Historicism, Evolutionism and the Rise of Comparative Law: Nineteenth and Early Twentieth Century Perspectives

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INTRODUCTION

Comparative law is traditionally defined as an intellectual activity whose object is the comparison of legal systems with a view to obtaining knowledge that may be used for a variety of theoretical and practical purposes. It encompasses: the comparing of legal systems with the purpose of detecting their differences and similarities; working with the differences and similarities that have been detected (for instance explaining their origins, evaluating the solutions utilized in different legal systems, grouping legal systems into families of law or searching for the

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common core of the systems under comparison); and the treatment of methodological problems that arise in connection with these tasks, including methodological problems connected to the study of foreign law.[1] Comparative law, as a distinct discipline, emerged in the nineteenth century. This development was precipitated by a number of factors. Of particular importance were the consolidation of the idea of the nation-state and the proliferation of national legislation; the expansion of international commercial relations, which brought litigants, lawyers and judges into contact with foreign legal systems; and the growing interest in the scientific study of social phenomena in a broader historical and comparative context. Comparative law may thus be said to have emerged from two distinct sources: legislative comparative law, when foreign legal systems are considered in the process of elaborating new national laws; and scientific or theoretical comparative law, when the comparative study of diverse legal systems is undertaken with the purpose of gaining a improved understanding of law as a social and cultural phenomenon.[2]

The development and consolidation of the nation-state during the eighteenth and nineteenth centuries and the growth of national legislation brought to an end legal unity in Europe and the universality of European legal science. National ideas, historicism, and the movement towards the codification of law[3] gave rise to a sources-of-law doctrine

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1 See M. Bogdan, *Comparative Law*, (Deventer: Kluwer, 1994), 18.

2 See K. Zweigert and H Kötz, *An Introduction to Comparative Law*, (2nd edn, Oxford, Clarendon Press, 1987, repr. 1993), 50.

3 The first national codes designed to achieve legal unity within one kingdom were compiled in Denmark (1683) and Sweden (1734). The process of codification continued in the late eighteenth and early nineteenth

that tended to exclude rules and decisions which had not received explicit recognition by the national legislator or the national judiciary.[4] Whether one stressed the *will of the nation* as a source of law or held that law expressed the organic development of the *national spirit*, law came to be viewed as a national phenomenon.[5] In this context, foreign law could

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centuries with the introduction of codes in Bavaria (*Codex Maximilianeus Bavaricus*, 1756), Prussia (*Allgemeines Landrecht für die Preussischen Staaten*, 1794) and Austria (*Allgemeines Bürgerliches Gesetzbuch*, 1811). The most important codificatory event of this period was Napoleon's enactment in 1804 of the French Civil Code (*Code civil des francais*). The importance of Napoleon's Code is attributed to not only the fact that it fostered legal unity within France, but also the fact that it was adopted, imitated or adapted by many countries throughout the world. This was partly due to its clarity, simplicity and elegance that rendered it a convenient article of exportation and partly due to France's influence in the nineteenth century.

4 The nationalization of the sources of law was due not only to ideological but also to social factors that, in a way, preceded the rise of nationalism. Industrialization and the early capitalism of the late eighteenth century were among the conditions that precipitated this development.

5 The influential German historical school challenged the natural law notion that the content of the law was to be found in the universal dictates of reason. According to Friedrich Carl von Savigny, a leading representative of this school, law is similar to language, ethics and literature in that it is a product of the history and culture of a people, and exists as a manifestation of national consciousness (*Volksgeist*) – it cannot be derived from abstract principles of natural law by logical means alone. In Savigny's words, " positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*). …[I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law…". *System des heutigen römischen Rechts*, Vol. I, (Veit, Berlin, 1840) 14. The rise of the Historical School was a manifestation of the general reaction to the rationalism of the School of Natural Law and the political philosophy associated with the French Revolution and the regime of Napoleon.

not be regarded as authoritative; it might only provide, through the medium of legal science, examples and technical models for the national legislator (i.e., it was still relevant in *de lege ferenda* connections).[6] One of the chief objectives of comparative law during the nineteenth century was the systematic study of foreign laws and legal codes with the view to developing models to assist the formulation and implementation of the legislative policies of the newly established nation-states. As the industrial revolution in Europe advanced, an extraordinary growth of legislative activity was stimulated by the need to modernize the state and address new problems generated by technical and economic developments. In drafting codes of law, the national legislators increasingly relied on large-scale legislative comparisons that they themselves undertook or mandated. Interest in the comparative study of laws, especially in the field of commercial and economic law, was also precipitated by the expansion of economic activities and the growing need for developing rules to facilitate commercial transactions at a transnational level.[7]

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6 A certain degree of universalism was typical of the nineteenth century laissez-faire economic theory. It advocated free trade. As far as questions of internal economic policy were concerned, empirical materials were relied upon irrespective of their provenance. Even though the interests of industry and trade were partly international, the basic presupposition was a strong liberal state capable of warranting internal discipline.

7 The growing interest in comparative law during this period is reflected in the establishment of various organizations and scholarly societies dedicated to the comparative study of laws. These included the Société de Législation Comparée in France; the Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre in Germany; and the Society for Comparative Legislation in England. The growth of interest in comparative law is manifested also by the increasing emphasis

By the close of the nineteenth century comparative law was associated with a much loftier goal, namely, the unification of law or the development of a common law of civilized mankind (*droit commun de l'humanité civilisée*), as declared at the first International Congress of Comparative Law held in Paris in the summer of 1900. At that Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of diverse legal systems, of norms and principles common to all civilized mankind. Such universal norms and principles may be taken to constitute the basis of a relatively ideal law – a kind of natural law with a changeable character.[8] The ideal of legal unification was also stressed at the twentieth anniversary of the International Association for Comparative Law and National Economics, held on the eve of the First World War in Berlin, where it was proclaimed that the association would continue to

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on comparative law as a subject in legal education.

8 "Conception et objet de la science juridique du droit compare", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, (1905-1907), I, 167 at 173. The unitary and universalistic mentality underpinning proposals presented at the Paris Congress reflected the influence of schools of thought that dominated European legal science in the nineteenth and early twentieth centuries. At the same time, many of the positions advanced at the Congress were in line with new jurisprudential trends emerging as a reaction to legal positivism and the formalism and extreme conceptualism of the traditional approach to law. Examples of such trends include *Zweckjurisprudenz* (focusing on the purposes that legal rules and institutions serve) and *Interessenjurisprudenz* (focusing on societal interests as the chief subject-matter of law), which were precursors of legal realism and the sociology of law. These new approaches are also connected with the development of functionalism in comparative law.

strive for the harmonization of law under the principle, "through legal comparison towards legal unification."[9] This statement reflects the hopes of early comparatists concerning the establishment of a future world law by relying upon the methods of comparative law.

One should note that the universalist aspirations for the establishment of, or a return to, legal unity are reflected in comparative legal scholarship already present in the nineteenth century. As already observed, by that time national ideas and the great codifications of the law in Europe had put an end to the Roman law-based *ius commune Europaeum*, leading to the establishment of diverse national legal orders. When comparing different systems of law, many jurists of that era had idealist, rational, liberal and enlightened motives. Believing in the basic unity of human nature and human reason, they sought to identify, through the comparative study of laws, the best solutions to legal problems that the national legislator could adopt. To them, the fact that laws and legal codes differed suggested that not all the various drafters fully grasped the precepts of reason in relation to certain common problems. Thus, they saw their chief task to be the elimination of confusion with a view to bringing to light the legal solutions that right reason would support. To them, legal rationalism, legal universalism and the uniqueness of solutions all pointed to the same unitary idea: the *Ius Unum*.[10]

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9 See Karl von Lewinski, "Die Feier des zwanzigjährigen Bestehens der Internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre", (1914) 9 *Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre*, suppl. to issue 9, 3.

10 Notwithstanding the decline of the idea of natural law, many scholars still believed in a universal truth, hidden behind historical and national

A second strand of universalism, connected with the development of comparative law as a branch of legal science or a scientifically devised method, was historicism, which in the nineteenth century became the basic paradigm of almost all sciences. The primary objective of legal-historical comparatism was to reveal the objective laws governing the process of legal development and, following the pattern of the Darwinian theory of evolution, to extend the scope of these laws to other social phenomena. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought to construct evolutionary patterns that would enable them to uncover the essence of the 'idea of

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variations, which could be brought to light through the comparative study of laws. In the words of the German philosopher Wilhelm Dilthey, "As historicism rejected the deduction of general truths in the humanities by means of abstract constructions, the comparative method became the only strategy to reach general truths." "Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften" in *Gesammelte Schriften*, Vol. VII, (4th edn. Göttingen, 1965, first published in 1910), 77 at 99. In 1852, Rudolf von Jhering deplored the degradation of German legal science to "national jurisprudence", which he regarded as a "humiliating and unworthy form of science", and called for comparative legal studies to restore the discipline's universal character. See Jhering, *Des Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Vol. I, (9th edn, Scientia-Verlag, Aalen, 1955), 15. See in general R. David, *Traité élémentaire de droit civil compare: Introduction à l'étude des droits étrangers et à la méthode comparative*, (Librairie générale de droit et de jurisprudence, Paris, 1950), 111; M. Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts*, (Steiner, Stuttgart, 1998), 7-8, 12, 24; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987), Chapter 4, 52 ff. Consider also W. Hug, "The History of Comparative Law", (1931-32) 45 *Harvard Law Review*, 1027 at 1069.

law'.[11]

The works of nineteenth century scholars, which endeavoured to explain legal phenomena on a historical-comparative plane, paved the

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11 The influence of this school of though is reflected in more recent discussions of the nature and aims of the comparative study of laws. According to M. Rotondi, comparison is one of two methods (the other being the historical method) whose combination can give us a comprehensive knowledge of law as a universal social phenomenon. Legal science relies upon these methods in order to detect and construe the (natural) laws governing the evolution of this phenomenon. In searching for relations between different legal systems, or families of legal systems, one seeks to discover, to the extent that this is possible, certain stable features in this evolutionary process that may allow one to foreshadow future developments concerning the character and orientation of legal systems and branches of law. "Technique du droit dogmatique et droit compare", (1968) *Revue internationale de droit comparé*, 13. And according to H. E. Yntema, comparative law, following the tradition of the *ius commune* (*droit commun*), as an expression of the deep-rooted humanist vision concerning the universality of justice, and based on the study of historical phenomena, seeks to discover and construe in a rational way (*en termes rationnels*) the common elements of human experience relating to law and justice. In the world today the primary task of comparative law is to elucidate the conditions under which economic and technological development can take place within the framework of the Rule of Law. "Le droit comparé et l' humanisme", (1958) *Revue internationale de droit comparé*, 698. According to G. del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." "L' unité de l' esprit humain comme base de la comparaison juridique", (1950) *Revue internationale de droit comparé*, 688. See also F. Bernhöft, "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", (1878) 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1 at 36-37. And see E. Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft* 13 at 17.

way for the recognition of comparative law as a branch of legal science and a distinct academic discipline. This approach to comparative law also received strong impulses from other sciences that at that time had recourse to the comparative method of analysis. Like comparative anatomy, comparative physiology, comparative religion, comparative philology and, later, comparative linguistics, comparative law was swept along in the welter of comparative disciplines founded upon the comparative method. But the reasons for the rapid growth of comparative law in this period should be sought, above all, in historical reality. Developments such as the proliferation of national legislation, which often involved the borrowing of legal models from one country to another, the growth of transnational trade and commerce and the spread of European colonialism around the world drove jurists to transcend the framework of national law, giving further impetus to comparative legal studies.

