<sup>5</sup> Yet since private international law was itself conceptualized as national law, conflicts developed even amongst national rules of private international law, yielding a further level of second-order conflict. Efforts to resolve the perceived underlying disharmony through negotiation of bilateral or multilateral treaties of unification or harmonization have generally not been effective, in spite of occasional successes.<sup>6</sup>

The development of the European Community and its successor, the European Union, has seen further progression of the idea of formal harmonization. Europe can be seen as a nascent state, with legislative, executive and judicial institutions, and necessarily bound together by uniform law. Early European Community legislation was even conceived as a process of "unification" before the present language of "harmonization" came into use.<sup>7</sup> Contemporary European harmonization is thus consistent with historical European concepts of national legislative unity and is arguably necessary, given the underlying European concept of disunity or conflict of European national laws. A European Civil Code is being contemplated, as well as other, less uniform measures of developing a (single) European *jus commune*.<sup>8</sup> There would also

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5. See generally H.P. Glenn, *Harmonization of Law, Foreign Law and Private International Law*, 1 EUR. REV. PRIV. L. 47 (1993); on the presumption of the systemic and complete character of national laws see H. BATIFFOL, ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ (Dalloz 1956), notably at pp. 16, 24.

6. On the general ineffectiveness of unification through treaties see J. BRAITHWAITE & P. DRAHOS, *GLOBAL BUSINESS REGULATION* 86 (Cambridge University Press 2000) (multiplication of treaty efforts but low rates of ratification); J. DALHUISEN, *DALHUISEN ON INTERNATIONAL COMMERCIAL, FINANCIAL AND TRADE LAW* 71 (Hart Publishing, 2000) (unification cannot go beyond terms of treaty itself and ratifying states; contents often simple compromises between national laws; difficulties of subsequent amendment); H. Kötz, *Rechtsvereinheitlichung - Nutzen, Kosten, Methoden, Ziele*, 50 RABELS ZEITSCHRIFT (1986).

7. Unification implied adoption by each Member State of identical texts. Harmonization implied adoption of identical policies or objectives or results, leaving some flexibility in choice of text and instrument. See H.P. Glenn, *Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions*, in INTERNATIONAL ACADEMY OF COMPARATIVE REPORT, MONTREAL 1990 XIII<sup>TH</sup> INTERNATIONAL CONGRESS GENERAL REPORTS 79 (Yvon Blais 1992).

8. See Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM 389 (2001), available at <http://europa.eu.int/comm/consumers/policy/>

have to be harmonization of the second-order conflicts of private international law rules, and this process is also under way in Europe, both through the development of international conventions and more recently through promulgation of European Union Directives in defining a European "judicial space."

There are indications, however, that measures of affirmative harmonization may not be as prominent at the European level in the future as they have historically been at the level of nation states. Existing European supranational law has been described as "de-harmonizing" as well as harmonizing because it effectively creates two levels of rules in each nation state.<sup>9</sup> It has also been described as a "failure" since national courts would have largely ignored it in the absence of doctrinal integration with national law.<sup>10</sup> Its method has been described as "virtually totally authoritarian"<sup>11</sup> while further measures in the field of contract have been criticized as unnecessary.<sup>12</sup> In the face of increasing numbers of cross-border transactions, private international law is seen as a "necessary rather than an adequate mode" of resolving cross-border disputes,<sup>13</sup> diminishing in importance as the role of transnational commercial law increases.<sup>14</sup> There has been recognition that "national leeway" is necessary in satisfying European

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developments/contract\_law/index\_en.html, with the accompanying reactions and comments from institutions and commentators in Europe. The Communication proposes four options for future development of contract law in Europe: i) leaving solutions to "the market," ii) developing "non-binding common contract law principles," in Restatement-like form, iii) improving and refining existing European-level law, and iv) adopting a new code-like instrument at the European level. Most European Community legislation in the field of contract has been for purposes of consumer protection. There have also been instruments in particular fields such as products liability, late commercial payments, cross-border credits transfers, etc.

9. W. Van Gerven, *A Common Law for Europe: The Future Meeting the Past?*, 4 EUR. REV. PRIV. L. 485, 491 (2001).

10. L. Niglia, *The Non-Europeanisation of Private Law*, 4 EUR. REV. PRIV. L. 575 (2001).

11. J. Smits, *A European Private Law as a Mixed Legal System*, 5 MAASTRICHT J. OF EUR. & COMP. L. 328, 332 (1998).

12. See the response of the English Commercial Bar Association (COMBAR) to the European Commission Communication, *supra* note 8, available at <http://www.combar.com>.

13. R. GOODE, *COMMERCIAL LAW IN THE NEXT MILLENNIUM* 87 (Sweet & Maxwell 1998).

14. R. Goode, *International Restatements and National Law*, in *THE SEARCH FOR PRINCIPLE[?] ESSAYS IN HONOUR OF LORD GOFF OF CHIEVELY* 45, 46 (W. Swadling & G. Jones ed., Oxford 1999); and see DALHUISEN, *supra* note 6, at vii ("I . . . consider the nineteenth century Continental European nationalization of private law, supported by the conflicts rules of those times, a modern day aberration, entirely inadequate for the modern business community.").

norms,<sup>15</sup> that European law is now situated in a developing global legal culture with its "emerging doctrine of transnational law,"<sup>16</sup> and that, at least in the field of corporate law reform, much legal integration will take place "from below" and not "from above."<sup>17</sup> There is therefore an increasingly recognized place for informal measures of harmonization within European law. Its place appears to be still larger in the context of the Americas.

