Chapter 15
Everything Old Is New Again: Stateless Law, the State of the Law Schools and Comparative Legal/Normative History

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I. Introduction

The awareness of legal and normative complexity – what some have referred to as *polyjurality* and I call *hybridity* – is growing, at least among legal academics.[1] Indeed, this perception has already begun to change comparative scholarship and may, over time, fundamentally alter the place of comparative research and teaching in both the university and beyond. This new consciousness and the related developments that have formed and guide contemporary hybridity suggest the necessity of transdisciplinary perspectives and a root-and-branch reappraisal of the state-centred legal positivism that still dominates the wider legal profession. But these changes in perspective also demand, among other things, a reconsideration of our pedagogical practices.

One weapon in the arsenal of legal educators interested in teaching their students the lessons of hybridity is c*omparative legal/normative history*. That is, comparison across both space and time and of both laws and norms, might prove a useful, if more moderate, option to alternative approaches that focus on legal and normative complexity, e.g., the social sciences, the humanities, etc. Comparative legal/normative history reveals the hybridity of the past and the blurry boundaries between laws and other norms. Instead of

comparative legal/normative history exposes a gumbo of competing and overlapping *iura* and *leges* that

dominated by the nation state and the valid law'.[2] Comparative legal/normative history also challenges the

cautious, conventional curricula.

In sum, for some of us, our future may be our past. Indeed, while our pedagogical approaches must be –

As our own, our bequest and our burden, familiar yet disorienting, and constitutive of our societies and our selves, this history may have more purchase than its rivals.

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2 *How to Teach European Comparative Legal History: Workshop at the Faculty of Law, Lund University, August 19–20, 2009* *ibid.* at 16

closed legal systems or *families*
doing so, histories of hybridity may prepare us for the future and new – *or are they old?* – possibilities.[12]

These sorts of lessons are important to the question of *stateless law* and its teaching. Students need some

has a history, including a complex birth and eventful life; rumours of its death are probably exaggerated. The state isn't, and never has been, the only source of laws, much less of norms. Students must become alert to the limitations of positivism, legal centralism and monism. They must know a bit about religion and politics, about church and state. They must see temporal changes to cultural and even linguistic complexities, e.g., *ius* and *lex*. They should know how social customs developed and how elites transform these into legal customs.

indeed, ignored.

In short, comparative legal/normative history can provide all of the lessons of hybridity that other approaches – legal philosophy, the humanities, the social sciences, etc. – can. But legal history might also be more attractive than these other approaches and consequently more likely to succeed in our aims. António wrote, for example, that alerting students to complexity could be:

> legal theory. However, academic conservatism in many law schools offers a sensible resistance to the integration of these studies in curriculum programs, fearing that these novelties could endanger the implicit apologetic

These comments are still stronger when extended to comparative legal and normative histories. They can be a valuable vehicle with which to spread the gospel of hybridity.

B. Trans-temporal Transnational Law

comparative legal history, much less comparative legal/normative history, isn't self-

conclusions from the observed similarities and differences to enhance our understanding of the respective systems'.

we can understand such comparative work to be a focus on entangled histories.[15] That is, we shouldn't adopt a sort of historical functionalism, but investigate the manner in which different *corpora* and *fora* interpenetrate one another. Indeed, because single traditions – if that phrase makes any sense – are also inherently plural,

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12 *Comparative Law and Hybrid Legal Traditions: Lausanne, 10–11 September 2009* *ibid.*

C.f. *Reading Past Legal Texts* *supra* *António Manuel* Hespanha, *Early Modern History and the Social Sciences: Testing the Limits of Braudel's Mediterranean*

15 *Comparison and History: Europe in Cross-National Perspective*

of, continental law. But the English *common law* also competed with its own *iura propria*, its local and American legal traditions. And a wide variety of legal sources or authorities, including many from beyond the and domestic.[16] As this indicates, our legal and normative histories are intertwined. Law and *non-law* are not easily divided.[18] There's simply no sharp distinction between them.[20] This is true both because they are important to one another and because contemporary Europe:

> the study of the past need not be the study of how we were or, even worse, of how we shall be. It can be the study of how different they – our ancestors, if you like – were from us. The step in this direction – towards the study of the past as another country – entails the same exit and return to the familiar landscape of contemporary law that comparativists experience when they approach contemporary foreign legal systems. The awareness of[21]

