The Boundaries of Comparative Law

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Boundaries: between public and private law – Political dimensions of private and public law – Boundaries between domestic law and transnational and international law – Boundaries between law and other disciplines, including economics, comparative politics, normative political theory, and hermeneutic disciplines – National styles of comparative law scholarship – Analytic and pragmatic traditions in comparative law scholarship

In this essay, in an effort to map some important features of the field of comparative law I examine the field's 'boundaries' as a scholarly discipline.[1] The boundaries are more than geographical, though they are so in part. The boundaries are also disciplinary, in two senses: within the field of legal scholarship; and with respect to other scholarly disciplines. I hope that sketching some of the field's features will illuminate some conceptual issues associated with the field, although my general argument is that all the boundaries – and therefore the conceptual issues – are becoming less significant than they were in the past. One might perhaps speak then of the 'globalisation' of comparative law as another feature of the field's development. In this, I suggest, developments in comparative law parallel those in the study of domestic law: for example, just as scholars of domestic private law note a weakening of the distinction between private law and public law, so too can we observe a weakening of the distinction between comparative private law and comparative public law. My method in this essay is allusive and evocative. That is, rather than provide detailed support for my assertions and speculations, I implicitly ask readers to consult their own scholarly experiences and

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[1] I take the metaphor of 'boundaries' from one of the themes of the conference at which a version of this essay was the keynote address, but I do not mean to suggest that the metaphor in itself has conceptual importance.

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intuitions to identify places where my claims resonate with those experiences and intuitions and places where they do not.

I must begin, though, with some important qualifications about my ability to describe these boundaries. My intellectual background is that of a domestic constitutional lawyer in the United States, who turned to comparative constitutional law in the early 1990s when, it seemed to me, developments in constitutional thinking and design outside the United States were more intellectually stimulating than what seemed to me the atrophied condition of discussions of U.S. constitutional law. One result is that I am largely self-educated in comparative constitutional law, and even more so in comparative law dealing with domestic private law.[2] As a result the map I sketch may well be more accurate with respect to comparative constitutional law than with respect to comparative private law. Further, in light of *when* I began to educate myself about comparative law, I missed some important controversies in the field's past – most notably, the discussion of whether there are families of law and, if so, what the families' significance is.[3] Finally, in my scholarship I have been largely indifferent to methodological disputes associated with older studies of comparative constitutional law. Such disputes include discussions of how one goes about choosing comparators and discussions of whether or to what extent functional explanations can or should be central to scholarship in comparative law. Undoubtedly one reason for my indifference is my judgment that those methodological discussions have not been terribly productive. Another reason, though, is tied to one of the boundaries of comparative law, a geographic one. For me, the measure of a study's value is not its methodological rigour but whether it is, as I put it, 'interesting' or productive of further thinking. That almost certainly reflects my location in a pragmatic U.S. scholarly tradition.

Before describing the boundaries of comparative law in more detail, I must note as well that I will be painting with a quite broad brush and will certainly omit, even overlook, important limitations and qualifications. My overgeneralisations are defensible, if at all, to the extent that they are interesting in the sense just mentioned – that others may find in them things worth thinking about, even if the result of that thinking is the conclusion that my argument is ill-founded.[4]

[2] I also note with some embarrassment that I have much less facility in languages other than English than do most scholars in comparative law.

[3] It seems to me that the field of comparative constitutional law mostly avoided that controversy, in part because that discussion began and ended during a period when the field of comparative constitutional law was largely fallow. I discuss below other reasons for the absence of a discussion of 'families' in comparative constitutional law.

[4] I think it would be inconsistent with the spirit of this essay to provide detailed supporting citations, or even exemplary ones, for many of my generalisations. I hope that the statements will

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I begin with an obvious *subject-matter* boundary: that between comparative private law and comparative public law. Early in the development of the field of comparative law, it was argued that studies of comparative private law were possible, but not studies of comparative public law. The argument, as I understand it, was that public law was more intrinsically local and political than private law. Decisions about public law embodied intensely local political and policy compromises, so that comparisons across domestic public law systems would ultimately come down to banal equivalents of Laurence Stern's observation in *A Sentimental Journey*, 'They order … this matter better in France.' Relatedly, the effective content of public law depends quite substantially upon the particular institutional arrangements used to develop and apply that law: systems with specialised administrative courts will deal with administrative law differently from those in which administrative review is conducted in courts of general jurisdiction, for example.

