The Effects of Globalization on Legal Education

*Prof. Michael Bogdan**

Abstract

The paper discusses the role international, comparative, and foreign law can and should play in the education of those law students who do *not* wish to specialize in transnational matters. Students desiring such specialization should, of course, be offered the widest possible array of optional courses on such matters, depending on the personal and financial resources of their institution.

However, in most law schools the students wishing to specialize in transnational issues constitute a relatively small minority, while the majority of law students intend to work mainly within the framework of their own national legal system. This gives rise to the question whether, and to what extent, the compulsory part of the curriculum should compel this majority to study subjects such as public international law, private international law (conflict of laws), and comparative law.

The space for compulsory courses is limited and there are many legitimate demands for a slice of it, but in a globalized world of today almost every lawyer must be prepared to face transnational issues, irrespective of his or her field of work. This paper, based on the long-time experience of its author as researcher and teacher of law, argues for a more globally-oriented legal education, especially for an increased role of comparative and foreign law.

Key words: Comparative law; Foreign law; International Law; Law school curriculum; Legal education.

* **Senior Professor of Comparative and Private International Law University of Lund, Sweden.**

I. Introduction

A presentation about the impact of globalization on legal education has to start with a definition of globalization as such, because that word can mean different things to different people. In this paper, the term globalization is used to describe the growing interdependence of the world's economies, cultures, and populations, brought about by cross-border trade in goods and services, technology, and flows of investment, people, and information.

The globalization process, as defined above, affects all areas of life, including the law. If and to the extent the law is affected, so must be legal education when preparing law students for the challenges they will have to face in the course of their future legal careers. Some 45 years ago, when I started teaching law, the undergraduate curriculum of Swedish law schools was almost totally focused on domestic Swedish law and all lectures and textbooks were in Swedish. In fact, in an anonymous student survey made in those days some twenty percent of the students admitted that they had chosen to study law because that was the only study program not requiring any working knowledge of English or any other foreign language.(1)

The world has changed since then. This short paper does not deal specifically with how the challenges of globalization are currently met or should be met by legal education in any particular country, such as Kuwait or Sweden, but contains rather some general reflections, based mainly on the long-time experience of the author as researcher and teacher of law. Swedish legal education will occasionally be used as an example, simply because it is the system the author is most familiar with. Of course, the impressive achievements of the relatively young Kuwait International Law School, evidenced by the quality certificates that were recently awarded to it by the UK Quality Assurance Agency for Higher Education, should also be taken into account, but unfortunately I do not possess sufficient knowledge about the Kuwait system to make any comments on it.

This paper discusses mainly the demands made by the globalization process on the role foreign and comparative law(2) can and should play in the education of

(1) It can be added that about the same percentage of students explained their choice by their desire to avoid, at all cost, any contacts with mathematics.

(2) Comparative legal work, as understood here, goes beyond a mere study of foreign law. It starts, of course, with such study but continues with comparisons between legal systems in order to establish their similarities and differences. Thereafter, the established similarities and differences can be analyzed =

those undergraduate law students who do *not* wish to specialize in transnational matters. Of course, students desiring such specialization should be offered, depending on the personal and financial resources of their institution and the flexibility of the prescribed curriculum, the widest possible array of optional courses focusing on international and cross-border issues. Thus, Swedish law schools reserve about one third of their undergraduate curriculum of 4.5 years for optional or elective courses (including the writing of a master thesis) and accept in general that a part or even all of this space can be filled by approved courses taken at foreign universities.

Our own in-depth courses often use foreign textbooks in English and foreign experts are often invited to give lectures there. I have noted that also the Kuwait International Law School, as can be expected in view of its very name, aspires to give the legal education an international dimension, offering the students courses on, *inter alia*, European law and international trade law, and allowing them to study up to twelve legal courses in English.

The only limitation that must be imposed on such a specialization in transnational matters is that a fundamental knowledge of the student's own legal system must not be neglected, because it is one of the necessary preconditions for understanding and dealing with transnational legal problems.

