Traversing Legal Boundaries: Reflections on the Mission of Comparative Law in the Age of Globalization

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1. Introduction: the Scope and Method of Comparative Law

Traditionally, comparative law is defined as a method of study and research 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. As Zweigert and Kötz have remarked, comparative law is "an intellectual activity with law as its object and comparison as its process."[1] Comparative law embraces: the comparing of legal systems with the purpose of detecting their differences and similarities; working

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1 *An Introduction to Comparative Law*, (2nd edn, Oxford: Clarendon Press, 1987), 2.

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 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.[2]

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the social and biological sciences and a renewed interest in history and linguistics during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to tracing broad patterns of legal progress common to all civilized societies. The notion of organic evolution of law as a social phenomenon led scholars to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the idea of law. As Franz Bernhöft remarked, "comparative law seeks to teach how peoples of common heritage elaborate the inherited legal notions for themselves; how one people receives institutions from another and modifies them 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 short, within the systems of law, for the idea of law".[3] In the late the nineteenth century the French scholars Édouard

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

3 "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", 1 *Zeitschrift für vergleichende Rechtswissenschaft* (1878), 1 at 36-37. And see E.

Lambert and Raymond Saleilles, motivated by a universalist vision of law, advocated the search for what they referred to as the 'common stock of legal solutions' from amongst all the legal systems of the civilized world. This idea was introduced at the First International Congress of Comparative Law, held in Paris in 1900, which also adopted the view of comparative law as an independent and substantive science concerned with unraveling the patterns of legal development common to all advanced nations. However, in the first half of the twentieth century the view prevailed among scholars that comparative law is no more than a ***method*** to be employed for diverse purposes in the study of law.[4] According to this view, comparative law is simply a means to an end and therefore the purpose for which the comparative method is utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as an independent discipline to the uses of the comparative method in the study of law. The basic feature of comparative law, understood as a method, is that it can be applied to all types and fields of legal inquiry. It is equally employed by the legal philosopher, the legal historian, the

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Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", 60 *Zeitschrift für vergleichende Rechtswissenschaft* 60 (1957), 13 at 17; According to Giorgio 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", *Revue internationale de droit compare* 2 (4) (1950), 688.

4 The co-called 'method theory' has been advocated by a number of eminent comparatists, including Frederick Pollock, René David and Harold Cooke Gutteridge.

judge, the legal practitioner and the law teacher, and covers the domain of both public and private law. As Gutteridge has pointed out, comparative law is not fragmentary in nature: it does not consist of a patchwork of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, understood as a method, is that it can be applied to all types and fields of legal inquiry.[5]

One might say that those who construe comparative law as a method and those who view it as a science look at it from different angles. When speaking of 'laws' and 'rules', the former have in mind normative 'laws' and 'rules' – the things that lawyers commonly work with. The latter, on the other hand, tend to perceive law primarily as a social phenomenon, and the relationship between law and society as being governed by 'laws' or 'rules', which transcend any one particular legal system. At its simplest level, that of the description of differences and similarities between legal systems, the comparative method allows us to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example where the socioeconomic and political structures, historical background and cultural patterns that underpin legal institutions and rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations which become progressively more scientific in nature.[6] One

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5 *Comparative Law: an Introduction to the Comparative Method of Legal Study and Research*, (Cambridge: Cambridge University Press, 1946) 10. And see G. Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique", *Revue internationale de droit compare* (9) (1957), 363-69.

6 Among the leading scholars who advocated the instrinsic value of

might argue that a sharp dichotomy between science and method can be epistemologically dangerous, since there is no science without method. And what connects the two is the model whose aim is to relate the experience of the real world to an abstract scheme of elements and relations.[7] In this respect, one might say that comparative law is part of legal science, using the term 'science' to describe a discourse that functions at one and the same time within 'facts' and within the conceptual elements that make up 'science'. And the goal of legal comparison as a science is to bring to light the differences existing between legal models, and to contribute to the knowledge of these models.[8] Scientific comparative law is distinctive among the branches of legal science in that it depends primarily on the comparative method, whereas other branches may place greater emphasis on other methods of cognition available, such as empirical induction or a priori speculation. Thus, although comparative law is sometimes identified with legal

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comparative law as a science and as an academic discipline is Ernst Rabel. According to him, "comparative law can release the kernel of legal phenomena from the shell of their formulae and superstructures and maintain the coherence of a common legal structure." Cited in H. Coing, "Das deutsche Schuldrecht und die Rechtsvergleichung" (1956) *Neue Juristische Wochenschrift* 569, 670. On the view that comparative law constitutes both a science and a method consider G. Winterton, "Comparative Law Teaching" (1975), 23 *American Journal of Comparative Law*, 69.

