

# Comparative Law Today

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*Ladies and Gentleman, Good MIDDAY!*

1. It's a great pleasure and even more an honour for me to be invited here to speak to you on the occasion of the sixtieth anniversary of The Finnish Committee for Comparative Law. I do not say that as the usual polite formula in order to please you, but I say this because 60 years is an accomplishment for a scholarly association. Moreover, I personally feel very strongly about comparative study of law – it fascinates as much as it puzzles me. In many ways I find comparative law somewhat an enigmatic creature, something that is utterly simple and terrifyingly complicated at the same time.

2. However, even when I say that it's a great pleasure and an honour to speak for you today, it is also an agonising thing to do. This is because the theme given to me is simply an impossible task. It is evident, that 'Comparative Law Today' is such a vast theme that anyone with sense and sensibility should politely withdraw and blame problems with schedule or any other convenient excuse we academics are so good at coming up with. Surely that would be a prudent thing to do. An honourable retreat, no doubt.

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3. You may wonder what on earth this speaker is talking about. Why is he not delivering the speech that everyone expects him to deliver? There is an undeniable *dilemma* I am facing here. In short, I *should* do something that clearly no comparative legal scholar alive can actually do. Or, to be more precise, no honest comparative legal scholar would even claim to be able to accomplish. The mind-boggling amount of research and literature on comparative law or comparative legal studies is so vast today that it cannot be neatly or otherwise captured at all. There are so many methodological approaches, themes, languages, and schools of thought that it would be downright arrogant to claim to “have it all”. Hopefully you are not overtly disappointed or disillusioned to learn that your speaker of today does not “have it all”. No such luck, I am afraid.

4. One possibility to get out of the impasse would be to *pretend* to know it all. That could work quite easily; I wear a suit and tie, I have written extensively on the subject, I hold a professorial chair. So, why not go for it? One could go on and claim to be painting a sweeping magisterial overall account of the present condition of the discipline of comparative law. Indeed, one could make fine, polished, learned perhaps even compelling presentation – but it would be false, mere rhetorical construction patched up by an academic conjurer of cheap tricks. That does not appear like a tempting way to go on about with this.

5. Or, better still, one could simply stop right here. One might be tempted to choose a stoic escape route: face calmly the sadness and loss of unified (and no doubt imaginary) comparative law. Perhaps I should simply say to you: look, it’s not going to happen let us go to a pub and sink into a drunken stupor for a shred of academic solace. We could bravely face the inevitable loss of unified comparative law and disappear in the shadows of methodological pluralism and the unstoppable on-march of globalisation.

6. But, as you can see here I am before you. Seemingly quite prepared to deliver a speech under the inhumanely menacing title of ‘Comparative Law Today’. Well, *there* is a title destined to make any honest comparative legal scholar to feel dwarfed by the

sheer immensity of the task. However, I believe that there *might* be a way out of this dilemma and, in fact, I have not painted myself into a corner here.

7. So, admitting that no full account can be given, faced with the grim reality, I have chosen to highlight the present state of comparative law by looking into certain revealing *discourses* on comparative law. What discourse you may ask. Where is our speaker now going after so narrow escape from the painted-into-a-corner dead-end? Basically, discourse can be defined as a group of statements which provide language in order to be able to speak about certain information concerning a certain object. Simply, discourse offers a language-device through which we can represent information. Like in this case, information about the discipline of comparative law or something we may label as comparative legal studies.

8. Now, my foundational assumption in this talk is that certain key discourses can provide us with rather decent – not perfect though – insight into the present state of comparative law today. Of course, even here there are difficulties. There are *so many* discourses within comparative law that one is faced with unavoidable choices. One is bound to find herself stuck between a rock and a hard place. In any case, out of the vast literature I have chosen two discourses which deal with the *past* and the *future* of comparative law. First one is a kind of an evergreen and it deals with legal families. Second one is something which is much trendier, perhaps even fashionable, and it is called global law.

