Introduction

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This book opens with a bold claim. It argues that a discipline with a long and reverent history such as comparative law is presently characterised by an important new dynamic that is taking it into new directions. Some may object that it is inherent to human nature that each generation perceives its experiences as new and unique, and that scholars are particularly susceptible to this proclivity to overemphasise novelty, given their vocation-related search for the new and the unconventional. At the same time scholarly work, at least theoretically premised on the notions of scrupulous research, rigorous methods and honest reporting, should allow for verifying and falsifying sweeping claims and vague intuitions. So, can we with a level of academic seriousness maintain that there is something significantly new and particular about the way comparative law is approached, employed and practised today, compared with the days of Montesquieu and Aristotle?

The various contributions in this book give different and only partial answers to this overarching question. Our own intuitions when embarking on this project were based on a number of observations. The first is probably a trivial one, namely that the undeniable swings and sways of globalisation have unleashed a previously unseen mobility of human and economic resources. Supported by virtually instantaneous and ubiquitous communication networks, this mobility produces a dramatic increase of human interaction across geographical regions, and inevitably a corresponding interaction between different legal traditions, institutions and mindsets (Hughes, 2002–2003). Second, there is a well-reported exponential increase in the number of practical initiatives in the areas of legal aid and of harmonisation and unification of law. Following the end of the Cold War, which marked the triumph of the Western model of democracy, rule of law and (regulated) market economy, a flurry of activities has unfolded, seeking to engraft a largely successful blueprint onto developing, transition and crises-affected states (Hellman, Jones and Kaufmann 2002). Concerning legal assistance to such countries, scholars nowadays speak of saturation and note fierce competition between donor agencies willing to engage in rule-transfer and institution-building. At the same time, a monumental attempt to match

economic integration with legal harmonisation results in a stacking of adaptation and unification projects at both regional and global level. Third, even without systematic statistic enquiry, it seems safe to assert that the literature on comparative law has grown exponentially, not least in relation to the topics covered here.

Those topics are law and development, private law and constitutional law. This means, in other words, that two very traditional areas within comparative law are being dealt with, together with a 'new', dynamic but hitherto less (scientifically) observed area, that of law and development. Consequently, the book contains traditional views as well as new perspectives on comparative law as a legal science.

If the increase in legal interaction, exchange and comparative law research mentioned above can be taken as a sign of new dynamics, what have then been the starting premises of the project as to the new directions of the discipline? One significant new trend from a research perspective seems to be that the growing demand for comparative law has triggered critical reflection on the discipline's theory and methodology. Previously, criticism of underdeveloped theory and methodology was frequently brushed away with reference to Gustav Radbruch's now famous statement that 'sciences that have to busy themselves with their own methodology are sick sciences' (as quoted by Zweigert and Kötz, 1998: 29). The most influential contributions on the comparative law method used to be conspicuously concise and confined to the classical situation of national law comparisons (Zweigert and Kötz, 1998; see however Constantinesco, 1972). Today, however, we can lean on a remarkable number of new scholarly works which address the epistemology and methodology of comparative law seen as a discipline studying the interaction of laws, cultures and traditions in a globalised world (Ewald, 1994–95; Gerber, 1998; Reitz, 1998; Harding and Örüci, 2003; Legrand and Munday, 2003; Van Hoecke, 2004; Reimann and Zimmermann, 2006; Örüci and Nelken, 2007).

Related to the above, we can note an increased interest in comparative law from neighbouring disciplines, notably legal sociology, legal history (Watson, 1993; Zimmermann, 2001), law and economics, as well as a reverse trend, that of an intensified recourse of comparative lawyers to social science methods and approaches. Given the abundance of practical harmonisation and legal assistance projects described above, in which comparative law typically is employed as a tool to promote societal change, it is not surprising that legal sociologists have developed a keen interest in exploring the feasibility, effects and desirability of such comparative exercises. The surge of studies on comparative legal cultures and traditions and on legal transplants is indicative of these interdisciplinary endeavours (Gessner, Hoeland and Varga, 1996; Nelken, 1996; Budak and Gessner, 1998; Van Hoecke and Warrington, 1998; Feest and Nelken, 2001; Glenn, 2004; Grillo, 2009). In a different vein, economists have been intrigued