II. The use of foreign and comparative law in the compulsory part of the undergraduate curriculum

In most law schools, the students wishing to specialize in transnational issues constitute a relatively small minority, while the majority of law students intend to work mainly within the framework of their own national legal system. Nevertheless, even jurists belonging to this majority, whether active as judges, advocates, prosecutors, government officials or other members of the legal profession, will in their daily work have to deal with situations involving not merely foreign legal rules as such but even foreign legal culture and thinking.

We live in a globalized world where both enterprises and natural persons are in numerous ways exposed to situations extending beyond national borders. Sweden is an illustrative example of this development and so is, I

= and processed for many different purposes, for example, by trying to explain them, by comparing the advantages and disadvantages of the different national solutions to the same legal problem, by searching for the common core of legal systems, by grouping legal systems into families of law, etc.

believe, Kuwait. We are very open societies as far as economy and trade are concerned, exporting most of what we produce and importing most of what we consume.

There is substantial immigration from countries with a legal culture very different from ours, and many of our own citizens reside abroad. There are numerous cross-border business and family relations, giving rise to intricate legal problems.

The compulsory part of the traditional undergraduate curriculum of most law schools, both in Sweden and in most other countries, does not always prepare the students for this type of challenges, but things have started to change. The time has come to discuss whether, and to what extent, the compulsory part of the law curriculum should compel all or majority of students to study not only public and private international law, but also foreign and comparative law.

The space for compulsory courses is of course limited and there are many legitimate and partly new demands competing for a slice of it. Some Western law schools, for example, are considering requiring each student to take a course on fundamental gender, human rights, environmental or migration issues. I may perhaps be perceived as biased when I argue that in a globalized world of today almost every lawyer must be prepared to face transnational issues, irrespective of his or her field of work.

In this sense, all students must become international lawyers. This paper argues therefore for a more globally oriented legal education, especially for an increased role of comparative and foreign law.

As mentioned above, this paper is based mainly on my experience as researcher and teacher of law, mostly in Scandinavia and other European countries. The situation may be different in other parts of the world. For example, law schools in the United States are post-college graduate schools with traditionally fewer compulsory subjects than is common in Europe.

European law schools are normally undergraduate schools with a scheduled study time of four to five years, thus allowing for a more voluminous compulsory part of the legal curriculum than their American counterparts, where compulsory courses frequently account for less than a half of the curriculum and are limited to such core subjects as contracts, procedure, torts and constitutional law.

In Europe, it is usual that two thirds or even more of the curriculum consist of

required courses. It is, therefore, more natural from a European than from an American perspective to suggest that a particular subject be made compulsory, as almost all areas of substantive law are in Europe expected to be covered by the compulsory part of the curriculum (albeit sometimes on a rather superficial level).

To begin with, it is submitted that comparative law can be of great service for the study of public international law (the law of nations), which is often one of the compulsory courses. For example, Article 38 of the Statute of the International Court of Justice (ICJ) in The Hague. lists the sources of international law the ICJ may rely on when adjudicating disputes between sovereign States, among them the "general principles of law recognized by civilized nations".

What is primarily meant by this are the legal principles in the national legal systems of the world and the only scientifically acceptable manner to determine such principles is to compare existing legal systems rather than to indulge in mere guesswork. The same applies to the determination of customary rules of public international law, to the extent the customs consists of national legal practice of states. Concepts such as "the international minimum standard" of "appropriate compensation" can be understood only with the assistance of comparative investigations of existing legal systems. In Europe, we have to consider the very far-reaching regional legislative cooperation as well. The European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (as amended) must be complied with in all fields of law, just as the U.S. Constitution permeates all fields of American law.

Although it is a treaty governed by international law, the European Convention does not limit itself to transnational situations and regulates even how the contracting States have to treat their own citizens and residents. A number of provisions in this Convention, for example Article 9(2), permit certain limitations of human rights provided the limitation fulfils certain conditions, among them the condition of being "necessary in a democratic society".