In contrast, in connection with contract law/the law of civil obligations and to some extent with respect to tort law/the law of civil wrongs, the thought was two-fold. Actors in these domains faced a set of similar problems, such as how people engaged in economic transactions could manage risk, and one could compare the solutions different domestic legal orders provided for those problems. In addition, contracts often and civil wrongs sometimes were transnational, and determining not only which nation's law ought to apply but whether one rule was better for everyone involved was an important practical exercise. And, finally, institutional variations among implementing institutions seemed smaller than was true in connection with public law.

Even at the outset one could see some pressures on the idea that comparative private law was a worthwhile intellectual enterprise while comparative public law was not. A tradition associated with Montesquieu and Herder asserted that domestic law, including private law, manifested a distinctively national 'spirit': the French Civil Code was French, the English common law was English, and so on through all the domestic legal systems one wanted to deal with.[5] The notion of a 'spirit' of the laws is of course quite obscure, but one need not be committed fully to something like Herder's romantic nationalism to see that Montesquieu and Herder had a point. In more modern terms, for example, scholars have argued that the rules in domestic legal systems about contractual allocations of risk as between parties depends in part on whether the domestic *culture* is one of relatively high or low trust in strangers.[6]

evoke in readers recollection of scholarship that conforms to the generalisation even when they see the statements as overgeneralisations.

[5] Combined with the interest in defending the comparative enterprise, these pressures may have provided some support for the effort to identify legal 'families.'

[6] *See,* e.g., C. Hill and C. King, 'How Do German Contracts Do As Much With Fewer Words?', 79 *Chicago-Kent Law Review* (2004) p. 889.

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A more recent challenge to the underlying distinction between private and public law comes from American legal realism as revived by scholars associated with critical legal studies. That challenge was that private law was no less political than public law: indeed, for some critical scholars, private law was *more* political than public law because its political dimension was more deeply concealed than that of public law. Theorists of power, notably Michel Foucault, have noted that power is more than direct coercion. It includes the ability to set the agenda for discussions and then to determine what the terms of the discussions should be – which argumentative tactics and styles are regarded as permissible and which are not.[7]

Drawing upon such accounts of power, we can understand the politics of private law *implicitly* to set the terms of discussion about what law should be. Analysis of private law was conducted in those terms rather than others with a different political content. Here too one need not agree with the precise content of the realist and critical claims to understand that they do more than a little to blur the distinction between private law and public law, at least to the point that it no longer makes sense to treat comparative private law as a worthwhile enterprise while simultaneously disparaging the possibility of comparative public law.

A second subject-matter boundary is that between domestic law and non-domestic law, with the latter encompassing both transnational and international law. Here the pressures on the boundary in public law are obvious, only slightly less so in private law. International human rights law embodied in multilateral agreements has influenced domestic public law around the world, sometimes by constraining domestic authority in the name of international human rights law and sometimes by being directly incorporated into the so-called 'constitutional bloc' that has immediate domestic effect.[8] And these decisions have affected even the domain of structures of domestic decision-making, by articulating ideas about the separation of powers in connection with judicial proceedings that have had interesting effects on the organisation of the judicial branch in several nations. Finally, there is the emergence, in my view only embryonic to this point, of 'global administrative law.' To date, most discussions of global administrative law deal with the application of public law principles to transnational decision-making bodies, but – as with international human rights law – such applications almost inevitably leach into domestic law.

In the form of multilateral and bilateral agreements, non-domestic law has important effects on domestic private law arrangements as well. European Union law

[7] In the U.S. scholarly tradition, an influential early article is P. Bachrach and M.S. Baratz, 'Two Faces of Power', 56 *American Political Science Review* (1962) p. 947.

[8] Perhaps the most interesting questions in connection with the constitutional bloc revolve around the domestic legal effect on domestic law of decisions by non-domestic bodies charged with interpreting the international agreements in the bloc.

