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Publication date

2009

Document Version

Final published version

Published in

European Review of Private Law

[Link to publication](#)

Citation for published version (APA):

de Boer, N. J. (2009). The theoretical foundations of the Common Core of European Private Law Project: a critical appraisal. *European Review of Private Law*, 17(5), 841-851.
<http://www.kluwerlawonline.com/document.php?id=ERPL2009053>

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The Theoretical Foundations of the Common Core of European Private Law Project: A Critical Appraisal

NIK J. DE BOER*

Abstract: This article develops a critical evaluation of the theoretical foundations of the Common Core of European Private Law Project, in particular, of the theory of Rodolfo Sacco. The overall aim of this exercise is to test to what extent the common core project can truly provide an accurate and relatively neutral description of European Private Law. First, it describes the comparative law theory of Rodolfo Sacco and describes briefly how this method is applied practically in the Common Core of European Private Law Project. Second, it describes a number of criticisms that can be raised against this method. In doing so, it defends the thesis that law has a multi-faceted character and that there is not one single method for the study of comparative law that is able to cover all of these different facets. Rather, in order to provide an accurate and precise description of a different legal system, one has to apply different comparative methods.

Zusammenfassung: Dieser Beitrag beabsichtigt, eine kritische Bewertung der theoretischen Grundlagen des *Common Core of European Private Law* Projektes, insbesondere der Theorie von Rodolfo Sacco. Das maßgebliche Ziel dieses Beitrags ist allerdings die Frage, in welchem Umfang das *Common Core* Projekt tatsächlich eine präzise und relativ neutrale Darstellung des europäischen Privatrechts bietet. Zunächst wird die rechtsvergleichende Theorie von Rodolfo Sacco näher dargestellt sowie auch erläutert, wie diese Methode im *Common Core of European Private Law* Projekt praktisch angewendet wird. Darüber hinaus wird eine Anzahl von Kritikpunkten näher aufgeführt, die gegen diese Methode vorgebracht werden können. Dabei wird die Ansicht vertreten, dass das Recht einen facettenreichen Charakter hat, sodass es nicht nur eine einzige Methode zur rechtsvergleichenden Untersuchung gibt, die es ermöglicht alle diese unterschiedlichen Facetten abzudecken. Zur Ermöglichung einer akkuraten und genauen Erläuterung eines anderen Rechtssystems ist es vielmehr erforderlich, verschiedene rechtsvergleichende Methoden anzuwenden.

1. Introduction

This paper discusses the theoretical foundations of the *Common Core of European Private Law Project*. The project was first established in 1993 at the University of Trento.¹ Its goal is ‘to unearth the common core of the bulk of European Private Law, that is, of what is already common, if anything, among the different legal systems of European Union Member States’.² Moreover, in the long run, its goal is to build a

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¹ R. SEFTON-GREEN, *Mistake, Fraud and Duties to Information in European Contract Law* (Cambridge: Cambridge University Press, 2005), xi.

² M. BUSSANI & U. MATTEI, ‘The Trento Common Core Project’, online available at <www.common-core.org/theproject.html#20>, last visited 7 Dec. 2008.

common European legal culture, inspired by the example of the United States.³ In doing so, it tries to provide ‘a picture of the law existing in the European systems in a number of important areas which has to be as reliable and exact as possible’.⁴ In this sense, the common core project can also be distinguished from other projects in the area of European Private Law such as that of the *Lando Commission* or the *UNIDROIT Principles*. As Ugo Mattei and Mauro Bussani proclaim, these projects ‘try to find out, on the basis of comparative research, which solution may best regulate certain legal problems in a common way, discarding at the same time the possibility that core divergence (and certainly not only details) might be justified on many grounds’.⁵ Whereas these other projects are thus of a more *prescriptive* nature, the common core project appears to aim more at providing an accurate *description* of European Private Law.⁶