9. Now, these discourses are not chosen randomly. No not at all randomly. In this context, I would like to add that people who are good themselves are not apt to suspect ill of others. Accordingly, surely you are all but convinced that your speaker does not do random. Yet, the fact that I am quite familiar with these particular themes may have *something* to do with my selection. Nevertheless, there is more to it which will become clear in what follows. Or, at least that is what I sincerely do hope.

10. Now, let us go on and see what there is with these legal families and what does that discourse portray us about the state of comparative law today.

11. In general, comparative law as a discipline can be divided into macro-level and micro-level comparison. In a micro-comparison the objects of research are normally individual legal rules, judgments, or individual legal institutions. In macro-comparative law, comparison is done between legal systems or legal cultures. Micro-comparatist may ask what constitutes a legally binding contract whereas a macro-comparatist may ask whether the rules of contract are based on statutory law or case law. Commonly, macro-comparative law is practiced by the academics and theoreticians whereas the micro-comparatists tend to hold interest in more practical-natured legal questions. Mind you, it is a useful thing to bear in mind that the distinction between micro- and macro-comparison is far from clear.

12. It can generally be said that in macro-comparison there are multiple theoretical frames. By far, the most widely spread conceptualizations are legal families accompanied with the later notions of legal cultures and legal traditions. Even though there are differences between these notions they, ultimately, concern the same thing: the typification of legal systems (in a broad sense) into whopping entities according to their general characteristics and legal histories.

13. However, it is beneficial to bear in mind that the great majority of legal scholars are *not* comparative lawyers and that of the comparatists only a *small* portion actually deal with macro-comparative law. Nevertheless, almost all legal scholars use or otherwise refer to comparative macro-constructs in their academic publications. We all see it and do it every day: common law this, civil law that, Islamic law, Asian law etc. Here's the thing; even those who do not hold the notion of legal family dear, still speak frequently of such things as common law, civil law, Islamic law etc.

14. One of the most widely spread and solidly established macro-constructs is the notion of legal family. In comparison with other macro-constructs legal family has one special feature; it implies historical relationship (or ancestry), concerning the origin or influence, of a legal system on another. However, the developments of the last few decades seem to have challenged the idea that systems can be grouped into major families. Reasons for this are diverse, but one of the crucial aspects is the fact that the key-component of traditional macro-comparative law, the State, is in decline and we are more aware of legal pluralism than in the past.

15. Arguably, much of the troubles are due to comparative law's own intellectual history: it was forged in order to respond to the fragmentation of European laws and the birth of national codifications in the nineteenth century. Notwithstanding, there are still scholars who think that the classification of legal families "is an important scientific question". It is unnecessary to decide whether classification is an important question or not, however, we can see that legal families play a significant role in today's legal academia, which is not confined to the Westphalian system anymore.

16. Legal families started as a distinctly taxonomic project during the nineteenth century. Overall, legal families became part of the canon of comparative law during the twentieth century, but in fact they contain various elements and dimensions from much earlier periods. As a result, legal families are theoretical amalgams and not coherent and analytical notions. And yet, legal families are not going to disappear it would seem. A telling example is the way how they are "reincarnated" in the literature as can be seen in competing attempts: for example Patrick Glenn's sweeping *Legal Traditions of the World* is, in the end, not *that* different from the classical legal family constructions even while it speaks different theoretical language. So, there seems to be a cycle of death and rebirth to which macro-constructs in the scholarly world are bound.

17. It seems feasible that, even though the legal families approach continues to be a target of criticism, it is unlikely to be completely abandoned by the scholars. The landscape is further complicated by the fact that there are some attempts not only to criticise but also to renew and refine the legal families approach. Two of the most interesting ones concern taking the parentage and hybridity, respectively, into account and, thus, escaping from the stiffness of the old legal families approach. The third one seeks to understand the relation between different systems of law and economy by relying on legal family classification. In contrast to the previous classifications and approaches these new attempts are interdisciplinary.

