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Edited by Helge Dedek
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A COSMOPOLITAN JURISPRUDENCE

H Patrick Glenn (1940–2014), Professor of Law and former Director of the Institute of Comparative Law at McGill University, was a key figure in the global discourse on comparative law. This collection is intended to honour Professor Glenn's intellectual legacy by engaging critically with his ideas, especially focusing on his visions of a 'cosmopolitan state' and of law conceptualized as 'tradition'. The book explores the intellectual history of comparative law as a discipline, its attempts to push the objects of its study beyond the positive law of the nation state, and both its potential and the challenges it must confront in the face of the complex phenomena of globalization and the internationalization of law. An international group of leading scholars in comparative law, legal philosophy, legal sociology, and legal history takes stock of the field of comparative law and where it is headed.

Helge Dedek is Professor of Law at McGill University and former Director of the McGill Institute of Comparative Law. Since 2014, he serves as Co-Editor-in-Chief of the *American Journal of Comparative Law*.

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A Cosmopolitan Jurisprudence

ESSAYS IN MEMORY OF H. PATRICK GLENN

Edited by
HELGE DEDEK
McGill University



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The perspective of the cosmopolitan must entail relationships to a plurality of cultures understood as distinctive entities. (And the more the better; cosmopolitans should ideally be foxes rather than hedgehogs.) But furthermore, cosmopolitanism in a stricter sense includes a stance toward diversity itself, toward the coexistence of cultures in the individual experience. A more genuine cosmopolitanism is first of all an orientation, a willingness to engage with the Other.

Ulf Hammerz^{*}

^{*} Ulf Hannerz, 'Cosmopolitans and Locals in World Culture' (1990) 7 *Theory, Culture & Society* 237, 239.

Contents

<i>Foreword</i>	
<i>William Twining</i>	page ix
<i>Acknowledgements</i>	xii
<i>Notes on Contributors</i>	xiii
<i>List of Images</i>	xix

INTRODUCTION

Where the ‘Real Action’ Is: From Comparative Law to Cosmopolitan Jurisprudence	
<i>Helge Dedek</i>	3

PART I THE TRADITION OF COMPARATIVE LAW: CONTEXT, HISTORY, PROMISE

1 How to Do Comparative Law: Some Lessons to Be Learned	
<i>Mauro Bussani</i>	29
2 The ‘Comparative Method’ at the Roots of Comparative Law	
<i>Giorgio Resta</i>	44
3 The Value of Micro-Comparison	
<i>John Bell</i>	64
4 Sociocultural Challenges for Comparative Legal Studies in Mixed Legal Systems	
<i>Esin Örüçü</i>	83
5 Breaking Barriers in Comparative Law	
<i>Michele Graziadei</i>	97

PART II THE CONCEPT OF TRADITION: POTENTIAL AND CHALLENGES		
6	Too Much Information <i>Martin Krygier</i>	117
7	Legal Systems as Legal Traditions <i>Catherine Valcke</i>	143
8	Learning from Patrick Glenn: Tradition, Change, and Innovation <i>David Nelken</i>	161
9	The Sunni Legal Tradition: An Overview of Pluralism, Formalism, and Reform <i>Ahmed Fekry Ibrahim</i>	180
10	Commensurability, Comparative Law, and Confucian Legal Tradition <i>Marie Seong-Hak Kim</i>	202
PART III CROSSING BOUNDARIES: CULTURAL TRANSFER, LEGAL COSMOPOLITANISM, AND THE DISSOLUTION OF THE STATE		
11	The School of Salamanca: A Common Law? <i>Thomas Duve</i>	223
12	The Un-Common Law <i>Vivian Grosswald Curran</i>	236
13	The Fabric of Normative Translation in Law <i>Ko Hasegawa</i>	249
14	Statehood as Process: The Modern State Between Closure and Openness <i>Gunnar Folke Schuppert</i>	267
15	Cosmopolitan Attachments <i>Neil Walker</i>	280
	<i>H Patrick Glenn: Publications</i>	292
	<i>Index</i>	299

Foreword

William Twining

Patrick Glenn died unexpectedly in 2014. This book was put together in his honour. Patrick would not have wanted a conventional *festschrift* or *liber amicorum*. He preferred dialogue, conversations, even criticism. The contributors have proceeded in the same spirit. The result is a series of responses to his writings in the form of extensions, applications, refinements, queries, and dissents, which combine to augment his legacy in a number of directions. All of the chapters exhibit great respect for him as a person, thinker, and scholar, but all engage with him critically.