### B. *Informal Harmonization*

Why is the law of the Americas so fundamentally different from the law of Europe, given the experience of the last two or three centuries, in spite of all that is common to them? There are several underlying reasons, all of which speak to American law being fundamentally concerned with a "reconciliation of opposites," an accommodation of ongoing diversity, rather than imposition of a single pattern of order. Law in the Americas must first of all encompass the legal traditions both of its original peoples and of its European settlers, and the enduring character of indigenous laws is now being recognized in an increasing number of American national constitutions. Within European tradition, in the Americas, there has been both reception and ongoing adherence, in some measure, to the *content* of European law, but this process in itself constitutes rejection of a European definition of law which would see it as exclusively national in character. Law in the Americas is thus conceived as having an inherently transnational dimension, though there has been national variation in the recognition of this dimension. The original process of reception has thus been followed by an ongoing, dialogical process by virtue of which the law of a once metropolitan jurisdiction remains accessible and known, but is now measured, as a suppletive source, against local conditions, local needs, and local law.<sup>18</sup> Derived originally from colonial

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15. M. DELMAS-MARTY & M.L. IZORCHE, MARGE NATIONALE D'APPRÉCIATION ET INTERNATIONNALISATION DU DROIT[:] RÉFLEXIONS SUR LA VALIDITÉ FORMELLE D'UN DROIT COMMUN PLURALISTE?, R.I.D.C. 2000.753.

16. K.P. Berger, *The Principles of European Contract Law and the concept of the 'Creeping Codification' of Law*, EUR. REV. PRIV. L. 21, 27 (2001).

17. R. BUXBAUM & K. HOPT, LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE 271 (Walter de Gruyter ed., 1988).

18. For the phenomenon in Quebec see P.G. Jobin, *Les Réactions de la Doctrine à la Création du Droit Civil Québécois par les Juges: Le Début d'une Affaire de Famille*, 21 C. DE D. 257, 270 (1980); in Canada generally see H.P. Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987); H.P. Glenn, *The Common Law in Canada*, 74 CAN. BAR REV. 261 (1995), translated and reprinted as *El common law en Canada*, 6 REV. DERECHO PRIV. 3 (1996); in the U.S., J. Langbein, *Chancellor Kent and the*

necessity, the process now parallels and contributes to the growth of transnational law, the interdependence of states and the cosmopolitan character of the legal professions.

Diversity and dialogue are thus fundamental historical features of law in the Americas and each appears fundamental to the other. There is thus, compared to Europe, great jurisdictional diversity in the Americas in private law. Europe would presently number fewer than 20 private law jurisdictions; in North America alone there are 99 and an eventual Free Trade Area of the Americas would encompass approximately 130. Some Latin American jurisdictions have in the past constituted themselves as "import substitution economies," radically opposed to the application of foreign law or judgments, yet this extreme form of particularism did not exclude ongoing reliance on foreign doctrinal sources.<sup>19</sup> The effect of jurisdictional diversity is moreover softened by linguistic commonality throughout much of the Americas, the diverse jurisdictions having resort to only four large or world languages for articulation of their texts. Dialogue is also facilitated by the historical fact that the civil and common law traditions have drawn remarkably closer together during the history of most American States, perhaps the best example of the process being the California Civil Code.<sup>20</sup> The Napoleonic form of codification moreover provides common structures and common vocabulary

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*History of Legal Literature*, 93 COL. L. REV. 547, 567 (1993) (speaking of "an inseparable entity called Anglo-American law," in spite of U.S. particularity); and in Latin America generally see A. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 611 (1992) (discussing "Eurocentric" character of Latin American scholarship).

19. See H. Fix Fierro & S. López Ayllón, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT'L. L. 785, 791 (1997).

20. H.P. Glenn, *Derecho Civil, Common Law y el Tratado de Libre Comercio de América del Norte*, 30 BOL. MEX. DERECHO COMP. 511 (1997); H.P. Glenn, *La Civilisation de la Common Law*, 1993 REV. INT'L. DR. COMP. 559 (1993); and generally on U.S. incorporation of civilian thought throughout the 19th and 20th centuries (latterly in the concepts of the Uniform Commercial Code), P. Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966); M.H. Hoefflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719 (1984); R. Batiza, *Sources of the Field Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799 (1986); on German influence on Llewellyn and the U.C.C., see S. Riesenfeld, *The Influence of German Legal Theory on American law: The Heritage of Savigny and His Disciples*, 37 AM. J. COMP. L. 1 (1989). On substantive convergence between the civil and common laws in many areas where commerce and finance are concerned, see DALHUISEN, *supra* note 6, at 5 (indicating substantial remaining difference in respect to land law and possession, equity, trust and agency, floating charges, tracing, restitution and assignment. In contract, differences would be "already much smaller.").



throughout much of civil law America.<sup>21</sup>

These underlying characteristics explain much of American political and legal institutions. While regional free trade areas exist, such as NAFTA or MERCOSUR, they are free of the supranational institutions which in Europe are responsible for the affirmative process of harmonization. Participating states are thus meant to preserve their specificity, and the lack of central institutions would be a means of ensuring that informal processes of legal integration do not yield to more affirmative processes of legal assimilation.<sup>22</sup> In the language of political science, there is a necessity to avoid a possible "integrative spillover,"<sup>23</sup> and the language of integration in the Americas would be that of "multistability," wherein integration would be "piecemeal," "soft, slow, multifaceted," "modular and network-like," "decentralized, collaborative and adaptive."<sup>24</sup> The structure would be appropriate for a "learning economy" in which "organizations must be capable of defining new goals and new means *as they proceed* through tapping into knowledge and information that other agents and groups possess, i.e., through cooperation with other stakeholders and through social learning."<sup>25</sup> Forms of governance would no longer be "exclusive, hierarchical and paternalistic" but "more inclusive, horizontal, distributed and participative."<sup>26</sup>

American experience with informal and voluntary forms of harmonization has been developing within the cadre of regional free trade associations such as NAFTA and MERCOSUR. This experience suggests three general propositions underlying the successful operation of a free trade zone. The first is that the impetus towards the creation of a free trade zone flows from a considerable level of *existing* convergence or harmony in the laws and economies of the states concerned. Political authorities do not attempt the impossible; they follow suggested paths and paths of least resistance. Negotiation of a free trade agreement is therefore undertaken when such an agreement is possible and when

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21. Garro, *supra* note 18, at 605.