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regulates some domestic transactions, for example, and the project of 'restating' European private law indicates interest in developing rules applicable in a large number of domestic courts. The globalisation of private law is, of course, most obvious in connection with economic matters, but there are quite a few international agreements with important effects on other areas of domestic private law.[9]

More broadly, Duncan Kennedy has offered an account of the 'Three Globalizations of Legal Thought' that focuses primarily on private law.[10] Kennedy refers to the first globalisation as classical legal thought, a relatively formalist and deductive account of law, using 'deduction within [a] coherent and autonomous legal order.'[11] The second globalisation was the rise of the social, whose characteristic mode of analysis involves balancing private interests against social interests leading to the 'rational development of law as [a] means to social ends.' In the third globalisation the characteristic 'legal technique' is 'neoformalism and balancing conflicting considerations.' In both private law and public law we can observe the use of proportionality-like doctrines, the penetration of rights-based thinking into private law – precisely the dissolution of the boundary between private law and public law I have already mentioned. A nice example of the dissolution in the third globalisation is the doctrine of indirect horizontal effect, which requires those charged with applying domestic private law to take public law values into account.

The subject-matter boundaries within comparative have come under pressure. So have disciplinary boundaries between law and other disciplines. As Kennedy's account of classical legal thought suggests, when comparative law was created as a field of study in the early twentieth century, the dominant mode of thinking – though one already under some pressure from 'the social' – treated law as an autonomous discipline, with an internal logic independent of the logics associated with other academic fields. Today, scholars in comparative law increasingly draw upon non-legal disciplines in their accounts of law: economics, empirical political science, political theory, and other disciplines. The boundary between law and other academic disciplines has become blurred.

Scholars of private law use formal economic models to 'explain' the content of private law, and some of these efforts are expressly comparative. The discipline of economics pushes in a comparative direction, because its models rest on

[9] My favourite example is the Hague Convention on the Civil Aspects of International Child Abduction, because it deals with family law, regarded in the United States as the quintessentially local legal field.

[10] As with much of Kennedy's work, this has circulated widely in various versions. One published version is D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge University Press 2006) p. 19.

[11] This quotation and the next come from Kennedy, *supra* n. 10, p. 21, which is a table summarising the three globalisations.

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generalised characteristics of markets, which in the core models are largely independent of time and place.[12] My impression is that 'law and economic' analysis is substantially more prevalent in the United States than in Europe, a point to which I will return. There is also some legal-economic analysis of public law, resting on what are known as 'rational actor' models of politics. But, even in the United States, these analyses are (in my view) mostly valuable as heuristics, bringing to the surface of scholarship some considerations that do affect public law and its development, rather than as the kinds of comprehensive accounts that economic analysis of private law purports to offer.

A prominent methodological essay in comparative public law calls for the merger of comparative constitutional law and comparative politics, in the form of reliance upon empirical or descriptive political science.[13] Ran Hirschl advocates for incorporating the insights of studies of comparative politics, both in carefully designed case studies and in 'large-N' quantitative studies, into the discipline of comparative constitutional law. A convenient example involves judicial independence, generally regarded as an important normative component in constitutional law. Empirical political science shows that it is more difficult to sustain judicial independence in states where a single party dominates the political system than in states with competitive political parties.[14] We now have a not insubstantial body of insights drawn from empirical political science that has helped scholars of comparative public law understand variations in public law.

I believe that something similar has occurred, though on a smaller scale, in connection with comparative private law. Again, the limitations on my knowledge come into play, but I have in mind the highly contested 'legal origins' thesis that greater rates of economic growth are associated with forms of legal regulation characteristic of common-law systems than occur in civil-law systems. Based upon 'large-N' studies, this thesis actually is interestingly continuous with, though pointing in a different direction from, an earlier argument in comparative private law. Max Weber argued that the formal rationality he attributed to civil law

[12] Of course economic analysts can be inspired by the specifics of markets in some times and places to identify general characteristics that they can then build into their models, but that is different from saying that the economics of 'French markets in the seventeenth century' were intrinsically different from the economics of contemporary markets. Rather, the seventeenth-century markets had different generic characteristics from those of contemporary markets, and were those generic characteristics to be reproduced today, the economic analysis would be the same.

[13] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Cambridge University Press 2014).

[14] The mechanism is reasonably obvious: a dominant party can more easily control the appointment of judges, both in connection with individual judges and in designing the system of judicial selection, than can parties in competitive systems, where power generally, but also power over the judiciary, rotates among the parties.