Glenn is now famous as the author of *Legal Traditions of the World*, which was published in 2000, having already been awarded the Grand Prize of the International Academy of Comparative Law two years prior. It is already in its fifth edition. For comparatists, he was already well known as an erudite, thoughtful, and highly original scholar who was given to challenging orthodoxies within the sub-discipline. What was surprising to almost everyone is that *Legal Traditions of the World* also turned out to be an audacious, radical, and provocative contribution to general jurisprudence. On publication, this work attracted a great deal of attention. Taken on its own, it has given Glenn the image of an *agent provocateur*, but it has to be set in the context of his later writings, which, although highly original, are more nuanced, reflective, and narrowly focused. As the authors of the subsequent chapters make clear, his later writings refine, amplify, and develop the bold theses of *Legal Traditions of the World*.

I first met Patrick in 2003 during his stay in Oxford. We became friends, had some enthralling conversations, and stayed in touch, but I have regretted that we never had much closer contact. Stimulated by the second edition of *Legal Traditions of the World* (2004), a group of us held a seminar at the School of Oriental and African Studies in 2005, and I helped to coordinate the publication of a symposium in the first volume of the *Journal of Comparative Law*.¹ Praise and criticism were evenly distributed and Patrick responded with characteristic grace and verve.²

¹ Nicholas HD Foster (ed), 'A Fresh Start for Comparative Legal Studies?' (2006) 1 *JCL* 100.

² H Patrick Glenn, 'Legal Traditions and *Legal Traditions*' (2007) 2 *JCL* 69.

As soon as I read *Legal Traditions of the World*, I realized that this was an important book, but it required several readings before I realized how important it was. It is worth spelling out the main reasons for its significance for both legal theory and the discipline of law.

First, it adopts a genuinely global perspective without the tendencies to reductionism of most globalization theory and inflated ‘globababble’.³ Glenn takes on all law, broadly conceived, in the whole world, but his message is one of complexity. Legal phenomena are varied, fluid, constantly changing, and interacting. They cannot be captured by simple static snapshots of ‘momentary legal systems’.

Second, *Legal Traditions of the World* shows how macro-comparative law, often dismissed as not intellectually respectable, can be central to developing a vision of legal phenomena that no longer treats sovereign nation states and Western municipal legal systems as the ‘essence’ of law. By moving beyond Western perspectives, it contributes significantly to the decolonization of comparative law and legal theory.

Third, by choosing tradition as his central concept in preference to legal systems, culture, civilizations, or legal families, Glenn reinserts history and pastness at the core, while rejecting dichotomies between past and present. *Legal Traditions of the World* can be seen as reviving the dormant tradition of historical jurisprudence of Vico, Montesquieu, Maine, and Vinogradoff and joins forces with contemporary jurists like Brian Tamanaha in re-establishing sociohistorical perspectives as the third, often missing, pillar of theoretical understandings of law.⁴ Although Glenn did not develop this very far, he has also provided an important bridge to world history, which is again becoming a respectable pursuit.⁵ However, I share the feelings of Martin Krygier and David Nelken (expounded in this volume) that Patrick was over-optimistic in suggesting that traditions are inherently benign and supportive of his hopes for ‘sustainable diversity’.

Glenn’s particular conception of tradition in terms of ‘flows of normative information’ has provoked much criticism and discussion. Clearly, there are conceptual difficulties, but in my view it suits his purposes very well. He gives the concept sufficient analytical purchase to enable comparison of traditions in terms of four aspects: information as the core that constitutes the identity of a tradition, its underlying justification, its concept of change, and how the tradition relates to other traditions.⁶ Moreover, as he pointed out to me in conversation, the concept of culture combines both ideas and actual practices while downplaying the past,⁷ whereas by confining the idea of tradition to information (ideas in a broad sense), he

³ William Twining, *Jurist in Context* (CUP 2019) 234.