22. V. Loungnarath, *L'Intégration Juridique Dans la Zone ALÉNA: Un Chantier Axé Sur les Processus*, 61 REV. DU BARREAU 1, 7 (2001) (speaking of a "risk that the movement of legal integration becomes one of legal assimilation . . . the expansive law being that of the strongest or largest state . . ." and the need for avoiding a "logic" of uniformity (author's translations)).

23. *See id.* at 31, with references.

24. G. Paquet, *On Hemispheric Governance*, in GOVERNANCE IN THE 21ST CENTURY 55-58 (Hayne ed., Royal Society of Canada/Univ. of Toronto Press 2000).

25. *Id.* at 57.

26. *Id.*

free trade is likely to be successful.<sup>27</sup> The second proposition is that the acceleration of trade resulting from a free trade agreement creates a type of legal draft or slipstream, which accelerates existing tendencies of convergence, while still preserving national forms of expression. This process is very evident within NAFTA, where Canadian and Mexican laws notably have been unilaterally revised, by both courts and legislatures, in light of the new environment created by free trade.<sup>28</sup> The third and final proposition is inherent in the process of informal harmonization, and it is that the process of convergence or harmonization is not totalizing, and that individual states remain free to take the protective or other measures which they consider necessary in the field of private law. These measures, such as protection of local land, or various types of blocking statutes, may be challenged according to domestic constitutional law but if they are nationally valid they will stand by way of exception to regional mobility. Even if they should be taken up at the governmental level as a free trade irritation or violation, there is no supranational institution which can abrogate or nullify them. NAFTA-type arbitration yields only declaratory-style judgments, opening the possibility of reciprocal measures by a complainant state. Legal diversity is thus an inherent element, and even an inherent good, within the free trade structure.

It should be recalled that the success of American free trade regions has occurred in the total absence of harmonizing measures undertaken by supranational authority. Some bilateral or multi-lateral treaties have contributed to this success, notably those concluded under the aegis of the OAS and its Inter-American Conference on Private International Law (CIDIP) in the fields of private international law or judicial collaboration,<sup>29</sup> but substantive

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27. On pre-NAFTA convergence of North American laws and economies, see Loungnarath, *supra* note 22, at 15; see also D. Trubek, Y. Dezalay, R. Buchanan & J. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 466 (1994).

28. See generally H.P. Glenn, *Conflicting Laws in a Common Market? The NAFTA Experiment*, 76 CHI.-KENT L. REV. 1789 (2001).

29. On the work of CIDIP, see Diego P. Fernández Arroyo, *L'influence des Conventions Internationales Sur l'Actualisation du Droit International Privé: Le Cas Latino-Américain*, in SWISS INSTITUTE OF COMPARATIVE LAW, THE RESPONSIVENESS OF LEGAL SYSTEMS TO FOREIGN INFLUENCES 217, 227 (Schulthess Polygraphischer Verlag, 1992) (noting that the CIDIP method involved rejection of the idea that a comprehensive codification of international law (such as the Code Bustamente) was possible); see also J. Samtleben, *Die Interamerikanischen Spezial Konferenzen für Internationales Privatrecht*, *Rabels Zeitschrift* 1980.257; and for the texts of many of

private law has remained essentially untouched by any such supranational or international measures. This is in sharp contrast with many assertions made in the European context, which may there be justified, to the effect that diversity of laws is incompatible with the notion of free trade. The American experience stands for the proposition, however, that a successful free trade association does not, in principle, require any formal measures of private law harmonization whatsoever.

The phenomena of American legal diversity and legal dialogue yield a general conclusion that the laws of the Americas are subject to a presumption of harmony rather than a presumption of conflict. This is why so little place is perceived for formal measures of harmonization. A presumption of harmony does not, however, eliminate conflict entirely. There remains, therefore, a place for private international law. Given the complexity of national laws, there remains also a place for various measures of informal harmonization.

### III. THE PROCESS OF INFORMAL HARMONIZATION

Informal harmonization is harmonization found in large measure in existing structures and processes (and is thus inherent in the diversity and dialogue of the Americas), and is harmonization which facilitates rather than imposes. It does not purport to bind, though may eventually be taken to be binding. Notions of voluntarism or consensualism therefore are essential to it at the level of individuals, corporations, institutions and states. It may consist in nothing more than a new awareness, yet may also approach the methods of formal harmonization through the development of new (though traditionally said to be "non-binding" or "soft") texts of law. In the case of a free trade association which has already been constituted, it is entirely appropriate as a means of facilitating the new free trade. It is also highly appropriate as a means of facilitating the convergence necessary for the eventual creation of a free trade association, and of assuring coordination of intra-regional measures with still larger legal developments in the world, which themselves in an increasing measure are also informal in character. Informal harmonization may thus take place across a wide range of actors, methods and subjects.

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the Inter-American Conventions on private international law, see L. Pereznieta Castro & J. A. Silva Silva, *Derecho Internacional Privado*[:] *Parte Especial*, 484 et seq. (Oxford University Press, 2000).

### A. *The Actors*

The actors in the process of informal harmonization are all well known. What is less well known is the new dynamic amongst them. Given modern technology and the "horizontal" and "participative" structures which necessarily prevail in the Americas,<sup>30</sup> there will be greater occasion for autonomous patterning on the part of the institutions and professionals involved and correspondingly less control exercised over them by vertical national structures. The language is that of "epistemic communities"<sup>31</sup> and of "grassroots harmonization" and "grassroots tools."<sup>32</sup> Nor should the different actors themselves be seen as autonomous institutions or groups. There are new possibilities of collaboration across traditional institutional or professional boundaries, amongst legislators, judges, academics and legal practitioners.

#### 1. Legislators

Legislators have been conceived in the past as the leading expression of national sovereignty. It is also possible to conceive of them as the leading instruments of international collaboration, charged with the delicate process of balancing national interests with the increasing necessities of regional and international collaboration and participation. They must network both internally and abroad to legislate better. Local interests require supportive national law to compete effectively abroad. There are regional and international standards which must be met. The pressures of international financial agencies must be acknowledged, in some manner. Local anachronisms which impede regional development must be eliminated, lest reciprocal measures be taken against local interests. Local protectionism must be measured against the benefits of local, and broader, competition.