7 See on this H. Barreau, *L'épistémologie* (3rd edn, Paris: Presses universitaires de France, 1995), 51.

8 Consider on this R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris: Économica, 1991), 8; "Legal Formants: A Dynamic Approach to Comparative Law", 39 *American Journal of Comparative Law* (1991), 24-25, 389.

sociology, it is really more confined. Naturally it does, however, support the other branches of legal science and is itself supported by them.[9]

Comparative law scholarship is concerned with different levels of concretization or abstraction. Depending on the level of concretization or abstraction on which a comparative study is conducted, a distinction is made between institutional or primary comparison, systematic comparison and global comparison. The institutional or primary comparison is concerned with the description, analysis and evaluation of a particular legal institution or rule. A legal institution may be considered from a number of different perspectives: historical, when one examines the development of the institution over time; sociological, when one considers the institution's operation in diverse socio-cultural environments; and normative-dogmatic, when the focus of the inquiry is on semantic and juristic aspects of the institution. The systematic comparison is concerned with the comparative examination of a set of legal institutions or rules pertaining to a particular branch of the law (e.g. private law). In this type of comparative study special attention is given to the interrelationship and interaction between the institutions under consideration and the general principles governing the relevant legal field. Finally, global comparison is concerned with the comparison of

9 Contemporary comparatists acknowledge the important relationship between law, history and culture, and proceed from the assumption that every legal system is the product of several intertwining and interacting historical and socio-factors. Thus, Alan Watson defines comparative law as "the study of the relationship between legal systems or between rules of more than one system … in the context of a historical relationship. [The study of] the nature of law and the nature of legal development." *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974), 6-7.

entire legal systems or legal traditions. Elucidating the similarities and differences between systems of law presupposes consideration of a variety of exogenous and endogenous (to the legal system) factors, some permanent other transient. These factors include: origins and historical development; socio-cultural environment; political and economic ideology and structures; physical and geographical features; the hierarchy of legal sources; the structure of the judicature; the enforcement of law; legal education; the role of legal profession; legal science; and style of legal reasoning.[10] The various factors are not independent of each other but rather are interrelated or interdependent and the scale and complexity of their operation vary from society to society and from country to country.

Comparative law embraces a variety of different, although often overlapping, studies: the study of two or more legal systems with a view to ascertaining their similarities and differences; the systematic analysis and evaluation of the solution which two or more systems offer for a particular legal problem; studies concerned with uncovering the causal relationship between different legal systems; anthropological and sociological studies into the ways in which different people experience legal norms and practices; and historical studies examining the legal evolution of diverse societies or countries. However, for an intellectual enterprise to be regarded as a comparative study, it must meet certain conditions.

The first point to note here is that comparative law involves drawing explicit comparisons between two or more legal systems or

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10 See R. Rodière, *Introduction au droit compare* (Paris: Dalloz, 1979), 4 ff; E. Agostini *Droit compare* (Paris: Presses universitaires de France, 1988), 10 ff.

aspects thereof. One engaged in the study of a foreign legal system can hardly avoid making comparisons between foreign legal institutions and those of her own country. Any study of foreign law may be said to be implicitly comparative in so far as all descriptions of foreign law are trying to make the law of one system intelligible for those trained in a different system. However, such intuitive or implicit comparisons can hardly be regarded as comparative law, and this applies also to incidental and disconnected comparisons sometimes made in legal literature. For a study to qualify as a comparative study it is essential that the comparative approach to the legal systems, institutions or rules under examination is made explicit. As Bogdan points out, "one cannot begin to speak about comparative law until the purpose with the work is to ascertain (and possibly also to further process) the similarities and differences between the legal systems, i.e. when the comparison is not merely an incidental by-product. …It is the comparison that is the central element of the comparative work."[11] Framing the inquiry in clearly comparative terms makes one think hard about each legal system being compared and about the precise ways in which they are similar or different. This does not of course mean that the independent study of foreign law is unprofitable. Indeed, besides being a valuable form of legal

11 *Comparative Law* (Deventer: Kluwer, 1994), 21, 57. According to Zweigert and Kötz, in order for a study to be regarded as a comparative law inquiry there must be "specific comparative reflections on the problem to which the study is devoted." This is best done by the comparatist stating the essential of foreign law, country by country, as a basis for critical comparison, concluding the exercise with suggestions about the proper policy for the law to adopt, which may require him to reinterpret his own system. *An Introduction to Comparative Law* (2nd edn, Oxford: Clarendon Press, 1987), 6.

scholarship in its own terms, such study is an important starting-point of any comparative inquiry.

Comparison is about identifying and explaining the similarities and differences between legal systems or aspects thereof. But for a comparative inquiry to be meaningful the objects of comparison (*comparatum* and *comparandum*) must share certain common features that can serve as a common denominator – a so-called *tertium comparationis*. Contemporary comparatists recognize that the legal institutions under consideration must be comparable to each other with respect to function: they must be designed to deal with the same problem. This common function furnishes the required *tertium comparationis* that renders comparison possible. Thus, a comparatist should normally devote considerable effort to exploring the extent to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. For instance, a comparative study in the area of constitutional law might ask how and to what extent each country under examination implements the ideal of the rule of law. Either one legal system has the same legal rule or institution as another, or it has different rules or institutions performing the same function, or it does not appear to address the problem at all. A diligent search for differences and similarities ought to encompass all of those possibilities. An inquiry into function presupposes a consideration of how each legal system works together as a whole. By asking how one system of law may achieve more or less the same result as another system without using the same terminology or even the same rule or procedure, the comparatist is forced to consider the interrelationships between

diverse fields of law as well as the broader socio-cultural context in which law operates.[12]