PIONEERS OF COMPARATIVE LAW IN GERMANY

In the fifteenth century, the problems generated by the fragmented nature of the law in Germany became intolerable as commercial transactions proliferated between the different territories.[12] Local custom was no longer adequate to meet the needs of a rapidly changing society,

12 During the early Middle Ages, the law that applied in Germany was customary law that tended to vary from region to region. After the establishment of the Holy Roman Empire of the German Nation in the tenth century, imperial law (concerned almost exclusively with constitutional matters) contributed as an additional source of law.

and the weakness of the imperial government meant the unification of the customary law by legislative action alone was unthinkable. If a common body of law could not be developed based on Germanic sources, another system offered a readily available alternative, namely, Roman law. This idea found support in the newly established German universities, where the teaching of law was based exclusively on Roman and canonical sources whilst Germanic customary law was largely ignored. German jurists regarded Roman law as superior to the native law and existing in force both as written law (*ius scriptum*) by virtue of the imperial tradition and as written reason (*ratio scripta*) due to its inherent value. By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[13] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence.[14] In some parts of Germany (such as Saxony), Germanic customary law survived and certain institutions of Germanic origin were retained in the legislation of local princes and of cities. Legal practitioners and jurists from the sixteenth to the eighteenth century executed the process of moulding into one system the Roman and Germanic law,

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13 German scholars use the phrase '*Rezeption in complexu*', that is 'full reception', to describe this development.

14 The Roman law that was received embodied the Roman law of Justinian, especially the Digest or Pandects, as interpreted and modified by the Glossators and the Commentators. This body of law was further modified by German jurists to fit the conditions of the times and thereby a Germanic element was introduced into what remained a basically Roman structure. For a closer look on the reception of Roman Law in Germany see G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*, (Heidelberg & New York, Springer, 2015), Chapter 7, pp. 265 ff.

which led to the development of a new approach to the analysis and interpretation of Roman law – referred to as *Usus modernus Pandectarum* ('modern application of the Pandects/Digest').[15]

In the early years of the nineteenth century the French Civil Code enacted under Napoleon in 1804 attracted a great deal of attention in Germany and parts of the country adopted this law as Napoleon extended his rule over Europe. The rise of German nationalism during the wars of independence compelled many scholars to express the need for the introduction of one uniform code for Germany to unite the country under one modern system of law and precipitate the process of its political unification. In 1814, Thibaut (1772-1840), a professor of Roman

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15 The term *Usus modernus Pandectarum* implies that the jurists' purpose was to apply the Roman legal texts in contemporary legal practice. These jurists may to some extent have been influenced by the work of the Humanist scholars of the sixteenth and seventeenth centuries, but they tended to use the Roman texts ahistorically, as just another source of legal norms. However, there was no general agreement among jurists as to which texts actually applied. Leading representatives of this movement include Samuel Stryk (1640-1710), a professor at Frankfurt a.d. Oder, Wittenberg and Halle; Georg Adam Struve (1619-1692); Ulric Huber (1636-1694); Cornelis van Bynkershoek (1673-1743); Arnoldus Vinnius (1588-1657); Gerard Noodt (1647-1725); and Johannes Voet (1647-1713). On the *Usus modernus Pandectarum* see F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 159 ff; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 225; A. Söllner, "Usus modernus Pandectarum" in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. II: Neuere Zeit (1500-1800), 1. Teilband, Wissenschaft* (Munich 1977), 501-516; R. Voppel, *Der Einfluß des Naturrechts auf den Usus modernus* (Köln 1996); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (Heidelberg 2005), 76-83.

law at Heidelberg University, declared this view in a pamphlet entitled 'On the Necessity for a General Civil Code for Germany'.[16] Thibaut, a representative of the natural law movement, claimed that the existing French, Prussian and Austrian civil codes could serve as useful models for the German draftsmen. However, Thibaut's proposals encountered strong opposition from the members of the Historical School, headed by the influential jurist Friedrich Carl von Savigny (1779-1861).[17] Proceeding from the idea that law is primarily a product of the history and culture of a people and a manifestation of national consciousness (*Volksgeist*), Savigny argued that the introduction of a German Code should be postponed until both the historical circumstances that moulded the law in Germany were fully understood and the needs of the present environment were properly assessed.[18] The influence of the Historical School and, perhaps more importantly, the lack of an effective central government, resulted in the abandonment of the early proposals for codification. At the same time, scholarly attention shifted from the

16 A. F. J. Thibaut, "Rezension über August Wilhelm Rehberg, *Ueber den Code Napoléon und dessen Einführung in Deutschland* (1814)" in *Heidelbergische Jahrbücher der Litteratur*, 7 (1814) at 1-32; and see: *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg 1814).

17 Savigny officially founded the School in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781-1854). They edited the programmatic journal of the School, the *Zeitschrift für geschichtliche Rechtswissenschaft* – the predecessor of the modern *Savigny-Zeitschrift*.

18 Savigny elaborated his thesis in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science' (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg 1814). For a closer look at the programmatic writings of Thibaut and Savigny see H, Hattenhauer, *Thibaut und Savigny: Ihre programmatischen Schriften*, (F. Vahlen, Munich, 1973).

largely ahistorical natural law approach to the historical examination of the two main sources of the law that applied in Germany, namely Roman law and Germanic law, in order to develop a true science of law. A group of scholars focused on the study of Germanic law, whilst others (including Savigny) concentrated on the study of Roman law and explored beyond the *ius commune* into the *Corpus Iuris Civilis* and other ancient sources. The latter jurists set themselves the task of studying Roman law to expose its 'latent system', which could be adapted to the needs and conditions of their own society. In executing this task, these jurists (designated Pandectists) elevated the study of the *Corpus Iuris Civilis* and especially Justinian's Digest to its highest level.[19] They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany. The new German civil law, that was finally embodied in the Civil Code (*Burgerliches Gesetzbuch* or BGB) of 1900, was largely the product of the work of the Pandectists. Extra-Pandectist sources exercised little influence on this law, despite the presence of diverse legal systems and law codes (such as the French Civil Code) in

19 Leading representatives of the Pandectists included Georg Puchta, Adolf Friedrich Rudorff, Ernst Immanuel Bekker, Alois Brinz, Heinrich Dernburg, Rudolf von Ihering and Bernhard Windscheid. In this connection, the contribution of Puchta (1798-1846) deserves special mention. Puchta emphasized the academic nature of law and the central role of the jurist in the law-making process at the final stage of the legal development of a people. He drew attention to the study of law as a coherent logical system built from interrelated concepts existing on a purely intellectual level. As the norms of positive law emerge principally through logical deductions from concepts, the legitimacy of legal rules is the result of logical-systematic correctness and rationality. In his works *Lehrbuch der Pandekten and Cursus Institutionum*, Puchta applied those ideas to the study of Roman law.

German territory, and notwithstanding the considerable amount of comparative law research that preceded the publication of the BGB. Indeed, from the beginning, the study of civil law in Germany has been a largely national affair built upon the *Pandektenrecht*.

The dominance of the Historical School and the conceptual jurisprudence of the pandectists in nineteenth century German legal thought account for the relative neglect of comparative law in Germany, especially during the period 1840-1870.[20] In the early years of that century, comparative law attracted the interest of a number of jurists, the most eminent of whom was Eduard Gans (1798-1839),[21] who studied law at Berlin, Göttingen and finally Heidelberg, where he attended Hegel's lectures and became thoroughly imbued with the principles of Hegelian philosophy. In his famous work on the law of inheritance,[22] Gans

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20 It should be noted here, moreover, that nineteenth century German legal positivists tended to discount the value of comparative law as a branch of legal science. In the words of E. R. Bierling, comparative law is "of little or no use for learning the principles of law." See *Juristische Prinzipienlehre* I., (Freiburg i. Br./Leipzig: Mohr, 1894), 33. Even after German legal positivism yielded to the neo-Kantian search for 'just law' in the early twentieth century, some German jurists rejected the notion that comparative law may be relied on as a means of discovering the just law. They argued that the comparative study of laws that were factually conditioned could never enable us to grasp those unconditionally valid modes of thought that are needed for the scientific study of law. Consider, e.g., R. Stammler, *Lehrbuch der Rechtsphilosophie*, (Berlin & Leipzig: W. de Gruyter & co, 1922), 11.

21 Gans is said to be the founder of German comparative law. Consider on this Franklin, Mitchell, "The Influence of Savigny and Gans on the Development of the Legal and Constitutional Theory of Christian Roselius", 1 *Festschrift Rabel* (Mohr, 1954), 141.

22 E. Gans, *Erbrecht in Weltgeschichtlicher Entwicklung*, (Berlin: Maurer, 1824-1835).

attempted a comparison of a diversity of legal systems (including Ancient Greek and Roman, Scandinavian, Scottish, Portuguese, Chinese, Indian, Hebrew and Islamic) in the spirit of *Universalrechtsgeschichte* or Universal History of Law. From a philosophical standpoint, the origins of German comparative law can be traced to the work of Hegel, especially his notion of the variety and asymmetry of human civilizations and their constituent institutions, such as law and ethics.[23]

A revival of interest in comparative law occurred in the later part of the nineteenth century. This revival was triggered in part by a practical interest in the study of foreign laws for purposes of legislation and was connected with the movement for the codification and

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23 According to Hegel, law and ethics are expressions of a historical evolution that is the manifestation of a national spirit, and the various national spirits in their entirety are manifestations of the world spirit. But Hegel's view of law must not be confused or equated with that of the Historical School as represented by Savigny. Although the Historical School, like Hegel, adopted the notion of national spirit, the use made of this concept was fundamentally different. Whereas in the Historical School theory it served as a rather nebulous unifying principle, providing a kind of a general bracket for the study of the development of legal institutions, the national spirit in Hegel's philosophy was given the function of expressing a universal freedom, a principle designated as the manifestation of the world spirit. Philosophy, Hegel says, "concerns itself only with the glory of the idea mirroring itself in the history of the world. [It] escapes to the calm region of contemplation from the weary strife of the passions that agitate the surface of society; that which interests it is the recognition of the process of development which the idea has passed through in realizing itself, the idea of freedom whose reality is the consciousness of freedom and nothing short of it." See C.J. Friedrich (ed.), *The Philosophy of Hegel*, (New York: Random House, 1954), pp. 157-58.

unification of the law in Germany.[24] Extensive comparative law research preceded the German Civil Code of 1900 and other enactments,[25] as well as legislative reforms in the field of criminal law. The rise of interest in comparative law during this period was associated also with a significant growth in historical, sociological and anthropological scholarship. Of particular importance was the rise of ethnological jurisprudence, a field of study combining the perspectives of ethnology and comparative law and concerned with discovering "the origins and early stages of law in relation to particular cultural phenomena."[26] Leading representatives of this field were Albert Hermann Post (1839–1895), Franz Bernhöft (1852-1933) and Josef Kohler (1849-1919).