The ability of national legislators to respond to regional needs is well illustrated in recent history in the Americas within the

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30. Paquet, *supra* note 24, at 57.

31. See BRAITHWAITE & DRAHOS, *supra* note 6, at 501-504 (defining epistemic communities as "loose collections of knowledge-based experts" and noting that "[s]ometimes the software of epistemic communities hijacks the hardware of the institutional order . . . [they] bring together adversaries . . . most . . . start with professions"); see also A.M. Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 364 (2001) (speaking of "talking shops" and citing A. Rigo of the World Bank that "the dissemination of information has played a far greater role in triggering policy convergence in various issue areas than more deliberative and coercive attempts.").

32. BUXBAUM & HOPT, *supra* note 17, at 287.

cadre of NAFTA, where Mexican and Quebec legislators, in the processes of re-codification, have radically changed long-standing law to provide for much greater openness in international litigation and the recognition of foreign judgments.<sup>33</sup> The formal version of the same process is evident in Europe, where the legislators of candidate countries must ensure respect for the *acquis communautaire*, prior to entry, and then ensure compliance with European directives. In the American process, however, the legislative contribution to the vitality of the free trade association is dependent on voluntarism and not supranational command.

## 2. Judges

It has been said that "a decentralized network of courts may be better adapted than legislatures or executives for initiating cooperation in the international . . . arena."<sup>34</sup> This would be because courts need not be so sensitive to domestic pressures and would be the ideal mechanism for assessing competing interests, with fairness, in order to reach effective compromises.<sup>35</sup> Judges are demonstrably aware of their increasing role in transnational collaboration. Transnational meetings of judges are now multiplying, often under the sponsorship of Judicial Councils.<sup>36</sup> The "emerging international dialogue between courts" would go "far beyond the bounds of official cooperation," according to a French judge, and would constitute "an upheaval in the practice of courts."<sup>37</sup> The same judge has concluded that "[t]he legal world is now an open world."<sup>38</sup>

The increasing importance of the judiciary at the regional and transnational level renders judicial reform more imperative, particularly where the effective administration of justice is affected by problems of corruption or intimidation.<sup>39</sup> Such reforms will

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33. Glenn, *supra* note 28, notably at 1801-02.

34. L. Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Trans-national Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037, 1038 (1997).

35. *Id.* at 1102-03.

36. Lord Goff of Chieveley, *Coming Together — the Future*, in THE CLIFFORD CHANCE MILLENIUM LECTURES[.] THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW 239, 248 (Basil S. Markesinis ed., 2000).

37. N. Lenoir, *The Response of the French Constitutional Court to the Growing Importance of International Law*, in Markesinis, *supra* note 36, at 165.

38. *Id.* at 163.

39. A.M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461, 476 (1995) ("an independent,

have a major effect in the necessary process of overcoming distrust of judicial administration in other countries.<sup>40</sup>

### 3. Academics

Professor Sacco has written that “[s]cholarship will be enough on its own, if it knows how to move to unify the methods of cognizance of the law . . . . Without the unifying work of scholarship, a uniform legislator would proceed on very difficult ground, full of mines of wearying disagreements about language.”<sup>41</sup> This is perhaps an overly optimistic view of the potential role of scholarship, but informal harmonization is in large measure a cognitive process, in which multiple actors must acquire an understanding of the mutual, non-conflictual relations of different laws. Legal scholarship and education must play a large role in this process, and clearly larger than it has played in the past in the Americas. Some of this increased level of pan-American legal scholarship will develop spontaneously, within the cadre of universities and institutes of research. There is as much inertia in the academy, however, as elsewhere, if not more. So some encouragement may be appropriate, both within and between universities, and in facilitating the relations between academics and other actors. There are already promising signs. A network of pan-American legal research institutes already exists, with its focal point at the National Law Center for Inter-American Free Trade in Arizona.<sup>42</sup> The effectiveness of such a network would obviate the need for a pan-American Law Institute, such as that being mooted for Europe.<sup>43</sup> In North America there are now also two consortia of legal education which facilitate exchange of students and professors between Mexico, the U.S.A. and Canada.<sup>44</sup>

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powerful, and effective administration of justice is crucial to foster serious expectations of free trade and sustained economic development in the Americas”).

40. P.A. O’Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT’L L.J. 127, 161 (1995).

41. R. Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171, 188 (2001).

42. B. Kozolchik, *The UNIDROIT Principles as a Model for the Unification of the Best Contractual Practices in the Americas*, 46 AM. J. COMP. L. 151, 156 n.16 (1998) (referring to collaborating institutions in Canada, Mexico, Argentina, Chile and Peru).

43. C. Schmid, *The Emergence of a Transnational Legal Science in European Private Law*, 19 O.J.L.S. 674 (1999).

44. For the North American Consortium on Legal Education [hereinafter NACLE], see <http://www.nacle.org>, and for NAFTA Lex, see <http://www.wcl.american.edu/naftalex/contact.html>.

#### 4. Legal Practitioners

A very large part of the burden of informal harmonization must fall, however, on those who practice law across national borders. For free trade to be unencumbered by national legal differences, legal practitioners must facilitate and not obstruct. There is already great expertise in this process, produced in part by increasing levels of transnational legal mobility and the development of transnational law firms or law firm linkages.<sup>45</sup> It has been said that "[a] common profession, with a common professional language, may well itself be a surrogate for a common substantive set of rules."<sup>46</sup> If there is not yet a common profession throughout the Americas, the members of its professions are increasingly cosmopolitan, and there is a looping process by which the contribution of members of the profession is accelerated as a result of the knowledge they gain in participating in free trade structures.<sup>47</sup> Members of the practising profession contribute to informal harmonization by their practice, but also through participation in the activities of their formal institutions. The work of the American Law Institute in the U.S. has been exemplary in the processes of law reform and harmonization within that country. There would therefore appear to be a role for the Inter-American Bar Association in the process of harmonization in the Americas. Members of the profession can also play a fundamental role in the work of interstate consultative committees, the grassroots institutions which can play a fundamental role in developing soft law and ensuring communication between the different professional actors.

