GLOBAL COMPARATIVE LAW – RIGHT CURE FOR THE WRONG DISEASE?

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INTRODUCTION

What does present day comparative jurisprudence have to offer jurists? Many would answer pretty much, however no one really seems to be quite sure what this would involve in the age of globalisation and Europeanisation. Notwithstanding, books and articles are written and nearly everyone seems to be even convinced that comparative law does, indeed, offer something of importance. Europe is no exception to this. But are the European private law oriented discussions and debates a suitable framework from which to define the uses and gains from up-to-date comparative law? Is it really enough using only the Lando/von Bar commission, Common Core project, European Group on Tort Law and such alike?

This review-article presents and analyses Werner Menski’s interesting argument for pluralistic and genuinely global comparative law. The content and general structure of this argument is described while it is also highlighted against the present literature on general comparative law. Also, the state of comparative law as a discipline is looked at side by side with the presentation of Menski’s argument and its key points. In the end, the author highlights some of the contributions and problems that Menski’s argument may contain. In conclusion, the contribution of pluralistic and global comparative law is assessed specifically from the point of view of the European legal mind – what value, if any, does the argument for a pluralistic and diverse open comparative law epistemology have from the point of view of a pro/contra novum ius commune driven Europe.

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* This is a review article of WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (Cambridge University Press, Cambridge, 2nd ed., 2006), xx + pp. 674.

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1. SOMETHING IS ROTTEN IN THE STATE OF IUS COMPARATUM!

The above paraphrase from Shakespeare's *Hamlet* (1: 4) has replaced the original 'Denmark' into an imaginary state of Ius Comparatum i.e. the academic discipline of comparative law. What is the rationale in doing so? Now, this paraphrase is best understood as a basic perception concerning the epistemological state of the discipline of comparative law i.e. not a mere rhetorical trick of a reviewer. Rather, it is a fairly accurate depiction of the alleged widely spread epistemological anaemia of the discipline.¹ It does not require much energy to go through specialist journals and reviews and to perceive that, indeed, academic comparative lawyers do not lack a self-critical mindset. Occasionally, one may feel that whining about the poor theoretical and methodological state of comparative law is some kind of compulsory ritual for those truly initiated. We are familiar with adjectives like ‘poor’, ‘inadequate’, ‘lacking this and that’ discourse. To be sure, there is no shortage of those complaining about the poor health of the discipline.

However, these diagnoses are obviously not anything novel since there has been a legion of writings by critical scholars repeating over and over again that comparative law is Eurocentric or North America centred and that this state of affairs is an embarrassment to comparative law itself.² How can the Other legal cultures be so totally ignored, or even understood, has been one of the basic questions animating critiques and scholarship concentrated around the broad anti-mainstream movement. To name some examples: Günter Frankenberg (legocentrism i.e. strong emphasis on the role of formal state made law), Vivian Curran (cultural immersion), David Kennedy (politics & governance), Andrew Harding (public law & South East Asia), Teemu Ruskola (legal orientalism) among others have formulated this critique in its various forms in their many articles, books and chapters in books.³ Notwithstanding, nothing really radical seems to

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¹ Conceptualisations of the state of the discipline are many. One that is of specific interest here is epistemological racism which refers to the Eurocentric tradition of comparative law because it builds theories and makes classifications as if the Third World or the South would not exist. See Upendra Baxi, *The Colonialist Heritage*, in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), pp. 46-47, especially p. 53 [hereinafter Legrand & Munday].