⁴ Brian Z Tamanaha, *A Realistic Theory of Law* (CUP 2017).

⁵ See, for example, the work of Jürgen Osterhammel and colleagues.

⁶ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, OUP 2014) xxvi.

⁷ On culture as a concept, see H Patrick Glenn, ‘Legal Cultures and Legal Traditions’ in Mark van Hoecke (ed), *Epistemology and Methodology in Comparative Law* (Bloomsbury 2004) 7, 11ff.

had made his project more manageable while treating the past as part of the present. These intriguing claims are explored in depth in the ensuing chapters.

Fourth, comparative law as a distinct sub-discipline has tended to focus on a rather narrow range of issues. Glenn, on the other hand, opens up the field by linking it directly to such topical ideas as corruption, fundamentalism, multivalent logic, ‘clash of civilizations’, and even chaos theory.

This volume neatly sets the ideas of Glenn the *agent provocateur* in the context of more nuanced and careful reflections of an immensely erudite and original scholar, and as John Bell suggests, he undermines any sharp dichotomy between macro- and micro-comparative studies. It brings out clearly why Patrick Glenn’s work deserves the attention of legal theorists and colleagues in other disciplines in addition to giving new directions to comparative law.

Acknowledgements

The publication of this volume concludes a long journey, throughout which a debt of gratitude has accumulated. First, I wish to thank Jane Glenn for kindly offering advice and, especially, for giving this project her blessing. Jane Glenn also suggested that I reach out to William Twining, whose participation in this project has been of pivotal importance. Besides contributing the Foreword, William Twining has accompanied this undertaking from its inception, has read the manuscript, and has offered feedback, guidance, and assistance throughout.

I also wish to express my gratitude to all the authors who have contributed to this volume for making this tribute possible. I am grateful to Vivian Curran, in particular, for organizing a panel in memory of Patrick Glenn at the 2018 World Congress of Comparative Law at Fukuoka, where several contributors to this book had a chance to present their homage to Patrick Glenn and to workshop their ideas.

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Jennifer Anderson and Amber Lynch have offered feedback and overseen the logistics of the editing process, both aptly drawing on their ample experience (inter alia) as Article Editors of the *American Journal of Comparative Law*. Cora Madden assisted in the editing process and created the index. Finally, I am grateful to the Eddie Look and Winnie Wing Yin Chan Fund and the Law & You Fund for financial support.

Helge Dedek

Notes on Contributors

John Bell is Emeritus Professor of Law at the University of Cambridge. He has written extensively on French law, comparative legal method, and German law. His major works include *European Legal Development: The Case of Tort* (with David Ibbetson, Cambridge University Press, 2012) and *Markesinis's German Law of Torts* (5th ed., edited with André Janssen, Bloomsbury, 2019). Previous publications have included *Judiciaries within Europe* (Cambridge University Press, 2006), and books on French constitutional and administrative law. Until 2019 he was editor of the *Cambridge Law Journal*. He taught previously in England at the University of Oxford (1980–89) and the University of Leeds (1989–2001), as well as at the Universities of Paris 1 and 2 (1974–75 and 1985–86).

Mauro Bussani is Professor of Comparative Law at the University of Trieste, Adjunct Professor at the University of Macao, and Member of the Faculty of the Católica Global School of Law (Lisbon). He has a PhD Honoris Causa from the University of Fribourg. He has been a visiting professor in Brazil, Canada, China, France, Hungary, Israel, Peru, Portugal, Serbia, Switzerland, the United Kingdom, and the United States. He is a member of the American Law Institute, the Société de législation comparée (France), and a Titular Member of the International Academy of Comparative Law. He coedits three comparative law series, one for Intersentia, one for Brill and one for Oxford University Press. His principal publications include 29 books (of which eighteen are edited) and more than 160 essays, written in English, French, and Italian. Many of his works have been translated into Chinese, Japanese, Korean, Portuguese, Serbian, Spanish, and Turkish.

