

Paper to be read at the Conference on Educating Lawyers for Transnational Challenges
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"Is there Curricular Core for the Transnational Lawyer?"

Introduction

The aim of this paper is to address the following theme of the session: changes to the core law degree curriculum that might best prepare tomorrow's transnational lawyer? In particular: (a) whether an understanding of comparative law is a necessary part of that preparation; (b) whether the insights of other disciplines should formally be incorporated into the law degree; (c) methods of incorporation, including whether comparative and interdisciplinary approaches should be woven into the curriculum generally, taught as separate courses or a combination of both; and (d) organizational support for participating law schools.

There seems to be an unspoken assumption to the theme of this session, that the inclusion of comparative law (as a methodology of legal research and analysis) in a curriculum is a *sine qua non* to the proper education of a transnational lawyer. This paper attempts to show that while comparative law has a role to play in the curriculum for the preparation of such a lawyer, it need not constitute a core element of his or her curriculum.

In order to avoid abstract discussion at all levels, the paper will make some references to the experience of the University of Cape Town (UCT) and one of its co-operating overseas Universities.¹ The paper will be divided into four parts. The first part will attempt to place the needs of the transnational lawyer in their proper perspective. The second will consider the core curriculum, the third will consider the role of comparative law in the curriculum and the fourth organisational support. The methods of incorporation of comparative law and interdisciplinary approaches will be woven into sections two and three.

Placing the needs of transnational lawyers into perspective: globalisation of law

The challenges of educating transnational lawyers are, indeed, linked to the increasingly "shrinking legal world" in which there are more and more 'cross-border flows of capital, goods, people, services and ideas' and a heightened linkage between the world's domestic legal jurisdictions. This is not to mention the impact of electronic technology and communication on the expansion of cross border legal business in all legal fields. However, there is equally a rising trend towards "globalisation" of, or uniformity in, the laws of the world, so that difference in the legal families of the world is shrinking.

The major catalysts for the "globalisation" of law are the proliferation of international and regional treaties imposing obligations on ratifying states to adopt uniform norms or legal standards or policies on the subject matter of the treaty; the extension of treaties and treaty obligations to both the public and private domains; the extensive range of first, second and third generation of human rights and their impact on the development of domestic laws along similar lines; the domestication of international law through national legislation (by the enactment of some provisions of the convention or the whole convention into domestic law) and by the courts;² regional or continental integrations to facilitate both economic and legal integration.

Space does not allow a discussion of these issues, but it may be fitting to offer an example of the domestication in South Africa of the United Nations Convention on the Rights of the Child (CRC) and the Hague Convention on the Civil Aspects of International Child Abduction (1980).³ The entrenchment of the rights of the child in the Constitution of the Republic not only bears evidence of the influence of the CRC, but it also incorporates directly the human rights norms of that Convention, such as the best interests of the child principle and the definition of a child. On the other hand, the Hague Convention on the Civil Aspects of International Child Abduction Act provides for the application of the whole Hague Convention, subject to the provisions of the Act relating mainly to jurisdictional matters. The result is that the law governing custody of children, for example, is as much international as it is South African. Thus the world may, in fact, be moving towards a "world law." Firstly, this will make it possible to educate lawyers for transnational legal practice (in a broad sense) even when focusing largely on the

national legal system and its needs. Secondly, it reduces the role comparative law will play in the education of the law graduate, thus creating more flexibility in the method of its incorporation.

The core curriculum

The curriculum is the chief instrument by which students are prepared to meet their professional needs and challenges. For the purposes of this paper, I define a transnational lawyer as a lawyer who is adequately qualified to work in a global context, not just one who is qualified to work in international organisations and across jurisdictional lines in all legal systems of the world (transnational lawyer in a narrow sense). The premise is that the curriculum for legal education should train lawyers for life and for legal practice in a broad sense for global contexts, including, transnational legal practice in a narrow sense.

A few of the most pertinent aspects of UCT's LLB curriculum are now presented as a concrete point of reference and illustration of a core curriculum for the transnational lawyer.⁴ According to this curriculum, the outcome of the LLB programme should be a versatile graduate with general analytical and communication skills, a basic conceptual knowledge with a sound knowledge of the general principles of South African Law and the ability to apply, assess and develop the law critically in the light of national needs and international developments. To this end the programme should be aimed at producing broadly educated graduates who have the historical, comparative and jurisprudential background that is essential for a thorough and critical understanding of law and legal institutions. For only such graduates will be equipped to assume leadership and make full use of the opportunities for renewal provided by new national laws and the increasing globalising trends in law and business.