by the apparent influence of legal institutions on economic efficiency and on the divergent impact that different legal systems and regulatory traditions seem to exert on economic efficiency (Ogus, 2007; Djankov et al, 2003). Whereas economists have early been among the enthusiastic supporters of comparative law research (Buxbaum, 1996) we can now observe a more conscious and structured attempt at linking the two disciplines in theories of comparative law and economics (Mattei, 1998), new comparative economics (La Porta et al, 1998; Djankov, 2003; see also Berkowitz et al, 2003) and varieties of capitalism (cf Hall and Soskice, 2001; Lane and Myant, 2006).

Another novel tendency can, in our view, be discerned in the expansion of the domain of comparative law studies and projects from the narrow ambit of private law to economic (regulatory) and constitutional law. Coming from the two doctrinal ends of the public/private divide, we have more recently observed a trend toward blurring the boundaries between public and private law and a growing acknowledgement of the need to investigate the interrelationships between the two. Only some decades ago, comparative law was an arena reserved chiefly for private lawyers. Contracts and torts were the typical topics of investigation (see e.g. Rabel, 1936, 57; Zweigert and Kötz, 1998) with occasional trespasses into non-private law areas. It is probably, again, the demise of the ideological East/West divide of the Cold War and the deepening and widening ambitions of political integration projects (notably the EU) that have opened up for unfettered comparative inquiries in the field of constitutional law and political organisation (Favoreu, 1990; Tushnet, 1999; Jackson and Tushnet, 1999; 2002; Arnold, 2003). The search light has been redirected from the crude distinction between democracy and dictatorship to studying, in a comparative manner, more subtle nuances and variations on the democratic theme (Djankov et al, 2003). In a similar manner, the stage was cleared for broader approaches to exploring alternative – public, private and mixed – institutional arrangements for legally framing the economy, but also for recognising the impact of constitutional rights and governance design on economic and private law (cf Cafaggi and Muir Watt, 2008).

Finally, the most challenging task for contemporary comparative law appears to be to redefine the role of the discipline in an era of Europeanisation and globalisation, where national law coexists and interacts with supranational and international law, and where legal rules are produced by a variety of institutions alongside and beyond the nation state. In this brave new world of legal pluralism, comparative law stands out as an indispensable tool for understanding and accommodating different legal cultures and institutional traditions. At the same time, comparative law with its preoccupation with municipal law of sovereign states (Twining, 2007) is, probably quite predictably, plagued by what has aptly been dubbed as ‘methodological nationalism’ (Beck, 2000; Joerges, 2004; Smits, 2008). It is therefore not

surprising that a considerable scholarly effort is now vested into identifying and testing new methodological tools for adapting the discipline of comparative law to the study of *multi-level governance* (Joerges, 2004; Dehousse, 1995; Lenaerts, 2003; Nergelius, Policastro and Urata, 2004; Petersen, Kjær, Krunke and Rask Madsen, 2008).

The contributions in this book take the pulse of these new dynamics in comparative law. Despite the large number of scholarly works that have recently been devoted to comparative law, what seems to be missing is a dialogue between scholars 'doing' comparative law and scholars 'theorising' about it. The theoretical and methodological discussion has so far largely remained the privilege of legal theorists who do not always personally engage in applied comparative law studies. And, conversely, comparatists are not necessarily closely following and getting involved in the theoretical debate. Our ambition has thus been to fill this important gap and to link the theoretical and methodological debate with insights from everyday comparative research. The contributions in the volume highlight a number of themes in the European and the international context, where comparative law can make a valuable contribution and where a discussion on the theory and methods of comparative law is particularly pertinent.