> The mistake for legal historians is to assume that the law of a given time and place develops in its own way which can be studied without regard to how the law is developed elsewhere. The corresponding mistake for an amalgam of solutions developed over time.[22]

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16 *Common* Law': Legal Hybridity in England and Ireland, *Mixed Legal Systems at New Frontiers*

Making Legal History: Approaches and Methodologies

18 *supra*

sic

ed, *Netherlands Reports to the Fifteenth International Congress of Comparative Law: Bristol 1998* (Antwerp: Intersentia,

Elgar Encyclopedia of Comparative Law

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How to Teach European Comparative Legal History: Workshop at the Faculty of Law, Lund University, August 19–20, 2009

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The Oxford Handbook of Comparative Law (Oxford:

22 *The Oxford Handbook of Comparative Law* *C.f.*

of doctrine (i.e., legal scholarship) on the continent has led, along with practical political developments, to a complex dialogue on the generation of a *novum ius commune Europaneum* (literally, a *new common law of Europe)* and its importance to its positive laws. *Erasmus* programme has made it easy for students in the member states to study in other member states for short periods. Along with has done much to foster a more complex education both within law and beyond.

American and continental – that make up the core of the state law of the province of Quebec, though in light of Canadian federal laws.
enshrined in Canada's constitutional texts, are also increasingly important. This transsystemic approach is

wrote that its aims

> development of a curriculum taught initially in one language, to a bilingual pedagogy, to an open-ended single disciplinary focus, to interdisciplinary studies, to a transdisciplinary orientation.

legal pluralism.

transsystemic approach doesn't merely cross traditions, but, at its best, transcends them.

The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System

importance, also handle legal hybridity as a matter of course. This is also true, of course, in mixed legal traditions like

Supra

state. *C.f.*

supra

'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England

been a few exciting developments.

of Law, wrote:

> provide up to twenty full scholarships each year for graduate law students from countries throughout the
>
> research and teaching on the impact of the global economy on fundamental notions of property, ownership, and trade regulation.

largely as it began. It can boast a very large number of international visiting faculty, researchers and students.

make it possible for students to put together an international legal education suitable to their interests and

in which *global* or *transnational* learning might take place. This is not integrated in the same manner as at

guarantee that the substance of the legal education they provide will be meaningfully transsystemic.

B. Beggars and Choosers

Similar, though usually more limited, undergraduate and graduate programmes are being developed on both

can't really know, of course, how well a lawyer has processed or thought through legal complexity beyond

legal scholars or the hiring of their graduates by transnational corporations. But this will only be suggestive, rooted perhaps in the pedigrees of these prestigious law schools rather than on the actual performance of the lawyers they produce. The law school rankings used in North America – the *US News & World Report* *Macleans* (Canada) – are notoriously suspect. Indeed, what could possibly measure the performance of legal

the impact of these programmes is at least as great as any other liberal education. The belief that law students

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The Shame of American Legal Education

Shame *C.f.*

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students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law

a similar argument maintains that a student's grasp of the complexity of social regulation, and the ways in

or scholar.
this, though generally only as electives.
of law schools as peripheral. They instead see their mission as producing competent practitioners or having high bar passage rates.

nineteenth century.[50]

is even more true for *stateless law*. Perhaps these approaches are attractive and appropriate for a limited number of elite institutions, but the approach is neither desirable to, nor, in all honesty, necessary for most lawyers.

Indeed, for most law faculties, even classes like comparative law and legal history are at the periphery.

interest in other legal systems is something like an interest in wines; a little knowledge about them is a sign of good taste and sophistication, but a serious dedication may be evidence of waste, or luxury, or even worse'.[51]

[52]

Viewed as still more exotic or esoteric, the complexities of legal and especially normative hybridity receive even less attention.

lagniappe, meaning a gratuitous extra (like a lollipop given to a child after a doctor's visit). Comparative law and the like are merely a bonus to the real work of the core, bar classes.
public institutions, law schools are more often viewed as trade schools than sites of liberal education.

Anita Bernstein has recently written on the addition of transnational law to law school curriculum. She

change.
school curriculum and the skimpy alternative of a lagniappe is this awareness, which originates in self-conscious policy: a plan, observation, assessment, response'.[55]

are important exceptions, even this lagniappe – in the form of comparative law, legal history, transnational law,

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50 This sentiment is occasionally backed by the demands of professional bodies as well. In Ireland, for example,

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52 *c.f.* Christopher

Ibid.

