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A Vision of Global Legal Scholarship

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A Vision of Global Legal Scholarship

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Abstract: Global legal scholarship should aim to be both post-national and inter-disciplinary. By post-national, we imply that it should rise above national legal systems and cover a more abstract corpus of knowledge about law, of which national legal systems would be an application. By inter-disciplinary, we mean that legal scholarship is enhanced by a deeper understanding of other sciences, without merging with any of them. This places global legal scholarship in a 'sweet spot', between traditional national legal scholarship and other social sciences. In order to retain its strong link with reality, global legal scholarship should also espouse empirical research methods.

Keywords: legal scholarship, global law, comparative law, inter-disciplinarity, empirical legal research

JEL classification: K0

What is the future of legal scholarship? This question is on the mind of many a legal scholar, as the traditional ways of legal scholarship are being challenged. These challenges come not just from long-term socio-economic trends (globalisation, technological advances, climate change). They also result from factors closer to home, such as the scarcity of means generally available for research. As a consequence, legal research needs to present a compelling and competitive case for access to resources, as against rival claimants.

Over the past 20 years, research faculties, including Tilburg Law School (TLS), have sought to rise to these challenges. Often taking US legal scholarship as a benchmark, European and other non-US scholars have by all accounts improved their research performance, in both quantitative and qualitative terms. Yet, US legal scholarship also suffers

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from its shortcomings. We are coming to the point where a new standard for legal scholarship might emerge from the continuing efforts of researchers across the world.

What should such scholarship look like? This short paper seeks to sketch an answer to this question. Legal scholarship should become *global*,¹ a term whose understanding is articulated around three characteristics. First of all, global legal scholarship should be *post-national*,² in that it rises above national or other legal orders in order to address law as a common, global phenomenon. Secondly, it should be *inter-disciplinary*, in that it puts law in relation with other disciplines and concerns itself with the interface between law and these disciplines. Thirdly, it should be *empirical*, in that it strives to retain a strong bond with reality, albeit perhaps a different one than before.

None of these characteristics are new, and yet – or perhaps therefore – each of them are construed in various ways in the literature. The following passages aim to go beyond received wisdom and propose a more concrete understanding of each.

1. Post-National Scholarship

This first characteristic – which is difficult to express in a single term – refers to the relationship between legal scholarship and its traditional object of study, i.e. positive law, seen as the law of a particular jurisdiction. In a nutshell, with the rise of the nation State, borders were also drawn within legal scholarship. By the end of the 19th century, within each national legal order, legal scholarship was concerned first and foremost with the study of that given order. Even then, this one-to-one relationship loosened up over time with the growth of international law and – for EU Member States – of EU law, both of which expanded the scope of inquiry of legal scholarship. At this point in time, there is widespread agreement that this one-to-one relationship might have outlived any usefulness it ever had.

Next to that, there has always been an effort, through comparative law, to break the bond between legal scholarship and the positive law of a specific regime. It is interesting to

¹ For lack of a better term. It should become apparent to the reader that there are few appropriate labels left that have not already been loaded with meaning in the literature. Accordingly, what matters here is not so much the label used, as the definition given to it.

² Here as well, there are plenty of terms to choose from to try to reflect how global legal scholarship is meant to stand in a different relationship to national legal orders than the traditional understanding of the past two centuries. ‘International’ or ‘Multi-national’ simply do not match the underlying concept. ‘Transnational’ is already quite widespread and has acquired a specific meaning, referring to private ordering next to, or bypassing, State ordering. ‘Supranational’ has a specific meaning in EU law. In the end, ‘post-national’ was chosen, even if it is also already in use, on the basis that it does suggest a dynamic phenomenon, and that it also implies that nationally-bound legal scholarship might have been a historical contingency.

see how comparative law itself evolved over time. When it began, modern comparative law was carried out from a given national regime: it was the study of ‘foreign law’, aiming at enriching the understanding of one’s own law. In short, comparative law took place from the inside looking out.

Progressively, comparative law scholars began to form an international community, which led them to take some distance from national legal communities. The perspective of comparative law then evolved, from the study of foreign law, towards the study of the various legal orders set next to one another, i.e. a proper comparison of legal orders.

It is conceivable to go one step beyond and anchor legal scholarship, not within national law, nor at the level of the various national legal orders, but above these systems. The latter are then viewed, not so much as objects of comparison, but as concrete applications of a higher, more abstract corpus of knowledge about law. The object of study of legal scholarship then becomes not a specific legal order, or even a comparison of legal orders (or *Rechtsvergleichung*, as the Germans put it), but that abstract corpus of knowledge which manifests itself in the various national legal orders. For instance, knowing what options and choices are available in the design of liability law (including the degree of relevance of conduct, various conceptions of wrongfulness – if needed – and illegality, devices to limit the ambit of liability etc.), one can study how different legal orders have made similar or different design choices and how this affects the quality of liability law.³ Of course, the options and choices are not known *a priori*; they are identified either as a result of a comparative study of the type described in the previous paragraph or otherwise through interdisciplinary inquiries (using economic analysis, for instance).