The actors in place, the question then becomes one of the methods to be used in the informal harmonization process.

##### *B. The Methods*

The methods of informal harmonization range from a simple awareness on the part of legal actors that legal relations need not be thought of as conflictual, through to more affirmative methods

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45. See H.P. Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977 (2001).

46. See BUXBAUM & HOPT, *supra* note 17, at 282.

47. For the emergence of "bicultural" lawyers in Mexico, versed in both Mexican and U.S. law, and the contribution to this development by the process of comparative deliberation in NAFTA arbitration panels, see S. López Allón & H. Fix Fierro, *Communication Between Legal Cultures: The Case of NAFTA's Chapter 19 Binational Panels*, in *THE EVOLUTION OF FREE TRADE IN THE AMERICAS* 3, 23, 39 (L. Perret ed., 1999).

of drafting of texts of "soft" law or model laws. The greater the extent of collaboration amongst the different legal professions involved, the greater the efficiency of each method in achieving the goal of harmony.

If there is an underlying principle of harmony of laws in the Americas, then legal professionals should be thinking in terms of the conciliation of laws and not in terms of the conflict of laws. Laws are best reconciled by the realization that it is people who conflict, and not simple, inert texts. Difference, opposition, or contradiction, in the formal expression of law, is not equivalent to conflict. Difference or opposition is rather essential to the notion of harmony, which consists of a (harmonious) reconciliation of opposites. Trade, since the Silk Road from China, has always overcome cultural and legal differences.<sup>48</sup> It is because of this overarching character of trade that much of the contact between civilizations has taken place. So trade will flourish in some measure even in the absence of any more vigorous measures of harmonization. This is how a *lex mercatoria* came originally to be developed, by traders and jurists willing to look beyond and over the local, customary, and even imperative laws which they encountered in their travels. Reconciling formally different laws may first involve a deliberate process of "overlooking" inconsistencies between national, state or provincial laws,<sup>49</sup> such that "international legal practice finds its way."<sup>50</sup> Traders do not insist on legal security derived from uniformity of formal laws. Professor Kozolchyk has observed that "[m]erchants try to stay as close as possible to the practices they know and feel comfortable with. They seldom engage in a practice simply because its outcome is assured by enforceable legal sanctions."<sup>51</sup> During the 1960s, Professor Ziegel noted the absence of complaints by the Canadian business community concerning the diversity of Canadian secured financing laws, a diversity which continues in some considerable measure today.<sup>52</sup>

Thinking in terms of the conciliation of laws is necessary, first

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48. On the tracing of intercontinental trade to at least 800 B.C. see D. HELD, ET AL., *GLOBAL TRANSFORMATIONS[.] POLITICS, ECONOMICS AND CULTURE* 152 (Stanford University Press, 1999).

49. B. Kozolchyk, *Commercial Legal Relations Between Arizona and Northern Mexico*, 5 ARIZ. J. INT'L. & COMP. L. 28, 29 (1988).

50. K. Hopt, *Common Principles of Corporate Governance in Europe?*, in B. Markesinis, *supra* note 36, at 106.

51. B. Kozolchyk, *supra* note 42, at 168.

52. J. Ziegel, *Uniformity of Legislation in Canada. The Conditional Sales Experience*, 39 CAN. BAR REV. 165, 199 (1961).



of all, on the part of legal practitioners. It is the "practising lawyers who are making the running," in terms of overcoming jurisprudential and doctrinal obstacles to their client's transnational case, in seeking means of reconciliation of different laws.<sup>53</sup> Legal education also has a great role to play here, though in both Europe and America contemporary legal education has been faulted for preoccupying itself with the "minutiae" of domestic law, rather than with discernible transnational principles and policies,<sup>54</sup> and for neglecting practices, usage and custom as a source of national and international commercial law.<sup>55</sup> Pan-American legal education is therefore a priority, first through the processes of exchange which are now beginning to develop,<sup>56</sup> and subsequently through the development of genuine transnational teaching.<sup>57</sup> Transnational publishing will follow transnational teaching and research. Given the tendencies in legal publishing, it may well precede both of them.<sup>58</sup> In Europe, with its presumption of conflict of laws, a large research project has been undertaken on the "Common Core" of European law.<sup>59</sup> Given a presumption of harmony of laws in the Americas such a project appears less imperative, but may become essential as a means of encouraging the academic world to adjust its practices.

Allowing parties to effect a conciliation of laws means they must have the freedom to do so. Legislators and judges thus have a key role to play in creating space for contractual and other practices of conciliation to emerge. This is entirely consistent with the broad recognition of party autonomy in contractual matters now being widely accepted in the Americas and crystallized in the Mexico City Inter-American Convention on the Law Applicable to International Contracts, notable also for its recognition of the importance of commercial custom and practice as a source of gov-

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53. See R. Goode, *supra* note 14, at 57.

54. *Id.*

55. See B. Kozolchyk, *supra* note 42, at 169-70.

56. NACLE, *supra* note 44.

57. See, e.g., M. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 SAN DIEGO L. REV. 1053 (1998).

58. See 2001 *Mid-Year Update for Distribution of Pan-American (and World) Legal Literature*, The Thomson Legal & Regulatory International Catalogue (2001) (twenty-four publishing houses are listed including ones in Argentina, Brazil, Quebec, common law Canada and the U.S.A. Approximately 10% of the titles are in Spanish; 22% of the materials are qualified as international).

