Two Paradigms of Jurisdiction

Ralf Michaels (*Duke*) has published "**Two Paradigms of Jurisdiction**" in the Michigan Journal of International Law (27 Mich. J. Int'l. 1003). Prof Michaels has very kindly provided us with an abstract:

This article addresses a puzzle: The law of jurisdiction remains strikingly different between the US and Europe, despite cultural and economic similarities. The reason suggested is one of paradigms. My hypothesis is that Americans and Europeans do not simply think differently about how to apply jurisdiction; they even think differently about what jurisdiction is.Similarities of goals notwithstanding, each side remains in its own paradigm of jurisdiction, and these paradigms are significantly different. Paradigms explain not only why these differences exist, but also why they remain stable despite all the transatlantic efforts at agreement and the relative similarity of goals and values. This explanation is seemingly paradoxical: convergence and unification are difficult not because of differences but because of similarities. Precisely because American and European law provide functionally equivalent methods for resolving the same problems, they cannot agree on, much less unify, these methods.

Propounding the notion of paradigmatic difference between U.S. and European thinking about jurisdiction makes important contributions both to the law of jurisdiction and to the theories and methods of comparative law. The contribution to the law of jurisdiction is both explanatory and evaluative. On a macro-level, exploring paradigmatic difference contributes to a mutual understanding of the structure within which Americans and Europeans think about issues of jurisdiction. Broadly, Americans adopt an "in or out" paradigm that is vertical, unilateral, domestic, and political, while Europeans adopt an "us or them" paradigm that is horizontal, multilateral, international, and apolitical. On a micro-level, understanding paradigmatic difference can provide a single explanation for a wide variety of differences between U.S. and European jurisdictional theory and practice. Taken together, paradigmatic difference suggests mutual criticism tends to be biased. As long as each side argues from within its own paradigm, the approach taken by the other side must necessarily seem deficient.

The second field to which the idea of a paradigmatic difference makes a contribution is the theory of convergence, legal unification, and comparative law. The common understanding is that unification is easy where legal systems are functionally equivalent because each side agrees on the goals and disagrees only on the means. Unification is difficult, according to this account, only where goal preferences differ strongly. By contrast, this Article shows how functional equivalence between different legal orders makes unification more difficult to achieve. Precisely where different legal orders reach similar results by different means, within different legal paradigms, it is very costly for them to unify those means, while the benefits from unification are rather slim. Although the theory of legal paradigms builds on functionalist comparative law, it represents a significant elaboration that can account for difference and for culture.

This Article proceeds as follows. Part II.A. presents two explanations frequently given to explain the differences between U.S. and European jurisdictional law, and shows that both are ultimately insufficient. Part II.B. introduces functional comparison and show how it can actually help stabilize, rather than overcome, difference. Part II.C. introduces the concept of paradigms and paradigmatic difference as a more promising explanation for these differences. Part III develops this hypothesis by laying out two different paradigms underlying different legal systems-a vertical, domestic, unilateral, political paradigm for U.S. law (Part III.A.), and a horizontal, international, multilateral, apolitical paradigm for European laws (Part III.B.). An important finding in these two sections is that each of the paradigms has ways of accounting for those considerations that are fundamental to the other paradigm, but in different ways: through subsumption under its own terms, and through externalization to other institutions than the law of jurisdiction. Part IV applies the findings of paradigmatic difference to five specific issues on which Americans and Europeans disagree: the role of due process; the discrimination against foreign plaintiffs in U.S. courts and against foreign defendants in European courts; the relevance of state boundaries and extraterritoriality; attitudes towards forum non conveniens, antisuit injunctions, and lis alibi pendens; and negotiation styles in the efforts to conclude a worldwide judgments convention in the Hague. Part V concludes.

You can download the article from **here** (PDF). **Highly recommended**.