2. Relationship of Comparative Law to Other Disciplines

In carrying out their tasks, comparatists rely heavily on insights drawn from several other disciplines in the fields of law, social sciences and the humanities. At the same time, comparative law supplies invaluable models, experience and resources to scholars and practitioners working in a diversity of fields. Exploring the relationship of comparative law with other fields of study assists our understanding of comparative law as a distinct discipline and elucidates the ways in which it interacts with other disciplines, especially how it contributes to, benefits from or overlaps with them. The list of disciplines to which comparative law is commonly related includes: public and private international law; legal history; legal philosophy; and sociology of law. The list of pertinent disciplines could easily be enlarged.[13]

2.1 Comparative Law and Public International Law

Public international law is the body of law that governs relationships involving states as well as intergovernmental or

12 See on this B. Grossfeld, *The Strength and Weakness of Comparative Law* (Oxford: Clarendon Press, 1990).

13 Other disciplines closely connected with comparative law include legal anthropology, the economic analysis of law, comparative politics, comparative cultural studies and comparative linguistics.

supranational organizations regarded as 'international persons'. Comparative law, on the other hand, is concerned with comparatively examining problems and institutions originating from two or more systems of law or with comparing entire legal systems with a view to acquiring a better understanding thereof. At first glance, there is little that connects these two fields. This is mainly because public international law is perceived as a relatively uniform system providing little, if any, opportunity to compare anything. Although comparing the public international law system itself with other legal regimes, including domestic ones, might be very informative,[14] comparatists tend to focus largely on national systems and have by and large neglected public international law as an object of study. This does not mean, however, that comparative law is of no practical use to international lawyers.

In this connection reference may be made to Article 38(1)(c) of the Statute of the International Court of Justice, which lists the 'general principles of law recognized by civilized nations' as one of the sources of public international law. As commentators observe, comparative law plays a part in the work of discovering and elucidating these 'general principles of law' that international and, occasionally, national courts are required to apply.[15] However, the role of comparative law in this respect

14 Consider on this M. Reimann, "Beyond National Systems: A Comparative Law for the International Age", 75 *Tulane Law Review* (2001), 1103.

15 According to R. B. Schlesinger, the phrase 'general principles of law recognized by civilized nations', "refers to principles which find expression in the municipal laws of various nations. These principles, therefore, can be ascertained only by the comparative method." *Comparative Law: Cases, Text, Materials*, (5th ed, Mineola NY: Foundation Press, 1988), 36. See also Schlesinger, "Research on the General Principles of Law Recognized by Civilised Nations", 51 *American Journal of International Law* (1957), 734; R.

should not be exaggerated, since serious comparative study to ascertain such general principles on a worldwide scale would be a nearly impossible task. Firstly, there is the problem of determining which legal systems should be considered. If priority is given to a few systems to the exclusion of others, questions may arise over the integrity and objectivity of the relevant judicial process. Secondly, questions arise as to whether certain domestic law concepts and principles are comparable or capable of being transposed into international law decisions. It is thus unsurprising that comparative law is rarely employed in practice here.[16]

Another area in which comparative law is claimed to be useful is treaty interpretation. It is true that courts trying to determine the meaning of a treaty provision sometimes consider how other courts have interpreted and applied it, and that involves examination of diverse solutions.[17] Such a practice, however, rarely involves a real comparative approach, since the goal is usually not discovering the best solution but, rather, determining the parties' intention when entering into the treaty. Comparative law plays a more significant role with respect to the

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David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (11th edn, Paris: Dalloz, 2002), 7.

16 For a closer look, see: B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Grotius Publications, 1953, repr. 2006), 392; A. Zimmerman, C. Tomuschat and K. Oellers-frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006), 259-261 (notes). Consider also M. Bothe and G. Ress, "The Comparative Method and International Law", in W. E. Butler (ed), *International Law in Comparative Perspective* (Alphen aan den Rijn, NL: Sijthoff & Noordhoff, 1980), 61.

17 According to Art. 31(3)(b) of the Vienna Convention on the Law of Treaties, courts engaged in treaty interpretation should take into account 'any subsequent practice in the application of the treaty'.

drafting of international treaties. Here, international law experts often rely on the legal experience of several systems to find the best possible rule or at least to encourage consensus. Nevertheless, on the whole, the use of comparative law in the field of traditional public international law is rather limited.

Comparative law is more often utilized in connection with certain sub-categories of international law that have evolved over the last few decades. For instance, in interpreting the European Convention on Human Rights the European Court of Human Rights has frequently resorted to a comparative study of member state laws in order to ascertain the meaning and ambit of treaty provisions.[18] Similarly, the European Court of Justice has been using the comparative method in interpreting European Union law and in seeking to arrive at decisions by assessing solutions provided by various legal systems.[19] Furthermore, the

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18 See on this P. Mahoney, "The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law", in G. Cavinet, M. Andenas and D. Fairgrieve (eds), *Comparative Law Before the Courts* (London: British. Institute of International and Comparative Law, 2004), 135.

