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Comparative Law in a Globalizing World: Three Challenges

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Abstract
Contemporary comparative law and comparative legal scholarship have generally been marked by constructivist purposes, as a means for state building and local law reform. In this sense they have lent support to the idea of law being an exclusively national phenomenon. However, as a result of globalization, the question is whether the discipline, as it stands now, is fit for dealing with an ever more interdependent world. The answer might well be in the negative, with a result that comparative lawyers have to adapt their analytical and educational toolkits to ones other than constructivist purposes, and also to the realities of a largely fragmented and fluid regulatory landscape. At least three challenges stand out with regard to changing comparative law from a marginal and static discipline into a central and dynamic one: the objects of comparative law; the role of comparative law in the law curriculum and the type of research a dynamic approach to comparative law requires.

Keywords
comparative law; comparative legal research; globalization; legal dynamics

1. Comparative Law as a Marginal and Static Discipline

Patrick Glenn has aptly and repeatedly observed that for a long time comparative law and comparative legal scholarship[1] have generally been marked by constructivist purposes: as a means for state building and local law reform.[2] In this sense comparative law lent support to the idea of law

[1] In the remainder of this text the term 'comparative law' is taken to include 'comparative legal scholarship'.

[2] PJ Glenn, 'The Nationalist Heritage' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 76-99 and PJ Glenn, 'A Transnational Concept of Law' in P Cane and M Tushnet (eds), *The Oxford*

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being an exclusively national phenomenon and an instrument in the nationalization of the law. Looking at the region where I come from, i.e. continental Europe: up until the nineteenth century, when the nation state was in formation for some time already,[3] there were quite some non-binding - secondary or supplementary - legal sources available, which interacted or competed with each other: e.g., canonical law, local statutes, custom, case law, Roman law (the overarching and unifying source), and, yes, the Bible (the latter the most 'binding' of all!). It was more specifically the ideal of codification - prominently entering the legal scene in the wake of the French revolution[4] - which wanted to put an end to this situation: law was identified exclusively with *written* and *national* law.[5] National codified law was on the one hand to be the exclusive source of law, identifiable through a local *Grundnorm* or *rule of recognition*,[6] and should on the other hand contain the solution for about every situation conceivable (law's adequacy).[7]

So although, paradoxically, the content of national law was the result of the mining of comparative sources,[8] extra-national inspiration was not

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Handbook of Legal Studies (Oxford University Press 2003) 839-862. In what has arguably for a long time been the most influential handbook of the discipline of comparative law, this constructivist approach is very much promoted: K Zweigert and H Kötz, *Introduction to Comparative Law* (Oxford University Press 1998) 11: 'In its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances.' (similar statements can be found throughout the introductory and methodological chapters of the book by Zweigert and Kötz).

[3] The rise of the nation state is of course a complex, and dialectic development. Usually one is referred to the Peace of Westphalia (1648) as the starting point of the nation state, although the concept of the state as such has developed from the thirteenth century onwards. For nuance and details I refer to M van Creveld, *The Rise and Decline of the State* (Cambridge University Press 1999). The use of the term 'state' came into use in the first part of the seventeenth century.

[4] Just as the concept of the nation state, the concept of codification didn't emerge during a fixed and clearly identifiable period in time. It was however after the French revolution that it gained momentum. For nuance and details I refer to P van den Berg, *The Politics of European Codification. A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands* (Europa Law Publishing 2006).

[5] It even suffered, as Gény said, from a 'fétichisme de la loi écrite codifiée.' F Gény *Méthode d'interprétation et sources en droit privé positif: essai critique* (Librairie Génerale de Droit et de Jurisprudence 1919) 70.

[6] These terms of course come from H Kelsen and HLA Hart respectively. On the neglect of Hart of comparative legal scholarship see the recent (posthumously published) monograph by AWB Simpson, *Reflections on 'The Concept of Law'* (Oxford University Press 2011) 157-160. The universalistic aspirations of his concept of law didn't seem to really invite Hart for comparative observations. It could and should have, though.