55 *Ibid.*

ibid.

etc. – is often neglected.[56] At many universities, such classes provide mere colour to the wider legal curriculum. They are too seldom obligatory. If this is true, surely this half-a-loaf lagniappe is better than none.

Comparative legal/normative history – inherently transsystemic, transtemporal and transnational – is one way to teach the lessons of hybridity.

must attempt some reasonable level of distance. History must be studied closely and weighted carefully, insofar as is possible, according to reliable standards of historiography. Lawyers are often very poor historians. They

In addition, to achieve the goals suggested here, a merely national history or a mere history of common laws *internal*, doctrinal legal history will be too shallow, though legal history shouldn't ignore what lawyers are saying about themselves and what they do. But internal histories miss too much And even an *external* history that seeks a wider context might require knowledge of disciplines – like the social sciences – that have developed useful methods and created useful models for understanding normativity, institutional or otherwise.[58]

Contracts or *Obligations* could, with enough care if

The canned histories provided by non-experts are as likely to perpetuate myth as provide enlightenment.[60]

Perhaps for each or all of these reasons, the teaching of genuine comparative legal history – much less normative history – is quite rare.[61]

[62] There have, in fact, been some proposals to move either legal history or comparative law from the periphery to the core of legal education.

> It might reasonably be claimed that legal history promises rich educative rewards in at least two distinctive directions: (i) as an element in a broad liberal education; and (ii) as a discrete discipline capable of enhancing legal education generally.

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56 *C.f.*

58 *Legalism: Anthropology and History* Press, 2012).

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62 *The Oxford Handbook of Comparative Law*

Epistemology and Methodology in Comparative Law

See e.g. Phillips, *supra*

C.f.

into, practically every region and crevice of legal study and scholarship' (*ibid.* at 252).

contain a strong element of comparative legal history'.[65] This is part of his wider concerns about legal [66]

one's own time'.
traditions. But there's little reason to be optimistic about the prospects of comparative legal/normative history, even among the elite law schools.

legal/normative history. It's possible to act as *rainmakers* through our activities outside of the classroom

classroom and the university. This is obvious, but not banal. Associational activity and the related conferences, blogs and websites, and publications that follow are extremely important in reaching much more than our own students. And this rainmaking may be necessary for those of us teaching in more provincial law schools

we might create sacred texts, a priesthood and partisans; we might alter programmes or change minds; we might make converts.

I have tried to do this, not least through my role in the establishment of the European Society for (*Comparative Legal History*) and a collaborative *Western Legal Traditions* casebook are all part of this mission.[68] And, in my own work, I've attempted to marry the expertise of European legal historians – often doctrinal and internal, on *iura communia* and *iura propria* – to the more contextual and external focus of North American, colonial and imperial legal historians.
legal historical scholarship because of its necessary engagement with mixity and *legal pluralism*. Similarly, *The Laws Many Bodies, c1600–1900*,
examines legal and normative complexity or hybridity from the early modern to the modern era. It attempts to

on Anglo-American courts of common law and the *learned ius commune* respectively. To do so neglects much of the complexity, legal and normative, that was important to our past and that, as a consequence, remains important in our present.

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65 *Legal History and a Common Law for Europe: Mystery, Reality, Imagination* (Stockholm: Institutet

66 *Shame*, *supra*

68 *Western Legal Traditions*

C.f. *The Law and Other Legalities of Ireland, 1689–1850*

Entanglements in Legal History: Conceptual Approaches

European Legal History: A Cultural and Political Perspective (Cambridge,

iura propria, make up at most 10

European Legal History: A Cultural and Political

IV. Conclusion

might say that legal history:

> Instead, legal systems and categories collide with and penetrate each other, reinforce and refute each other, in unpredictable ways. Civil or common law, religious or secular law, domestic or international law, state law or some other kind, all form part of the open-textured, complex, heterogeneous normative universe which everywhere, inscribed in private documents, embedded in custom, extruded from transactions or experienced

Perspective *C.f.* *Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective* (Durham, NC: Carolina Academic Press, 2011). *supra*

Similarly, a class on, for example, Legal History could also be comparative.