The methodological basis for this common core project has been drawn mainly from the works of the Italian Professor Rodolfo Sacco.⁷ His theory can be characterized briefly as a dynamic approach to comparative law, in which great importance has to be given to the notion of *legal formants*. The aim of this paper is to develop a critical evaluation of Sacco’s comparative method and the use made of it in the common core project, by looking at a number of criticisms that can be raised against this approach. The ultimate goal of this exercise is to determine to what extent the common core project can truly provide an accurate and relatively neutral description of European Private Law. Moreover, in this paper, I work with the hypothesis that because of the multi-faceted character of law, not one single right method exists for the study of comparative law that is able to cover this multi-faceted character of law. Therefore, no single method can provide an accurate and neutral description of European Private Law.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ The common core approach is, however, more than a purely descriptive approach. It also seems that the project does not claim to be neutral to the extent that it holds to draw a map of European Private Law not related to any point of view. I therefore use the words ‘relatively neutral’ throughout this article, imperfect as those words may be. See M. GRAZIADEI, ‘The Functionalist Heritage’, in *Comparative Legal Studies: Traditions and Transitions*, eds R. MUNDAY & P. LEGRAND (Cambridge: Cambridge University Press, 2003), 118; see also U. MATTEI, ‘The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Perspectives’, *Hastings International & Comparative Law Review* 21 (1998) (in particular): 898–902.

⁷ See, generally, R. SACCO, ‘Legal Formants: A Dynamic Approach To Comparative Law (Installment I of II)’, *American Journal of Comparative Law* 39 (1991a): 1–34; *id.*, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’, *American Journal of Comparative Law* 39 (1991b): 343–401; and also: *id.*, *Introduzione al Diritto Comparato* (Utet: Turin, 1994), in particular 1–63.

In order to test this hypothesis, first the theory of Rodolfo Sacco is discussed in some detail. In doing so, I explain the notion of *legal formants* and try to describe how Sacco's approach has been incorporated in the common core approach. Second, a number of criticisms against Sacco's and the common core approach are discussed, drawing attention to a number of problems that this approach does not deal with. Finally, a conclusion is given on whether the common core project is able to offer a relatively neutral and accurate description of European Private Law.

2. Sacco's Dynamic Approach to Comparative Law

An initial question that confronts anyone trying to compare different legal systems is how to compare different legal systems. A second and related question concerns the object of comparison: what does one compare when engaging in comparative law? A problem that renders an answer to both questions very difficult is that legal concepts are usually given a particular meaning within a particular legal system, especially in the area of private law. When one thus tries to compare different legal systems, one cannot merely apply domestic legal concepts to that of a foreign legal system. In comparing different legal systems, one thus has to take a step back and try to overcome these different uses in legal concepts by applying a method that is more 'concept-neutral'. An example of such an approach can be found in the work of the Italian professor Rodolfo Sacco, whose theory will be set out in this section.

According to Sacco, the primary aim of comparative law is to obtain better knowledge of legal rules and institutions that are compared. Moreover, he states that '[o]nly through comparison do we become aware of certain features of what we are studying'.⁸ When engaging in comparative law, the comparatist compares legal rules. However, as Sacco states, it is no easy task to determine what exactly the legal rules are in a particular system. In trying to determine legal rules, most jurists falsely assume unity in legal rules. Instead, Sacco states that 'living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges'.⁹ He calls these elements *legal formants*, and any legal system contains a multiplicity of such legal formants, which are not necessary in harmony with each other. The method of comparative law thus has to be such that it is able to identify and observe these different legal formants in order to determine what the legal norms of a foreign legal system are.¹⁰ In this way, the method is anti-dogmatic and can thus provide a check on whether domestic interpreters of the law really use the method they proclaim to use.

⁸ SACCO (1991a), *supra* n. 7, 5.

⁹ *Ibid.*, 22.

¹⁰ *Ibid.*, 25.