Whether this condition is fulfilled can only be established by checking and comparing the laws of countries that are considered democratic. In the law of the European Union (EU), comparisons between the legal systems of the Member States play an important role in the everyday work of its institutions, including the EU Court of Justice.

When interpreting various statutory provisions of EU law, this Court tends

to give their wording an autonomous meaning based on the objectives of the instrument in question as well as on "the general principles which stem from the corpus of the national legal systems".(3)

Both the European Human Rights Convention and EU law are integral parts of the national legal systems of most European countries. While some European law schools teach them separately or as parts of public international law, other schools (including my own) have decided that the time is ripe to let them take their natural place within all courses, ranging from contracts to immigration and from penal to family law. It is submitted that such an integrated approach is preferable, but whatever method is chosen the most important goal remains of course to provide all students with a basic knowledge of these rules affecting the legal system as a whole.

Turning to the usefulness of comparative and foreign law studies for private international law, it is rather surprising that many law schools, even in Europe and the U.S., do not make conflict of laws, or at least its basic principles, a compulsory element in their curriculum. As mentioned above, even jurists who do not normally deal with cross-border situations will, in our globalized world, encounter them in their work, irrespective of whether they specialize in, for example, divorces or consumer sales.

Again, it is less important whether private international law is taught as a separate subject or is divided and taught in connection with the affected field of substantive law (such as family law or contracts), although my experience speaks in favor of the former alternative. Far from being of a merely "technical" nature and devoid of ethical, religious, economic and political considerations, conflict rules decide such controversial issues as whether and when immigrants must adapt to their new country's culture in family and inheritance matters or whether consumers should retain the protection of the legislation of their own country even when shopping online on foreign sites.

Thus, the recent wave of immigrants coming to Sweden from the Middle East and North Africa has led to an increased number of situations involving, at least in part, the application of foreign Islam-based family and succession law. Comparative law plays an important role in these cases.

For example, the Swedish Supreme Court had recently to deal with the classification of the Islamic (*in casu* Iranian) *mahr* and, after having carried

(3) See, for example, *LTU* v. *Eurocontrol*, case 29/76, [1976] European Court Reports 1541.

out comparisons between Swedish and Iranian law, arrived at the conclusion that the *mahr* in the case at hand had to be subjected to the Swedish conflict rules on matrimonial property regimes rather than to conflict rules on contracts or maintenance.(4)

Studies of foreign and comparative law are rewarding also for jurists who are engaged in the preparation of new legislation or are involved in other kinds of work *de lege ferenda*, for example as judges creating precedents or legal scholars recommending a law reform.

The importance of learning from the experience of other countries is universally accepted within natural sciences, medicine and technology. It is submitted that a similar need to make use of the experience of others should also be recognized in the field of law. In some countries, including Sweden,(5) reports of legislative committees proposing important new legislation, as well as doctoral dissertations, are traditionally expected to pay attention to and take into account relevant experiences of the most important foreign legal systems. It would normally be a bad idea to propose the enactment of rules that have been tried but failed in other comparable countries.

It is a known fact that judges of highest judicial instances, when facing a gap in their legal system, examine often the solutions used in foreign countries and evaluate the foreign experiences, even if this is not always made apparent in the formal reasoning given in the judgments. Comparative law can thus to a certain extent replace experiments, which for obvious reasons are almost impossible to carry out in the field of law.

Similarly, when applying rules derived from an international convention or resulting from some other manner of unification or harmonization, the judges are supposed to compare how these rules are interpreted in the other participating countries. This does not, of course, mean that the harmonization or unification of law are always desirable.

They are welcome where they facilitate trade and other contacts between the countries involved, but not if they are carried out for their own sake, without

(4) See Nytt Juridiskt Arkiv (the semi-official collection of decisions of the Swedish Supreme Court), Stockholm 2017, p. 168.