Moving to a post-national scholarship changes the position of the legal scholar. In a sense, the legal scholar is freed from the shackles of national law (or more generally of a relationship to a single legal order) and of law-producing institutions such as the *trias politica*. Even if scholarship – legal or otherwise – has always been conceived as an independent venture, it cannot be denied that a close relationship to a specific legal order creates some dependency, even if only as a matter of supplying the scholar with sources to work with and issues to research. By turning specific legal orders into applications, the legal scholar regains control over his or her research agenda, and over his or her materials. Legal scholarship regains more autonomy.

³ Quality can be measured according to many parameters, be it efficiency, effectiveness, satisfaction of the parties, etc. For the purposes of the present discussion, it is immaterial how quality is defined.

Of course, with freedom always comes responsibility. In the absence of a reference point in positive law to provide structure, it is up to the legal scholar to organise his or her research work and defend his or her choices as to how to approach, organise and select legal issues. Without wanting to explore this in detail,⁴ it can be ventured that comparative law can serve as inspiration, with its functionalist methodology. The shortcomings of functionalism can be addressed with a more elaborate policy dimension and with more dynamism, so that the resulting approach can provide a sound basis for the legal scholar.

In the longer term, post-national scholarship has significant theoretical implications as well. First of all, it is pushing the whole of legal scholarship in a more abstract and more theoretical direction. Post-national scholarship, in and of itself, tackles law at a more general or fundamental level since it takes place at a level above national legal orders; requiring a measure of abstraction from the details of these orders. The more traditional scholarship that relates to a specific legal order can then be reframed as applied research. Even if it is seen as applied, traditional scholarship would benefit from taking into account the fundamental, post-national research.⁵ By the same token, traditional scholarship is also drawn towards a more abstract level.

Secondly, the greater autonomy of legal scholarship affects its authority and its legitimacy. As long as legal scholarship relates to a specific positive law regime, it can derive some authority and legitimacy from that regime, in the sense that legal scholarship enables a better understanding of that regime (whether through synthesis or critical examination) and therefore contributes to its improvement (or at least to its sustainability). We can leave open the precise shape of that line of argument, since what matters here is that post-national scholarship stands on its own and must earn its own authority and legitimacy.

I would suggest that the answer to this issue lies in a greater emphasis on the scientific nature of legal scholarship. Here, science should not be defined too narrowly as something akin to natural sciences, but rather more broadly as a rational endeavour in pursuit of knowledge.⁶ The authority and legitimacy of legal scholars would then rest on the strength of their method and their independence.

At the same time, there are some obstacles in the way of enhancing the scientific nature of legal scholarship. One of the main ones is the lack of a clear theoretical foundation.

⁴ This is the object of a longer piece: see Pierre Larouche, 'Legal Emulation between Regulatory Competition and Comparative Law', TILEC Discussion Paper 2012-17, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044679> accessed 31 July 2012.

⁵ For instance, by way of literature review in introduction.

⁶ For all intents and purposes, the Popperian view is widely accepted, whereby falsifiability is the central pillar of science. Unfortunately, it is not clear that legal scholarship can meet that standard.

It never ceases to amaze colleagues from other disciplines that there is no agreed definition (nor even an agreed upon set of alternative definitions) for such central concepts such as justice, fairness or legitimacy. This is not to say that these concepts are meaningless or useless, quite to the contrary. They will remain at the heart of legal thought and scholarship.

One can doubt, however, whether these concepts can be defined endogenously, from within legal scholarship. This would imply that the legal scholar would have to look outside of the law for guidance on how to fill in or construe a number of concepts which play a central role in high-level legal scholarship. In other words, input from other disciplines is needed to elaborate the normative content of legal scholarship (and by extension, of law itself), hence the significance of the second characteristic, inter-disciplinarity.

2. Inter-Disciplinarity

Even if it may sound somewhat counter-intuitive, ‘inter-disciplinarity’ is more appropriate than related concepts such as ‘multi-disciplinarity’ or ‘pluri-disciplinarity’. Indeed global legal scholarship is not about combining legal scholarship with another discipline, let alone integrating it with another discipline. Rather, it should develop an interface between law and other disciplines, which would be broader than a one-on-one relationship with a single other discipline, but at the same not so deep that it would encompass entirely the other discipline.