Sacco then makes a further step in explaining the idea of legal formants as he states:

The statutes are not the entire law. The definitions of legal doctrinal scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by the courts. In order to see the entire law, it is necessary to find a suitable place for statute, definition, reason, holding and so forth. More precisely, it is necessary to recognize all 'legal formants' of the system and to identify the scope proper to each.¹¹

Legal formants consist thus in all those factors that actually influence the legal rules of a given legal system. Moreover, these formants are not necessarily confined to the sources of law recognized as the official sources of law in a particular legal system, for example, the sources of law indicated by the constitution. The idea that law is created only by the official state organs is stated to be an 'optical illusion'.¹² An example of such a 'non-official' legal formant is the influence to which judges are subject. The status of legal scholarly writing may be different when judges in a particular legal system mostly have an academic background rather than one of having been in legal practice. When considering a different legal system, one thus has to take into account 'legal formants' such as this influence to which judges are subject: it partly determines the weight to be given to scholarly writing.¹³ Another important point to keep in mind is that legal formants are never in complete harmony but that, in many cases, they will be actually conflicting. This means as well that no single answer to a legal problem may exist within a particular legal system.¹⁴ For example, scholarly writing may offer a different interpretation of a particular statute than that of the actual judiciary. Nonetheless, both disciplines may still influence each other. In trying to answer a particular legal problem, one thus has to take into account both approaches.

Sacco makes a further distinction between legal formants, namely, between those that are explicitly formulated and those that are not. The latter he names *cryptotypes*.¹⁵ Sacco's idea is that legal scholars follow many of such implicit rules when answering a particular legal problem. Recognizing and studying these *cryptotypes* form an important part of legal studies, and in this respect, comparative law is indispensable, because '[o]nly comparative studies have the penetration that can

¹¹ *Ibid.*, 29.

¹² SACCO (1991b), *supra* n. 7, 343-344.

¹³ BUSSANI & MATTEI (2008), *supra* n. 2.

¹⁴ SACCO (1991b), *supra* n. 7, 343.

¹⁵ *Ibid.*, 384.

make such implicit patterns known'.¹⁶ Such patterns can be found if the method of comparative law is factual, in the sense that it tries 'to describe empirically how the law of a given country actually functions'.¹⁷ In doing so, it becomes similar to other disciplines of law, as other sciences are based on factual inquiry as well. The study of comparative law can thus become part of an interdisciplinary field of study.¹⁸

On the basis of Sacco's theoretical approach to comparative law, in practice, one has to engage in comparative law by applying a method that takes into account the multiplicity of legal formants, as well as the fact that these legal formants may be 'unofficial' and can be disharmonious. For this reason, the common core method is an approach that is factual in nature, in the sense that it focuses on results in particular cases rather than on the concepts applied in different legal systems.¹⁹ The common core method is such that it asks legal experts of the different legal systems studied to answer questionnaires that contain hypothetical cases. The description of these cases is as factual as possible and is sufficiently specific in order to make sure that its respondents take into account all possible legal formants that lead to the results in these cases. The result of these studies is contained in several books in the series of the Common Core of European Private Law.²⁰

3. A Number of Possible Criticisms

3.1 *Legal Practice Moves Faster; a Criticism Offered by Martin Shapiro*

Shapiro Offers a criticism on the common core project that applies particularly to the law of contract. Moreover, his criticism is not directed at the common core project method directly; nonetheless, I believe it has some implications for it.

Shapiro takes the position that the law of contract consists in large part of the actual contracting practices of lawyers and their clients. Now, within these practices, one can discern a number of aspects that change the law of contract. First, because it is currently common to draw up long contracts instead of short contracts, lawyers write more of their law into the contracts themselves. Thereby the value of law enacted by the state organs actually diminishes to a large extent, as the actual norms that regulate the parties' relations are those laid down by the lawyers and clients themselves. Second, a major change in contract practices is that contracts are now to a large extent drafted by American and English law firms and with the choice

¹⁶ *Ibid.*, 385.

¹⁷ *Ibid.*, 388.

¹⁸ *Ibid.*, 388-389.

¹⁹ SACCO (1991a), *supra* n. 7, 29.

²⁰ See, e.g., R. SEFTON-GREEN, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005); and R. ZIMMERMAN & S. WHITTAKER, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).

of New York or English law as the law ruling the contract. This practice is prevalent mostly with multi-national companies.²¹

The question is whether the common core project takes these two developments sufficiently into account. The theory behind the common core project does not pose any necessary limits for legal practice to be considered as legal formant. However, it is difficult to map such a development by applying the factual approach used in the common core project. Legal experts in the different legal systems may not always be aware of the legal practices that exist in their system. The results achieved through the application of the common core method thus may not represent the entire picture of what law is, precisely because it is unable to map this legal practice. Moreover, the fact that national companies operate worldwide and might be contracting often under the law of New York means that a description of merely the European legal systems does not really offer a description of the law that regulates big European companies.