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systems provided a greater degree of predictability than common law reasoning did, thereby making it easier for investors to make confident predictions about how the law would affect their investments. Weber posited a mechanism, predictability based upon formal rationality, that might explain economic growth in civil law nations. The mechanism supporting the 'legal origins' thesis is probably that the common law allows for more flexible adjustments as the economic environment changes. As I noted, though, the 'legal origins' thesis is highly contested, and I am in no position to adjudicate the controversy. I suspect, though, that as with respect to comparative public law, economic analysis is likely to be more valuable in comparative private law as a source of productive hypotheses than as the basis for scientific 'truth.'

Normative political theory is another discipline that has infiltrated the field of comparative law. Public and private law are understood as vehicles for advancing liberalism (or the 'rule of law') understood as normative political theorists understand it. Of course 'liberalism' is itself a contested concept. In the United States, for example, liberalism has a substantial libertarian component. In public law, this leads to skepticism about the public displacement of private arrangements; in public law, to the so-called 'will theory' of contracts. Elsewhere, liberalism is understood to have a substantial 'social' component, again to use Kennedy's term, or to combine social-democratic themes with libertarian ones. These geographic differences correspond to disagreements among normative political theorists about the content of liberalism.

It may be worth mentioning as well the possibility of finding some normative political theory other than liberalism to use in analysing comparative law. The public law example that comes to mind is the brief flurry of interest in 'Asian values' as the foundation for public law. As it turned out, the 'Asian values' discussion subsided relatively quickly, as it became clear that proponents of 'Asian values' were dressing up their political agendas in fancy theoretical terms that, it turned out, paralleled disagreements within liberal political theory about liberalism's content.[15]

I conclude this overview of the boundary between law and other disciplines by mentioning hermeneutic disciplines, most notably anthropology and literary theory, that might work their way into scholarship on comparative law. In the United States those disciplines have had relatively little influence, and I am not in a position to say anything about their role elsewhere.[16]

[15] A similar problem of political opportunism may attend the current Chinese discussion of constitutionalism as a Western value, but perhaps something of intellectual value will ultimately emerge from that discussion.

[16] Annelise Riles has written some extremely interesting works on comparative law from an anthropological perspective, and Bruno Latour's study of the French *Conseil d'Etat* is in the

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The discussion so far has alluded to a final set of boundaries, this time real ones – geographic boundaries. Of course the field of comparative law is organised around geographic boundaries, dealing as it does with the law of distinct nations. That specific use of geographic boundaries cannot be blurred without collapsing the field into some other, such as international law or, as I suggest in this essay's conclusion, into 'law as such.' Here, though, I am interested in a different effect of geographic boundaries – how (if at all) different ways of thinking about comparative law are located differentially in different nations.[17]

My account here is even more impressionistic than in other parts of this essay. Further, the impressions are subject to qualifications associated with the globalisation of legal scholarship, a point to which I will return in my concluding comments about the education of scholars of comparative law. And, finally, my examples come almost exclusively from the subfield of comparative public law, though I do have the impression that they are accurate (though overgeneralised) as to comparative private law as well.

My impression, then, is that there are indeed different national styles of engaging in scholarship on comparative law, and in particular a distinction between a U.S. style and a European style. As I read the English-language literature, the only one with which I have extensive familiarity, European scholars of comparative public law are substantially more interested in bringing ideas from normative political theory to bear on the subject than are U.S.-based scholars. One example is the dramatic difference between the interest in European comparative constitutional studies in what those scholars call the foundations of constitutions. These include ideas about the constituent power and other ways of understanding the connection between a constitution and a nation's people. Until relatively recently, those ideas played a relatively small role in comparative constitutional scholarship done in the United States.[18]

The difference I have identified is not night-and-day, of course.[19] The comparative public law scholarship on basic rights in both traditions seems to me

hermeneutic tradition. I simply report my sense that this scholarship has not had much of an influence on the field, at least in the United States.

[17] My formulation is designed to capture the thought that, while one might find every specific way of thinking about comparative law in any nation, one might also find a larger proportion of scholars using a single approach in one nation than one finds in another.