The content and structure of the curriculum is designed to pursue the following objectives, among others:

- (a) *Transferring essential knowledge of South African law, including understanding/critical ability*

The aim is to produce graduates who have a thorough understanding of the core areas of South African law; the essentials of the nature of law and legal reasoning, and the critique thereof; the increasing internationalisation of law; the social and historical context of the law in operation; and graduates who know how to find and (creatively) interpret the law and pursue its development and reform.

The achievement of this aim relies on a curriculum consisting of a mixture of compulsory 'core' courses and optional courses. The compulsory courses cover all central areas of substantive legal knowledge in the fields of Private Law, Public Law and Commercial Law, as well as the basic forms of legal procedure, and legal method, legal history and legal theory. Furthermore, the content of individual courses consists of descriptions and critical analyses of particular areas of South African law, usually enriched by comparative material drawn from other jurisdictions as well as theoretical literature.

- (b) *A curriculum that keeps abreast of changing international, national, regional and professional needs; Equips students to meet regional development needs; contains appropriate and relevant disciplinary material; And promotes social responsibility and critical citizenship.*

The relevant structure and content of the curriculum for the achievement of this objective are the suite of compulsory and optional courses designed to prepare students for entry into the post-graduate stage of professional practical training for legal practice in South Africa in a manner that reflects the faculty's vision of producing graduates who have a grasp of the law's international environment, its African context, and its general character as a social practice.

The compulsory courses include all those subjects that are essential in the formation of lawyers. In addition to understanding the nature of law and legal reasoning, and the historical, comparative and international context of South African law, a student must grasp the essential Private Law disciplines such as Contract, Delict, Property, and Persons and Family, the organisation of the state and the exercise of power involving Constitutional Law and Administrative Law, Criminal Law, the commercial aspects of law such as Corporations, Insolvency and Banking Law, and civil and criminal court

procedures. Additionally, International Law, African Customary Law and Jurisprudence are compulsory courses. Also compulsory are Interpretation of Statutes and Foundations of South African Law, which deal extensively with the methodology of finding and interpreting the law in legislation and precedents, and Comparative Legal History, which explores the historical evolution of legal doctrines in private law, especially in the areas of contract, delict, enrichment and property. Comparative legal history aims at familiarizing students with the basic building blocks of South African Private Law.

The compulsory component of the curriculum clearly displays the sensitivity of the legal training to: the African heritage and geographical location of the country (i.e. inclusion of African Customary Law); the globalisation and the increasing internationalisation of all facets of law (whether criminal law and procedure, child custody, contract formation and enforcement, intellectual property and trade law). It also demands that all lawyers have a good grounding in the basic principles of international law; and sensitivity to the need for students to reflect on the nature of law, its place in society and relationship to justice instead of focusing on mere technical training.

A menu of optional law subjects is available in the final year of study. There is a wide variety of options, enabling students to choose in accordance with their interests and career plans. The range of options is also designed to cater for specific needs of the legal profession, and/or commerce and industry (e.g., Constitutional Litigation, Electronic Law, Copyright, Intellectual Property, Competition Law, Revenue Law, Trusts and Estate Planning, Dispute Resolution, Labour Law) as well as national, regional and international developmental needs (e.g. Comparative legal systems, conflict of laws, Environmental Law, International Human Rights Law, Refugee and Immigration Law, Criminology, and Legal Aid and Legal Practice). In addition, final year research papers, provide further opportunity for in-depth study of matters of current professional and developmental concern.

Furthermore, guest lectures and seminars by leading members of the legal profession, notably judges, are also a frequent occurrence, keeping students abreast of the latest developments and bridging the divide between the academic and practical spheres of law.

(c) *Broad-based knowledge and versatility*

This objective is pursued in two ways. First, the suite of courses offered, particularly the range of compulsory courses, is meant to produce graduates who have a broad contextual knowledge of South African law and are able to adapt and extend their knowledge and skills to a wide variety of circumstances. Secondly, the programme structure ensures that all its LL B graduates have a background in disciplines other than law. The underlying aim is to ensure that students develop into well-rounded graduates who possess not only the technical knowledge and skills of their professional discipline, but also a broader appreciation of society and its needs, and of their role in fulfilling these. Throughout the curriculum, particular stress is placed on developing an appreciation among students for the historical and geographical/national variability of the law.