The articles in the book are organised within three broadly defined problem areas. Within the first area, the focus is on the use of comparative law in legal aid programmes and in various instances of 'export of law'. In his contribution *Gianmaria Ajani* revisits his earlier theme of legal transplantation (Ajani, 1995). He draws attention to a process of shifting allocation of the authority to change the law from national parliaments and judiciaries to foreign states (through country targeted legislation), international organisations (IMF, IBRD) and international business and transnational trade practices. Being increasingly conceptualised as instruments for societal change, legal rules thus do not derive their legitimacy from internally generated political bargaining between corporate groups and domestic actors, but rather from emulation of best practices, identified by foreign and supranational bodies on the basis of comparative assessment of the expected effect on economic performance. Ajani sees several problems with this development: first, new law remains out of touch with local epistemic communities and remains ineffective. An externally generated process of legal change reaffirms a formalistic, positivist understanding of law leading to the familiar 'law in the books' malaise. Ajani therefore calls for recourse to a broader comparative law methodology in line with Sacco's legal formants approach (Sacco, 1991) and acknowledging the interdependence between legal frameworks and enforcing institutions. He sees the role of comparative law methodology in tempering perceptions about the neutrality of law and instrumental use of law. The linking of comparative law with the new institutional economics is suggested as a productive way of

bridging the need for uniformity in international standards with sensitivity to local institutional design, ultimately correcting the flaws of normative optimism and indeterminacy.

Per Bergling takes a critical look at legal assistance to developing countries. He identifies a need for a consistent holistic methodology for mapping legal systems and for more robust diagnostic of local needs for reform and legal aid. His contribution analyses the multiple information and communication problems plaguing legal development co-operation. Importantly, an emerging method of legal cartography is identified based on intense multi-staged communication and exchange between aid providers and aid recipients. The method employs a variety of knowledge-gathering techniques – from the comprehensive study of available written material, through field interviews with target groups and qualitative interviews with identified respondents, to polls and other quantitative methods. At the stage of data analysis, a realistic ‘craftmanship’ approach is accepted and preferred rather than a perfectionist, overly ambitious stance. The latter is seen as poorly anchored in a reality of scarce resources and limited time frames for assistance projects and occasionally even threatening the success of the operation. The chapter provides an account of some of the most important methodological considerations for the articulation of better strategies, and discusses three recent efforts to map entire legal systems: ‘An Introduction to the Vietnamese Legal System’; ‘UNMIBH Judicial System Assessment Program’; and ‘Comprehensive Legal System Needs Assessment for Vietnam’.

Michael Bogdan addresses the much debated issue of the interrelations between rule of law and market economy reforms. He argues convincingly that a functioning market economy, including its indispensable legal framework, is a necessary, albeit not always sufficient, precondition of democracy as we know it in the West. His chapter attempts to explain why supporting market-oriented legal reforms is a necessary element in the support for political democracy and human rights.

The pragmatic approach taken in the chapters by Bergling and Bogdan is in sharp contrast to the predominantly theoretical contribution by *Claudio Corradetti*, trying to give an answer to the question of transplantability of human rights. Proceeding from Gunter Teubner’s autopoietical theory of law and in dialogue with the Habermasian theory of moral validity, Corradetti finds support for a two-tier approach to human rights transplantability, where human rights norms are first formulated through a top-down process of legal/cultural interpretation of universally justified formal human rights categories. In the second tier, international norms are reinterpreted through the activation of several social sub-systems, in the ‘legal irritants’ manner eloquently described by Teubner (1998), according to contextual patterns of interpretation and incorporation of the rule. Thus, Corradetti finds an intermediate position between

Watson's famous 'pure theory of legal transplants' that conceptualises law as an autonomous legal system (cf Ewald 1995), on the one hand, and a complete rejection of transplantability, based on conceptions of law as strictly embedded into and dependent on society, on the other.