59. M. Bussani & U. Mattei, *The Common Core Approach to European Private Law*, available at <http://www.jus.unitn.it/dsg/common-core/approach.html>. The goal of the project is not to impose new rules and categories but to "find" similar solutions. Funding for the project is provided by commercial banks and by the European Union.

erning law in international contracts.<sup>60</sup> Arbitration should also continue its expansion in the Americas,<sup>61</sup> and the judges and scholars of America should come to recognize, to the extent they have not done so already, that a presumption of harmony of laws is inconsistent with the rule of some European countries (based on a presumption of conflict) that rules of private international law are of mandatory application by the judge. Private international law should intervene only in cases of genuine conflict, and when foreign law is explicitly pleaded by a party.<sup>62</sup>

Admission of party autonomy is of consequence not only for individual contractual relations, but also for the practice of "contractualization" or private modelling of contractual relations. Over time, repeating commercial actors will standardize their practices and commercial usage will become explicit and written during this process.<sup>63</sup> Electronic forms of contracting can exist only through the existence of such standardized practices. Thus, an "international private law of contract" emerges which is substantive in character.<sup>64</sup> The debate on whether such a transnational *lex mercatoria* is possible now appears to be over, and it is said that it presently has "a sufficient reality for its own normativ-

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60. On the Convention, see F. K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 203 et seq. (1997). On the principle of party autonomy see J. Basedow, *The Effects of Globalization on Private International Law*, in J. BASEDOW & T. KONO, LEGAL ASPECTS OF GLOBALIZATION[:] CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY 8 (The Hague, Kluwer Law International, 2000) ("The traditional counterargument that the free choice of the applicable law can only exist within and not above that legal order [of the state] cannot be maintained as the legislative powers are being redistributed among several levels . . . the nation state is not the only and natural cornerstone of legislation").

61. See generally J. L. Siqueiros, *Arbitral Autonomy and National Sovereign Authority in Latin America*, in LEX MERCATORIA AND ARBITRATION 183 (Thomas Carbonneau ed., Transnational Juris Publications, 1990). (Latin American participation in the Court of Arbitration of the International Chamber of Commerce grew from 3% in 1991 to 11.5% in 1996); see H.P. Glenn, *Globalization and Dispute Resolution*, 19 C.J.Q. 136, 141 (2000), with references.

62. See H.P. Glenn, *Conciliation of Laws in the NAFTA Countries*, 60 LA. L. REV. 1103 (2000), with references; and for the law of the NAFTA countries on this question see Glenn, *supra* note 28, at 1797-98.

63. A. Martin-Serf, *La Modélisation des Instruments Juridiques*, in E. LOQUIN & C. KESSEDJIAN, LA MONDIALISATION DU DROIT 179, 194 (Litec, 2000), with examples; H. van Houte, *La Modélisation Substantielle*, in LOQUIN & KESSEDJIAN, *supra*, at 233-35; B. Kozolchyk, *On the State of Commercial Law at the End of the 20th Century*, 8 ARIZ. J. INT'L. & COMP. L. 1, 22 et seq. (1991) (notably on electronically programmed usages of trade in the framework of contracts).

64. See, for the concept, Q. Alfonsín, *Téoria del Derecho Internacional Privado* 46-7 (1955), discussed in F. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANS. L. 487, 491 (1995).

ity to be accepted.”<sup>65</sup> In transnational contract cases, domestic law would, therefore, now be only of residual application.<sup>66</sup> Custom, not law, would again be recognized as “the fulcrum of commerce,” as it largely has been since the origins of exchange.<sup>67</sup>

The emergence of transnational law is interesting in a number of respects. Fundamental to this type of law would be the concept of general principles or standards, which would exist beyond or outside of formal, state sources of law.<sup>68</sup> State law, as well as emergent transnational law, would constitute evidence of such general principles or standards. Law would thus be found, as it was prior to the process of legal nationalization, beyond its formal utterance. This new transnational form of custom, usage and principle was originally seen as “soft” law, lacking the binding force of state law. The language of international commercial law is now changing, however, and it is being recognized that such law is “binding” or “mandatory” in character, since the parties have explicitly accepted it, or voluntarily participated in the practice governed by it.<sup>69</sup> As binding law, transnational practice represents a higher norm than an international, private law convention, which is usually dispositive in character and yields to the private agreement of the parties.<sup>70</sup> The content of such transnational law would be inherently fair or equitable, since to be accepted as such a “best practice” it must satisfy a “marketplace standard” acceptable to all and embody concepts of trust and protection of the interests of other participants. International traders do not, over time, treat themselves as strangers.<sup>71</sup>

The development and application of substantive, transnational law, in the form of custom, practice, usage and principle, is the work of legal practitioners, academics and judges. The pri-

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65. DALHUISEN, *supra* note 6, at 63.

66. *Id.* at vi.

67. L. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1, 3 (1980).

68. On such principles, see DALHUISEN, *supra* note 6, at 34, 65; Goode, *supra* note 14, at 4, 48; Basedow, *supra* note 60, at 7 (notably for the adoption of “general principles” by section 7 of the Vienna Convention on the International Sale of Goods).

69. Kozolchyk, *supra*, note 42, at 170 (noting that art. 1.8 of the UNIDROIT Principles for International Commercial Contracts states that parties are “bound” by practices they have agreed to or established between themselves); DALHUISEN, *supra* note 6, at 721 (listing “mandatory” custom as the primary source of transnational law, followed in priority by uniform treaty law of mandatory character, precise contractual terms, directory customs or practices, treaty rules of a directory nature, and general, suppletive principles).

70. Goode, *supra* note 13, at 90.

71. Kozolchyk, *supra* note 42, at 154.

mary contribution of each of them is openness and acceptance of the possibility of extra-state normativity.