With regard to the method of incorporation, all the basic routes towards the LL B degree enable students to combine the same core curriculum of legal studies with different configurations of additional knowledge and skills in cognate disciplines. The combinations differ in the quantity of non-law courses a student would take before graduating with an LL B, ranging from 8 non-law semester courses to a full degree in a non-law field. The incorporation of the non-law disciplines is largely assured by a high degree of co-operation between the Law Faculty and the University's Faculties of Humanities and Commerce with respect to course offerings and teaching. This approach avoids unnecessary resource-based constraints, which would result if non-law courses were to be taught in the Law Faculty.

(d) *Critical enquiry/research and the extension of knowledge to new problems and issues*

This aim addresses the vast, subtle, complex, and ever-changing nature of law, so that it cannot ever be fully within the grasp of an individual or even an accessible database, with the result that continuous research and its effective application are intrinsic features of legal practice. Therefore, every course requires an element of research and its application, alerting students to the importance of legal research material and the necessity of keeping up to date therewith. Furthermore, there is a skills component to the

curriculum, which uses selected courses to develop students' skills in writing, research and oral presentation in an incremental manner.

The curriculum also recognises that the world to which law is applied is even more complex and dynamic than the law and that legal reasoning can seldom content itself with reporting and applying research results. An essential feature of legal practice is that lawyers apply extant law to novel sets of facts and new social problems. This renders crucial the skill to judge the transferability of legal principles across time and across issues, and the ability to extend existing legal knowledge to *new* arenas. Each course therefore focuses on striking the correct balance between teaching students the substantive law as it now stands and fostering the ability to analyse the strengths and weaknesses thereof, and to understand the underlying policies and values.

e) Improving suitability/performance for the marketplace

In addition to the professional (private sector) jobs they fill, the Faculty expects graduates to be able to fill positions in fields with fast-changing needs - in government, in the prosecutorial service, in international forums, the commercial world and academic and research institutions. In order to equip them for the market, graduates must have a good understanding of key concepts and be able to respond quickly to new developments and new contexts. Thus they must have an understanding of the basic principles of law, strong analytical skills, the ability to identify and solve new problems, and flexibility. These aims are attained by, among others, a regularly updated curriculum whose content has been described in the foregoing pages; a learning environment that encourages student initiative and includes regular interaction with students by a wide variety of prominent figures from outside the faculty and the academic world and by rigorous assessment methods, that require the demonstration of knowledge, analytical ability, problem solving skills, critical reasoning ability, and skill in oral and written presentation of arguments in a variety of formats.

It is clear from the discussion of the UCT curriculum that comparative law is not taught as a separate compulsory subject. Instead it is incorporated in the various subjects and offered as an optional course. That this is not necessarily an inherent flaw in the

curriculum is apparent from the discussion of the role of comparative law in the curriculum in the next section.

The role of comparative law in the curriculum

The increased uniformity of laws diminishes but does not completely remove the utility of comparative law⁵ in transnational legal practice. While acknowledging its methodological shortcomings,⁶ comparative law presents itself as an indispensable building block in the curricula for the education of a transnational lawyer. Concerned as it is with the study of 'the methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law'⁷ (macrocomparison) and with the rules used to solve concrete problems and specific legal institutions (microcomparison)⁸ in the various legal families of the world, the comparative approach contributes both to the versatility and ability of the graduate with regard to critical enquiry discussed above. It also exposes him or her to the utility of the comparative method with regard, for example, to enhancing a better understanding of one's own legal system and its problems, to draw useful lessons from the foreign system;⁹ to developing a "feel" for the foreign legal systems,¹⁰ which enables him or her to¹¹ build interpretation bridges across jurisdictions and between the various families of law in the world;¹² and to filling gaps in domestic law with foreign law.¹³

With regard to the incorporation of comparative law in the curriculum, it may be observed, firstly, that while both macrocomparison and microcomparison approaches are necessary for a better understanding of the way the foreign legal system operates,¹⁴ it is clear that a full incorporation of both in one curriculum may be impossible, due to space and time limitations.¹⁵ It is noteworthy that some faculties that currently teach comparative law as one of the courses aimed at preparing students for legal practice in this century (and the future)¹⁶ seem to put (correctly) more emphasis on the macrocomparison approach.¹⁷

Secondly, on the premise of uniformity of laws and the associated diminished role of comparative law in transnational legal practice, it does not appear critical to teach comparative law as a compulsory course, provided that students can be exposed to the international perspective in individual courses. The extent and demand for exposure will

differ from one course to another as some courses have more international dimensions than others.