Vivian Grosswald Curran is Distinguished Professor of Law and Vice President of the International Academy of Comparative Law as well as past President of the American Society of Comparative Law. She also is correspondante étrangère of the Institut des sciences juridique et philosophique de la Sorbonne, Centre de droit comparé et internationalisation du droit. She serves on the Board of Advisors of the Max Planck Institute for Comparative and International Private Law, Hamburg, and

the Luxembourg Max Planck Institute for Procedural Law's Comparative Procedural Law and Justice Project. Her writing is in the area of comparative and transnational law and her most recent book is *Porosités du droit/Law's Porosités* (Société de législation comparée, Paris, 2020).

Helge Dedek is a Full Professor of Law at McGill University. He is interested and has published in comparative and transnational legal history, legal theory, and private law. He is a Titular Member of the International Academy of Comparative Law and has held appointments as Professor of Transnational Law and Foreign Legislations at Lausanne University and as Director of the McGill Institute of Comparative Law. Since 2014, he has been serving (together with Franz Werro) as the Editor-in-Chief of the *American Journal of Comparative Law*.

Thomas Duve is Director of the Max Planck Institute for Legal History and Legal Theory and Professor of Comparative Legal History at Goethe University Frankfurt. His work focuses on the legal history of the imperial spaces of the Iberian monarchies in the early modern period and modernity. He is particularly interested in the history of canon law and moral theology, especially that of the School of Salamanca, and in the history of knowledge creation in the field of law and other modes of normativity. Further fields of interest include the history and methodology of the discipline of legal history.

Michele Graziadei is Professor of Comparative Private Law at the University of Torino and Fellow at the Collegio Carlo Alberto, in Torino. His research focuses on the methodology of comparative law, comparative legal history, legal pluralism, legal translation, and other theoretical problems relating to the comparison of laws. He is a Titular Member of the International Academy of Comparative Law, and President of the Italian Society for Research in Comparative Law (SIRD). He is the author of over a hundred publications in several languages.

Ko Hasegawa is Professor Emeritus of Legal Philosophy and a Visiting Fellow and Adjunct Lecturer at the Advanced Institute of Law and Politics at the School of Law, Hokkaido University, Sapporo, Japan. His academic interests are broadly the structure of legal thinking, rights and justice, and the concept of law. He has published three books and many papers on various issues in legal philosophy. He has also co-edited a book for an introduction to legal philosophy and edited a collection of collaborative essays on the problem of the interaction of different legal systems. Further, as he developed a comparative interest in law, he communicated with H Patrick Glenn for several years until his untimely death, in particular, concerning the problem of the confluence of *Legal Traditions*. Professor Hasegawa is currently working on the logic of confluence in law, especially through considering the reception problem in modern Japanese law, for bridging between the explorations of legal philosophy and the ones of comparative law and legal history.

Ahmed Fekry Ibrahim is a researcher in Islamic law and Islamic studies. He holds a BA from Al-Azhar University, an MA from the American University in Cairo, and a PhD in Islamic studies from Georgetown University (2011). His research interests cover juristic discourse and court practice in both the formative period of Islamic law and the post-classical Mamluk and Ottoman periods. He is the author of *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse University Press 2015), and *Child Custody in Islamic Law: Theory and Practice in Egypt since the Sixteenth Century* (Cambridge University Press 2018). His research has been supported with research grants from the Fonds de recherche du Québec–Société et culture (FRQSC) and the Social Sciences and Humanities Research Council of Canada (SSHRC). He can be reached at afi@georgetown.edu.