19 In the *Nold* judgment, for instance, the Court expressed the view that "fundamental rights form an integral part of the general principles of law (…) In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States" (*Nold* v *Commission*, case 4-73, 14 May 1974, para 13). The Court has used the comparative method in diverse fields of law and in connection with a variety of legal issues. Consider, e.g., *Algera*, joined cases 7/56, 3/57 to 7/57, 12 July 1957; *Hansen & Balle* v *Hauptzollamt de Flensburg*, case 148/77, 10 October 1978; *Zelger* v *Salinitri*, case 129/83, 7 June 1984; *CECA* v *Ferriere Sant'Anna*, case 168/82, 17 May 1983; *Orkem*, case 374/87, 18 October 1989.

comparative method is often utilized in the field of international criminal law. Extradition to a foreign state usually presupposes that the act for which extradition is sought corresponds to a criminal offence of certain gravity under the penal law of the requested country. Moreover, punishment cannot be imposed for an act committed abroad if the act is not punishable under the law of the country in which it was committed; nor can the punishment imposed for an offence committed abroad exceed the maximum punishment provided by the law of the country in which the offence took place. To determine such matters a comparison between the laws of the requesting and requested country is necessary.

Finally, comparative law can be relied on to elucidate the differences between legal cultures and thus help one understand the predilections and mental attitudes that determine how people in different parts of the world think about and react to law, including public international law. An understanding of these differences is essential to the larger international law objectives of maintaining peace and security and promoting international cooperation.[20]

2.2 Comparative Law and Private International Law

Private international law, also known as conflict of laws, is a form of private law consisting of the rules that determine the law to be applied by courts or other authorities in cases involving more than one legal order. Although these rules are primarily of national origin, by their very nature they have a transnational scope and aspire to promote

20 R. David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (11th edn, Paris: Dalloz, 2002), 6.

international decisional harmony, i.e. uniformity of results regardless of forum. The role of comparative law in relation to private international law is twofold: first, it assists legislators with the drafting of new conflict of laws rules; secondly, it is used by courts during the process that leads to the application of foreign law or the recognition and enforcement of foreign judicial decisions and judgments. One might say that as the actual operation of private international law depends to a large extent on comparative law, it provides the latter with practical legitimacy.[21]

Comparative law is particularly important in the process of drafting or codifying national conflict of laws rules. Because of the supranational and technical nature of these rules, private international lawyers and legislators routinely seek advice from comparative law scholars. The same holds with respect to the drafting of international conflict of laws conventions, especially by the Hague Conference on Private International Law. During the last few decades, European Union countries have moved closer to the harmonization of their conflict of laws rules in the context of the Europeanization of private international law process. The comparative study of European legal systems has been an indispensable part of this process. This pervasiveness of comparative law in the sphere of legislation has entailed a high degree of international uniformity in private international law, at least with respect to basic principles and general rules.

Furthermore, where private international law rules require the application of foreign law, judges rely on comparative law to identify, make intelligible and correctly apply the relevant foreign laws. This is

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21 See on this C. von Bar, *Internationales Privatrecht, Erster Band, Allgemeine Lehren* (München: Beck, 1987), 1, n. 123 et seq.

particularly true with respect to those countries that do not recognize the automatic application of the *lex fori* (the law of the country of the court) in resolving conflict of laws cases and in countries (such as, e.g., Germany, Austria, Switzerland and Italy) where judges are expected to apply foreign law ex *officio*.[22] The need for comparison is acknowledged even if, eventually, judges revert to the *lex fori*. It should be noted, further, that comparative analyses are often necessary in order to actually apply existing conflict of laws rules. For instance, conflict of laws rules often employ terms the proper interpretation of which requires an understanding of their respective meanings in all the legal systems involved in a case.[23] Moreover, many private international law conventions explicitly require that courts interpreting their provisions consider what other jurisdictions have done, so that uniformity of meaning is maintained. Although the process of obtaining such knowledge does not in itself amount to comparative law in a strict sense, the application of conflict of laws rules presupposes comparisons between different systems of law, even if these comparisons are not always made

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22 Consider T. C. Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared", (1996) 45 *International and Comparative L. Q.* 271; Th. M. de Boer, "Facultative Choice of Law, The Procedural Status of Choice-of-Law Rules and Foreign Law", (1996) 257 *Recueil des cours*, 223-447; M. Reimann, *Conflict of Laws in Western Europe, A Guide Through the Jungle* (Irvington, NY: Transnational Publishers, 1995), 159 ff.

23 This is referred to as the problem of 'qualification' or 'characterization'. See on this E. Rabel, "Das Problem der Qualifikation", 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1931), 241. And see M. Reimann, "Comparative Law and Private International Law", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 1384-7.

explicit in the relevant judgment.[24] It is thus correct to say that, even in its practical, day-to-day operations, "no system of private international law can escape involvement with the discipline of comparative law".[25]

2.3 Comparative Law and Legal History

It has long been recognized that law and history are closely linked. The history of the Western civilization, in particular, would be inconceivable without law. As Carl Joachim Friedrich remarked, "from feudalism to capitalism, from Magna Carta to the constitutions of contemporary Europe, the historian encounters law as a decisive factor."[26]

Legal history explores the sources of legal phenomena and the evolution of legal systems and individual legal institutions in different

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24 Consider, for example, the situation where a judge is required to decide whether a will made by a citizen of a foreign country is invalid due to lack of capacity of the testator. According to the conflict of laws rules applying in the country of the forum, this question must be decided in accordance with the law in the testator's country. It thus becomes necessary for the judge to resort to the applicable foreign legal system in order to find the rules that correspond, in content and substance, to the rules of their own system concerning the capacity to make a will, irrespective of the terminological and other differences that may exist between the two systems. Similar considerations apply in connection with the recognition and implementation of foreign judicial decisions.