For these reasons, it does not appear to be detrimental to the curriculum not teach comparative law as a separate course.

Organisation Support for participating faculties

It is clear from the discussion of the curriculum core that its implementation and the achievement of its goals require not only that teaching be research-led, but also that the delivery of the programme is through staff who are excellent in teaching and research, and who reflect, among other things, the international character of knowledge and of the law itself. These require resources, which most faculties, especially in developing countries, are hard pressed to find. Organisational support for these faculties should therefore aim at increasing staff numbers and developing research capacity and teaching skills. A related activity should be the promotion of staff and student exchanges among the participating institutions, to foster and augment comparative approaches.

Conclusion

To come back to the main question constituting the title of this paper, yes there is a need for a curricular core for the transnational lawyer. However, placed in proper perspective, which ascribes to the increasing uniformity of laws, the needs of the transnational lawyer need not be met by placing comparative law at the centre of the curriculum. What is needed is a curriculum that ensures that the graduate has (a) a broad-based legal education, (b) has a solid knowledge of the law and the effective use of legal materials in his or her national jurisdiction (c) is versatile with respect to his or her ability to apply law to new problems and (d) is exposed to certain degrees of comparative law and its utility. Some Faculties may not be able to mount such curricular due to resource constraints and may, therefore, require support from other participating Law schools and Faculties.

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¹ The University of Melbourne.

² See, for example, Rwezaura 'Domestic application of international human rights norms protecting the rights of the girl-child in Eastern and Southern Africa' in W in Ncube ed *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (1998) 28.

³ Act 72 of 1996 (commencement date 1 October 1997).

⁴ The information is extracted, in some cases verbatim, from the UCT Law Faculty Quality Assurance Report prepared in 2003 by F du Bois, C Himonga, A Pillay, C Rademeyer and W Scharf.

⁵ For a discussion see, for example, ICH Collins 'Method and aims of comparative law' (1991) *Oxford Journal of Legal Studies* 396.

⁶ Ibid.

⁷ K Zweigert and H Kotz *An Introduction to Comparative Law* (3rd rev ed) p 4.

⁸ See *ibid*; R Hyland 'comparative law' in *A companion to philosophy of law and legal theory* D Patterson ed 184 (1996) 4-5.

⁹ Ibid.

¹⁰ This 'feeling' for foreign legal systems is more than linguistic skills. It equips the comparitist with 'the mastery of a form of intellectual juggling...which allows the matching of different concepts and notions:' Markesinis 'Judge, jurist and the study of comparative law' (1993) *LQR* vol 109 622 at 626.

¹¹ See generally *Ibid*.

¹² Ibid.

¹³ F du Bois and D Visser, 'The influence of foreign law in South Africa,' esp. pp48-60 (forthcoming).

¹⁴ Zweigert and Kotz (*supra*) p 5.

¹⁵ As Murdoch has rightly pointed out, 'it is impossible to cram every subject into a law degree'. All that is required is that a student is aware of the diversity of subjects, and even such awareness 'need not signify depth' if, in my opinion, students are equipped to handle legal materials confidently: Murdoch, 'Is there method in the new madness? Responding to new pressures ahead - more of the same, or all change?' in the Commonwealth Legal Education Association et al *Legal Education: 2000 and Beyond Ocho Rios, Jamaica December 14-16, 1998 Conference papers* 6 at p 8.

¹⁶ See for example the objectives of the juris doctor programme at the University of Melbourne Faculty of Law (Faculty handbook Feb 2004 p11).

¹⁷ For example, the University of Melbourne Faculty of Law juris doctor programme states the following as objectives of comparative law: an understanding of the methods and purposes of comparative law; the ability to identify the uses of comparative law in legal research; the ability to use comparative law effectively in legal research; a working knowledge of the principal families of law in the world, their relationship to one another and the reasons for similarities and differences between them; the ability to identify similarities and differences between the values, principles and policies of the world's legal systems; the ability to find understand and apply selected areas of law in selected countries; demonstrate cross-culture sensitivity to the challenges inherent in the search and reform of foreign law; the ability to engage in the debate on the viability of legal transplants; and the ability to identify and critically evaluate the movement for the uniformity of law Faculty handbook Feb 2004 p11. Similarly, Comparative Legal Systems taught at the University of Cape Town focuses on 'the broad systemic features of legal systems rather than on the comparison of specific legal doctrines and principles.' (Faculty of Law handbook 2004 p 51).