The development of an international private law of contract may thus be a highly informal practice, based on a slow process of recognition of best practices. It may also take on more formal characteristics, ranging from trade or industry-specific articulation of their governing rules (Codes of conduct, Guides, under various sponsorships), through Restatement-like syntheses of existing law, sponsored and articulated by organizations such as the OAS, UNIDROIT or UNCITRAL. In Europe, the Lando Commission has articulated a private statement of Principles of European Contract Law. The importance of these unofficial statements of law is increasing and there are likely to be more of them in the future, particularly in more specialized fields of law. In the Americas there appears to be a clear role for the OAS in the development of these legal instruments, either through encouragement of industry-specific and industry-articulated codes of conduct, or through more direct sponsorship of model laws or Restatement-like documents. The latter may also constitute, in some measure, partial "Prestatements" of what the law should be. The authority of these informal statements of law increases the more they incorporate both practical and academic expertise; they are examples of "grassroots" or "creeping" codification. Their legal status is the object of discussion. They have "strong persuasive force,"<sup>72</sup> and have the advantage of being politically neutral and anational.<sup>73</sup> They are sufficiently flexible to allow for future development, and their persuasive character allows states to proceed at different rates of adherence.<sup>74</sup> While criticized,<sup>75</sup> their impact has been said to be "quite remarkable."<sup>76</sup> Widely accepted by arbitrators as law, their acceptance by national courts has been slower in coming, though it is now occurring, and judicial adoption is increasingly favoured in the literature.<sup>77</sup>

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72. DALHUISEN, *supra* note 6, at 78.

73. Goode, *supra* note 14, at 3.

74. K. P. Berger, *The Principles of European Contract Law and the Concept of the 'Creeping Codification' of Law*, EUR. REV. PR. L. 21, 24 (2001); BUXBAUM & HOPT, *supra* note 17, at 230.

75. See DALHUISEN, *supra* note 6, at viii (objecting that they represent too frequently a simple compromise between domestic laws, inadequate for international practice).

76. Goode, *supra* note 13, at 93.

77. For instances of judicial adoption in France, Australia and Canada, see H. Kronke, *Ziele — Methoden, Kosten — Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT*, JURISTEN Z. 2001.1149 at

The development of substantive transnational law often does not require legislative intervention, though may be encouraged by legislative incorporation by reference. Legislators may more directly bring about harmonization through the process of legislative "modelling" by which they track the development of legislative "best practices" abroad and seek to implement and improve them at home. There is now a large literature in praise of this process, which would see it as a "competition of laws" in which efficiency would be the ultimate criteria for adoption. Efficiency would be resisted by the path dependency (or inertia) of existing national solutions. There is debate as to whether this process leads to a "race to the bottom" or to a "race to the top," a debate which presently appears to be inconclusive.<sup>78</sup> This suggests that the legislative process is in reality more complex,<sup>79</sup> but it is clear both that there are major factors of convergence of legislation in liberal, free-market democracies,<sup>80</sup> and that economic efficiency is a major legislative objective in many sectors. Mexico has thus recently created a regime for non-possessory security interests in moveable property, paralleling, though not precisely imitating, similar regimes in the U.S., common law Canada and Quebec.<sup>81</sup> The Quebec version has been proposed as a model for Chilean legislative reform.<sup>82</sup> These are examples of legislative "transnation-

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1153, 1154; and for judicial adoption, see Basedow, *supra* note 60, at 6 ("it is difficult to understand why conflict rules always should refer to the private law of a certain nation"); O. Lando, *The Principles of European Contract Law and the Lex Mercatoria*, in Festschrift Kurt Siehr 391, 402 (T.M.C. Asser Press, 2000); H.P. Glenn, *An International Private Law of Contract*, in P. Borchers & J. Zekoll, *INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM[.] ESSAYS IN HONOR OF FRIEDRICH K. JUENGER* 53, 59 et seq. (Transnational Publishers, Inc., 2001).

78. *But cf.*, Braithwaite & Drahos, *supra* note 6, at 167 ("The principle of world's best practices clearly dominates that of lowest-cost location").

79. See Buxbaum & Hopt, *supra* note 17 at 283, 248, on "Harmonization of Law on the Basis of Priorities Derived from Non-Economic Values"; H. Baum, *Globalizing Capital Markets and Possible Regulatory Responses*, in Basedow & Kono, *supra* note 60, at 103 (notion of race to bottom or race to top, "too simplistic in the international context . . . rather the evolution of a greater variety of regulatory options associated with different markets . . . particular types of issuers and investors").

80. See J. Wiener, *Globalization and the Harmonization of Law* 150 (Pinter, 1999); Braithwaite & Drahos, *supra* note 6, at 81 (on the process of "reciprocal adjustment" in the legislative modeling process).

81. See J. Wilson, *Mexico: New Secured Transactions and Commercial Registry Laws*, 7 INTER-AM. TRADE REP. 1815 (2000); and for background, see T. Nelson & B. Kozolchyk, *Harmonization of the Secured Financing Laws of the NAFTA Partners: Focus on Mexico* (Tucson, AZ: National Law Center for Inter-American Trade, 1998).

82. See F. D. Struell, *Quebec's Creative Regime as a Model for Chile's Secured Transaction Reform*, 5 SW. J. L. & TRADE AM. 207 (1998).

alization.”<sup>83</sup> They leave room for national preferences, while still bringing national laws within a range of mutually-shared concepts and categories. International trade can live with this.

The process of legislative transnationalization can be facilitated by the negotiation of model laws at the international level, which are then proposed to nation states for adoption in existing or modified form. Model laws provide the advantage of an initial cadre of harmony or unity, from which states depart only for good reason. They are, however, able to do so, and the technique of model laws is therefore ultimately one of informal harmonization, entirely compatible with American diversity.

In general the methods of informal harmonization in the Americas are compatible with the methods of informal harmonization on a more universal or global level. The openness of the process of harmonization within the Americas necessarily implies a certain openness towards the world. There are certainly particularities of the Americas, but these have not prevented widespread participation by American countries in the formulation of international instruments and in their subsequent ratification.<sup>84</sup> Informal instruments such as the UNIDROIT Principles for International Commercial Contracts can thus be seen as a “guide” to objective, international standards and play a “mutually supportive” role with the law of the Americas.<sup>85</sup>

The judicial role in informal harmonization is not necessarily limited to recognition and application of transnational instruments. As previously mentioned, it is important also that the judiciary reserve the rules of private international law for cases of genuine conflict, where foreign law is pleaded by a party. Private international law is private law, and needs to be of mandatory application by the judge only where there are clear legislative indications that this must be the case.<sup>86</sup> Judges also engage increasingly in “judicial parallelism”, accompanied by transnational citation of judicial authority where the form of judgment so permits, such that harmonization may emerge from patterns of

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83. B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 251 (Routledge, 1995).

