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IS THERE A CURRICULAR CORE FOR THE TRANS-NATIONAL LAWYER?

**(a discussion paper for the A.A.L.S. conference in May, 2004, on
educating lawyers for transnational challenges)**

This paper discusses the role international, comparative and foreign law can and should play in the education of those law students who do **not** specialize in transnational matters. The students desiring such specialization should, depending on the resources of their institution and the flexibility of the prescribed curriculum, of course be offered the possibility to choose from a widest possible array of optional courses on public and private international law, international commercial transactions, comparative law, major foreign legal systems, etc. The only limitation that must be imposed on such a specialization is that a fundamental knowledge of the own legal system is one of the necessary prerequisites for understanding and being able to deal with transnational legal problems. In most law schools, the students wishing to specialize in transnational issues constitute a relatively small minority.

The question to be dealt with here is whether and to what extent the majority of law students, who wish to work mainly within the framework of their own legal system, should be compelled, by curricular core requirements, to study subjects such as international law, comparative law and foreign law. This question has arisen due to the fact that almost every lawyer must today be prepared to face some transnational issues, regardless of whether he or she works in the field of business law, family law, criminal law, administrative law or any other legal field. In this sense, all students must become “transnational lawyers”. On the other hand, the curriculum space for compulsory subjects is limited and there are other new, legitimate demands for a slice of it; it could, for example, be argued that every student must be

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required to get acquainted with fundamental gender or environmental issues as well.

This paper is based mainly on European (mostly Scandinavian) experiences and it must be pointed out that the curriculum of most law schools in the U.S. comprises traditionally much less compulsory subjects than what is common in Europe, where 75 percent or even more of the curriculum consists usually of obligatory courses, to be taken by all students. It is, therefore, more natural in a European than in an American perspective to suggest that a particular subject be made compulsory, as almost all central legal fields are in Europe expected to be covered by the compulsory part of the curriculum (albeit often on a rather superficial level). This is related to the fact that European law schools are normally undergraduate schools with a scheduled study time of 4 – 5 years, thus allowing for more voluminous legal curricula than their American counterparts.

As far as **public international law** is concerned, certain parts of it should be included in compulsory curricular core, at least in Europe. The European Human Rights Convention is, for example, today part of the legal system of almost all European countries and must be kept in mind in all fields of law, just like the U.S. Constitution permeates all fields of American law. Although a part of international law, the Convention does not limit itself to transnational situations. The law of the European Communities has, on the other hand, ceased to be perceived as belonging to international law and constitutes today part of the national legal systems of all member states of the European Union. While some law schools teach E.C. law as a legal subject of its own, other schools (including my own) have decided that the time is ripe to let it take its natural place within all courses, ranging from contracts to immigration and today even family law. It is submitted that the latter, integrated approach is preferable and could, in fact, be used even concerning human rights, but the

most important thing is that all students obtain a basic knowledge of these rules affecting the legal system as a whole.

Private international law (conflicts of law) plays a more important role in Europe than in the U.S., where most conflict cases are not international but interstate. Substantive legal rules vary much more between European countries than between sister states within the U.S. (although some harmonization is taking place, partly due to E.C. law). The conflict rules of many European countries regarding personal matters attribute more weight to citizenship than to domicile, which means that foreign law has to be applied to large numbers of recent immigrants. Far from being of a merely “technical” nature, conflicts rules decide such issues as, for example, whether and when immigrants must adapt to their new country’s culture in family and inheritance matters or whether consumers retain the protection of the legislation of their own country even when shopping in Cyberspace. It is submitted that the basic principles of conflicts of law should be a compulsory element in legal education (as is the case in all Swedish law schools). 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 the experience of this author speaks in favor of the former alternative. In the U.S., conflicts is practically never a compulsory part of the curriculum, which is probably due to the above-mentioned factors, such as the shorter time American law students spend at the law school and by the less transnational character of the subject.

Also the role of **comparative and foreign law** is and should naturally be different in the legal education in the U.S. and in Europe. Of course, both American and European lawyers belong today to the same “global village” with a need from time to time to engage in meaningful communication with a foreign colleague, which is difficult if each and one of them is a “prisoner” of

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his own legal system's concepts, terminology and way of legal reasoning and lacks understanding of his counterpart's way of thinking and working. An American lawyer will, however, usually be able to find in most countries a counterpart who not only speaks English but knows so much about American law that he can understand what the American lawyer is saying and convey his own message so that the American 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 who is expected to adapt in order to understand and be understood by the foreign counterpart.

What has just been said is one of the reasons why my school decided, in the middle of the 1990's, that the previously optional course on comparative and foreign law be made compulsory. The course, which is formally a mere sub-course within a larger, ten-week course comprising also public and private international law, corresponds roughly to 3 weeks of full-time work (this is difficult to translate into the American credit system). The main purpose of the sub-course on comparative and foreign law is to provide all students with some basic knowledge about and understanding of English, American, French, German, Chinese and Moslem law and legal thinking, as well as to introduce them to the methodological problems arising in connection with the study of foreign law in general (such as the most common misunderstandings and mistakes). The above-mentioned legal systems have been chosen because they constitute the most important legal cultures in the world today, having spread all over the globe. There is practically no country whose law does not have its roots in one or more of these few legal cultures, which means that learning about them provides almost a global insight into the laws of mankind if the students, in addition to the study of individual legal cultures, are made familiar with the "world map of legal systems" (*e.g.* are informed that

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Australian law follows the English model or that the Japanese civil code is based on the German one). It goes without saying, however, that the students must also be made aware of the fact that the same or similar legal rules may function in different ways in societies based on different ethical, religious, political and economical principles.

It is important to realize that it cannot be the purpose of a general course on comparative and foreign law to make the students acquainted with the contents of foreign substantive law. There is no time to do that and such knowledge would in any case be of very little value and soon become obsolete. The substantive contents of legal rules changes often and can relatively quickly be found by a jurist who is familiar with the particular legal system's general features and working methods which do not normally change, such as the sources of law, the role the law plays in society, the legal professions, fundamental legal concepts (such as the trust in Anglo-American law) and some basic legal terminology. The focus of the course must, therefore, be on these general features rather than on the substantive law. Even so, the time restraints 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 is done with sufficient care.

Foreign law can play an important role for the law students also in another respect, namely in order to give them a better understanding of their own legal system. When studying the solution to a particular legal problem in Swedish law, it may be of great value for the Swedish students to see that the same problem can successfully be dealt with in a quite different way, perhaps even simpler and better. The students begin to see their own legal system from a new point of view and with a certain distance; they realize there is nothing

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God-given about its rules. For this purpose, substantive foreign law should be taught within the framework of all regular courses, even if only by way of a few well-chosen examples rather than in a consistent and comprehensive way. The examples used do not necessarily have to demonstrate differences between legal systems; they may as well illustrate how seemingly different solutions can at the end of the day lead to the same substantive result. Such interaction with foreign law makes the students more open-minded and ready for the transnational challenges waiting for them after graduation. It must, however, be admitted that such comparative approach to teaching substantive law can hardly be implemented without internationally-minded professors who have experience of foreign law from their research or practice. It is probably much easier to find one comparatist to teach a course on comparative and foreign law than a whole set of professors qualified and willing to teach their respective substantive subjects from a comparative perspective.

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