25 A. von Mehren, "The Contribution of Comparative Law to the Theory and Practice of Private International Law", 26 *American Journal of Comparative Law* (1977-8) 32, 33.

26 *The Philosophy of Law in Historical Perspective* (Chicago: University of Chicago Press, 1963), 233-234.

historical settings. It is concerned with both the history of a single legal order and the legal history of many societies, the universal history of law. The role of the comparative method in this field is particularly important. As Frederic William Maitland pointed out, "history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history. … An isolated system cannot explain itself, still less explain its history."[27] By comparatively examining systems of law at different stages of development, legal historians attempt to trace the evolution of legal institutions on a broader level and the historical ties that may exist between legal orders. The comparative method is also utilized in connection with time-related or diachronic comparisons within one and the same legal order (for instance a comparison between German law or an institution thereof in the eighteenth century and today). A comparative perspective is as indispensable to the historical study of law as legal history is to the study and comparison of contemporary legal systems. Without the knowledge derived from historical-comparative studies it is impossible to investigate contemporary legal institutions, since these are to a great extent the product of historical conditions, borrowings and mutual influences of legal systems in the past.[28]

However, notwithstanding the interconnection of legal history and

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27 F.W. Maitland, *Collected Papers* (Cambridge: Cambridge University Press, 1911), 488-489.

28 As commentators have observed, comparative legal history is 'vertical comparative law', while the comparison of modern systems is 'horizontal comparative law'. Consider on this W. Ewald, "Comparative Jurisprudence (1): What Was it Like to Try a Rat?", 143 *University of Pennsylvania Law Review* (1995), 1889, 1944.

comparative law, one should not fail to observe certain important differences between these fields with respect to both their methodology and objectives. With regard to methodology, legal history and historiography exhibit a fairly high degree of sophistication and consistency, whilst comparative law remains largely underdeveloped. One reason for this is that legal historians have generally extensive training and high professional standards by contrast to comparative lawyers, who often have no graduate training in comparative law. With respect to legal history's objectives, the primary focus is on understanding the past (and, by reflection, the present), whilst the utility of its findings for current legal practice is largely neglected. The comparative study of law, on the other hand, is pursued not only for knowledge's sake but to a large extent also for its practical utility (for example, in connection with legal reform or the international harmonization of law). One might thus say that legal history is methodologically advanced but of limited practical use, whilst comparative law is methodologically unsophisticated but practically significant. The differences pertaining to their methodology and objectives pose a serious obstacle to the integration of the two disciplines and the development of a true comparative history of law.

2.4 Comparative Law and Legal Philosophy

Broadly speaking, legal philosophy, also known as legal theory or jurisprudence,[29] is concerned with general theoretical questions about the

29 Legal philosophy is referred to as jurisprudence in England and other common law countries. French and other civilian lawyers use the term

nature of law and legal rules, about the relationship of law to morality and justice, and about law's social nature.[30] One of its principal objects is the analysis of the characteristic elements of law that distinguish it from other systems of rules and standards and from other social phenomena. A distinction is made between *normativist* (logical), *sociological* and *axiological* (evaluative) theories of law. In spite of their differences, all types of theory have universalism in common: they aim to systematize, to find a general means of explanation to enable the discernment of legal phenomena irrespective of time and place. Even if it is admitted that different legitimate approaches to legal phenomena exist, something is considered as the inevitable starting-point, and this is often declared as the ontological essence of law. The questions, 'what is law?', 'how is law cognizable?' and 'what methods can be used for testing propositions

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jurisprudence as the equivalent of that which English lawyers call case-law.

30 Continental European jurists draw a distinction between general theory of law and legal philosophy (in a narrow sense). The former focuses on the basic concepts, methods, classification schemes and instruments of the law; the latter examines the values that underpin legal systems, institutions and rules. As J.-L. Bergel remarks, "the general theory of law starts out from the observation of legal systems, from research into their permanent elements, from their intellectual articulations, so as to extract concepts, techniques, main intellectual constructions and so on; the philosophy of law, on the other hand, is more concerned with philosophy than law for it tends to strip law of its technical covering under the pretext of better reaching its essence so as to discover its meta-legal signification, the values that it has to pursue, its meaning in relation to an all-embracing vision of humanity and the world." *Théorie générale du droit* (2nd edn, Paris: Dalloz, 1989), 4. Furthermore, the term legal science (*scientia juris*) is used to denote positive law organized in such a way that it rationalizes, scientifically, law as an empirical object. See on this P. Orianne, *Apprendre le droit: Eléments pour une pédagogie juridique* (Brussels: Labor, 1990), 73 ff.

