The Return of the Private

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Three reasons are given for why, under conditions of globalization, we comparatists should no longer focus so much on private law. The reasons are all false, and the suggestion is false, too. We should look more to private law, not less. If anything, we should focus less on public and constitutional law.

The first reason given: private law does not matter, because the most important policy decisions are made in public law. This is false. It relies on an inadequately narrow understanding of policy decisions. Even narrowly, the assumption seems false: many of the most important policy decisions occur in private law. The death penalty costs far fewer lives in the US than the mortgage contract. More broadly: globalization confronts us with a wave of private law: private contracting, protection of property rights, etc.

The second reason given: private law is merely technical and doctrinal. We should focus on law in action, not law in the books * we should look to how law plays out in society, not at how it is phrased in texts, we should look to legal culture, not legal technique. This is false, because the dichotomy is false. Law in the books is law in action. Legal technique is legal culture. Doctrine is what lawyers do, technique is what private actors do. Reducing law either to its effects on the rest of society or to an inseparable element of general culture is dangerously reductionist.

The third reason given: There is no such thing as private law, all law is public. This may be true, although in a somewhat uninteresting way, as long as we think within each legal system. Once we get outside of the state paradigm, this is untrue. Globalization transcends both the public/private and the domestic/international divides, but it does so in a way that is more interesting than a mere blurring of differences. The new divide in global law is that between domestic public law and transnational private law. Public law is domestic, private law is transnational; domestic law is public, transnational law is private. If we comparatists are interested in transnational law, we must be interested in private law.
If comparative law merely looks to the effects of regulations, it becomes a sub-discipline of comparative politics and comparative economics. If comparative law merely looks to the effects of law on society it becomes a sub-discipline of comparative sociology and anthropology. Political scientists are better at comparative politics than we are, and comparative sociologists are better at sociology than we are. What we, as lawyers, contribute to comparative law, is our expertise in, well, law, and legal theory. We should cherish, not dismiss, law. We should cherish, not dismiss, private law.