For that purpose, it might be useful to conceive of inter-disciplinarity as a progression along a number of stages.⁷

⁷ The following model is based on the experience at TILEC over the past 10 years.

Stage 1 (Notice) is the minimum requirement to engage into any inter-disciplinary enterprise.

At Stage 2 (Listen and talk), scholars hold a monolithic view of the other discipline, i.e. the other discipline is there to provide answers to questions, as a mere input for work in one's own discipline. That input, however, does not do full justice to the other discipline.

With time, the scholar moves to Stage 3 (Compare). He or she gains a richer and fuller understanding of the other discipline. He or she understands that, much like his or her own discipline, the other discipline also has competing theories, gaps and unresolved issues. That richer understanding, however, does not yet fully feed back into the work in the own discipline.

At Stage 4 (Dialogue), the scholar goes one step further. He or she is able to situate his or her work in perspective with, and in relation to, the discussion in the other discipline. He or she connects the competing theories, gaps and unresolved issues across the disciplines. He or she uses the richer and fuller understanding of the other discipline gained at Stage 3 to sharpen and enhance his or her analysis of the open issues in his or her own discipline. Meaningful dialogue between disciplines begins. Stage 4 is probably the furthest one can go when working as a single researcher with a mono-disciplinary background and training.

The step to the further stages is large, in our experience, and it marks a departure from inter-disciplinarity towards a more multi-disciplinary model. In other words, while it is possible to bring a number of disciplines into the analysis at Stage 4, the level of integration reached at Stages 5 and 6 is hard to sustain outside of a single pairing of disciplines (e.g. law and economics, law and psychology, etc.). In order to reach Stages 5 and 6, a multi-disciplinary research team or a multi-disciplinary training (dual degree) seems required. At Stage 5, the flow of information is reversed: in addition to using knowledge of the second discipline to improve the quality of work in the first discipline, that improvement is such that in return the second discipline can be enriched: this can be achieved when two scientists from the respective disciplines work together on a joint product. Finally, at Stage 6 (Blend), the two disciplines are integrated into a larger whole.

Indeed, legal scholars should beware of over-ambition when it comes to inter-disciplinarity. In Europe, for sure, few legal scholars are trained in another discipline in addition to law. European scholars may not be able to contribute significantly to other disciplines, at least not without working in teams of colleagues from these other disciplines. At the same time, European legal scholars are usually trained more intensively in law, since a Ph.D. in law tends to be a pre-requisite for academic positions in Europe. This opens up a

window of opportunity for European legal scholarship: it could seek to build on its deeper legal expertise, while enriching it by emulating state-of-the-art inter-disciplinarity from US scholarship, thereby pushing the frontier of scholarship.

The main challenge – and the main opportunity – is to position legal scholarship in the middle of the other disciplines, without tying it too tightly to one or the other discipline in particular.⁸ By way of metaphor, the legal scholar could be assimilated to a general practitioner (GP) of medicine. General medicine connects with all specialities, without going into depth in any given speciality. However, it is concerned with the day-to-day care of patients. It deals with patients in their entirety and in their specific context. In comparison, specialists typically deal with a subset of the human body, seen with a certain measure of abstraction. Legal scholars would then be general practitioners in social sciences, able to understand specialists, call upon them, communicate with them and learn from them. At the same time, the metaphor allows some room for legal scholarship to have its own domain and function: legal scholars are ultimately being best placed to oversee the general operation of law in society. They are the ones who have the best overview and the best knowledge of what could work, or not, in a real, practical setting.

Continuing with the metaphor, with respect to any other discipline, legal scholarship will therefore be more applied. Legal scholars should not shy away from that, even if it implies that their work will be perceived as less ‘scientific’ by other disciplines (all the while aspiring to be more scientific than heretofore). Being more applied than pure economics or pure sociology means being more concerned with how the output from these sciences could actually work out in the practical context of our societies, in particular given institutional and procedural (transactional) constraints.

Herein lies a massive challenge for legal scholarship: we are not yet equipped to deal with the normative consequences of the findings of other social sciences. Not only are those findings analytical in nature, but they are also made under a set of assumptions and a research hypothesis which typically narrows the focus of inquiry to make it more manageable. A premium is put on the strength of the findings at the expense of complexity. In contrast, when it comes to investigating which normative content the law should take, lawyers are bound to take a broader perspective: the law must be such that it achieves the objectives it is meant to achieve (as they might have been agreed in the polity) while remaining coherent. A legal norm which would achieve efficiency while completely ignoring competing values, such as

⁸ Which can lead to insularity or a loss of relevance.

social justice, personal integrity or the coherency of the legal order, might conform to the findings of economic research, but it would not be acceptable from a legal perspective. Law must be operational within the broad context of the polity, with any and all goals and objectives which the polity might decide upon (even if these goals and objectives are not ‘pure’ from the analytical perspective of a given social science).

