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► **To cite this version:**

Hélène Ruiz Fabri. From Babel to Esperanto and Back Again: The Fate of International Law (or of International Lawyers?). 2018. hal-04695109

HAL Id: hal-04695109

<https://hal.science/hal-04695109v1>

Submitted on 12 Sep 2024

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By Hélène Ruiz Fabri

February 8, 2018

This post is part of the Joint Symposium that we are co-hosting with Opinio Juris on Anthea Roberts' new book *Is International Law International?* (OUP, 2017).

While I've been reading, I have wondered about the exact nature of Anthea Roberts' book. A sociological inquiry? A manifesto? A plea? Against arrogance? Against a new Empire? For comparison? For pluralism? Maybe a bit of all this? In any case, it is a polite call for lucidity. It seems the author has tried to confirm some hunches she picked up along the way.

In one sense, writing such a book was a risky enterprise. Contrary to what the title might suggest, Anthea Roberts writes less about international law than about international lawyers, who are in constant danger of thinking of international law in a parochial way while claiming its universality. Indeed this book might be a good way to displease many people, although everyone has the choice between identifying with the tendencies she uncovers or considering themselves an exception. But past that, Anthea Roberts comes out with some statements which can be felt as more or less dreadful, depending on one's situation. She does not propose a miracle cure but at least a realization. To this extent, her approach is not a pessimistic one.

Admittedly, it is possible to criticize this or that angle of the study, such as the choice – even motivated – to focus on the P5 or the presentation of the specifics of a domestic system which does not seem perfectly understood, or else the delimitation of what is “western”. But what I found most interesting is the way in which Anthea Roberts was able to present an analysis which turns out to be very political, as a project as well as in its outcome.

From the outset, I understood the book as another step in Anthea Roberts' study of what she calls “comparative international law”. I have to confess that I was rather reluctant when starting my reading. First, I was not sympathetic to this wording because I felt it as rather old-fashioned. In my view it recalled the old understanding of comparative law – indeed the most usual one – consisting in comparing domestic law and more or less exotic foreign law(s) or, less often, foreign laws alone. Thus the focus on various – and national – approaches to international law belongs to this trend. Second, I do not like the locution ‘comparative law’ as I have the constant feeling that it rests upon a misunderstanding. It does not refer to law as a



set of norms but to a methodology applied to law, and which can be applied to any kind of law, be it domestic or international, private or public, etc. Thus comparing how various international courts and tribunals deal with a specific issue can qualify as comparative international law, which can therefore be de-nationalized.

Obviously, the book had to tame me, and it did.

Going further in my reading and the reflection it triggered rang a bell. It reminded me of the Congrès international de droit comparé held on the initiative of the Société de législation comparée in Paris from July 31 to August 4 1900, on the fringes of the Exposition universelle. In his report on behalf of the Organizing Committee, Saleilles promoted the idea of a 'common law of civilized humanity' ("droit commun de l'humanité civilisée") which he presented as the tool for what he called the most reliable and fecund progress ("l'instrument du progrès le plus sûr et le plus fécond" – R. Saleilles, *Conception et objet de la science du droit comparé, Congrès international de droit comparé, Société de législation comparée, 1900, t. 1, p. 167s.*). There was this dream that a better knowledge and understanding of the various laws of the world would allow lawyers to bring them closer and to draw common principles from them. There was undoubtedly a shared belief that it would be for the common good. Throughout the 20th century and because of, or despite, its turbulence, one might have thought that these common principles, this common law, would take hold in international law. Isn't this an almost foregone conclusion, even a redundancy, as the vocation of international law is to be a common law? By the way, comparative works undertaken in Paris at the instigation of Mireille Delmas-Marty on the occasion of the centenary of the Congress of 1900, entitled "Variations autour d'un droit commun" (Editions SLC, 2 books, 2001 and 2002), put a lot of emphasis on the internationalisation of law as a vehicle of common principles and pieces of a common law, although the contention was worded very cautiously. Thus it called for the metaphor of a jigsaw puzzle to characterise this evolution.

Interestingly, Anthea Roberts uses the very same image when she recalls that "it is important to understand the various elements examined as different pieces of a puzzle in which the aspects are individually open to criticism but collectively paint a more compelling portrait" (p. 48). However, her book brings to light a kind of regression if not regarding reality, at least regarding our beliefs. Even international law might not be common. Therefore, irony might be at play if at the same point in time that comparatists believe in the universalizing ability of international law, international lawyers have to acknowledge that international law is not a unit but a puzzling puzzle of national, if not even more fragmented, visions.