(5) See, for example, Åke Lögdberg, "Some Aspects of Comparative Law, Particularly the Importance of Foreign Law in Shaping the Swedish Legal System", in *Mélanges de droit comparé en l'honneur du doyen Åke Malmström*, Stockholm 1972, pp. 159-169, at pp. 163-167.

bringing about any significant practical advantages. Law is only one of the aspects of the culture of a given society, like music or food.

Just as we want to preserve and do not want to harmonize or unify the culinary traditions or the musical tastes of the peoples of the world, we should not merely tolerate but also support the preservation of their national legal heritage to the extent this does not undermine the efforts to achieve aims that have been agreed to carry more weight.(6)

Looking at foreign law plays an additional important and positive role for the law students, namely it gives them a better understanding of their own legal system. For example, when studying the solution to a particular substantive legal problem in Swedish law, it is of great value for the Swedish students to see that the same problem can successfully be dealt with in a quite different way and that many legal rules and legal institutions, which one previously took for granted and necessary in every civilized society, have actually arisen in one's own legal system more or less accidentally or because of special historical or geographical factors.

Many legal rules and legal institutions, which one previously regarded as being original to one's own legal system, may in fact turn out to have foreign roots. In other words, students begin to see their own legal system from a new point of view and with a certain distance. For this purpose, the students should be confronted with foreign law also within the framework of regular courses on substantive law, even if only by way of a few well-chosen examples rather than in a consistent and comprehensive manner.

The examples used in teaching do not necessarily have to demonstrate differences between legal systems; they may on the contrary be even more interesting when they illustrate how seemingly very different legal approaches lead very often to the same or similar substantive result. In fact, substantial differences between two legal systems on a certain point are often compensated for by means of other differences on other points, so that the differences cancel each other out wholly or partially. For example, the role of inheritance rights granted to a surviving spouse by the law of one country may in another country be fulfilled by the rules on the division of matrimonial property.

(6) About law as a cultural phenomenon, see, for example, Erik Jayme, "Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung", in *Rabels Zeitschrift für ausländisches und internationals Privatrecht* (law journal connected with the Max Planck Institute for Comparative and International Private Law in Hamburg), 2003, pp. 211-230.

In some parts of private law, the similarities of outcomes are so significant that they may almost be presumed. The most likely explanation of this phenomenon are the present-day similarities between peoples' way of life in different parts of the world, due in large part to such globalization factors as economic integration, modern means of transportation and communication technologies, cross-border cultural influence of the mass media (including entertainment related to legal matters), and international development aid in the field of law. This is not quite new though: the German-American comparatist Max Rheinstein estimated almost half a century ago that approximately eighty percent of private-law disputes would reach the same result regardless of whether they arose and were decided in the USA, Canada, France, Argentina or Japan.(7)

This similarity is confirmed by the everyday experiences of tourists and other travelers. For example, I have never had the privilege of studying the law of Kuwait, but I am almost sure that I could master even complicated legal transactions governed by Kuwait law, such as shopping in a bazaar or hiring a car. The travelers, including the legally untrained ones, simply assume that such transactions are in foreign countries subject to roughly the same rules as in their home country, and they are mostly right. Of course, such assumptions may be dangerous when it comes to more important business transactions, where it is highly recommended to use the services of lawyers. In any case, the assumptions do not justify elevating rules of one's own country to some kind of natural law.(8)

What has been said covers merely the most conspicuous reasons speaking in favor of making studies of foreign and comparative law a compulsory element of the law curriculum. We all live in the same "global village" and need to communicate with foreign colleagues. The use of different languages is, as such, becoming less of a problem, because most of today's young jurists, especially in the Western countries, have usually at least a basic command of English, which is the current *lingua franca* of international communication.(9)

(7) See Max Rheinstein, «Comparative Law – Its Functions, Methods and Uses» in Rotondi, ed., *Inchieste di diritto comparato 2. Buts et méthodes du droit comparé*, Padova & New York 1973, pp. 547-556, at p. 553.