Post's starting-point was the assumption that society is defined through the evolution of the law and its symbolic practices. If the legal

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24 The practical aims of comparative law were drawn attention to in the world's first journal devoted to comparative law, founded by Karl Salomo Zachariä and Karl Joseph Anton von Mittermaier in 1829. See *Kritische Zeitschrift Für Rechtswissenschaft und Gesetzgebung Des Auslandes*, No. 1 (1829) 25. Mittermaier, a professor at Heidelberg, was the first jurist to utilize comparative law by systematically comparing, contrasting and evaluating the laws of diverse countries. His work went beyond the study of statutory enactments into the reality of law as practiced in the courts and the social and political context in which law operates.

25 Reference should be made here to the General German Negotiable Instruments Law enacted in 1848 and the General German Commercial Code of 1861, both of which drew on comparative studies not only of the laws of different regions of Germany but also of the relevant laws of other European countries, such as the Dutch Commercial Code of 1838.

26 L. Adam, "Ethnologische rechtsforschung", in L. Adam and H. Trimborn (eds), *Lehrbuch der Volkerkunde* (Stuttgart, Enke, 1958), 192. The new interest in ethnological jurisprudence and related matters was given a focus in the *Zeitschrift für Vergleichende Rechtswissenschaft*, founded in 1878.

order played a major part in shaping societal culture as a whole, as contemporary anthropologists recognized, then a historical approach to the study of law could engender a really scientific model of explanation only if it was able to integrate indigenous legal practices into a universal theory of legal evolution. The focus of Post's scholarly endeavours was the construction of a general science of law on an anthropological basis. He describes what he refers to as 'the universal law of mankind' in terms of diverse forms of social organization, on the grounds that the law is a function of 'social formations' brought about by the 'spirit' or 'mentality' of a people. The historical and comparative study of laws received a considerable impetus through ethnology, which Post describes as "that new science which deals with the life of all nations according to a method arising purely from natural sciences and which has embraced into its realm all peoples on earth."[27] According to him, comparative ethnology enabled jurists to discover "far-reaching parallels in the laws of all peoples on earth which could not be reduced to accidental correspondence, but which could only be regarded as emanations of the common nature of mankind."[28] Ethnological jurisprudence thus focuses on the discovery of those legal norms and institutions which can be found among all peoples of the world.[29] It should be noted that, although

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27 A.H. Post, *Grundriss Der Ethnologischen Jurisprudenz*, (Oldenburg and Leipzig, Schulze, 1894), I, 2.

28 A.H. Post, *Grundriss Der Ethnologischen Jurisprudenz*, (Oldenburg and Leipzig, Schulze, 1894), I, 4.

29 A.H. Post, *Grundriss Der Ethnologischen Jurisprudenz*, (Oldenburg and Leipzig, Schulze, 1894), I, 7. Post views law as a universal phenomenon. "There is no people on earth without the beginnings of some law. Social life belongs to human nature and with every social life goes a law." Ibid, 8.

Post adopts a functional view of law as a product of a particular socio-psychological order, his work is concerned more with the systematic ordering of the bewildering multitude of customary laws than with explaining the evolution of legal systems.[30]

Another prominent figure in German ethnological jurisprudence was Franz Bernhöft, who, together with Georg Cohn, edited the fist volume of the Journal of Comparative Jurisprudence (*Zeitschrift für Vergleichende Rechtswissenschaft*) in 1878.[31] Bernhöft stressed the importance of expanding the scope of comparative jurisprudence beyond the study of the Roman and Germanic legal systems, the focus of the German Historical School. A legal science based on consideration of these two systems alone would be incomplete, just as it would be incomplete a science of comparative linguistics based on the study of only two languages. Moreover, Bernhöft drew attention to the value of the comparative study of foreign laws as an aid to legislation and, in particular, the codification of law in Germany. But, for him, the ultimate aim of comparative jurisprudence was to bring to light the general laws governing the development of law and to apply them to the history of particular nations.[32] It is important to note, however, that Bernhöft's

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30 For an in-depth discussion of Post's work within the framework of nineteenth century scientific thinking consider R.M. Kiesow, *Das Naturgesetz des Rechts*, (Frankfurt am Main; Suhrkamp, 1997).

31 This journal, as well as the International Society of Comparative Law and Economics (*Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre*), founded in 1894 by F. Meyer, gave an important impetus to the development of comparative law in Germany.

32 In Bernhöft's words, "[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them

definition of comparative jurisprudence did not extend beyond law in the strict sense of the word, i.e. positive law. From this viewpoint, customs may be seen as belonging to a merely preliminary stage in the development of law, and thus they could be considered only insofar as they have contributed to the formation of positive law.

The problematic distinction between peoples with and without law was called into question by Josef Kohler, who became editor of the above-mentioned *Zeitschrift für Vergleichende Rechtswissenschaft* in 1882. Although he had a distinguished career in legal practice as a judge and an expert in the fields of commercial and incorporeal law, Kohler was convinced that the scope of jurisprudence extended beyond practical problems and goals to the study of law as a social and cultural phenomenon.[33] His work in comparative law was at first concerned with the comparison between German law and the legal systems of other European states, as well as the United States. Furthermore, he examined the structure of legal orders in non-independent territories, mainly those under the protection of the German Reich (*Schutzgebieten*).[34] Although he initially adopted Post's theory of legal evolution, according to which the European legal systems represented the highest level of a 'natural'

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according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, for the idea of law." "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", 1 *Zeitschrift für vergleichende Rechtswissenschaft*, (1878), 1 at 36-37.

33 See on this B. Grossfeld & I. Theusinger, Josef Kohler, Brückenbauer zwischen Jurisprudenz und Rechtsethnologie, *RabelsZeitung* 64 (2000), 696.

34 Consider B. Grossfeld & M. Wilde, Josef Kohler und das Recht der deutschen Schutzgebiete, *Rabels Zeitschrift* 58 (1994), 59.

course of legal development, he later departed from it and recognized that law evolves in diverse ways as an interdependent element of the mental and material culture of a particular people.[35] He thus adopted the view that the construction of a 'universal' science and history of law would presuppose a broader study that would embrace the laws and customs of peoples from all parts of the world and consider the development of diverse legal institutions on a comparative basis. In his voluminous work, consisting of more than 2,300 scientific publications (including books, articles and reviews), he describes and explores the laws of peoples in all corners of the earth.[36] In seeking to build the foundation of a truly universal science of law, he extended the scope of

35 Nevertheless, he often expressed the view that non-European peoples should adopt and evolve according to the European model. See B. Grossfeld & M. Wilde, Josef Kohler und das Recht der deutschen Schutzgebiete, *Rabels Zeitschrift* 58 (1994), 73.

36 Of special interest are his works on the laws of indigenous peoples, such as the Indians, Aztecs and Papuans. In a well-known article on the law of the Australian Aborigines he expressed the view that these people, however 'primitive' their economic life may be, "possess law. They have legal institutions that are put under the sanction of the general public, for law exists before any organization of the state, before any court or any executory performance exists: it exists in the hearts of the people as a feeling of what should be and what should not be. …Although it may be left to the single individual to obtain justice for himself, and although there may be no possibility to obtain a formal decision on the question of right or wrong, law manifests itself in that the community as a whole not only approves or disapproves of the act of the individual, but also supports the one who is believed to have justice on his side in his pursuance and exercise of law." "Über das Recht der Australneger" *Zeitschrift für vergleichende Rechtswissenschaft* 7 (1887), 321. Consider also J. Kohler, "Das Recht der Azteken" *Zeitschrift für vergleichende Rechtswissenschaft* 11 (1895), 1.

his inquiry to include as many societies as possible no matter how 'primitive' or 'advanced' they may appear to have been. However, Kohler's scholarly efforts came up against serious problems resulting from the relative scarcity of reliable sources of information on the law and customs of non-European peoples at the turn of the nineteenth century. In an attempt to address this problem, he sought the support of the German Imperial Government, and especially the branch of the Foreign Office (Auswärtiges Amt) dealing with indigenous peoples in German overseas territories. As there were no trained ethnologists among the German colonial officials who could supply the required information, Kohler resorted to the questionnaire method, which had first been applied in Germany for field research in ethnological jurisprudence by Albert Post. In 1897 he published his questionnaire that the German colonial administration sent out to all the German colonies. It contained 100 groups of questions pertaining to matters of criminal law, personal and family law, law of property and procedural law, and was designed to elicit answers on how such matters were dealt with by customary mechanisms at the community level.[37] Kohler organized the material

37 See on this B. Grossfeld & M. Wilde, Josef Kohler und das Recht der deutschen Schutzgebiete, *Rabels Zeitschrift* 58 (1994), 69. It should be noted that the questionnaire method, notwithstanding its advantages, was beset by a number of problems. Most of were derived from the fact that the questionnaire was prepared by jurists according to the categories of European law, which bore little or no affinity to the legal notions and practices of the indigenous peoples under consideration. This problem was further exacerbated by linguistic and communication difficulties. It is thus unsurprising that the answers received often bore little or no relation to the 'living law' of the people concerned. Kohler was aware of the limitations of the questionnaire method and thus insisted that a general description of

contained in the relevant responses into six reports, which he published in the *Zeitschrift für Vergleichende Rechtswissenschaft* from 1900 onwards.

Kohler's work in ethnological jurisprudence was further developed by a number of distinguished scholars, most of whom shared his historical-comparative outlook, such as Richard Thurnwald (1869-1954), regarded as the founder of modern legal ethnology or, as it is otherwise called, anthropology of law; Leonhard Adam (1891-1960), editor of the *Zeitschrift für Vergleichende Rechtswissenschaft* from 1919 to 1938; and Hermann Trimborn (1901-1986). Thurnwald viewed law as a function of the conditions of life and mentality of a society that should be understood functionally in the context of a cultural system. He observed that in the relatively small communities of indigenous peoples the connection of law with other cultural functions is much closer than the one that exists in complex societies with a highly differentiated division of labour.[38] From this viewpoint, he stressed the great diversity of laws in indigenous societies – a diversity that reflects the variability of the cultural milieu in all its aspects.[39] Thurnwald's book titled *The Beginning, Change and*

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the country and people in their ethnological and economic aspects, in particular with regard to their religion, language, history, tales and stories, should precede their answers to the juridical questions. See his "Fragebogen zur Erforschung der Rechtsverhältnisse der sogenannten Naturvölker, namentlich in den deutschen Kolonialländern", *Zeitschrift für Vergleichende Rechtswissenschaft* 12 (1897), 427.