Maybe the answer is that international lawyers should become comparatists. This is Anthea Roberts' claim as I understand it. I accept it provided that we reflect further on the object and purposes of comparison in this context and that we look at how comparatists have reflected on the functions that comparative law can perform. In a nutshell, two main functions can be identified, knowledge and influence. Of course, comparison fulfils first and foremost a

cognitive function. Thanks to a resulting increased awareness of diversity, it allows us to understand law as a contextualised cultural phenomenon. Admittedly contextualisation is not a foreign language for international lawyers but more efforts might be needed in this direction. Comparison also allows us to learn that the fact others do or think differently does not mean that they are wrong. This cognitive function can even amount to a “subversive function”, as Horatia Muir Watt puts it (*La fonction subversive du droit comparé*, *Revue internationale de droit comparé*, Year 2000, Vol. 52, No 3, pp. 503-527), speaking of comparative law as a means of critical understanding of the law. According to her, “comparison is thus capable of freeing legal thought from inhibiting conceptual constraints by paving the way to new ways of reading the law”. Understanding what others do or think helps us to question critically what we think or do. This is typically what Anthea Roberts promotes in her book, highlighting both sides of the coin. First in positive terms, by stating that “consciously assuming a comparative international law approach may help international lawyers to look at their field through different eyes and from different perspectives, enabling them to understand others more fully and to critique themselves and their own state more perceptively” (p. 321). Then in negative terms, by recalling that “if international lawyers operate in silos, either domestically or transnationally, they risk failing to connect with, and understand the perspectives of, those coming from diverse backgrounds and holding different perspectives” (p. 323). Of course anyone might not share this view. Some comparatists have a pessimistic vision in the sense that they think that, due to our differences, we can never be sure of understanding each other. Others have a more optimistic view according to which, despite our differences, we can never be sure of not understanding each other. In any event, being able to deal with and discuss any different view or interpretation is – or should be – part of the DNA of any lawyer.

But there is more, in relation to the second main function that comparison might help to perform, i.e. influence. The temptation which occurs almost inevitably with comparison is classification, even hierarchisation. History is paved with examples of countries trying and sometimes succeeding in exporting their legal models, civil codes, criminal codes, etc. History also tells us that such transfers sometimes called mimetism do not take place without distortion (I like the French word for this which is “gauchissement”) and there, we are back to context and the cultural – or social – dimension. This alone tells us that there cannot be common law without hybridisation and Anthea Roberts demonstrates that reducing the issue in international law to a competition between civil law and common law systems lies on a biased understanding which ignores the various ways of influence. Comparison is never neutral, this is a given, but it comes with the fact that any strategy can engender a counter-strategy, all the more that there are huge asymmetries. There, we face the hidden paths of influence. Comparison, in the sense of knowing better the other, can feed resistance to unification, playing against the globalist delusion at least as we thought we could understand it so far. By focusing on states which figure prominently in the global flow of students, Anthea Roberts might have identified ways of influence – through education which can also play as an acculturation – but also possible Trojan horses. She rightly shows that the ones who learn

the ways of reasoning of others without reciprocity, might in the long run be able to beat those from whom they have learnt at their own game. There we are. The time has come to open our eyes but are we ready? Is the international elite that Anthea Roberts rightly identifies and that I used to call 'the International Bubble' ready to open up and renounce its "entre-soi"?

Two last remarks in this regard. First, my experience with comparison – or comparative law if one prefers – is that it is very demanding and that, at least speaking about academy, it remains a rather marginalized discipline instead of being a methodology pervading each and every field of expertise. And yet, this is an incredibly useful tool not only to escape domestic silos but also silos of specialisation or even hyper-specialisation. Second, and it goes hand in hands with comparison, language is key. Monolingualism is a killer. Not because the current *lingua franca* is English (or Globish?) but because trying to master professionally – and not only as a tourist – at least two languages teaches the many difficulties in moving from one to the other without changing ways of reasoning, losing subtleties, facing dilemmas, while monolinguals do not even care about being understood.

The conversation to which Anthea Roberts has terrifically contributed with her book is far from being over, surtout si nous sommes nombreux à accepter de déplacer notre regard.