concerning law?' must be coherent in a certain manner. A link abides between ontology, epistemology and the methodology of law. There are different possible ontologies: law is norms (a *normativist* ontology); or law is fact, a social or (also) a psychological phenomenon (a *realist* ontology). But whether law is considered as a matter of norms or of facts, it must be acknowledged that it involves values: law reflects certain values or it is a means for achieving certain desired social states of affairs or goals. Thus, one might declare that law has three aspects: rules, behaviour (social context) and values. These aspects must be tied together in some manner for a claim of universality to possess substance, and different theories attain this in different ways. For example, in Marxist theory the uniting factor is *materialism*, dialectical and historical. Other theories construe this factor as the existentialist concept of *experience*.[31] One might say that the uniting links between the different aspects of law are located on more than one level. First, these aspects are united at the

31 Much of contemporary British legal theory has its roots in the tradition of philosophical empiricism – the philosophical position that no theory or opinion can be accepted as valid unless verified by the test of experience. In this context normativity, both in law and morals, is understood and explained in terms of social practices observable in the world. The nineteenth century jurist John Austin, for example, defined law in terms of a command supported by a sanction and as presupposing the habitual obedience of the bulk of a community to the commands of a sovereign himself not habitually obedient to anyone else. See *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954, first published in 1832). Similarly, H.L.A. Hart's conception of legal obligation, although somewhat more complex, derived from the observation of people's actual practices analysed in terms of 'the internal point of view' crucial to their comprehension of and participation to these practices. Consider *The Concept of Law* (Oxford: Clarendon Press 1961, 2nd ed. 1994).

level of language. Norms, behaviour and values are interpreted together. Interpretation is a linguistic phenomenon, even though in the sphere of law it also pertains to the social regulation of human behaviour. Secondly, a uniting factor exists at the level of epistemology and methodology. The social interest of knowledge is another essential link that connects (or may connect) the different aspects of law.

Commentators agree that comparative law is of great value in empirically testing the propositions of legal theory.[32] Such propositions can be assessed on the basis of concrete comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order – indeed, most legal theorists seem to assume a deductive universality of analysis. The starting-point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse orders. How should these similarities or differences be explained? Here one must take into account that certain matters antecede the norms of valid law, such as concepts that impart regulatory information and certain universal problems with respect to which norms take a stand (the way these problems are conceived is connected with their conceptual shaping).[33] Comparative law proceeds from the following two assumptions: (a) law is not only a manifestation of will but is also socially established – hence one cannot compare wholly incidental legal

32 Consider, e.g., F. H. Lawson, *The Comparison: Selected Essays*, (Amsterdam: North Holland, 1977) II, 59.

33 One might perhaps say that there is a dialectical relationship between concepts and problems.

regulations on a purely formal basis; (b) law stems from social relations, but it cannot be entirely reduced to them, for otherwise one should not compare law at all but only the basic facts which the law expresses. There is an *intentional* element in law; its 'facts' are not 'brute facts' but *institutional* facts, which should be construed in their social context.[34] Intentional action can be interpreted with the assistance of an scheme involving goals, i.e. states of affairs which have certain properties justifying their perception as valuable; and epistemic conditions, i.e. knowledge concerning, among other things, social structures, possible means and means-goals relations. It is insufficient to compare the form and the factual content of a legal institution to some similar institution in another legal order. There is an evaluative component attached to facts and concepts, and this should not be ignored. Furthermore, an analysis of social power is also needed when an intentional model is used to understand and explain legal institutions. Such an analysis may complement both normativist and realist approaches to comparative law.

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34 According to O. Weinberger, "Institutional facts…are in a peculiar way complex facts: *they are meaningful normative constructs and at the same time they exist as elements of social reality*. They can only be recognised when understood as normative mental constructs and at the same time conceived of as constituent parts of social reality. As a meaningful normative construct, the law is the object of hermeneutic analysis. The real existence of the legal system is conditioned by a multitude of different circumstances: the law exists in the consciousness of people, meshes in with interconnections of behaviour-patterns and expectations, has standing relationships towards social institutions and observable events." N. MacCormick and O. Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: Kluwer, 1986), 113. Consider also J.R. Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1969), 51; G.E.M. Anscombe, "On Brute Facts", 18(3) *Analysis* (1958), 69.

One should ask: which social group possesses the power to impose its own world-picture – its knowledge, beliefs and desires regarding society – as the ground for legal norms and their application? After addressing this question, one can proceed to an analysis of those factors that led to the normative modeling of society through law in certain way.

Comparative law allows additional perspectives towards a more complete understanding of law by bringing to light what unites the laws of different peoples and also what divides them. It introduces concepts, styles, organizations and categorizations previously unknown and opens unsuspected possibilities in the very notion of law, thus enabling jurists to comprehend and address more effectively the issues they are concerned with. Comparatists, in turn, cannot fully understand laws and legal systems unless they fathom their underlying values, notions of justice and general mentalities. One should therefore expect them to pay considerable attention to philosophical studies of law when carrying out their tasks.[35] As the scope of their work extends beyond merely descriptive inquiries to the study of broader theoretical issues, comparative law and legal philosophy would unavoidably tend to overlap, even though their point of emphasis is different.