Marie Seong-Hak Kim is Professor of History at St Cloud State University (USA), and attorney at law. She specializes in comparative legal history with emphasis on Korea, Japan, and France. She is the author of *Custom, Law, and Monarchy: A Legal History of Early Modern France* (Oxford University Press 2021), *Constitutional Transition and the Travail of Judges: The Courts of South Korea* (Cambridge University Press 2019), *Law and Custom in Korea: Comparative Legal History* (Cambridge University Press 2012), and *Michel de L'Hôpital: The Vision of a Reformist Chancellor during the French Religious Wars* (Truman State University Press 1997), and the editor of *The Spirit of Korean Law: Korean Legal History in Context* (Brill Nijhoff 2016).

Martin Krygier is Gordon Samuels Professor of Law and Social Theory at the University of New South Wales, Australia; Honorary Professor, RegNet, Australian National University, and Senior Research Fellow, Central European University Democracy Institute. He is a fellow of the Academy of Social Sciences in Australia. His works include *Philip Selznick: Ideals in the World; Between Fear and Hope; Civil Passions*, and (as editor) *Spreading Democracy and the Rule of Law?; Rethinking the Rule of Law After Communism; Community and Legality; The Rule of Law After Communism; Marxism and Communism; and Bureaucracy*. He writes on the conditions and nature of the rule of law, and the challenges involved in developing and sustaining it, particularly in politically scarred societies, more particularly those of post-communist Europe. He has a particular interest in the implications of populism for the rule of law and constitutional democracy. His writings seek to meld politically engaged legal and political theory with social theory, observation, and experience. In 2016, he was awarded the Dennis Leslie Mahoney Prize in Legal Theory, for his book on Philip Selznick and his writings on the rule of law.

David Nelken, PhD, LL.D. (Cambridge), has been Professor of Comparative and Transnational Law at the Dickson Poon School of Law, King's College, London, since 2013 (and was Vice Dean and Head of Research, 2013–16). From 1976 to 1989

he taught at Cambridge, Edinburgh, and University College, London, before moving to Italy in 1990 as Distinguished Professor of Legal Institutions and Social Change at the University of Macerata. From 1995 to 2013 he was also Distinguished Research Professor of Law at Cardiff University, and from 2010 to 2014 Visiting Professor of Criminology at Oxford University. Professor Nelken's research involves theoretical enquiry and empirical investigation in the areas of comparative sociology of law and legal and social theory and criminology, and awards received include the American Sociological Association Distinguished Scholar Award (1985), the Sellin-Glueck International Award of the American Criminological Society (2009), the Podgorecki Distinguished Senior Scholar Award from the International Sociological Association (2011), and the (United States) Law and Society Association's International Scholar Award (2013). In comparative law, he has been mainly interested in discussions of legal culture and legal transplants; see, for example, *Adapting Legal Cultures* (edited with Johannes Feest, Hart/Bloomsbury 2001) and *Comparative Law: A Handbook* (edited with Esin Öricü, Hart/Bloomsbury 2007).

Esin Öricü started her academic career at the University of Istanbul and then joined the University of Glasgow in 1976, where she is now Professor Emerita of Comparative Law. Professor Öricü is also Professor Emerita of Comparative Law, Erasmus University, Rotterdam, and a Visiting Professor at Okan University, Istanbul. She holds an honorary doctorate from the University of Uppsala and is a Titular Member of the International Academy of Comparative Law. She also served as Vice Chair of the Scottish Association of Comparative Law. Professor Öricü has authored and edited many prominent books, articles, and book chapters, dealing with comparative law, in general, mixed jurisdictions, multiple aspects of Turkish law, including family law, constitutional law, and historical aspects of the Ottoman Empire.

Giorgio Resta, PhD University of Pisa (1999), is Full Professor of Comparative Law at the University of Roma Tre. Senior Wainwright Fellow at McGill Law School (2015), he taught courses as a visiting professor at McGill, EHESS, and Nagoya, among other universities. Associate Member of the International Academy of Comparative Law, ELI fellow, Honorary Member of the Italian Civil Law Association, and co-founder of the Italian Academy for the Internet Code, he served as a member of two Legislative Reform Committees appointed by the Italian Ministry of Justice. He is the author of books and essays in the fields of comparative law, law and technology, law and history, and general private law.