38 R. Thurnwald, *Werden, Wandel und Gestaltung des Rechts im Lichte der Völkerforschung, Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen*, Vol. 5, (Berlin, de Gruyter, 1934), 2 ff.

39 In view of this fact, Thurnwald argues that indigenous law "cannot be opposed to the law of peoples with higher civilizations as something uniform. …This follows from the mere fact that the political organization [of indigenous societies] shows a great diversity; from the homogenous

Configuration of Law (*Werden, Wandel und Gestaltung des Rechts*), represents an effort to cover in a systematic way the entire field of legal anthropology on a comparative basis.[40] Adam defined the subject of ethnological jurisprudence as lying between the disciplines of jurisprudence and ethnology, with its focus being on the laws and customs of non-European peoples.[41] His approach is elaborated in his work "Ethnological Jurisprudence" ("Ethnologische Rechtsforschung"), included in the *Textbook of Ethnology* (*Lehrbuch der Völkerkunde*), the third edition of which was edited by himself and Trimborn in 1958. According to Trimborn, ethnological jurisprudence constitutes an exclusively historical science and, as such, is part of a general or universal history of law.[42] In his well-known works on the laws and customs of pre-Columbian

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democratic associations of hunting-and-gathering tribes, through the agglomeration of ethnic groups, to stratification according to descent and according to social and occupational characteristics, and from chieftainship without [formal] authority up to the sacred sovereign and the rationalistic despot. *Werden, Wandel und Gestaltung des Rechts im Lichte der Völkerforschung, Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen*, Vol. 5, (Berlin, de Gruyter, 1934), 16.

40 The book forms the fifth volume of his major work titled *Human Society in Its Ethno-Sociological Foundations* (*Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen*), published between the years 1931 and 1934.

41 As Adam explains, "one should imagine jurisprudence and ethnology as two intersecting circles; the segment belonging to both circles constitutes ethnological jurisprudence. However, ethnological jurisprudence has hardly anything to do with legal dogmatics or with 'analytical jurisprudence' of the highly developed legal systems; therefore, it belongs predominantly to ethnology." "Ethnologische Rechtsforschung" in L. Adam & H. Trimborn (eds), *Lehrbuch der Völkerkunde*, 3rd edn., (Stuttgart, Enke, 1958), 189, 190.

42 See H. Trimborn, "Die Methode der ethnologischen Bechtsforsehung" (1928) 43 *Zeitschrift fur vergleichende Bechtswissenschaft*, 416 , 420 ff.

Peru he applied his cultural-historical method of ethnological jurisprudence to a concrete example.[43]

Ernst Rabel

The recognition of comparative law as an academic discipline in Germany was largely the result of the efforts of Ernst Rabel (1874-1955), regarded as one of the world's most eminent legal comparatists. Rabel was born and grew up in Vienna, where he was exposed to the artistic and intellectual movements that swept that city at the turn of the twentieth century. He studied law at the University of Vienna, where he was profoundly impressed by Ludwig Mitteis, a leading legal historian and expert in Roman law.[44] It was from Mitteis that Rabel learned the significance of the historical-comparative study of law and acquired the methodological tools with which he would engage the comparative study

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43 Consider H. Trimborn, "Familien- und Erbrecht im praekolumbischen Peru", (1927) 42 *Zeitschrift für vergleichende Rechtswissenschaft*, 352; "Straftat und Sühne in Alt-Peru", (1925) 57 *Zeitschrift für Ethnologie*, 194. In another work this scholar compares the substantive criminal law as applied in the Inca Empire with that applied by the Chitcha in Columbia and by the Aztecs in Mexico. See "Der Rechtsbruch in den Hochkulturen Amerikas", (1937) 51 *Zeitschrift für vergleichende Rechtswissenschaft*, 7.

44 Mitteis' seminal work *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, published in Leipzig in 1891, is regarded as a turning-point in contemporary Roman law scholarship. This work went beyond the confines of classical Roman law to the comparative study of other legal systems of antiquity, especially Greek law. See on this R. Zimmerman, "In der Schule von Ludwig Mitteis", *Rabels Zeitschrift* 65 (2001), 1.

of legal systems.[45] After graduation, he worked as an apprentice in his father's law office and also completed his doctorate in law under the supervision of Mitteis. In 1899 Rabel followed Mitteis to Leipzig where, after he completed his *Habilitation* (1902), taught Roman law and German Private Law. In 1906 Rabel was appointed to a professorship in Basel, where he had the opportunity to familiarize himself with the new Swiss civil law. After Basel, his academic career took him to Kiel (1910), Göttingen (1911), Munich (1916)[46] and then to Berlin (1926), where he established the Kaiser Wilhelm Institute for Comparative and International Private Law.[47] Moreover, Rabel served as a judge both in Germany and an international level. He was a member of the German-Italian Mixed Arbitral Tribunal (1921-1927), which heard reparation claims against the German Reich and private contract claims arising out of wartime conditions. Furthermore, he served as an ad hoc judge at the Permanent Court of International Justice in the Chorzow Cases (1925-1927) and as a member of the Permanent German-Italian (1928-1935) and German-Norwegian (1929-1936) Arbitral Commissions. This blend of German and foreign as well as academic and judicial experience shaped

45 See on this D.J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language", in A. Riles (ed.) *Rethinking the Masters of Comparative Law*, (Oxford, Hart Publishing, 2001), 190, 192.

46 In 1917 he established the Institute for Comparative Law at the University of Munich, the first of its kind in Germany.

47 The Institute undertook basic research, reporting on current legal developments in diverse jurisdictions, and also furnished practical advice to the German legislature, government departments and agencies, the courts and bar, and companies engaged in international trade. Rabel's Institute is today the Max Planck Institute for Comparative and International Private Law in Hamburg.

Rabel's work, which from an early stage utilized the comparative method. From 1927 to 1936 Rabel edited the Journal of Foreign and International Private Law (*Zeitschrift für ausländisches und internationales Privatrecht*), which now bears his name, and produced a number of important comparative law works, especially in the field of the law of sales. In 1928 he proposed to the League of Nations' Institute for the Unification of Private Law (now UNIDROIT) that it adopt the unification of the law of international sales of goods as one of its principal projects. The Institute entrusted Rabel and his colleagues at the Berlin Institute for Comparative and International Private Law with the task of carrying out an extensive comparative law investigation with a view to developing a uniform sale of goods law for worldwide application. The first draft of this law was published in 1935. A year later, Rabel published the first volume of his seminal work *Das Recht des Warenkaufs* (The Law of the Sale of Goods), which provided a comprehensive analysis of his findings in this field.

Rabel's career took a downward trend after the National Socialists came to power in 1933. Since he was of Jewish descent, he became target of the new regime, which stripped him of certain positions he held, including the directorship of the Kaiser Wilhelm Institute, and prohibited him from publishing scholarly works. To escape persecution, he immigrated to the United States in 1939 (at the age of 65) and continued his work as a research scholar with the support of the American Law Institute. On behalf of this Institute, he authored a monumental work in four volumes titled "The Conflict of Laws: A Comparative Study," a true masterpiece lying at the intersection of

comparative law and private international law.[48] He also held research positions at the University of Michigan Law School, which published his "Conflict of Laws" as part of its Legal Studies series,[49] and Harvard University, where he completed the fourth volume of the above-mentioned work. With the exception of his treatise on the conflict of laws, Rabel's comparative law scholarship in English is not very extensive. Nevertheless, he made a significant contribution to the development of comparative law and conflict of laws studies in the United States and some of his students, such as Max Rheinstein and Friedrich Kessler, became leading figures in the field of comparative law in that country.[50] In 1950 Rabel returned to Germany and lived in Tübingen, where he was made honorary professor at the local university. He also spent some time at the Free University of Berlin, which appointed him professor emeritus.[51]

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48 The first edition dates are: Volume 1 (1945); Volume 2 (1947); Volume 3 (1950); and Volume 4 (1958).

49 During his stay at this university he received advice and editorial assistance from Hessel Yntema, a distinguished comparative law scholar, and other members of the Law School. See J. Thieme, "Ernst Rabel (1874-1955): Schriften aus dem Nachlass", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 50 (1986), 251, 268.

50 See D.J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language", in A. Riles (ed.) *Rethinking the Masters of Comparative Law*, (Oxford, Hart Publishing, 2001), 190, 207-208. Both Rheinstein and Kessler immigrated to the United States after the National Socialists came to power in Germany. The former was appointed professor of law at the University of Chicago, and the latter held a professorship at Yale University.

51 For a closer look at Rabel's career see: G. Kegel, "Ernst Rabel – Werk und Person", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 54 (1990), 1; G. Kleinheyer & J. Schröder, *Deutsche Juristen aus fünf*

Rabel's scholarship extends over a wide range of topics: Roman law, Egyptian papyrology, German legal history, private law, public international law, private international law and, above all, comparative law. He believed that comparative law could provide a large palette of tools for the resolution of fundamental legal problems facing Europe, in general, and Germany, in particular.[52] He saw comparative law as having three distinct though interconnected aspects: (a) the first aspect is concerned with the historical evolution of legal systems and the interrelations between them;[53] (b) the second aspect pertains to the study of contemporary legal orders and the elucidation of their differences;[54] and (c) the third aspect, combining legal history, jurisprudence and philosophy of law, seeks to bring to light profound truths about the development and social impact of laws.[55] However, Rabel never fully

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Jahrhunderten. Eine biographische Einführung in die Geschichte der Rechtswissenschaft, (2nd edn., Heidelberg, C.F. Müller Juristischer Verlag, 1983), 346 ff; Max Rheinstein, "In Memory of Ernst Rabel", (1956) 5 *American Journal of Comparative Law*, 185.

52 See J. Thieme, "Ernst Rabel (1874-1955): Schriften aus dem Nachlass", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 50 (1986), 251, 305.

53 This was the focus of Rabel's work during the first part of his career.

54 This was the focus of his research after 1916.

55 In a paper published in 1919, Rabel remarked that this third aspect "penetrated philosophy, where historical and systematic legal science, together with legal philosophy, examine the deepest issues of the evolution and impact of law." "Das Institut für Rechtsvergleichung an der Universität München", 15 *Zeitschrift für Rechtspflege in Bayern* (1919), 2. In an article discussing the reach and functions of comparative law, Rabel remarks that "the subject matter of thinking about legal problems must be the law of the entire world, past and present, the law's interrelation with soil, climate and race, with the historical destiny of peoples (war, revolution, the

developed the third aspect of comparative law.