3.2 *Lasser*

An approach that appears to be altogether different from that of Sacco is Mitchell Lasser's approach to comparative law.²² Whereas Sacco's approach can be characterized as essentially factual, Lasser's approach can be qualified as consisting of literary analysis. As Lasser indicates himself, his approach can be summarized as resting on three essential theses. First, the method more or less assumes that one can actually gain an insight in the concepts of other legal systems. In studying a different legal system, the goal of the method actually appears to gain 'fluency in the conceptual universe of that system'.²³

Second, such fluency can be obtained by applying a so-called method of 'rigorous literary analysis of the discourses deployed in those legal systems'.²⁴ One thus needs to approach the documents and arguments produced by a legal system as if they were literary, simply by subjecting these documents to close reading. The underlying idea of this method is that not only the substantive content of these documents and arguments are meaningful but that they are meaningful apart from their actual substance as well.²⁵ The method thus takes the perspective of those that apply these concepts seriously, that is, the participant's perspective. In comparing different systems, one has to adopt a sort of internal perspective of the person working

²¹ M. SHAPIRO, 'The Common Core: Some Outside Comments', in *The Common Core of European Private Law*, eds M. BUSSANI & U. MATTEI (The Hague: Kluwer Law International, 2003a), 224-225.

²² See his approach, e.g., M. DE S.-O. L'É. LASSER, 'The Question of Understanding', in *Comparative Legal Studies: Traditions and Transitions*, eds R. MUNDAY & P. LEGRAND (Cambridge: Cambridge University Press, 2003b), 197-239.

²³ LASSER (2003a), *supra* n. 21, 199.

²⁴ *Ibid.*, 212.

²⁵ *Ibid.*, 203.

within a particular legal system, rather than taking an external perspective by looking merely at the substantive result achieved in that system. Clearly, in this respect, Lasser's method is very different from Sacco's. Whereas Sacco bases his comparative methodology on fact, Lasser holds that insight into a different legal system is gained by understanding the concepts applied in it and with that its style of legal reasoning.

Third and finally, this analysis should be applied not only to the official documents produced by the state and the documents that are considered to constitute the official sources of law in the particular legal systems. Rather, the method needs to be applied as well to non-official documents that influence the legal discourse and are closely related to the official discourse. The reason for this is that according to Lasser, the official view of a legal system might not reflect its actual working in practice. One thus has to look at other documents such as academic writing or the arguments put before the courts by counsel.²⁶ Here, it seems that Sacco's and Lasser's approaches are similar, as a main feature of Sacco's theory is, that the question of what is law in a particular system cannot be answered by looking merely at its official sources.

The goal or result of applying Lasser's comparative method is to gain a fluency in the legal language of the legal system studied, that is, that one is able to use and understand the legal concepts used in the particular system, apply these to legal problems and also to criticize the use of such legal concepts in the particular system. Whereas the common core method is clearly of a factual nature and focuses on the substantive aspects of different legal systems, Lasser's approach seems to be focused more on the different types of legal reasoning employed in different types of legal systems. In this sense, Lasser's approach can perhaps be characterized as a study of the mentality or *mentalité* of legal systems.²⁷ A key point in Lasser's approach is thus that even if two legal systems deal with legal problems in a similar way, in the sense that the result achieved in a particular case by both systems may be the same, the law of these two systems may still be very different because of different legal mentalities.²⁸ An example of this given by Lasser himself is that of the difference in legal reasoning between that of the United States and that of France. A further important point to note is that these differences are in turn related to the different or radically different historical and cultural origins of the two systems.²⁹

One can conclude from this discussion of Lasser's approach to comparative law that the method of the common core project cannot account for all differences and/or similarities between different legal systems. Moreover, by applying the

²⁶ *Ibid.*, 207-212.

²⁷ M. DE S.-O. L'É. LASSER, 'Is There a Transatlantic Common Core of Judicial Discourse?', in *The Common Core of European Private Law*, eds M. BUSSANI & U. MATTEI (The Hague: Kluwer Law International, 2003), 216.