84. Eleven South American states thus took part in the negotiation of the Vienna Convention on the International Sale of Goods; a total of sixty-two countries, and eleven countries of the Americas, including all three of the NAFTA countries, have now ratified it.

85. Kozolchyk, *supra* note 42, at 155, 176; and see, Garro, *supra* note 18, at 589 (counseling against “regional isolation” on international contractual arrangements).

86. See *supra* text accompanying note 62.

jurisprudence.<sup>87</sup> More affirmatively, a judicial practice of transnational judicial collaboration has now developed in North America in international bankruptcy cases, as a result of which joint judicial protocols and even joint, teleconferenced judicial hearings are undertaken.<sup>88</sup> Such practices should be encouraged in a broader range of cases wherever parallel proceedings are present or likely. A further judicial contribution to informal harmonization is possible through favourable reception of the forthcoming UNIDROIT Principles and Rules of Transnational Procedure, which may be voluntarily adopted in cases of transnational litigation, or used as a suppletive source of "generally recognized standards of civil justice."<sup>89</sup>

### C. *The Subjects*

In an important sense, the subjects of informal transnational harmonization are self-selecting. The process simply occurs as the need and possibilities present themselves, amongst the appropriate actors. There is thus a large process of legislative convergence in many fields of law, and no pressing need for more affirmative measures of harmonization.<sup>90</sup> In other fields more affirmative measures are taken by those most immediately concerned, who are able themselves to establish sufficient common ground to advance their activities. The results are then recognized by others, who may recognize the binding nature of the informal harmonization process in particular industries or fields of trade.<sup>91</sup> Other subjects are best left to judicial practice, and this has been said to be the case, for example, for defining the duty of care of corporate directors, an area "with substantial and irreducible factual components" requiring flexibility in the application of principle.<sup>92</sup> Private international law could also be left to natural forces of development and convergence, as a "necessary rather than an

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87. Goode, *supra* note 13, at 92 (speaking of this is an "increasing source of transnational commercial law," notably in recognition that abstract payment undertakings (e.g., letters of credit and demand guarantees), legally bind by virtue of their own issue).

88. See Glenn, *supra* note 28, at 1805, with references.

89. See G. Hazard, Jr., et al., *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 INT'L. LAW & POLITICS 769 (2001); and for the latest version of the Principles, see <http://www.unidroit.org> or <http://www.ali.org/ALIProjects.htm>, as well as a forthcoming (2002) number of the Uniform Law Review.

90. See DALHUISEN, *supra* note 6 at viii ("outside the professional area, I see at this moment much less need for trans-nationalization of private law on any scale").

91. *Id.*

92. BUXBAUM & HOPT, *supra* note 17, at 272.

adequate mode" of resolving cross-border disputes.<sup>93</sup>

Where then are the informal processes of harmonization in need of assistance? A first response to this question should come from specialists in particular fields of legal practice, who recognize a need for further measures and the inadequacy of existing methods. These opinions should be checked against the commercial actors involved, who may be less concerned with legal smoothness than the lawyers. Commercial interests may also, however, press for more "enabling" rules of governance in particular fields and heed can be given to these requests where "countervailing public policy considerations are relatively trivial."<sup>94</sup> The need for more affirmative measures is particularly evident where the process of contractualization is weakest, namely, in defining rights and obligations of third parties. Thus both measures of transnationalization and private international law would be weakest in "tripartite relationships with contractual and proprietary aspects, like agency and trusts, but also in documents of title and negotiable instruments . . . or in letters of credit or in assignments of monetary and other claims . . . ."<sup>95</sup> Further examples which have been cited are those of financing of receivables, financing of mobile equipment, settlement and payment systems, security interests in pools of indirectly held investments, cross-border electronic commerce and cross-border insolvency.<sup>96</sup> A number of these topics are currently the object of other, more global efforts of harmonization, and it is therefore important to harmonize harmonization efforts in the Americas and the world. The general law of contract, for example, now benefits from the UNIDROIT Principles for International Commercial Contracts, the floating common law of common law countries, a U.S. Restatement, and a set of European Principles. There would appear to be no need for a further statement of pan-American contract law. Particular subjects and particular regional needs of harmonization must therefore be identified. Here again there would be a role for a pan-jurisdictional organization such as the OAS to play, either through on-going consulta-

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93. GOODE, *supra* note 13. For this having already occurred in the NAFTA countries, see Glenn, *supra* note 28; and for the ongoing vigour of private international law, see the new *Revista Mexicana de Derecho Internacional Privado* sponsored by the Academia Mexicana de Derecho Internacional Privado y Comparado (e-mail revidipri@yahoo.com).

94. BUXBAUM & HOPT, *supra* note 17, at 273 (giving example of authorizing a company to sell its own stock).

95. DALHUISEN, *supra* note 6, at 85.

96. Goode, *supra* note 14, at 75.



tions with interested organizations or through occasional sponsoring of conferences dedicated to the identification of needs. Such a pragmatic, needs-driven process would appear preferable to the creation of any permanent Inter-American law reform agency.

#### IV. CONCLUSION

The harmonization process, however it is defined, is often thought of as an evolutionary process, leading to greater and greater levels of uniformity and correspondingly greater levels of supranational governance. The process of *informal* harmonization is not, however, an evolutionary process. It does not project further levels of uniformity and elimination of diversity, but rather the reverse, that uniformity is not an objective in itself and that harmony flows from recognition of diversity and the ability to work within it. Measures of harmonization are thus not imposed but allowed to develop, or at most encouraged. The Americas would thus exist not as an evolutionary process, but as an equilibrium amongst its diverse peoples.