18. Finally, none of the existing classifications of legal families or legal family definitions have been universally accepted by scholars. In any case, David's, and Zweigert and Kötz' classifications are by far the most wide-spread and accepted, at least implicitly, by many. Despite the flaws, legal families and legal family classifications continue to exist and, more importantly, they are continuously recycled by many legal scholars. True, these scholars may not speak of legal families but I cannot see much scholarly merit in just deleting the word "family" and replacing with it "culture" or "tradition". Smoke and mirrors by and large, I daresay.

19. Realisation, that legal families and other similar types of macro-constructs are reasoned from the vast masses of detailed facts about law to generalisations, is needed if these notions are to have a future as a part of macro-comparative law. And we can go further with this assumption. As the debate over convergence between the common law and the civil law indicates, even the basic distinction of legal families into common law and civil law is a problematic one and should be understood in a context. Let alone other than Western legal traditions.

20. If I dare to speculate a bit, it may be expected that the future of legal families does look less taxonomic and overarching than previous classifications and approaches. Furthermore, we can also expect that the groupings of legal families which are based on

‘law as rules’, in a Western private law sense (legal positivist tradition), to essentially collapse. It has been argued that the Western law, altogether, is in crisis because of the weakening of the belief system on which it was historically based and because it encounters other legal traditions in the continuous construction of a body of transnational and transcultural ‘world law’. There is, in any case, anyhow, very little reason to doubt that we can expect the debate to continue among the scholars.

21. So, none of these macro-constructs is objectively better than the others – they are merely suited for different purposes. In that light, it seems likely that these notions do not replace each other but, rather, they are complementary as to their nature.

22. It is possible to conclude that there still probably is a future for the legal families approach, but it is most likely a future without a taxonomic endeavour; that is, the grand project of an exact taxonomy is ended. This more nuanced and developed legal family concept is, of course, very close to such notion as legal tradition. Today’s approaches are struggling to take into account the hybridity and plurality of law and the diminishing role of the State. It is therefore unsurprising that the macro-constructs of the future are probably quite blurred as to their borders. Despite hybridity and blurring more subtle approaches like anthropological, linguistic, or socio-legal are needed if macro-comparative law is to provide more reliable outcomes than it does by relying on the old mainstream approach.

23. Perhaps, it may prove to be an insurmountable obstacle for the legal families approach to endure successfully in a world where the State is no more the defining factor for law. But, then again, legal family classifications have never admittedly been dictated by traditional State borders. In other words, borders of States are not necessarily borders of legal families, cultures, or traditions.

24. Legal families, legal cultures, legal traditions have all been around for quite some time. They belong in the past and today of comparative law. It may be that they are also

part of the future of the discipline. On the contrary, my second comparative law discourse dealing with so-called global law has not been part of the comparative law's past. Global law is, instead, part of the present-day comparative law scene and apparently it will also be a relevant part of the future of the discipline. So, turning now to consider what “globalism” means for today's comparative study of law.

25. Global law is a vast field covering a wide array of themes and approaches. It has become a buzzword in non-nationally oriented law and legal studies. Paradoxically, nobody really seems to know exactly what it is. Open-endedness is an intrinsic part of it. Of course, there are definitions available but these definitions are by no means exhaustive.

26. Characteristically, the normative and legal conception of global law defines it as the law of non-State governance systems. These are, for instance, normativities developing beyond the scope of the sovereignty of the State. This kind of global law may develop through a formal process within an international forum (e.g. through multinational deliberation in the UN) or it may occur in a less formal manner, growing out of the common practices of a profession like, for example, the work of international arbitrators. However, this narrow legal conception of global law is not all that there is to it.