2.5 Comparative Law and Legal Sociology

The sociology of law is defined as the study of the relationship between law and society, including the role played by law and legal process in effecting certain observable forms of behaviour; the values

35 See on this W. Ewald, "Comparative Jurisprudence (1): What Was it Like to Try a Rat?", 143 *University of Pennsylvania Law Review* (1995), 1889.

associated with law; and the collective beliefs and intuitions that relate to these values. A sociological account of law normally hinges on three closely interrelated assumptions: that law cannot be understood except as a 'social phenomenon'; that an analysis of legal concepts provides only a partial explanation of 'law in action'; and that law is one form of social control. Legal sociology goes beyond national frameworks and considers the social functions of law with a view to discovering the common and special social conditions existing in diverse countries. Special attention is given to the role that social and political structures, economic conditions and cultural attitudes play in legal development.

One fundamental difference between legal sociology and comparative law is that the former is primarily a descriptive social science, whilst comparative law also concerns itself with the question of how the law ought to be by comparatively examining the legal rules and institutions of diverse systems.[36] Nevertheless, there are many points of overlap between the two disciplines, since both are engaged in charting the extent to which law influences and shapes human behaviour and the role played by law in the social scheme of things. It is thus unsurprising that comparatists need legal sociology as much as legal history and legal philosophy. In so far as comparative law seeks to understand the similarities and differences between legal systems, and the way in which

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36 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd edn, Oxford: Clarendon Press, 1987), 10-12. Consider also A. Watson, *Legal Transplants* (Edinburgh, Scottish Academic Press, 1974), 183. However, this way of looking at the two disciplines has recently been called into question. See, e.g. A. Riles, "Comparative Law and Socio-legal Studies", in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 775, 801-2.

legal rules and institutions operate in practice, a sociological approach can add significant descriptive depth and explanatory potential. Such an approach invites one to look not only at the law in the books but also at the law in action and helps the comparatist understand legal rules, institutions and processes as results of social conditions, political structures and economic realities – in short, it opens the comparatist's eyes to the social contingency of law. It should be noted, however, that the extent to which comparative law may benefit from legal sociology would depend on the view of law a comparatist adopts. If this view is fundamentally positivist and doctrinal so that law is construed as a system of rules and principles, the distance between the two disciplines tends to increase and legal sociology is of little use to comparative law. On the other hand, if the comparatist's approach to law is pragmatic and sociological, the distance between the two fields becomes very small, and a sociological perspective forms an integral part of comparative law.[37]

In recent decades comparatists have been drawing on the sociological perspective in many diverse contexts: the study of non-Western and traditional legal systems and the comparative examination

37 One should note here that much of the comparative method is derived from the work of Max Weber, one of the founders of modern sociology. Weber's theory has influenced the work of many distinguished comparatists, including Max Rheinstein, who declared that whenever comparative law delves into the social function of law, it becomes legal sociology. M. Rheinstein, *Einführung in die Rechtsvergleichung* (Munich: Beck, 1987), 28. For a closer look at Weber's views on legal sociology see his *Economy and Society*, ed. G. Roth and C. Wittich, (Berkeley: University of California Press. 1978), 641-900. And see A.A. White, "Max Weber and the Uncertainties of Categorical Comparative Law", in A. Riles (ed.) *Rethinking the Masters of Comparative Law* (Oxford and Portland: Hart Publishing, 2001).

of legal cultures; the study of the role of customary norms, especially in countries formerly under colonial rule; the debate concerning efforts to export Western notions of legality and the rule of law to developing countries; the debate concerning the relative autonomy of law in the context of the so-called 'legal transplants' theory; and, in recent years, the scholarship on global legal pluralism and the role of supranational and non-state law.

3. Assessing the Influence of Comparative Reasoning on Legal Thought and Practice

At a time when world society is increasingly mobile and legal life is internationalized, the role of comparative law is gaining importance. While the growing interest in this field may well be attributed to the dramatic increase of international transactions, this empirical parameter accounts for only part of the explanation. The other part, at least equally important, has to do with the expectation of gaining a deeper understanding of law as a social phenomenon and a fresh insight into the current state and future direction one's own legal system. Comparative law enables lawyers and jurists to integrate their knowledge of law into a cultural panorama extending well beyond their own country and provides them with a much broader knowledge of the possible range of solutions to legal problems than familiarity with a single legal order would allow. In this way, they can develop the standards and sharpen the analytical skills required to address the challenges they face in a

rapidly changing world of unexpected connections.[38]

Since its inception as an academic discipline in the late nineteenth century, scholars have offered various suggestions on the actual and potential functions and uses of comparative law. These may be classified under four main headings: (a) comparative law in legal education; (b) comparative law as an aid to legislation and the reform of law; (c) comparative law as a tool of judicial interpretation; and (d) comparative law as a means of facilitating and understanding the unification or harmonization of law.[39]

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38 As Aharon Barak, former president of the Supreme Court of Israel, remarked: "When a national jurist – a judge, a professor of law, or an attorney – is confronted with the need to understand a legal phenomenon – for example, "what is law?"; "what is a right?"; "what is a legal person?"; "what is the relationship between morality and law?" – that jurist is certainly permitted, and it is even desirable, to examine the understanding of legal phenomena and legal concepts beyond his national framework. These are all universal aspects which cross-national boundaries, and in order to understand them, it is worthwhile to turn to all thought which has been developed on the subject, be its geographical origin as it may. So did our forefathers through the years. And so did Holmes, Cardozo (judges), Roscoe Pound, Hohfeld, Fuller, Llewellyn (professors), and many others. They did not shut themselves inside of their national borders. The entire world was before them." "Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia", speech for the Fulbright Convention, 29 January 2006.