Clearly legal transplants and transplantability are central themes in this first part of the book. *Richard Sannerholm* continues the debate on the dichotomy of an autonomous versus a socially embedded perspective on law and the resulting opposite views on legal transplants, i.e. from full acceptance to formulating a 'law of non-transplantability' of law. Similar to Corradetti, Sannerholm seems to take an intermediate position, stressing in particular the importance of the process of transplantation. Together with Berkowitz, Pistor and Richard (2003), Sannerholm emphasises ownership and participation in law reform as crucial factors for the success of legal transplants, chiefly through enabling processes of trial and error, innovation and correction. When he then turns to the particular context of legal transplants in post-conflict states a dilemma becomes apparent. Exactly because of the still fresh scars of conflict, internal ownership and participation in reform are difficult to mobilise and trust is lacking. Transplants thus might be inevitable, but it is suggested that donors should look for benchmarks and best practices in countries where similar problems have been solved. International norms, standards and model legislation are also seen as possible solutions, or developing of standardised regulative frameworks at regional level (e.g. Organization for Harmonization of Business in Africa). The chapter provides a rich account of specific difficulties in post-conflict situations and attempts to resolve the problems in real-life initiatives of legal aid.

The articles within the second area tackle some most important and controversial topics in comparative constitutional law. The article of *Otto Pfersmann*, represents a theoretically oriented attempt to define what the concept of comparative law actually entails. According to him, comparative law may never be just another field of study like 'Swedish law or German law'; instead, it should rather be seen as a 'scientific discipline aiming at objective knowledge', based on 'the analytical expertise of a plurality of legal systems'. The article is an ambitious attempt to build bridges between comparative law and traditional legal theory. *Rainer Arnold* analyses the development within European constitutional law at a time when constitutional rules may be found at, at least, three different legal levels: in the national constitutions, within EU law and in the general principles of law developed by the ECJ, the European Court of Human Rights and also other international legal bodies. This development certainly calls for re-thinking and re-classification (or re-conceptualisation) of a number of crucial terms and concepts within the whole field of constitutional law, as shown clearly and convincingly by this contribution. More discussion on this issue is bound to follow.

In his chapter, *Markku Suksi* deals with autonomy and independence of specific areas or regions in Europe, like the Åland Islands, compared to the Basque region, Scotland and other regions in Europe, all from a comparative perspective. Needless to say, this is a highly important but hitherto somewhat neglected area.

Johan Lindholm addresses the well-known problem within comparative law of what is actually possible to compare, this time from a constitutional perspective. The question, then, is what to do concerning issues that are classified as constitutional in one legal order but not in others. Hardly surprising, there appear to be two basic approaches or schools, one universal (that seems to be gaining ground) and one more nationally oriented. In this context, Lindholm also touches on recent jurisprudence from the US Supreme Court in this somewhat sensitive area.

Also, other comparisons are however important to conduct in the contemporary doctrine. Within the European context, the sometimes differing jurisprudence between national constitutional courts (of which the German one is the most influential) and the European Courts in Luxemburg and Strasbourg is of particular importance, notably in the area of human rights. As illustrated by the article of *Kateryna Karpova*, those courts have a special significance since they are perceived as ‘role models’ for national courts in Eastern Europe, who are now developing a jurisprudence of their own.

The contributions within the third part of this book map and discuss recent trends in comparative private and economic law. Even though the contributions refer to global developments, as for instance *Unidroit* Principles of International Commercial Contracts, they also reveal a certain European bias by pondering mainly over the challenges of legally framing the internal market of the Member States of the EU. Due to the rather unique processes taking place in Europe, this bias is perhaps understandable. Two of the most fascinating and widely discussed projects of harmonisation of European private law, namely the Principles of European Contract Law (PECL, the *Lando* group project) and the Principles of European Tort Law (PETL, the *von Bahr* project) are discussed chiefly from a methodological perspective. The initiator and long-term co-ordinator of the PECL project, professor *Ole Lando* guides us into the intricacies of designing methodology for harmonisation of laws that is sufficiently attentive to national specificities and yet sufficiently effective to move the enterprise forward. While his contribution is inspired by a belief in the ‘need to unify or harmonise the laws of the world or a region of the world’, other authors like *Mårten Schultz* are more sceptical as to whether there is sufficient evidence for such a need of total harmonisation. Importantly, Schultz raises serious objections against the questionnaire method for mapping national laws and institutions, often used in big-scale harmonisation projects. He sees the questionnaire as a blunt tool unable to penetrate and

reflect the complexities of national legal doctrine and thinking in a particular legal area.