²⁸ LASSER (2003b), *supra* n. 22, 216.

²⁹ *Ibid.*

factual approach of Sacco, one may not come to the understanding of a legal system that one attains by applying Lasser's method of rigorous literary analysis. In particular, it is hard to see how the common core approach can give an understanding of the different mentalities that exist in different legal systems, as the focus in this method is on facts rather than on concepts. On the other hand, Lasser's approach might fall foul to the problem that its perspective is too internal and that this will make the comparator blind to some legal formants not explicitly formulated within the legal system, the so-called *cryptotypes* discussed at the end of section 3. Another problem with Lasser's approach is that it tries to view the other legal system from an internal point of view; whereas the viewer is not actually a participant in the legal system he is studying, the comparatist remains an external viewer. The scholar trying to compare the legal systems thus might not be provided with an adequate picture of the law of the different system, because he or she is too pre-conditioned by the concepts that he or she knows from the legal system of origin.³⁰

The most appropriate conclusion that can be drawn from this discussion is that both methods of comparative law are able to offer interesting insights in other legal systems. It is important to note as well that both approaches are not exclusionary of each other, rather they can be considered complementary, as Lasser himself notes.³¹ Both are useful and valuable. However, if the common core project truly aims at providing a 'picture of the law existing in the European systems in a number of important areas which has to be as reliable and exact as possible', then it has to take in account the approach of Lasser as well in order to describe the different legal mentalities of legal systems.

3.3 A Functionalist Bias?

A question is whether Sacco's approach to comparative law and the common core method can be characterized as *functional* approaches and are thus subject to a powerful criticism that has been raised against this theory.

A good account of the functionalist approach can be found in the description of comparative method by Zweigert and Kötz, as they state that 'the basic methodological principle of all comparative law is that of functionality'.³² This functionalist method is premised on the idea that in law only those things that fulfil the same function are comparable and that different legal systems face essentially the same problems, solve these problems by different means, but achieve quite similar results. The consequence of this is that the study of comparative law must be directed at studying legal problems in purely functional terms, legal problems must be formulated

³⁰ LASSER himself seems to acknowledge these criticisms, see LASSER (2003a), *supra* n. 21, 221-236.

³¹ See LASSER (2003b), *supra* n. 22, 216.

³² K. ZWIGERT & H. KÖTZ, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1992), 34.

without reference to legal concepts derived from a particular legal system.³³ For this reason, Zweigert and Kötz hold that the comparatist must eradicate the preconceptions that result from having studied his own legal system. Instead, he must treat as law whatever affects ‘the living law in his chosen system.’³⁴ In spite of this required openness to difference, the functionalist method does assume a considerable amount of similarity between legal systems. It does so in terms of the problems that arise in different legal systems and also in terms of the results achieved by different systems; it uses a presumption that the practical results achieved are very similar as a means of explaining another legal system. At the beginning of the comparative research, the presumption of similarity helps the comparatist to know in which part of the law to look; at the end of the research, it helps him to check his results; if the practical results are more or less the same in the other legal system, then the comparatist can presume he did his work well.³⁵

If one compares the approach of Zweigert and Kötz with that of Sacco and its practical component in the common core system, one can clearly discern a lot of similarity. Both approaches hold that legal problems need to be stated in factual terms, without reference to concepts inherent to a particular legal system. Second, both approaches require openness in the sense that comparatists should be open to possible different sources of law than those of their native system. This idea is clearly expressed in Sacco’s idea of legal formants. However, one might say that the focus of Zweigert and Kötz is very much on operative rules and that this approach assumes a unity in law, whereas Sacco’s approach acknowledges a multiplicity of legal formants and the fact that its various legal formants may be disharmonious.³⁶ The common core method may however be described as functional, as it clearly assumes that similar problems do arise in different legal systems and that these problems can be expressed in functional terms.³⁷

The functionalist method and, with it, the common core method fall foul of the point made by Alan Watson in his theory on legal transplants. According to Watson, law cannot always be described properly in functional terms.³⁸ Watson challenges the view that law can always be functionally linked to society, in the sense that it deals with the particular social circumstances of a particular society. Although much of the law can be described in functional terms, it cannot always be

³³ *Ibid.*, 34.