[7] PC Kop, *Legisme en Privaatrechtswetenschap* (Kluwer 1982) 2-3.

[8] See Glenn (n 2) 84.

really felt to be a necessity anymore. National law was thought to be self-supporting, and the legal system was predominantly understood as an entity in which '*demos*', law creation and a specific and delineated area were intimately bound. Since the nineteenth century it was: *La Nation, la loi, le roi* - in that order.[9] As a result comparative law 'blossomed' as a static discipline in the margin, both in terms of the law school's curriculum and in terms of research;[10] an intellectual pastime if there ever was one.

In recent years comparative law has witnessed a revival, especially due to European unification processes.[11] However, as a result of globalization – which with Twining can loosely be described as the developments and interactions which are making the world more interdependent with respect to ecology, economy, communications, language, politics, etc[12] - the question is if the discipline as it stands now is fit for purpose, i.e., dealing with this ever more interdependent world. In my opinion the answer is in the negative, and comparative lawyers have to adapt their analytical and educational toolkits to other than constructivist purposes, and also to the realities of a largely fragmented and fluid regulatory landscape.[13] At least three challenges stand out.

2. Comparative Law as a Central and Dynamic Discipline: Three Challenges

As a result of the foregoing ('constructivism') most comparative law is still typically concerned with traditional legal questions: what is the law in at least two jurisdictions and how do they compare? The applicable legal

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[9] Rousseau's thinking has been of great influence here. See J Miller, *Rousseau. Dreamer of Democracy* (Yale University Press 1984). A similar development as just described with regard to the process of codification in continental Europe could be witnessed in the common law through the evolution of the doctrine of *stare decisis*, which was only firmly rooted in the English legal system by the end of the nineteenth century. On this J Evans, 'Change in the Doctrine of Precedent during the Nineteenth Century', in L Goldstein (ed), *Precedent in Law* (Oxford University Press 1987) 35-72.

[10] A comparative approach in any case seems sometimes to be more a matter of being *en vogue*, instead of really bringing useful insights to the issue being researched. M-C Ponthoreau, 'Le droit comparé en question(s). Entre pragmatisme et outil épistémologique' 57 *Revue internationale de droit comparé* 2005, 9.

[11] A process which is very much building on the traditional constructivist ambitions of comparative law too.

[12] W Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000) 4.

[13] P Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance' in M Adams and J Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 189-190.

norms in the different jurisdictions have to be identified and described with an eye to their subsequent systematization and the identification of similarities and differences. In a globalizing world however, comparative law should also self-consciously and explicitly encompass a dynamic approach to supplement its customary and more static perspective, to be able to answer questions such as: how do the societal changes that occur as a result of globalization impact on the configuration of legal traditions or cultures; how do these adapt or maintain their distinctiveness; how is law used in relation with other legal cultures and traditions; how do new legal configurations become assimilated, rejected or refashioned in a host legal system, etc?[14] In doing so we have to expand comparative law's traditional focus on municipal law of western nations.[15]

Another clear implication of globalization is that the nature of legal education will have to change. 'Neither a nationally confined doctrinal instruction in the rules and methods of a particular field in a given country nor the, more often than not, relatively randomly chosen jurisdiction of comparison, can provide for an adequate training of the soon to be graduate legal scholar – or practitioner', Zumbansen recently wrote.[16] Legal education has to shift from a purely local approach, to what we might call an integrated approach that can make more sense of legal dynamics and diversity. This is comparative law broadly defined. We are nevertheless still struggling to build in such an approach into the law school curriculum; an approach that also deals with the questions identified in the previous paragraph.[17] Many options present themselves (all having advantages and disadvantages): starting law school with teaching broadly accepted legal principles as they are currently unfolding, thereafter integrating how different jurisdictions have integrated these principles, and finally situating this in an ever more interdependent (legal) world; or teaching comparative law as a separate graduate curriculum (after having gone through a thorough traditional national education); or integrating a global and dynamic perspective

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[14] H Muir Watt, 'Globalization and Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 589 (with further references).