27. According to Walker: ‘Global law, whether explicitly so-called or implicitly conceived, involves various different ways of imagining...a global aspect of law to “contain” of legal variety’. Global law is closely connected to transnational law, or, as Walker says, global law is ‘one particular subset of transnational law’. If we accept Walker's idea that global law is, indeed, a subset of transnational law, then, we need to define what it is that we mean by transnational law.

28. Today it is assumed that law has somehow spilled out beyond the borders of nation-States. As a result, we can see that businesses are operating across national borders creating regulation which effectively binds business actors. In Europe we are used to

the present situation in which laws and other type of normativities are stemming from various European institutions instead of nation-State sources. Moreover, international criminal justice increasingly reaches out to catch serious violators of human rights regardless of the fact in which particular State these perpetrators are or what was the geographical location of their crimes.

29. Transnational law also affects the way how judicial professionals do their work because judges in various courts can draw on each other's ideas in such a way that we are possibly seeing the genesis of some kind of transnational judicial communities. Also human rights instruments and agencies are spreading legal ideas around the globe, thus, 'creating new expectations of rights and protections not limited by national borders'. All this characterises what global law is about.

30. Transnational law is – like global law – is an elusive notion and there is no consensus concerning its definition. We can separate different conceptions of transnational law. One possible way to answer the question consists of three different notions. It has been suggested that the first notion refers to the law that regulates all kinds of transnational phenomena. This regulation is normative in a sense that it consists of 'rules, principles and/or standards and related decisions and other juridical acts "located" in one of two kinds of legal systems: public international law or the State (national/domestic/municipal) law'.

31. The second notion is related to an area of law which gradually builds up around transnational legal problems and which takes shape in the interactive process of domestic law and interstate law creating 'the pool of norms that may be thought of as rules of decision in potentia and they also bestow authority upon certain actors to exercise a power of decision that leads to some kind of resolution of a transnational issue, problem or dispute'.

32. The third notion which we may label as transnational socio-legal pluralism, is different because it conceives ‘transnational law...as being in some meaningful sense autonomous from either international or domestic law’. Crucially, this kind of a manner to understand transnational law is much more detached from State legal systems than the first two conceptions of global law because it can be understood and constructed in a manner which gives it independent existence without the official law of the modern State.

33. The last mentioned notion of transnational law is, in fact, what global law in a *deep sense* seems to be about. Subsequently, this kind of global law is a challenge for comparative law which seems to become either useless or universal, i.e. useless because law is transforming into global and there is no point to compare or law is allegedly universal because ‘we are all comparatists now’.

34. The prevailing mind-set of today’s comparative law is described by *Universalism* and a conscious attempt to break loose from the epistemic limits set by nation-States. Even though transnational law and global law both go beyond the State, global law seems more Universalist because it appears to be interested in protecting the common interest of humanity. Interestingly, this feature has long been the research-ethical and legal theoretical mobiliser of many comparatists too. In a way, today’s global law and/or transnational law scholars carry on the Universalist tradition championed by classical comparative scholars.

35. Certainly, universalism belongs to modern comparative law too. Comparative law is non-national in essence because it consciously detaches itself from the limits set by the legal system of a nation-State. Comparative analogy dismisses borders from the point of view of research. In contrast, research interests of national legal disciplines focus on their own legal orders. Likewise, private international law and public international law have normative system-bound aspects and characteristics that separate them

from comparative law and from global law, which both are more pluralistic and fluid entities.

36. No doubt many would accept that this idea about the comparative basic dimension crossing national borders in legal research is not particularly modern or related to globalisation only. There is, and has always been, an epistemic urge to cross borders and to gain general non-national knowledge about law. In this way, it is easy to grasp that a very much alike epistemic urge – whether explicit or implicit – belongs also to global law.

37. However, the kind of universalism behind the idea of global law goes *a step further* than the epistemological universalism of comparative law. Comparative law's epistemological universalism assumes the existence of non-nation State based legal knowledge. The hard-core version of convergence-universalism struggles for a Universalist harmonization, meaning that the final goal of global law would be to spread uniformity across State borders and move towards a world law.