(8) A well-known example of this phenomenon is the arbitral award in the matter of *Petroleum Development Ltd.* v. *The Sheikh of Abu Dhabi*, rendered in 1951 by the English arbitrator Lord Asquit of Bishopstone. The law of Abu Dhabi was applicable to the dispute, but it lacked the necessary legal rules on the point. The arbitrator filled in the lacuna with English law, with the justification that English rules "are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence – this modern law of nature" (18 *International Law Reports* 149).

(9) As most members of the world-wide scientific community, including this author, are not native English-speakers, it has been said that "bad English" is today the only truly international language of scientific communication.

This is the reason why it is so important that the Kuwait International School of Law requires its students to participate in a special program for learning legal English. The access to foreign legal materials has also become much easier, for example due to the advent of the internet. Nevertheless, communication remains difficult if each of the jurists participating in the dialogue is a "prisoner" of his or her own legal system's concepts, terminology, and way of legal reasoning and lacks understanding of his counterpart's way of thinking and working.

This is particularly important to be kept in mind by jurists from relatively small jurisdictions such as Sweden or Kuwait. An English lawyer will usually be able to find a counterpart who not only speaks English but also knows so much about English law that he can understand what the English lawyer is saying and convey his own message so that the English lawyer can understand it.

A lawyer from a small jurisdiction such as Sweden cannot count on communicating with foreign colleagues with such ease, since they usually know nothing about Swedish law and are not even able to read Swedish; it is rather he or she who is expected to adapt in order to understand and be understood by the foreign counterpart.

These are the principal reasons why my school decided, as early as in the middle of the 1990s, that the previously optional course on comparative and foreign law should be made compulsory. The course is relatively short, corresponding roughly to three weeks of full-time work (in reality, the course extends to ten weeks, but they are shared with the course on legal history). The main purpose of the course on comparative and foreign law is to provide all students with some basic knowledge about and understanding of the main features of Anglo-American, French, German, Chinese, and Islamic law and legal thinking, and to introduce them to the principal methodological problems arising in connection with the study of foreign law in general.

The enumerated legal systems have been chosen not only because they represent very powerful States, but also – and in the first place – because they are the roots and sources of almost all of the existing legal systems in the world today, having spread all over the globe. There is practically no country whose law, at least in part, does not have its roots in one or more of this handful of legal cultures. Thus, approximately one-third of all humankind live in countries with a legal system which to a significant extent is based upon English law and, according to a rough estimation, approximately one sixth of humankind live in those more than fifty countries whose legal system to a significant degree is

influenced by Islamic law. Learning about the fundamental features of just a handful of legal systems offers thus a global insight into the laws of mankind, provided that the students, in addition to the study of individual legal cultures, are introduced to the concept of families of law and made aware of the "world map of legal systems" (for example, are informed that the legal system of New Zealand follows the English model or that most of the Japanese civil code is a translation of the German one). It has to be added though that many, perhaps most, of the existing legal systems are mixed, for example combining the commercial law of the former colonial power with domestic legal principles in family and succession law.

The students must therefore be made aware of the fact that the grouping of legal systems into families of law is a very basic and blunt pedagogical instrument,(10) which should be used primarily in order to provide beginners with a quick and rather superficial overview of the bewildering multitude of legal systems of the world. At the same time, it is important to explain to the students that the same or similar legal rules may function in different ways in societies based on different ethical, religious, political, and economical principles.

Among the elementary methodological problems arising in connection with the study of foreign law, it is important to advise the students how to avoid the most common misunderstandings and mistakes committed in the course of such studies. Perhaps the greatest danger facing a student of foreign law is the conscious or instinctive assumption that the methods of working with the law (the legal "handicraft") he or she is familiar with in the own legal system are used in the studied foreign legal systems as well.