[15] This is the so-called 'Country and Western' tradition, contrasting especially between the 'parent' civil and common law systems, and mostly dealing with private law. Twining (n 12) 185-187.

[16] Zumbansen (n 13) 188.

[17] Interesting proposals and ideas can be found in J Husa, 'Turning the Curriculum Upside Down' (2009) 10 *German Law Journal* 913 and S Chesterman, 'The Evolution of Legal Education: Internationalization, Transnationalization, Globalization' (2009) 10 *German Law Journal* 877 (with many references).

throughout the curriculum (i.e., an approach that also puts perspective - even subversive perspective[18] - to national law); etc.

In line with all this, globalization also requires a renewed research agenda. This however calls for a resort to other disciplines than the law; interdisciplinarity is the key here. But how much or what type of interdisciplinarity is needed for answering the type of questions that are raised by globalization? In particular, the humanities and social sciences are important. We should nevertheless avoid as much as possible the legal researcher from becoming a 'jack of all trades (and a master of none)'. From a practical point of view, this issue is relevant because depending on the mode or intensity of interdisciplinarity, comparative lawyers may experience fewer or more difficulties while doing research. I would be pragmatic here: all this does not mean that scholars engaging in comparative law need to be fully versatile in other disciplines besides their own, at least not in terms of being able to do the type of research that is typical of these other disciplines. But they must in any case be able to build on these other disciplines.[19]

3. Final Observations

The issue for comparative law is not whether or not the nation state will sooner or later fade way. I don't think it will, at least not in the foreseeable future. Let it also be clear that depending on the topic to be dealt with, it is to a greater or lesser extent still possible and sensible to engage in traditional multi-jurisdictional – i.e. state-centered – comparative law. So, too, will the long established purposes and aims of comparative law continue to be relevant for many years to come (including its constructivist purposes).[20] Globalization is nevertheless challenging the state-centered approach to comparative law as being the exclusive one. Globalization is a very complex and hybrid phenomenon, and law is no longer parochial nor fully

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[18] G Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 *The American Journal of Comparative Law* 683.

[19] This is by the way not a plea for excluding *strong* interdisciplinary perspectives altogether, but realistically that might well require group work. For a helpful overview of dimensions of interdisciplinary legal research, see BMJ van Klink and HS Taekema, 'On the Border: Limits and Possibilities of Interdisciplinary Research' in BMJ van Klink and HS Taekema (eds), *Law and Method. Interdisciplinary Research into Law* (Mohr Siebeck 2011) 7-32.

[20] See on these aims: G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Reimann and Zimmermann (n 14) 401-406.

cosmopolitan: 'it includes empires, spheres of influence, alliances, coalitions, religious diasporas, networks, trade routes, migration flows, and social movements. It also includes sub-worlds such as the common law world, the Arab world, the Islamic world and Christendom, as well as special groupings of power such as the G7, the G8, NATO, OPEC, the European Union, the Commonwealth, multi-national corporations, crime syndicates, cartels, social movements, and non-governmental organisations and networks. All of these cut across any simple vertical hierarchy and overlap and interact with each other in complex ways. These complexities are reflected in the diversity of forms of normative and legal ordering.'[21]

If comparative law does not want to become a marginal discipline again, or even fade away into oblivion, we have to rethink its role as a scholarly discipline and as an integrated and dynamic part of the law school curriculum. It should in any case be clear that in an increasingly interdependent era that makes ever greater demands on our ability to understand the world with which we are confronted, comparative law can be of tangible benefit and a center-piece of legal education and research. All this of course makes the task of comparative law even more complex than it already was: integrating globalization into the legal discipline raises questions of feasibility and practicality, of what still should/can be national to legal education, of how much non-law should be part of the curriculum, of making lawyers sensitive of the non-orderly world of borders and non-borders, etc. The challenges are formidable indeed, but they cannot be ignored.

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[21] W Twining, 'Globalisation and Comparative Law' in E Örücü and D Nelken, *Comparative Law: A Handbook* (Hart Publishing 2007) 70.