Yet another approach to harmonisation is demonstrated in the chapter by *Christoph Schmid*, reporting on a comparative project where a more functional, institutional stance is taken. A successful combination of legal and economic analysis produces a fascinating picture of widely divergent regulation in the vital sector of conveyance services across Europe. Although the contribution does not try to explain the reported discrepancies, entrenched positions of the legal professions at the national level transpires as one powerful explanatory factor. This chapter thus provides a helpful illustration to the contribution by *Antonina Bakardjieva Engelbrekt* which reviews some recent applications of institutional theory to comparative economic law. The focus is in particular on a series of contributions in institutional economics known as the 'Legal Origin Theory' (La Porta et al, 1998) and the New Comparative Economics (Djankov et al, 2003). After discussing the strengths and pitfalls of these theories, Bakardjieva Engelbrekt advances an alternative comparative institutional approach for the cross-country study of institutional choice and design in economic law and policy. Building on institutional theorists like Neil Komesar (participation-centred approach) and Douglass North (historical institutionalism) the approach emphasises the importance of comparing the modalities of actor participation in alternative decision-making processes as well as taking into account the conservative forces of institutional inertia. On a practical level the focus is on procedural and institutional rules which ultimately determine substantive outcomes. The implications of such an approach for the analysis of European integration, seen as a multi-level system of governance, are sketched out.

Although the chapters are grouped following classical divisions between private and public law, the ambition has been to critically examine and challenge established categorisations. This is illustrated by the contributions of *Anna Lytvynyuk* and Lindholm. Whereas *Johan Lindholm* analyses the feasibility of a constitutional/non-constitutional comparison, Lytvynyuk presents the debate of the so-called '*constitutionalisation*' of private law, signifying the reach of constitutional rights onto civil litigation. Her chapter presents the evolution of the German concept of *Drittwirkung* and suggests direct and indirect methods of subjecting private law to constitutional rights. Finally, it briefly touches upon the possible repercussions of the concept of *Drittwirkung* in the Central and East European Countries.

The majority of contributions to a large extent confirm our initial intuitions and assumptions of a previously unseen new dynamic in comparative law. In a concluding chapter *Peter-Christian Müller-Graff*, after mapping the forces behind this new development of comparative law, succinctly analyses the challenges the discipline faces in the future. The author sees comparative law

being increasingly burdened with a new task of developing transnational commonly acceptable legal standards. From this perspective the main challenge for comparative law is in his view to preserve a 'careful scepticism towards the assumption of general universality'. In addition Müller-Graff warns against the risk that comparative law surrenders its distinction-sensitive approach in the quest for general principles. He argues compellingly that the chief responsibility of the discipline lies in strengthening tolerance for equivalent standards and respect for local responsibilities and autonomy.

Still, and despite the new dynamics hopefully documented in this volume, there is also considerable continuity in the discipline's tasks and self-identification. One persisting feature is the openness and vagueness of the very concept of comparative law. As incisively observed by Pfersmann in this volume, one can speak of comparative law in many contexts and imply many different meanings in the concept. The distinction between legislative and scholarly comparative law has also earlier been noted by comparative law scholars (Zweigert and Kötz, 1998: 52). It should here be stated that working with a broad and somewhat vague concept of comparative law and eschewing strict definitions has been a conscious choice and point of departure in this volume. This has helped us to keep an open mind and to accommodate a variety of viewpoints, in an attempt to present the many faces of modern comparative law. However, we are likewise aware that methodological and theoretical concerns should be carefully distinguished depending on whether one is operating in the field of legislative or of scholarly comparison. The normative ambition behind certain comparative endeavours would clearly require different strategies and invoke different methodological tools than the ones that we normally find in purely academic-driven projects.

Finally, as some authors with long experience in the field remind us, the main driving force of comparative law remains the same. Human curiosity, which is ultimately at the core of any serious comparative enterprise, is a deeply seated human trait after all (Lando). And it is curiosity that will continue to prompt comparative lawyers to seek legislative, judicial and scholarly inspiration in other legal systems (Müller-Graff) in a quest for generating new knowledge and for enhancing our understanding about a changing and ever more interdependent world.

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