Gunnar Folke Schuppert is Professor Emeritus of Public Law and Administrative Science at Humboldt University Berlin. He led a research project on rule of law at the Collaborative Research Centre 700 (SFB) titled 'Governance in Areas of Limited Statehood' until 2017 and is a fellow at the Max-Weber-Kolleg Erfurt.

From 2003 to 2011, he held a research professorship on ‘New Forms of Governance’ at the Berlin Social Science Centre (WZB) and was Managing Director of the WZB Rule of Law Centre. He has authored over 200 academic publications. Most recent publications include *Eine globale Ideengeschichte in der Sprache des Rechts* (A Global History of Ideas in the Language of Law) (Max Planck Institute for European Legal History Research Paper Series No. 2019–02) (English translation forthcoming); *The World of Rules: A Somewhat Different Measurement of the World. Global Perspectives on Legal History* (Max Planck Institute for European Legal History No. 10, 2017); and *Governance of Diversity: Zum Umgang mit kultureller und religiöser Pluralität in säkularen Gesellschaften* (2017).

William Twining is the Emeritus Quain Professor of Jurisprudence at University College London, having held the post until 1996. He is a leading member of the Law in Context movement, and has contributed especially to jurisprudence, intellectual history, and the legal theory of ‘globalization’. Publications include *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) and *Globalisation and Legal Theory* (Cambridge University Press 2000).

Catherine Valcke is Full Professor, Faculty of Law, at the University of Toronto. She has taught, lectured, and published on comparative law and comparative law theory worldwide, including in such journals as *Nomos*, the *American Journal of Comparative Law*, *Harvard Journal of Law and Public Policy*, *Yale Journal of International Law*, and the *European Review of Private Law*. Her work on English and French contract law was recently cited as ‘illuminating’ by the English House of Lords. An elected member of the International Academy of Comparative Law, she has acted as National Reporter for Canada to the Congress of the Academy on several occasions. Her book *Comparing Law* (Cambridge University Press 2018) bridges comparative law and legal theory in developing an analytic framework for comparative law that is consistent with the traditional literature accumulated to date and will guide future work in the field.

Neil Walker holds the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh. His main area of expertise is constitutional theory. He has published extensively on the constitutional dimension of legal order at sub-state, state, supranational, and global levels, and on the relationship between security, legal order, and political community. Previously, he was Professor of Legal and Constitutional Theory at the University of Aberdeen (1996–2000) and Professor of European Law at the European University Institute, Florence (2000–08). He has held various visiting appointments, including Eugene Einaudi Chair of European Studies, University of Cornell (2007), Distinguished Visiting Professor of Law, University of Toronto (2007), Global Professor of Law, New York University (2011–12), Sidley Austin-Robert D McLean Visiting Professor of Law, Yale University (2014–15), and International Francqui Chair, University of Leuven, (2017). He has

an LLD (Honoris Causa) from the University of Uppsala, is a fellow of the British Academy, and is also a fellow of the Royal Society of Edinburgh. His most recent books are the monograph, *Intimations of Global Law* (Cambridge University Press, 2015) and the edited collections, *The Scottish Independence Referendum: Constitutional and Political Implications* (co-editor, Oxford University Press, 2016), and *Sovereignty in Action* (co-editor, Cambridge University Press, 2019). He is presently completing a study of the EU as an ‘experimental project’.

Images

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|---|--|-----|
| 1 | Michel de Broin, <i>Black Whole Conference</i> (2005). Collection du Musée d'art contemporain du Val-de-Marne, France | 4 |
| 2 | R Buckminster Fuller, US Pavilion, Expo 67, Montreal – Archives de la Ville de Montréal, VM94-EX136-779 | 8 |
| 3 | The US Expo 67 Pavilion, now called the 'Biosphere' and housing an environment museum (photo: Guilherme Duarte Garcia, 2013) | 9 |
| 4 | Michel de Broin, <i>Black Whole Conference</i> (2005) | 17 |
| 5 | H Patrick Glenn, 1940–2014 (photo: Lysanne Larose) | 290 |