Rabel maintained that the principal goal of comparative law is 'pure science.' Its centrality lay in the fact that all specific uses of comparative law, as a form of 'applied' science, flow from it. Although he was never very precise about what he meant by 'science', often he seems to construe the term broadly as the self-conscious and disciplined search for knowledge (*Erkenntnis*). For him, the subject of the relevant scientific inquiry is the legal rule (*Rechtssatz*).[56] As he explains, "legal comparison means that the legal rules of one state (or other law-prescribing community) are analyzed in connection with those of another legal order or a number of legal orders from the past and the present."[57] Although

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formation of states, subjugation), with religious and ethical beliefs, the ambition and creativity of individuals; the needs of production and consumption; the interests of strata, parties, classes. Intellectual trends of every kind are at work …the congruity of adapted paths of law, and not least the search for an ideal state and an ideal law. All of these are mutually dependent in social, economic and legal design. The law of every developed people dazzles and trembles under the sun and the wind in a thousand hues. All these vibrating bodies together form a whole which nobody has yet perceived and understood." "Aufgabe und Notwendigkeit der Rechtsvergleichung", in *Rheinische Zeitschrift für Zivil- und Prozessrecht* 13 (1924), 279, 283.

56 The term *Rechtssatz* does not have a direct translation in English. The closest translation is probably 'legal rule,' understood here in the broader sense of 'authoritative legal proposition." See E. Rabel, "Die Fachgebiete des Kaiser-Wilhelm-Instituts für ausländisches und internationales privatrecht (gegründet 1926) 1900-1935", in *25 Jahre Kaiser-Wilhelm-Gesellschaft zur Förderung der Wissenschaften* 3: *Die Geisteswissenschaften*, (Berlin, Springer1937), 77-190.

57 E. Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung", in *Rheinische Zeitschrift für Zivil- und Prozessrecht* 13 (1924), 279, 280.

Rabel viewed comparative law as a science, he also stressed the practical utility of its methods. This combination of the academic and practical aspects of comparative law shaped his approach and also distinguished it from those of past and contemporary comparatists. Rabel sought to develop methods and tools that would enable lawyers to better understand the foreign legal problems they faced and respond to them effectively. His scholarly endeavours were also directed at encouraging students to immerse themselves in the details of specific legal situations and thereby gain valuable knowledge of how such situations were dealt with in diverse legal systems. Moreover, his methods were aimed at producing better law through the clarification of the concepts of legal language and the improvement of the solutions to societal problems available to decision makers. It is important to note here that for Rabel the formal language of legal rules and principles divulged little about how problems are actually solved and thus reliance on language alone is likely to obscure rather than shed light on what is happening. The correct way to acquire information about a foreign legal system is to ask how the relevant rules and principles related to and addressed a concrete factual situation. In this way, Rabel shifted the methodological focus of comparative law to the specific societal functions of rules and thus laid the foundations of what is now regarded as the basic methodological principle of comparative law, namely, the principle of functionality.[58]

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58 See relevant discussion in Chapter x below. It should be noted that, although Rabel often emphasizes the importance of method, in the broad sense of a carefully devised plan about how one achieves a set of goals, he did not elaborate a detailed methodology. What he proposes as a methodology consists of some generally defined principles that would serve

Today, the Max Planck Institute for Comparative and International Private Law (founded by Rabel and reopened in Hamburg after the Second World War) is regarded as the principal centre of comparative law research in Germany.

THE ORIGINS OF COMPARATIVE LAW IN ENGLAND

During the nineteenth century England was a colonial power and interaction between domestic and foreign laws was unavoidable. The Judicial Committee of the Privy Council, sitting in London, operated as the highest court of appeal for all countries and territories of the British Empire, with the exception of Britain. Apart from dealing with appeals from other common law jurisdictions, this court heard appeals from jurisdictions applying Hindu and Islamic laws (India); Singalese and Tamil laws (Ceylon); Chinese law (Hong Kong, the Malay States, Sarawak and Borneo); Roman-Dutch law (Ceylon, South Africa and Rhodesia); elements of the French Napoleonic Code embodied in the Canadian Civil Code of 1866 (Quebec); Norman customs (The Channel Islands); and Asian and

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the goals of comparative law as he identified them. In form, his methodology has many elements in common with the historicist methodology in the social sciences that prevailed in Germany from the 1880s until the First World War. From this viewpoint, 'method' was a matter of in-depth examination of trends and patterns in the evolution of society and economy and not a matter of theoretical construction of methodological principles. Consider on this D.J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language", in A. Riles (ed.) *Rethinking the Masters of Comparative Law*, (Oxford, Hart Publishing, 2001), 190, at 198-199.

African customary laws. It should be noted here that, according to the English model of colonial governance, imperial control was indirect and existing local laws and customs remained in force, except to the extent they were specifically displaced by English legislation (this occurred mainly in the fields of public and criminal law).[59] Under these circumstances, there was a need for "a more ready access to the sources from whence an acquaintance might be derived with those systems of foreign jurisprudence, which [were] most frequently presented to the consideration of an English tribunal."[60]

Among the earliest attempts at applying the comparative method to practical aspects of law are Burge's *Commentaries on Colonial and Foreign Laws*, written for legal practitioners and published in 1838;[61] and

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59 Although indigenous legal systems continued to apply, they were in the course of time profoundly influenced by English law. The same occurred in countries under the control of other Western colonial powers, such as France and Holland. On the issue of Western legal expansion see W.J. Mommsen and J.A. de Moor (eds.), *European Expansion and Law: the Encounter of European and Indigenous Law in the 19th-and -20th-Century Africa and Asia*, (Oxford & New York: Berg Publishers, 1992); L. Benton, *Law and Colonial Cultures* (Cambridge: Cambridge University Press, 2002). Where settlement took place in lands of no previous settlement (a rather curious notion), English (or Western) law was taken to be imported with the settlers themselves. When this occurred, indigenous populations and local laws were essentially ignored, for purposes of establishing a territorial law, by almost all European powers, including England.

60 W. Burge, *Commentaries on Colonial and Foreign Laws*, (London, Saunders and Benning, 1838), p. v.

61 W. Burge, *Commentaries on Colonial and Foreign Laws Generally: And in Their Conflict with Each Other, and with the Law of England*, (London, Saunders and Benning, 1838). According to Rabel, the range and quality of Burge's work made it useful as a substitute for a basic text on comparative private law.

Levi's *Commercial Law* (1852), an extensive treatise comparing the commercial laws of Britain with the laws and codes of other merchantile countries, including those of ancient Rome.[62] In 1848, the House of Commons' Select Committee proposed that the Chairs in international, comparative, administrative and English law should be established at the universities, but it was some years before this proposal was implemented. By the late nineteenth century, as the common law became entrenched, though now in its larger Commonwealth existence, comparative law came to be recognized as a form of science, even though it never acquired the profound scientific character of its Continental counterpart.[63]

Of particular importance to the development of comparative law in England was Sir Henry Maine's work on the laws of ancient peoples (*Ancient Law*, 1861), wherein the author applied the comparative method to the study of the origins of law that Charles Darwin had employed in his *Origin of the Species* (1859). Maine (1822-1888), the founder of the English historical school of law, was born in Scotland and was educated at Cambridge University. After his graduation in 1844 he accepted the position of tutor at Trinity College, a position he held until he was

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62 Leone Levi, *Commercial law, its principles and administration, or, The mercantile law of Great Britain: compared with the codes and laws of commerce of the following mercantile countries: Anhalt, Austria ... Wurtemburg, and the Institutes of Justinian*, (London: W. Benning, 1850-1852). See also L. Levi, *Commercial Law of the World*, (London: Smith, Elder, 1854). It should be noted that Levi was the first scholar to propose the international unification of commercial law through the method of comparative law.

63 See on this matter, H. C. Gutteridge, Comparative Law: an Introduction to the Comparative Method of Legal Study and Research, 2nd edn. (Cambridge: Cambridge University Press, 1949).

appointed professor of civil law at Cambridge in 1847. In 1850 he was called to the bar and two years later accepted appointment as reader in Roman law and jurisprudence at the Inns of Court. He also served for some years as legal member of the council of the viceroy of India (1863-1869) and as vice-chancellor of the University of Calcutta. After his return to England in 1869, he was appointed to the chair of historical and comparative jurisprudence at the University of Oxford. He held this position until 1877, when he was elected master of Trinity Hall Cambridge and ended his career as professor of international law at Cambridge.

Maine was among the first scholars to argue that law and legal institutions must be studied historically if they are to be properly understood.[64] In his *Ancient Law* he proposed what may be described as an evolutionary theory of law, complete with a pattern of growth to which all systems, though geographically or chronologically so remote from one another as to exclude the possibility of extraneous influence, could be shown to conform. By drawing on knowledge of Greek, Roman biblical and other ancient legal systems, as well as on native institutions of contemporary India, he reached the conclusion that different societies

64 As commentators have observed, Maine's approach reflects the influence of Carl von Savigny's theory of the genesis and foundation of law, as well as the current interest in evolution, triggered by the publication of Charles Darwin's masterpiece *The Origin of Species* in 1859. A further, remoter influence has been Hegel's philosophy of history, which might have suggested to Maine the notion of uniform principles of development. See J. Stone, *Social Dimensions of Law and Justice*, (London: Stevens & Sons, 1966), 120. And see H. Janssen, *Die Übertragung von Rechtsvorstellungen auf fremde Kulturen am Beispiel des englischen Kolonialrechts: ein Beitrag zur Rechtsvergleichung*, (Tübingen : Mohr Siebeck, 2000), 164-165.

tend to develop, so far as their legal life is concerned, by passing through certain stages that are the same everywhere. He asserted that the earliest stage was in one sense pre-legal: king-priests uttered judgments about actual disputes, which contained a strong religious element. The next stage involved the crystallizing of these judgments into custom, of which the oligarchies that had succeeded the early monarchs acted as custodians. The third stage, usually associated with a popular movement to overcome the oligarchic monopoly of expounding the law, is that of the codes.[65] At this point some societies cease to progress further, since their legal institutions are unable to evolve new dimensions beyond the bounds of their petrified codes. These societies, which Maine called 'static,' are contrasted with the 'dynamic' ones, i.e. those societies that had the ability to adapt their legal systems to novel circumstances. To meet the needs derived from such circumstances, the latter societies employ three mechanisms of change, namely, fictions, equity and legislation. Although Maine's scheme has been found by later scholars to rest on evidence too weak to support such far-reaching generalizations, some of his insights have been particularly enlightening. Probably the most celebrated of them is his view of the way in which dynamic or progressive societies evolve:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily

65 Examples of such codes include the Greek codes of Draco and Solon and the Twelve Tables of Rome.

> substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. …Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.[66]

In this way, Maine arrives at his often-quoted conclusion that the movement of the dynamic societies has been a movement from Status to Contract. Status is a fixed condition in which an individual lacks will and opportunity. When ascribed status prevails, legal relations depend entirely on birth, family group or caste. This situation is indicative of a socio-cultural order in which the group, not the individual, is the primary unit of social life. As society evolves, this condition gradually gives way to a socio-cultural order based on contract. According to Maine, a progressive society is characterized by the emergence of the independent, free and self-determining individual, based on achieved status, as the central element of social life. In the context of such society, the emphasis on individual achievement and voluntary contractual

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66 *Ancient Law*, (London, New York and Toronto: Oxford University Press, 1931, repr. 1946), 139-140.

relations set the conditions for a more developed legal system that employs legislation as the principal means of bringing society and law into harmony.

