



2014

Introduction-Papers from the 2013 American Society of Comparative Law Annual Meeting

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Recommended Citation

Kenneth S. Gallant, Sarah Howard Jenkins, Introduction-Papers from the 2013 American Society of Comparative Law Annual Meeting, 36 U. Ark. Little Rock L. Rev. 149 (2014).

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INTRODUCTION—PAPERS FROM THE 2013 AMERICAN SOCIETY OF COMPARATIVE LAW ANNUAL MEETING

*Kenneth S. Gallant and Sarah Howard Jenkins**

In October of 2013, the UALR William H. Bowen School of Law was honored to host the Annual Meeting of the American Society of Comparative Law (ASCL). The ASCL is the United States' leading organization devoted to the comparative study of law, a vibrant and growing field. Traditionally, "comparative law" is defined as the study of the similarities and differences of laws of different nations. Today, however, it includes the comparison of national and international law—particularly in areas such as criminal law where a body of international criminal law is growing up alongside national criminal law—and comparisons of national law with the laws or customary rules of trade promulgated by various international organizations. Comparative law also includes the study of the relationship between formal law—such as governmental systems—and informal, social, religious, and other systems of law-like rules and behaviors that exist in every society.

The area where comparative law is of the most immediate practical use to lawyers and judges is the field of conflict of laws. A litigator or a transactional lawyer, whether addressing an interstate or transnational matter, must understand the differences among the legal regimes that may apply to her or his client and the different methods that the various interested states or nations will use to resolve conflicting rules of law.

Given the importance of this area of the law, Bowen School of Law proposed Comparative Conflicts of Law as the overall theme for the 2013 ASCL Annual Meeting. This theme aligns with Bowen's mission to advance both the study of law and the practice of law in Arkansas and the United States.

* Bowen School of Law is represented in the American Society of Comparative Law by two faculty members. Professor Kenneth S. Gallant is Bowen Law School's Delegate to the ASCL. Sarah Howard Jenkins, Charles C. Baum Distinguished Professor of Law, is Bowen's designated Editor for the ASCL's American Journal of Comparative Law. Both served as co-chairs of the 2013 annual meeting and are grateful to Deans John M. DiPippa, Paula Casey, and Michael H. Schwartz for the financial and staff support provided for organizing and conducting the meeting. We would also like to thank staff administrative assistants: Colleen Godley, Vinnie Francis, Terry Harrison, Jennifer Maxwell, and Haley Walker; Assistant Dean Wanda Hoover and former Communications Director Tonya Smith; Interim Library Director Kathryn Fitzhugh and Library Coordinator Tina Medlock.

The ASCL accepted this theme, as well as Bowen's proposal to host the 2013 meeting. Together with the ASCL Annual Meeting Committee, chaired by Professor Ralf Michaels of Duke University, we developed a program centered on that theme. In addition to the general theme of Comparative Conflict in Laws, the meeting featured a Hot Topics panel entitled Privacy, Transparency and Surveillance in the Age of Big Data and a panel of papers submitted by Younger Comparativists—comparative law professors who have been teaching for less than ten years.

In this issue, we present two outstanding papers from the 2013 ASCL Annual Meeting. The first addresses the overall theme of the meeting, Comparative Conflict of Laws: *Globalization and Private International Law in Commonwealth Africa*, by Richard Frimpong Oppong, Assistant Professor of Law at Thompson Rivers University in Kamloops, British Columbia, Canada. The second is taken from the Hot Topics Panel on Privacy, Transparency and Surveillance in the Age of Big Data: *The Snowden Revelations, the Transatlantic Trade and Investment Partnership and the Divide between U.S.-EU in Data Privacy Protection*, by Ioanna Tourkochoriti, Wertheim Fellow at Harvard Law School.

Professor Oppong's contribution demonstrates the importance of private international law—another term for “conflict of laws”—principles applied by courts, to regional economic integration on the continent of Africa. He focuses on how the recognition of one nation's court judgments by surrounding nations is vital for private contracting parties to trust that their rights will be respected in both of their nations. He points out the importance of recognition of judgments to successful regional economic integration regimes such as the European Union and MERCOSUR.