³⁴ *Ibid.*, 35-36.

³⁵ *Ibid.*, 40.

³⁶ See, for this point, M. GRAZIADEI, ‘The Functionalist Heritage’, in *Comparative Legal Studies: Traditions and Transitions*, eds R. MUNDAY & P. LEGRAND (Cambridge: Cambridge University Press, 2003), 114-117.

³⁷ In this sense, *ibid.*, 117-118.

³⁸ See A. WATSON, *Legal Transplants. An Approach to Comparative Law* (Athens and London: The University of Georgia Press, 1993), 96; and GRAZIADEI (2003), *supra* n. 36, 118-124.

so described. Watson derives this conclusion from the fact that most legal changes actually derive from legal borrowing. This means that law is not specifically related to the particular needs of a particular society, that is, law is not necessarily rooted in functional conditions. To state this in his words, ‘usually legal rules are not peculiarly devised for the particular society in which they now operate and also... this is not a matter for great concern’.³⁹ Instead, legal elites that are engaged in interpreting and applying the law are often self-referential, in the sense that the rules of the legal debate are established by the participants in this debate themselves. Law thus depends much on its ‘internal logic’, namely, the logic established by the legal elite within a particular legal system.⁴⁰ The functional approach, therefore, seems unable to capture this aspect of a different legal system. One can come to an understanding of the law in as far as it is functional, but as Watson has shown, by this, one will not gain an understanding of the internal logic of a particular system. This is the case, simply because this internal logic is not functional and thus cannot be described in functional terms. A parallel can be drawn here with Lasser’s approach that focuses on an understanding of the concepts of a different legal system. With this approach, one seems to be studying this internal logic of a particular legal system as well. This criticism can also be turned around: does the common core project really map the functional features of European Private Law or is it merely a drawing up of a new European Private Law internal logic? A reason for a positive answer to that question may be that the ‘Common Core map’ is drawn up by a legal elite considering hypothetical cases and such cases may not necessarily be of actual ‘functional’ relevance in the societies studied.

4. Conclusion

The theoretical foundation for the common core project to be found in the work of Sacco and its practical component in the actual workings of the project offer interesting approaches to the study of comparative law. The method tries to take into account the multiple factors that make up the actual legal rules, and in doing so, it tries to offer a description of law that is concept-neutral and thus makes legal issues suited for comparison.

However, as was shown in this paper, the common core approach seems unable to provide a complete picture of the law. For this reason, it does not achieve its ambition of providing an accurate and relatively neutral description of European Private Law, simply because it does not capture all of it. First, as can be concluded from the discussion of Shapiro’s criticism, it may not be able to offer an adequate account of actual legal practice. Second, as appears from the discussion of both

³⁹ WATSON (1993), *supra* n. 38, 96.

⁴⁰ See GRAZIADEI (2003), *supra* n. 36, 118–124.

Lasser and Watson, the common core method is unable to describe the forms of legal discourse and the legal mentalities that exist within different legal systems.

The question is whether these ‘deficits’ in the common core approach can be remedied and a comparative method can be developed that can provide a picture of European Private Law that is exact and reliable. What appeared from the foregoing discussion is that law is multi-faceted; within a legal system, a multiplicity of legal formants exists that are possibly in disharmony, and legal mentalities vary between different legal systems. It is submitted that this multi-faceted character of law is crucial for any comparatist to take into account. In particular, this is because it is likely that understanding law according to traditional legal concepts will become more difficult as a result of the phenomenon of globalization.⁴¹ The multi-faceted character of law is thus likely to come even more to the foreground. For this reason, I hold that not just one right method for comparative law exists, as there is not one method that can cover all these different aspects of the law. Perhaps, however, an exact and reliable picture of European Private Law can be drawn by using various different methods of comparative law. It is in this manner then that one has to consider the common core project method, highly valuable but by no means the only right method.

⁴¹ For such an argument in the area of international law, see P.S. BERMAN, ‘From International Law to Law and Globalization’, *Columbia Journal of Transnational Law* 43 (2004–2005): 485–556.