Commentators have described Maine as a defender of laissez-faire economic individualism.[67] However, the transformation of liberal laissez-faire governments into social welfare states and the resultant huge volume of social legislation tending to reduce more and more the freedom of contract in the later decades of the nineteenth century suggested that the process which Maine discerned had begun to go into reverse. Although the vision of social evolution espoused by Maine did not match reality, his contribution to the fields of anthropology and comparative law cannot be questioned. By establishing the link between law, history and anthropology, he drew attention to the role of the comparative method as a valuable tool of legal science. For him, comparative law as an application of the comparative method to the study of legal phenomena of a given period could play only a secondary or supporting role to the real science of law, i.e. a legal science historical and comparative in character. While comparative law is concerned with the analysis of law at a certain point of time, historical-comparative jurisprudence focuses on the idea of ***legal development*** or the dynamics of law.[68]

Frederick Pollock, Maine's disciple and successor in his scientific endeavours, sought to elucidate the connection or interrelationship

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67 See, e.g., H. Janssen, *Die Übertragung von Rechtsvorstellungen auf fremde Kulturen am Beispiel des englischen Kolonialrechts: ein Beitrag zur Rechtsvergleichung*, (Tübingen : Mohr Siebeck, 2000), 168.

68 See Janssen, supra note 63, 166.

between the 'static' point of view of comparative law in a narrow sense and the 'dynamic' approach of historical jurisprudence. According to him, the properly so-called jurisprudence or science of law must be both historical and comparative. In this respect, comparative law plays more than a merely subsidiary role; it occupies a distinct place in the system of legal sciences.[69]

In 1894, a Chair of Legal History and Comparative Law was founded at the University College, London and shortly afterwards the English Society of Comparative Legislation was established, which meant that there were now a number of similar societies on both sides of the Channel. Apart from the establishment of research institutes, scholarly journals and a national committee on comparative law, a positive parliamentary initiative designed to encourage the comparative study of laws occurred in 1965, with the enactment of the Law Commissions Act. This Act created two law reform commissions, an English and a Scottish Law Commission, whose function is, among other things, to obtain information from foreign legal systems, as appears likely to facilitate their function of systematically developing and reforming the law.[70] A further stimulus for comparative legal studies to take place occurred when Great Britain joined the European Community (EC) on 1 January 1973.

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69 As Pollock remarked, "It makes no great difference whether we speak of historical jurisprudence or comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." "The History of Comparative Jurisprudence", (1903) 5 *Journal of the Society of Comparative Legislation*, 74 at 76.

70 See s 3(1) Law Commissions Act 1965.

THE DEVELOPMENT OF COMPARATIVE LAW IN FRANCE

Nineteenth century French legal scholarship has contributed significantly to the rise of modern comparative law. Special reference should be made here to a group of jurists (referred to as *juristes inquiets* or 'anxious jurists') who, despite their political differences, shared a common concern (*inquiétude*) about the growing discrepancy between the formalism and extreme conceptualism of the traditional legal system and a rapidly changing social reality. Among the principal representatives of this group were Raymond Saleilles (1855-1912), and François Gény (1861-1959). Important turning-points in the development of comparative law in France include the establishment of a chair of comparative legal history at the College of France in 1831; the creation of a chair of comparative criminal law at the University of Paris in 1846; and the founding of the French Society of Comparative Legislation (*Société française de législation comparée*) in Paris in 1869.[71] In 1876 the French Ministry of Justice set up an office of foreign and international law (*Office de législation étrangère et de droit international*), which employed the comparative method in the investigation of problems of private international law. In the 1890s comparative civil law began to be taught in Paris,[72] and in 1900 the first International Congress of Comparative Law was organized by Raymond

71 The Society's periodical, now called *Revue internationale de droit comparé*, is still in existence today.

72 A Chair of comparative civil law was founded in 1902. Other similar professorships established during the same period included a Chair of comparative maritime and commercial law (1892) and a Chair of comparative constitutional law (1895).

Saleilles and Édouard Lambert in the context of the Paris World Fair.

Raymond Saleilles initially taught legal history at the Universities of Grenoble (1884) and Dijon (1885-1895). In 1895 he moved to Paris where he first held the chair of comparative criminal law and afterwards the newly created chair of comparative civil law.[73] Saleilles was able to introduce French jurists to the laws and legal cultures of diverse countries and thus made a significant contribution to the advancement of comparative law in his country. He viewed comparative law as an important methodological tool and, at the same time, as a means by which one could illuminate law as a social and historical phenomenon transcending national boundaries. Moreover, he believed that familiarity with a range of legal systems and their processes of development makes possible a more complete understanding of one's own legal system and opens up new and unsuspected possibilities for both national legislators and judges in dealing with concrete legal problems.[74]

Saleilles was familiar with several civil law and common law systems, but was particularly conversant with German legal thinking, especially the spirit and methodology of the German Historical School, which he introduced in France through his teaching and extensive writings.[75] According to him, the Historical School was successful in

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73 For an overview of Saleilles career consider E. Gaudemet, "Raymond Saleilles 1855-1912", *Revue bourguignonne de l'Université de Dijon* 22 (1912), 161; R. Beudant et al, *L'Oeuvre juridique de Raymond Saleilles*, (Paris: Rousseau, 1914).

74 See R. Saleilles, "Rapport sur la conception et l'objet de la science du droit comparé", *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900*, Société de législation comparée, Paris, LGDJ, 1905, 68 ff.

75 Reference may be made here to his *Essai d'une théorie générale de l'obligation d'après le projet de code civil allemand*, which appeared in 1890, and

demonstrating that law evolved through adaptation of legal rules and principles to the demands of social reality. In this respect, the judiciary is entrusted with the important function of adjusting the law to constantly changing socio-economic conditions.[76] Saleilles believed, further, that changes in the field of law reflected also the interests of and ongoing conflicts among diverse social, economic and political groups according to what he saw as 'laws of evolution'.[77] A defining moment in the development of his thought, a moment at which he recognized the inadequacy for legal science of the socio-historical determinism of the German Historical School, came with his realization that the relation between social reality and legal institutions was not merely a relation of cause and effect. Rather, legal institutions were unavoidably value-laden, and as such they had to correspond not only to material interests and related conflicts in society, but also to prevailing ideals and values. However, ideals and values exhibit an internal logic and consistency and, as a consequence, legal institutions are not simply determined by social forces, but themselves help to shape the social value system. Furthermore, Saleilles dismissed the rigid dogmatism and exaggerated conceptualism of the German Historical School, which he criticized for neglecting fundamental principles of justice and equity in favour of

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his *De la déclaration de volonté: contribution à l'étude de l'acte juridique dans le Code civil allemand*, published in 1901. In 1901 Saleilles commenced work on an annotated translation of the German Civil Code (BGB).

76 It is thus unsurprising that Saleilles referred to the common law judges, whom he regarded as the true heirs of the Roman law judges, as the ideal prototypes.

77 See R. Saleilles, "Ecole historique et droit naturel", *Revue trimestrielle de droit civil* (1902) 1, 80, 94-95.

logical abstraction and the correct reckoning with conceptions.[78] This approach reflects the position of the circle of the French *Juristes Inquiets*, of which Saleilles was a leading member.

The *juristes inquiets* emerged in late nineteenth century, a period that saw the culmination of the industrial revolution that had begun in the eighteenth century; the consolidation of capitalism and the free market economic system; the growth of new technologies and methods of production; the expansion of the factory system; and the rapid growth of population in urban centres. These developments were accompanied by the rise of a new social class of wage labourers who were engaged in industrial production, the proletariat. The living conditions of the working masses were extremely harsh, while the gap between them and the wealthy capitalist class continued to grow. Under these circumstances, social and political conflicts frequently broke out, as society struggled to come to terms with problems that ensued from the unequal distribution of wealth and the rise of corporate cartels, unemployment, economic depression and urbanization. In this context of rapid socio-economic change, many jurists believed that the traditional legal system was incapable of keeping up with social reality and of producing credible solutions. The term *juristes inquiets* was introduced by Paul Cuche, a professor of law at the University of Grenoble, who in 1929 stated that the 'inquietude' of that period derived from the discordance between the fundamental concepts of law, expressing the individualism of the old regime, and the emerging interest in solidarity, which arose from the

78 For a closer look at Saleilles' argument see his "Ecole historique et droit naturel", (1902) 1 *Revue trimestrielle de droit civil*, 80.

changing social and political conditions.[79]

By proposing a series of changes capable of addressing the growing imbalance between the legal system and social reality, the *juristes inquiets* hoped to prevent social rebellion and avoid the coming of socialism, which they regarded as a form of nihilistic anarchism or equated with the desire to place society under the absolute control of the state.[80] Thus, starting from the assumption that both freedom and regulation amounted to forms of state intervention, Saleilles sought to advance solutions which preserved a minimum of individualism while still promoting social reforms grounded on the notion of mutual collective assistance. To accomplish their goals, the *juristes inquiets* devised the concept of French legal classicism or Exegetic School (*École de l'exégèse*),[81] which they used as a basis for explaining how nineteenth century French jurists approached the law. Although the nineteenth century jurists said to belong to this school never believed that they shared a common ideology or method, they tended to recognize that legislation, as the incarnation of

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79 P. Cuche, "A la recherche du fondement du droit. Y a-t-il un romantisme juridique?", *Revue trimestrielle de droit civil* (1929) 28, 57. On a political level, the movement of the *juristes inquiets* comprised a rather heterogeneous assortment of ideological affiliations.

80 See on this A.-J. Arnaud, *Les Juristes face à la société du XIXe siècle à nos jours*, (Paris, PUF, 1975).

81 The term *École de l'exégèse* was introduced in 1904 by E. Glasson on the centennial anniversary of the promulgation of the French Civil Code and was made widely known through the works of J. Bonnecase who, however, recognized that the relevant school of thought had been in existence from the early nineteenth century. See Bonnecase, "A la recherche du fondement du droit. Y a-t-il un romantisme juridique?", *Revue trimestrielle de droit civil*, (1929) 28, 359, 366. And see N. Hakim, *L'autorité de la doctrine civiliste française au XIX siècle*, (Paris, LGDJ, 2002).

the state, furnished both the substantive norms and the institutional mechanisms and that were necessary to arrive at the correct solution to any legal problem.[82]

According to the *juristes inquiets*, the legal formalism of the *École de l'exégèse* manifested itself in the sphere of private law in two main ways. First, it was argued that the members of this school proceeded from the erroneous premise that the civil code constituted a complete legal system in which all analytically derived propositions had been integrated into an internally coherent and gapless body of rules.[83] This way of looking at the legal system prompted them to reject the notion that contradictory results could potentially be attained, for recognition of this

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82 For a closer look see M. –C. Belleau, "The 'Juristes Inquiets': Legal Classicism and Criticism in Early Twentieth-Century France", (1997) *Utah L. Rev.* 379, 383 ff.