An English jurist studying French law might tend to give more weight to judicial decisions than they have in the French legal system, whereas a French jurist studying English law might commit the opposite error. No less dangerous is, however, to attempt to avoid this danger by exaggerating to the other extreme, for instance if a French jurist would believe that when studying English law it suffices to rely exclusively on precedents, or if an English jurist would believe that when studying French law only needs to be concerned with the statutory

(10) It is important to realize that the most common groupings of legal systems, resulting usually in their division into a common-law family, civil-law (Romano-Germanic or continental) family, socialist family, Islamic family and Confucian family, are based mostly on pedagogical criteria which can be useless or even wrong for other purposes, where the pedagogical categorization may resemble an inconsistent division of books into thick books, religious books and French books.

provisions without having to consider judicial decisions. The truth is that in both England and France statutory texts as well as precedents are to be taken into consideration, even though the weight accorded to them is not the same. Furthermore, even when the value of a source of law is theoretically the same in two countries, there may be differences in their use, for example concerning the weight given to *obiter dicta* in the case law or the freedom to deviate from the literal meaning of words when interpreting statutory provisions.

It is important to emphasize that the purpose of a general course on comparative and foreign law cannot be to acquaint the students with the contents of foreign substantive law. There is no time to do that and such knowledge would in any case be of little value and soon become obsolete. The substantive content of legal rules changes often and can be easily found by a jurist familiar with the particular legal system's general features and working methods, such as the finding and interpretation of sources of law, role of law in society, fundamental legal concepts, etc.

The course must focus on these general features rather than on the substantive law. Even so, time constraints do not permit the course to go beyond the most important, fundamental aspects of the legal systems in question, but it is truly amazing how much useful knowledge the students can acquire within a very short time, provided the selection of the course materials and of information is done with sufficient care. This selection can be inspired and assisted by one of the number of existing comparative law textbooks and handbooks of varying size and detail.(11)

III. Conclusion

To sum up, interaction with foreign and comparative law is in several respects beneficial to undergraduate law students, in particular by making them more open-minded towards foreign legal ideas, while at the same time providing them with sound skepticism towards uncritical transplanting and copying of foreign legal models. It must, however, be admitted that such a comparative approach to teaching cannot be implemented without internationally minded professors who have experience of foreign law from their research or practice. It is probably much

(11) See, for example, Uwe Kischel, *Comparative Law*, Oxford 2019; Peter De Cruz, *Comparative Law in a Changing World*, 4th ed., London 2018; Mathias Siems, *Comparative Law*, Cambridge 2014; Michael Bogdan, *Concise Introduction to Comparative Law*, Groningen 2013; J. Michael Rainer, *Introduction to Comparative Law*, Wien 2010; Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3rd ed., Oxford 1998.

easier to find one comparatist professor to teach a general course on comparative and foreign law than a whole set of professors qualified and willing to teach their respective substantive subjects from a broad comparative perspective.

The suggestions made in this paper might on their face be perceived as an unconditional and enthusiastic support for the globalization as such, by presenting legal education as an instrument or vehicle serving and promoting the globalization process. There can be no doubt that as a whole that process has brought and continues to bring many benefits to mankind, especially in terms of economic growth, even though not to the same degree in all parts of the world. However, where there is light there is also shadow.

For example, in our globalized world it is often very difficult for an individual country to impose more stringent legal requirements on the business actors than other countries, because the businesses can "vote with their feet" and relocate their activities to a country with a more business-friendly legal environment. Such pressure of economic forces may lead to a less desirable harmonization of law, appropriately called "race to the bottom", having a negative impact on, for example, the environment, the condition of labor in some parts in the world, and the possibilities to fight tax evasion and fraud. Such negative effects of globalization have to be counteracted by various means, the law being perhaps the most important of them. If and to the extent national and international legislators take measures against the negative consequences of globalization, it is our duty as law teachers to teach our students how to use them as efficiently as possible. But that is another story.

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