38. Basically, the convergence-Universalism embodies essentially a Kantian idea of cosmopolitan law. In essence, both the convergence-promoting and divergence-promoting approaches reject parochialism and in this sense they are indeed Universalist in their defiance of the legal and epistemic dominance of the State law. Both global law and comparative law critique national parochialism that is typically accompanied by legal positivism. No surprise then, that they both accommodate *legal pluralism* as an important part of their project.

39. However, and here's the thing, comparative law is an offspring of 1800s and 1900s and it took its disciplinary form during the Westphalian era of the nation-State, but the challenge of today and especially that of tomorrow is how to adapt its methodological insights to a situation where the nation-State is not the main defining entity anymore. Accordingly, the manner by which we compare fluid transnational entities will require

comparatists to keep our eyes open in the future. And yet, there are undisputed connections between comparative law and global law.

40. Where does this discussion leave us? I argue that we still need comparative law because it is a useful academic practice mediating between legal parochialism, totalizing legal uniformism, and legal centralism. No doubt, global law contains an inherent component of normative Universalism (i.e. belief that global law has universal application and is not limited in scope) and a desire to reach uniformity. Crucially, comparative law acts as an *antidote* against too uniformistic ideas about global law; it reminds of the differences and divergences between legal cultures. In brief, modern pluralist comparative law has an important function of reminding what is different and, hence, resists overarching uniformity.

41. In the end of the day, pluralist and modern comparative law is very intimately connected to the ongoing discourse on global law. We should not hasten to bury comparative law in a faddist manner because of the rise of global law. Comparative law's epistemological and global law's normative Universalism are related, yet, they are different versions of Universalism. Altogether, I very much agree with Örüçü when she says that "the assertion that 'globalization', the catchword of the new century, will diminish the value of comparative law...is a mistaken view."

42. Now, is there more general conclusion about the state of comparative law today we can make on the basis of the above discussion? What these two discourses have actually revealed to us? Or, should I have done as I suggested in the beginning of this speech i.e. should I have said "look, it's not going to happen let us go to a pub and sink into a drunken stupor for a shred of academic solace." Perhaps not.

43. What is clear, in my mind, is that comparative study of law is today a vast field and it contains many important and intellectually interesting discourses: legal transplant de-

bates, never-ending yacking around so-called functionalism, law and economy approaches, global legal history, comparative legal theory, comparative legal linguistics, quantitative approaches are but examples of present comparatively oriented discourses and debates within legal academia. If there is one general observation it would be that of pluralism. Pluralism of approaches and subjects.

44. Moreover, the legal family discourse and global law discourse both indicate one typical feature of today's comparative law. That is layeriness i.e. comparative study of law today involves several distinct layers. The problem for someone who tries to grasp the present state of comparative law is that comparative law's development has not been, is not, and will not be straightforward. For instance, this means that even while new scholars abandon legal transplant and replace it with legal irritant or legal transposition, or legal transfer or legal translation the old notion of legal transplant will not go away. So, in comparative law there really are no paradigm shifts in the sense of *Thomas Kuhn*. Generally speaking, there has been no *fundamental* change in approach or underlying assumptions. It may be that quantitative approaches will change that in the future, but, that is not a foreseeable future.

45. In the end, if we really want to understand comparative law it is essential that we conceive its change as *organic development* i.e. internal growth based on adjusting and adapting to the situations at hand. And quite frankly, my dear audience, this is the beauty and horror of comparative law not only today but also yesterday and quite likely also tomorrow. To conclude, I realise that to speak of the beauty and the horror of comparative law is violently incompatible in a phrase and yet it seems to catch poetically the true essence of comparative study of law as I see it – realizing, of course, that this view may not be shared by everyone. But that is a different story altogether.

*Thank you for your attention.*