83 The perception of the Napoleonic civil code as a masterpiece of unity and clarity that set France apart from other civil law countries lent support to this premise. See on this V.V. Palmer, "Insularity and Leadership in American Comparative Law: The Past One Hundred Years", (2001) 75 *Tulane Law Review*, 1093. The French *École de l'exégèse* shared many common elements with the German school of *Begriffsjurisprudenz* (jurisprudence of concepts). Favouring the construction of grand schemes of systematization, *Bergriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories as a means of constructing highly systematic bodies of positive law. By comparing conceptual forms the members of this school hoped to find concrete evidence of general, universally valid, legal systematics, and to reveal the common core or essence (*Wesen*) of basic juridical concepts, even if it was admitted that every legal order has a system of its own. It should be noted that the school of *Begriffsjurisprudenz* had gradually evolved from the historicist notion of law that had been articulated by Friedrich Carl von Savigny in the early nineteenth century.

possibility entailed the risk of indeterminacy and uncertainty within the legal order. The *juristes inquiets* sought to demonstrate that the formalism of the *École de l'exégèse* had overestimated the ability of legal abstractions to produce clear and indisputable outcomes, and proposed as an alternative a 'sociologically' minded jurisprudence.[84] Second, the *juristes inquiets* asserted that the jurisprudence of the *École de l'exégèse* supported an individualist ethic that tended to sacrifice collective interests on favour of ideologically conservative legal doctrines. In its place, they proposed the 'social' as the basis for a substantive agenda for dealing with the exaggerated individualism of private law. The *juristes inquiets* endeavoured to show that in many cases the method of the *École de l'exégèse* was incapable of producing unequivocal results, and that the classicists' claim to be able to resolve legal problems by relying on a logically necessary induction of 'constructs' was false. They argued that the process of constructing 'constructs' was largely subjective and guided by extra-juristic considerations rather than pure logic.[85]

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84 The *juristes inquiets* rejected the notion that one could solve any legal problem simply by literally applying the language of the civil code to a given factual situation on three grounds: the limitations of language – it was inherent in the nature of language in general and legislative language in particular that it would often be unclear or ambiguous; the foreseeability of future situations –legislation could neither be universal nor timeless for it could not foresee all possible events or future changes; and the consequences of legislative void – the classical claim that the intent of the legislator was that whatever the Code did not explicitly prohibit it meant to permit was nonsensical and circular. For a close look see M. –C. Belleau, "The 'Juristes Inquiets': Legal Classicism and Criticism in Early Twentieth-Century France", (1997) *Utah L. Rev.* 379, 383 ff.

85 For a critical view of the *juristes inquiets'* argument consider C. Jamin, "Le vieux rêve de Saleilles et Lambert revisité: À propos du Congres

The *juristes inquiets* made a significant contribution to the development of legal thought not only in France but also in countries belonging to the common law family. It is noted, in particular, that their critical views on what they portrayed as a rigidly formal and positivist legal classicist school are reflected in the thinking of the advocates of American legal realism and sociological jurisprudence, such as Roscoe Pound, Benjamin Cardozo and Morris Cohen.[86]

The Paris International Congress of Comparative Law of 1900

An important landmark in the development of modern comparative law was the International Congress of Comparative Law organized by the French Society of Comparative Legislation (***Société française de législation comparée***) and held in Paris from July 31 to August 4 1900, during the Paris World Fair and the International Congress of Higher Education. The Congress regulations prepared by the Society divided the program into six sections, with the greatest emphasis being placed on general theory and method,[87] and selected French as the official Congress

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international de droit comparé de Paris", *Revue internationale de droit comparé*, 52 (4) (2000) 733, 736. See also K. Engle, "Comparative Law as Exposing the Foreign System's Internal Critique: An Introduction, (1997) *Utah L. Rev*. 359, 363.

86 Consider, e.g., R. Pound "Mechanical Jurisprudence" (1908) 8 *Columbia Law Review* 605, 611-612; B. Cardozo, *The Nature of the Judicial Process*, (New Haven: Yale University Press, 1925), 103, 105; M. Cohen, "The Basis of Contract", 46 *Harvard Law Review* (1933), 553, 575-578.

87 Article 8.

language.[88] The French jurist Édouard Lambert, a former student of Raymond Saleilles[89] and professor at the Faculty of Law at Lyon, was entrusted with the task of elaborating the theoretical and methodological aspects of the new discipline.

The Congress was declared to have four principal objectives.[90] First, from the viewpoint of comparative legal science, it would determine the methods that were most appropriate to use in analyzing diverse systems of legislation. Comparative law deals with this task in three stages, namely, observation, comparison, and adaptation. Observation proceeds from the thesis that the legislative text is nothing without interpretation, and that interpretation itself is nothing without consequences. Comparative law thus must look beyond the letter of the

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88 Reports and other materials not in French were to be translated or summarized into French (article 11). It should be noted here that only one English scholar, Sir Frederick Pollock, took part in the proceedings as a representative of the English legal tradition, while all other participants were from Continental Europe.

89 As Lambert's doctoral supervisor, Saleilles had introduced the former to the *juristes inquiets'* movement and their jurisprudential critique of the *École de l'exégèse*. As a member of this group of jurists, Lambert appears to have adopted a much more radical stand in the common project of critique. This stand is reflected in his assessment of François Gény's influential treatise *Méthode d'interprétation et sources en droit privé positif* (1899), which he criticizes as much too restrained in its attack the conceptualism of the *École de l'exégèse* and as "not daring …to rebel openly against the dogma of law's fixity." See E. Lambert, "Une réforme nécessaire des études de droit civil", *Revue internationale de 1'enseignement*, (1900), 216, 230.

90 These objectives were stated in a report prepared by Saleilles and addressed to the organizing commission of the Congress. See R. Saleilles, "Rapport presente a la Commission d'Organisation sur l'utilite, le but et le programme du Congres," 29 *Bull. de la societe* (1900), 228-36.

law in order to bring to light those consequences. At the second stage, comparative law examines the rational rapprochement among diverse systems of national legislation, considering their technical-juridical forms and concepts as well as their practical implications. In light of this analysis, a predominant type can then be singled out and used as a model for other national legislatures. At the third stage, comparative law adapts the selected model to national, social, and environmental conditions and significant cultural traditions. At this stage of the process it is difficult to formulate in advance any clearly defined general laws. Here, historical knowledge can play an important supplementary role to comparative law. Such knowledge is particularly useful in identifying examples of inadequate legislation and artificial adaptations, as well as in illuminating the conditions and methods that enable legislation to be successfully integrated into existing national law and the life of a people. These techniques can also be utilized to develop new theoretical models and justify the legitimacy of judicial construction of legal rules. When applied to legislation, legal doctrine and judicial interpretation the above-mentioned three stages of comparative law might lead, at least in part, to the development of a 'common law of civilized mankind' (*'droit commun de l'humanite civilisee'*).

The second objective of the Congress was to determine the role of comparative law as a method of instruction. The third objective was to ascertain which comparative law outcomes should be utilized through legislative action, judicial interpretation or international convention. The fourth and final objective of the Congress was to discover and organize techniques and mechanisms for obtaining information about the sources of foreign law and its theoretical elaboration.

The programme of the Congress comprised a theoretical and a

practical part. Furthermore, its scope was viewed as broad enough to embrace a diversity of legal fields, including private law, private international law, commercial law, public law and criminology.

Édouard Lambert presented the report on general theory and method for the first part of the Congress. He also summarized reports that drew attention to the importance of foreign law translations, especially for lawyers engaged in matters of private international law. It was recognized, however, that although translation work constitutes an important prerequisite of legal comparison, comparative law required much more than mere knowledge of foreign law.

Lambert then proceeded to comment on the issue of comparative law methodology, drawing on the work of Franz Bernhöft, a professor at the University of Rostock and, as noted earlier, a leading representative of German ethnological jurisprudence. According to Bernhöft, there is no uniform comparative law method but, rather, three interconnected principal methods: the ethnological, the historical and the dogmatic. The ethnological method is characterized by its universality, since it is concerned with observing the legal life of all peoples and nations. Through the examination of a diversity of legal cultures, ethnological comparative law reveals the dependence of law on social and economic relations and the striking uniformity of nations on the same level of civilization. The historical method constitutes in essence an extension of legal history. Finally, the dogmatic method, which was particularly popular in the later half of the nineteenth century, focuses primarily on the relationship between law and contemporary life. It aims at elucidating the needs of commerce and ethical views that demand satisfaction from law, as well as at creating the legal forms capable of addressing those demands. Both of these goals require in-depth knowledge of a nation's

general social, political and economic life.

Lambert informed the participants that, according to Congress commentators, comparative law should employ both social science methods, including comparative institutional history, and legal science methods, and expressed his agreement with this approach to the matter. He used the term comparative legislation (***législation comparée***) to describe the entire body of legal norms that applied in a country, including those derived from scholarly doctrine and judicial jurisprudence. He argued that the study of different countries' laws can reveal a unity of general purpose that goes beyond each system's particularities. It is thus possible to discern a common basis of legal institutions and a 'common legislative law' (***droit commun législatif***).

According to Lambert, comparative law, as a branch of legal science, has three practical goals. First, it may exercise an influence on legal policy and legislation; second, it can improve existing national legislation by influencing the development of scholarly doctrine and judicial jurisprudence; third, it can promote the convergence of legal systems through the elimination of the accidental differences in the laws of peoples at similar stages of development. As Lambert declared:

> [C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.[91]

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91 "Conception générale et definition de la science du droit comparé", in

Lambert also referred to the issue of legal education reform, arguing that the teaching of comparative law should be given the same attention as that of domestic civil law, since the only way to understand living law is to bring to light its historical development, its conceptual affinity with the laws of neighbouring countries and the social and economic reasons that justify its rules.[92]

Raymond Saleilles, commenting on the general meaning and definition of comparative law and in the final report that he delivered at the Congress' closing session, expressed the view that comparative law could conceptually be approached into two different ways. First, it could be regarded as a subsidiary science to each branch of law. In this respect, as far as national legislation is concerned, the primary task of comparative lawyers would be to study foreign laws with a view to formulating proposals for the adoption of 'better' enactments or the improvement of existing domestic legislation.[93] This goal could be accomplished either through scholarly doctrine, disseminated by means

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Procès verbaux des séances et documents du Congrès international de droit comparé 1900, (1905-1907), I, 26.