Professor Oppong demonstrates that Africa's failure, especially the common-law African countries, to participate in the political processes and arrangements necessary to harmonize conflict of laws regimes is responsible for the meager levels of commerce among its nations as opposed to trade with more developed but more distant countries. He points out, however, that the courts of some common-law African countries have begun to deal with issues of private international law rules and harmonization of laws within the limits of the statutory powers of African countries. He proposes a way forward for increased participation in legal systems in common-law Africa to improve legal and economic cooperation in the region in order to promote growth.

Dr. Oppong's work might appear far removed from the interests of American lawyers, except those whose clients trade with African businesses or who represent African businesses and individuals. However, there are two indirect lessons for the United States in his work. The first is that his work truly demonstrates the importance of the Full Faith and Credit Clause of the United States Constitution in unifying a continental-scale economy. In

the absence of such a unifying legal text, legal and commercial relations between the countries of common-law Africa are difficult.

The second is that the current incoherence among the states of the United States concerning choice of law systems can have deleterious consequences in the long run. His paper suggests that conscious attention to unifying or harmonizing choice of law rules may be necessary to this task. Within the American legal system, this can be done by parallel state legal development—such as the Uniform Commercial Code’s choice of law provisions, through Congressional action under the Full Faith and Credit Clause of the Constitution, or through joint State-Federal cooperation under the Interstate Compact Clause.

In contrast, Dr. Tourkochoriti’s paper provides a comparative assessment of data privacy in the United States and the European Union, focusing mostly on data held in private hands. She begins with the context of negotiation for freer trade between the United States and Europe pursuant to the current Transatlantic Trade and Investment Partnership negotiations. This is of particular interest in Arkansas, the home of Acxiom, Inc., one of the world’s largest collectors and processors of information for commercial and marketing purposes.

She develops the differences between United States and European Union laws concerning the collection, processing, and usage of data about private persons. She addresses both governmental and private data collections but focuses on the latter.

Dr. Tourkochoriti identifies a vital difference between American and European attitudes on data collection, processing, and retention. The American legal attitude towards data collection and usage embodies the same libertarian presumption seen in American law generally: data collection and usage is permitted unless there is a rule against it. The European legal attitude, based in the European Convention on Human Rights, is that collection and usage of personal data are prohibited, as a breach of privacy, unless such collection and usage is allowed by law. Moreover, the United States permits much greater latitude for parties, including large collectors of data to contract out of limitations on data usage. This difference has a similar origin: the American emphasis on freedom of contract—versus the European emphasis on the value of privacy as a positive human value, which may be protected by making it non-waivable in some circumstances. Certain skeptical Americans might add that “waivers” of privacy in the United States have essentially become contracts of adhesion. It is effectively impossible to get products and services on the internet, or even internet service itself, without allowing the service provider to use personal information for marketing purposes. Dr. Tourkochoriti delineates how these differences in attitude have developed into vastly different regimes of private data collection.

Finally, Dr. Tourkochoriti identifies the points that will need to be negotiated between the United States and Europe in order for the Transatlantic Trade and Investment Partnership talks to succeed. In particular, she identifies ways in which harmonization of privacy rules might occur. Using comparative law technique, Dr. Tourkochoriti has illustrated not only differences between the European and American the data privacy laws but has also given a convincing hypothesis of the reason for this difference and identified a way that these differences might be resolved.

Dr. Tourkochoriti's paper, like Professor Oppong's paper, has an indirect lesson for regulators and conflict of laws scholars, a lesson about the limits of conflict of laws. One might try to use conflict of laws rules to resolve the U.S.-EU differences over data privacy. Strict regulation of jurisdiction over data generated in the EU and in the United States, might allow entities which collect, analyze, and use data in each place to understand their duties and responsibilities. Such a jurisdictional wall, however, would likely frustrate at least some of the integrative goals of the Transatlantic Trade and Investment Partnership talks. Thus we have a good example of a difference between national, U.S. domestic, and supra-national, EU, laws which cannot be adequately dealt with by even the best private international law, conflict of laws, system. The U.S. and the EU must instead work to harmonize the substance of their data privacy regimes. Although the comparative law processes can identify the differences and similarities between legal regimes, it is the nations themselves that must work to harmonize the disparate values and standards reflected in their laws.