[18] As one indication, the first edition of what has become the widely-used coursebook on comparative constitutional law that Vicki Jackson and I co-authored did not contain a discussion of the idea of constituent power. A brief discussion has since been added. I speculate that European scholars are more interested in constitutional foundations in this sense than U.S. scholars because, with constitutions that are either unwritten or relatively new, those foundations are more proximate to them.

[19] For example, the political scientist Walter Murphy wrote comparative public law scholarship about constitutional foundations as Europeans would understand the term, and his students, including Gary Jacobsohn, have continued to do so.

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to combine interest in liberal political theory with questions about the institutional capacity of courts (specifically) to implement those rights effectively. There are modest differences, arising I suspect from stronger strands of social democratic and communitarian thinking in European versions of liberalism, and perhaps from the fact that U.S. domestic constitutional scholarship has had more time to develop a complex account of relative institutional capacity.[20]

Differences arise as well from the relative importance of specific doctrines within domestic law. An obvious public law example is the large body of non-U.S. scholarship on the doctrine of proportionality and the underdevelopment of such scholarship in the United States. That is almost certainly driven by the fact that proportionality plays a much smaller role in U.S. public law doctrine than it does elsewhere. A private law example is the interest in British legal scholarship – and I suspect elsewhere – in the law of restitution, an interest that is substantially weaker in the United States because, as I understand it, other doctrines in the United States manage to do things that restitution law does elsewhere.

The idea of 'managing to do things' introduces the pragmatic U.S. scholarly tradition. Pragmatic concerns – how can doing scholarship in comparative law help us resolve our own domestic problems? – seem to me to characterise the U.S. tradition in comparative public law at least. As I understand the history of the field, such pragmatic concerns were an important force driving the field's creation, and I do not suggest that they have disappeared in the European tradition. Rather, my impression is that the balance between pragmatic and political-theory concerns is tilted toward the former in the U.S. tradition, toward the latter in the European one. I do not find this at all surprising, in part of course because I am a U.S.-based scholar, but more important, I think, because pragmatism has been an extremely strong component of U.S. scholarly traditions in all normatively inflected fields.

A final word on the globalisation of legal scholarship, again based on my impressions of comparative public law: the fact that there are different national (or regional) traditions of scholarship in comparative law affects the course of development of scholarship in nations outside those traditions. The topics scholars are interested in and the approaches they take to those topics seem to me strongly influenced by the simple fact of *where* scholars receive advanced training. Indian scholars, for example, are oriented to British universities, Japanese scholars to German ones, scholars in Latin America to Germany and Spain, because those

[20] These differences are reflected, I believe, in the receptivity in non-U.S. based scholarship to the proposition that constitutions should incorporate socio-economic rights, and that courts should enforce them in some appropriate way. U.S.-based scholarship is substantially more skeptical, even putting to one side the domination of that scholarship by a jurisprudence from the U.S. Supreme Court that rejects the view that the U.S. Constitution enacts socio-economic rights.

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nations are where they receive their post-graduate training.[21] Increasingly, though, scholars receive post-graduate training either in the United States or, more interesting, in more than one national tradition.[22] The effect over time may be to blur distinctions among national traditions of comparative scholarship.

I conclude with what should by now be this essay's obvious, though of course speculative, thesis: comparative law as a scholarly field has been characterised by several kinds of boundaries – subject-matter, disciplinary, and geographical. All of those boundaries have become blurred over the past generation, though they will never disappear completely. Legal scholars for generations have argued that our proper object of study, understood at an extremely high level of abstraction, is law *tout court*, with subject matter divisions being imposed only for convenience. My suggestion can perhaps be taken in the same vein. The field of comparative law is dissolving into the field of law, period. In this, perhaps, that field has undergone a globalisation not unlike that experienced in domains well beyond scholarship.[23]

[21] I have far less familiarity with scholarship in comparative private law, but I suspect, without much supporting evidence, that there are similar 'training' effects with respect to the use of law-and-economics approaches: private law scholars who receive post-graduate training in the United States seem to me more likely to use those approaches than private law scholars trained in European universities.

[22] An instructive recent example is G. Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* (Oxford University Press 2016), written by a scholar who received his post-graduate training in the United States and which uses U.S. free speech doctrine as the primary comparator rather than British or European doctrine.

[23] The causes of this possible dissolution, such as the diversification of the national and regional traditions in which scholars of comparative law are educated, may themselves be features of globalisation as well.

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