92 It should be noted here that Lambert viewed comparative law as pertaining primarily to the field of civil or private law. Though not on the scale demanded by him, comparative private law (*droit privé comparé*) is today regarded as being of great importance in France.

93 According to Jamin, both Saleilles and Lambert saw comparative law as the principal means for the renewal and enhancement of French legal thought. See C. Jamin, "Le vieux rêve de Saleilles et Lambert revisité: À propos du Congres international de droit comparé de Paris", *Revue internationale de droit comparé*, 52 (4) (2000) 733, 743. Consider also C. Jamin, "Saleilles' and Lambert's Old Dream Revisited: on the Occasion of the Centennial of the International Congress of Comparative Law, Paris 1900", *American Journal of Comparative Law* 50 (2002), 701.

of legal instruction and scholarly publications, or through judicial interpretation embodied in published court decisions. Second, comparative law could be viewed as an independent science with its own objectives, rules of operation and methods. Saleilles observed that there is a general and gradual convergence in legal evolution around the world and pointed out that history and sociology offer useful insights for comparative law methodology. As an independent discipline, comparative law is concerned not with what law should be, but with discovering fundamental similarities among diverse national legal systems. In Saleille's words: "[the goal of comparative law] should be to retrieve from the mass of particular legal institutions a common fund, that is the points of rapprochement that may be discovered from apparently diverse elements. These points constitute the essential identity of universal legal life."[94]

The principal difference between Saleilles and Lambert is that, according to the former, one can detect a common basis in all civilized peoples (*fond commun de l'humanité civilisée*), which could replace the old concept of natural law. Saleilles asserted that the detailed study of all legal systems, from all times and in all places, would reveal the general laws explaining the rise, development and demise of legal institutions. Lambert, on the other hand, denied that universal and eternal laws could be discovered and embraced the view that comparative legislation (*législation comparée*) could only reveal a common basis for those countries that had attained a similar level of social and economic development.

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94 *Session du Congrès: Procès-verbaux sommaires (Séance générale de clôture du 4 août 1900), in 1 Congrès international de droit comparé, Procès-verbaux des séances et documents* 21-25 (1905), at 143.

Thus, according to him, for the discovery of a 'common legislative law' (*droit commun législatif*) it was sufficient to study existing legal systems at such a level of development.[95]

According to Saleilles, the distinct science of comparative law would analyze the law-making function in three stages. At the first stage it would critically examine each selected foreign enactment from a social and economic perspective. At the second stage, it would seek to discover common elements susceptible to an evolutionary process observable in many countries. Finally, at the third stage, it would attempt to determine one or more 'ideal forms' for a given legal institution, which would inform and direct the development of legal policy of diverse nations with similar social and economic conditions. This approach to the matter could lead to the formation of a 'common law of the civilized mankind' (*droit commun de l'humanité civilisée*); in other words, it would gradually construct a unitary law out of diverse legal particularities.

It should be noted here that a number of jurists at the Congress expressed the view that a uniform law, or a common law of civilized humanity, cannot be achieved, for diversity and competition are inevitable facts of life. According to Andre Weiss, probably Saleilles' most arduous critic, "the uniformity of laws is not feasible, nor is it

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95 It should be noted, in this connection, that Lambert regarded the codification of law as a mark of a legal system at a high level of development. It is thus unsurprising that he expressed doubts as to whether non-codified or common law systems, such as the English, should be included in comparative law studies. See on this R. Michaels, "Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung - Gedanken anläßlich einer Jubiläumskonferenz in New Orleans", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 66 (1) (2002), 97, 101.

desirable... It is a chimera today to impose a single law for all men, a dangerous chimera. A law is not an abstract formula, forged a priori, appropriate without distinction for all; it is a concrete rule destined to apply to such and such situation, obliged to take account of certain conditions, which are not the same in all places, as well as differences in races and social institutions."[96] Other participants argued that comparative law, by working with differences, has the potential of promoting a competitive and gradual adaptation of law. In this respect, different countries might be seen as 'laboratories of experience' for other countries and legislation, legal doctrine and judicial jurisprudence in each nation could progress toward a common process leading to a universal legal science. However, it is important that the areas and issues with respect to which unification is feasible are correctly identified and engaged with.[97]

Notwithstanding the objections raised against the notion of a 'common law of civilized mankind', commentators agree that the positions advanced at the Paris Congress offered a fresh start for the discipline of comparative law.[98] Until that time, jurists only knew codified

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96 A. Weiss, "Rôle, fonction et méthode du Droit comparé dans le domaine du Droit civil", (1900) 29 ***Bulletin de la Société de législation comparée***, 417, 420.

97 For an account of the conference proceedings and the positions advanced at the Paris Congress see D. S. Clark, "Nothing New in 2000? Comparative Law in 1900 and Today", (2001) 75 ***Tulane Law Review***, 871.

98 As X. Blanc-Jouvan has remarked, the Paris Congress of 1900 "still remains the inescapable reference point for all comparatists, inasmuch as it marked, if not the birth of comparative law (which had long existed before that date), at least the beginning of a true reflection on this new branch of the legal science. It gave a tremendous impetus to the study of foreign and comparative law throughout all the century. Its success was due, to a large

legal systems or systems based on the English common law. The codification of law was envisioned as being a product of jurisprudential rationalism, and reason was naturally perceived as unique, universal and non-contradictory. Although law codes diverged, this was attributed to the fact that not all of the code drafters had fully grasped the precepts of reason. Jurists before the 1900 Congress believed that if there were more than one codified solution to a legal problem, only one of them was rational and therefore correct (and that was usually the one adopted by the legal system of the jurist concerned). In the lands where the Romano-canonical legal tradition prevailed and respect, a degree of diversity was permitted and divergent interpretations of a text could arise and persist.

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extent, to the participation of the most important jurists of the time… They considered all of the main aspects of this discipline: its aims, its uses (and misuses), its means and its functions, its relationship to other branches of law, the way it should be taught, and its impact on the practice of law…. The opinions expressed at the 1900 Congress were, in fact, much more advanced than we often assume, so much so that we are naturally led to wonder whether, in spite of all appearances and in spite of countless colloquia, books, and articles, we have made any real progress in this field." "Centennial World Congress on Comparative Law: Opening Remarks" (2001) 75 *Tulane Law Review*, 859, 862. Other commentators have argued, however, that the notion of comparative law adopted at the Congress was excessively narrow in its focus. In the words of M. Reimann, "the concept of comparative law that the Paris Congress bequeathed to the twentieth century was extremely narrow. Its was the science of a "***droit commun législatif***." This meant, essentially, the comparison of the private law codes and statutes of continental European countries with the purpose of legal harmonization and unification. Most importantly in our present context, it meant reducing the discipline to the comparison of national legal systems." "Beyond National Systems: A Comparative Law for the International Age", (2001) 75 *Tulane Law Review* 1103, 1105.

However, such differences could be erased through jurisprudential analysis, which made possible the identification of the best solution and thus the return to a unitary idea: the *Ius Unum*. The notion of unity in the law tends to prevail when one espouses the view that comparative law can pave the way to the unification or standardization of law. According to Rodolfo Sacco, this unitary and universalistic mentality is characteristic to comparative scholarship at the earliest stage of its development. On the other hand, a comparative law that recognizes legal diversity does not have any connection with the 'unitary theorem'.[99] However, the pluralistic mentality, which embraces diversity, did not yet exist at the time when Saleilles and Lambert advanced their proposals. After the Paris Congress, the narrow comparative approach based on written codes, judicial decisions and conceptual definitions and focusing primarily on European legal systems was no longer defensible. The norm that was the object of comparative law study was no longer only the formalized norm, and the scope of the discipline was broadened to include systems and forms of law that lay outside the Western legal tradition.[100]

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99 See on this matter R. Sacco, "One Hundred Years of Comparative Law", (2001) 75 *Tulane Law Review* 1159, 1166.

100 See on this issue, M. Reimann, "Beyond National Systems: A Comparative Law for the International Age", (2001) 75 *Tulane Law Review* 1103. Consider also R. Sacco, *L'avenir du droit comparé: un défi pour les juristes du nouveau millénaire*, (Paris: Société de législation comparée, 2000), 340; W.A. Stoffel, "Enlightened Decision Making", (2001) 75 *Tulane Law Review* 1195.

CONCLUDING REMARKS

A great deal has changed since Lambert and Saleilles envisaged a common body of laws shared by all 'civilized nations.' The sheer diversity of cultural traditions and ideologies, the problems dogging European unification (despite the tremendous push for European unity furnished by the treaties establishing the European Economic Community[101] and the European Union),[102] and the difficulties surrounding the prospect of convergence of common and civil law systems have given rise to a great deal of skepticism regarding the feasibility of this ideal. Nevertheless, quite a few comparatists today still espouse a universalist approach either through their description of laws or by looking for ways in which legal unification or harmonization[103] at an international or regional level may be achieved.[104] The current interest in matters concerning legal

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101 The Treaty of Paris (1951) and the Treaty of Rome (1957).

102 The Maastricht Treaty (1992).

103 It should be noted that whilst unification contemplates the substitution of two or more legal systems with one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards." W. Kamba, "Comparative Law: A Theoretical Framework", (1974) 23 *International and Comparative Law Quarterly* 485, at 501.

104 An example is Rudolf Schlesinger's common core theory, according to which "even in the absence of organized [legal] unification efforts, there exists a common core of legal concepts and precepts shared by some, or even by a multitude, of the world's legal systems… At least in terms of actual results – as distinguished from the semantics used in reaching and stating such results – the areas of agreement among legal systems are larger than those of disagreement…[T]he existence and vast extent of this common core of legal systems cannot be doubted". R. B. Schlesinger, H. W.

unification and harmonization is to considerable extent connected with the phenomenon of globalization – a phenomenon precipitated by the rapid rise of international economic transactions and the emergence of a large-scale transnational legal practice. The ongoing tendencies of globalization and regional integration today set new challenges for comparative law scholarship, both at a national and international level. In response to these challenges comparative law has diversified and increased in sophistication in recent years. It is on the way to becoming largely international, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation states. But taking into account international and transnational regimes takes more than adding their description to our catalogue of legal systems. It requires that we develop a better understanding of how legal norms and institutions operate at the national, transnational and international levels, and that we explore the interplay between these levels. Moreover, the careful examination of function and context needs to be complemented by methods and techniques designed to enable legal professionals to operate effectively in new and diverse contexts.

Baade, M. R. Damaska & P. E. Herzog, *Comparative Law: Cases – Text – Materials*, 5th edn, (Mineola, NY: Foundation Press, 1988), 34-35, 39. See also R. David and J. Brierley, *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*, 3rd edn, (London: Stevens, 1985), 4-6.