In the end, when the relationships between global legal scholarship and legal orders - on the one hand, post-national, and between global legal scholarship and other social sciences on the other hand (inter-disciplinary), are put together, one can picture a ‘sweet spot’ for global scholarship, at the intersection between the specificities of legal orders and those of each neighbouring discipline.

Even if legal scholarship remains more applied than mono-disciplinary scholarship from other social sciences, the emphasis on inter-disciplinarity nevertheless risks compounding the trend towards abstraction and generality, which was noted above in the discussion of trans-national scholarship. Legal scholarship could then cut loose from its moorings and lose a lot of its social relevance. US scholarship has already been affected by this, as evidenced by the on-going discussion on the relevance of legal scholarship (and even of the current model of legal education). In order to avert that risk, a third characteristic should be added to global legal scholarship, namely reliance on empirical research methods.

3. Empirical Research

Whereas the first two characteristics of global legal scholarship have been discussed for some time, the third one corresponds to a more recent development. At this point in time, it should be considered as an aspiration more so than a benchmark.

Empirical legal studies are rapidly expanding in the US and they are already taking root in the EU as well. Of course, it could be argued that it is a logical consequence of inter-disciplinarity: if legal research is to open up to other social sciences, then it should also open up to the methods of these sciences. Yet, this would sell both other sciences and empirical legal studies short. On the one hand, inter-disciplinary legal scholarship does not need to be empirical: many works seek to incorporate some of the more theoretical aspects of other social sciences into law,⁹ while some social sciences offer non-empirical methods which have been useful to inter-disciplinary legal scholarship.¹⁰

On the other hand, it could be argued that empirical research is more than just a methodology. It safeguards the close link with reality, which has always been the hallmark of legal scholarship. However, that link is recast. Traditionally, legal scholarship is anchored in reality through a relatively close link with legal practice: the research agenda is often driven by problems arising out of practice, the object of study is often practical situations arising out of court cases or otherwise, and the research output is meant to be relevant to legal practice.

Legal practice, however, does not necessarily offer a representative view of reality: it is often concerned with difficult or major issues, where some intervention is needed. To continue with the medical metaphor, the influence of legal practice can draw legal scholarship towards a pathology of sorts, where troublesome instances are thoroughly investigated.

The use of empirical methods to bolster legal scholarship offers another way of connecting with reality, this time via the study of empirical data. Instead of seeing a slice of reality through the prism of legal practice, the legal scholar investigates it directly and more comprehensively via empirical methods. In so doing, the legal scholar can step out of a ‘pathological’ approach into a broader perspective. Furthermore, he or she can take some critical distance from legal practice. By following an empirical approach, a scholar can afford not to be content with simply taking at face value the issues identified in legal practice.

⁹ Not to mention legal philosophy, which is by nature theoretical.

¹⁰ Economics being the prime example: many of the mainstays of law and economics literature use economic models – as opposed to econometrics or experiments – to analyse the law.

Rather, he or she can weigh them properly by investigating basic questions such as: How often does this problem arise? What are the consequences?

The current surge in empirical legal research remains strongly influenced by social science methodology. While empirical legal research is already enriching legal scholarship, at the same time its full potential still has to be developed. More specifically, other social sciences often want to match the scientific model of natural sciences.¹¹ As a consequence, their empirical methods emphasise replicability and falsifiability. When investigating law, other social sciences therefore focus on measurable and quantifiable factors, for instance the characteristics of the judge or the jury in a case, the political affiliation or geographical origin of members of parliament voting on a bill etc. Often, the actual content of the law is left outside of the investigation, since it is subject to the vagaries of interpretation (including the interpretation made by the researcher him - or herself). The most sophisticated empirical research uses computer tools to apprehend content, via word counts etc.

Nonetheless, we are still far away from having developed empirical research methods that can account for the content of law, while maintaining a satisfactory level of scientific rigour. That is one of the main challenges awaiting legal scholarship in the coming years.

4. Conclusion

In the previous paragraphs, I sought to provide new insights into the three main characteristics of global legal scholarship, i.e. that it is post-national, inter-disciplinary and empirical. These characteristics are also applicable, by extension, to global legal education, which feeds from such legal scholarship.

If global legal scholarship can develop along the lines outlined above, law schools will become one of the most vibrant places on campus and in society at large, a place where social (and other) sciences meet around global legal scholarship and where the most exciting, relevant and consequential research is conducted.

¹¹ We can leave aside whether this is a desirable aim or not.