39 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford: Oxford University Press, 1998), 13-31; P. de Cruz, *Comparative Law in a Changing World* (2nd edn, London: Cavendish, 1999), 18-24.

3.1 Comparative Law in Legal Education

The practice of law has traditionally entailed the mastery of a single country's laws and practices. Faced with an occasional international deal or a foreign lawsuit, the response of the typical lawyer has been to seek out and rely upon local counsel: a reputable licensed attorney in the relevant foreign jurisdiction. Likewise, a traditional legal education focused exclusively on the sources, substance and procedures of one domestic legal order. However, in the last few decades, with the emergence of a global market for capital, goods, and services, enormous developments are taking place in the global economic landscape. Financial services, telecommunications, manufacturing, e-commerce and investments are all areas where the process of globalization continues to grow and develop at a rapid rate. Legal practitioners today have to work in this rapidly changing economic environment. The domestic insularity in which many lawyers in the past could practice their profession is no longer sustainable as the inter-connectedness between countries grows. This inter-connectedness extends, of course, beyond the domain of the economy to embrace environmental and human rights issues and matters such as migration and transnational crimes. Even areas of law with a strong domestic focus, such as criminal law and family relations increasingly involve international and transnational issues. The integration of the global economy, the rise of transnational problems like climate change and terrorism, the need for governments to collaborate to regulate increasingly mobile people, money and goods all point toward legal transnationalism. Today's lawyers must be able to provide advice on antitrust and competition, consumer protection, environmental and employment law issues for each country in which their clients conduct

business. Transactional lawyers are expected to follow their clients across borders, negotiating mergers among companies with international profiles and securing goods and services from suppliers around the globe. Tax and estate lawyers must be ready to interpret – and where appropriate, to recommend – investments and holdings outside of their clients' home states. Even family law, once the exclusive purview of the domestic legal order, has become internationalized in the context of transnational custody disputes. In the public sector, we have seen a blossoming of treaties and other international agreements in the areas of international trade, human rights, and criminal law. Governments around the world increasingly rely upon lawyers to interpret a complex body of international law and to advise and advocate on behalf of national interests.

In response to the internationalization of legal practice law schools around the world have bolstered their comparative and transnational law offerings and developed new study abroad and joint-degree programs. Most law schools are either contemplating or have already introduced into the first year curriculum a comparative legal studies course, such as Comparative Legal Traditions or Introduction to the Study of Foreign Laws. This kind of course aims to introduce some common concepts that would help students think about "big picture" issues[40] that are relevant to dealing with the range of more narrowly topical courses. Many law schools boast a multiplicity of new course offerings on topics such as

40 Examples of such issues include: the comparative law method; the concepts of legal tradition, legal family and legal culture; legal pluralism and harmonization of laws; comparisons between civil and common law systems; legal transplants and hybrid legal systems.

comparative corporate taxation law; comparative commercial law; comparative contract law; comparative constitutional law; comparative criminal law; comparative migration and citizenship law; comparative intellectual property law; and comparative environmental law. Within the legal subjects that form the core of the curriculum there is greater interest in comparative legal analysis, as well as greater attention to how global developments and international actors and institutions affect the operation of domestic law. Moreover, law schools provide opportunities for their students to conduct their studies in a transnational legal environment, wherein they are exposed to different laws, legal systems and approaches to resolving legal problems.[41] Accessibility of transport and technological innovations permit today's legal classroom to be mobile, allowing students to study overseas or online through the use of teleconferencing and other forms of electronic communication.[42] The effect of globalization on legal scholarship has been similarly transformative. In virtually every field of legal study, there is greater interest in comparative analysis, greater cross-border collaboration among academics, and more extensive engagement in projects abroad. One reason for these developments is that the global integration of the

41 Law professors are encouraged, as much as practicable, to co-teach with colleagues from other legal systems. Co-teaching enhances the learning of students and faculty alike, and is a valuable transnational exercise in itself.

42 The ability to speak, write and conduct research in multiple languages is essential to an effective transnational law study. Therefore, many universities today place a high premium on students who enter law school with extensive study or experience in a foreign language. In addition, universities are committed to make available existing or newly developed courses intended to maintain and improve the students' foreign language proficiency.

economy, technological innovation and new ideas about regulation and governance are creating similar pressures on domestic legal regimes and producing similar social problems to which legal regimes must respond. However, we are also in the midst of a cultural shift in which social and political issues are more globally interconnected and law itself has enhanced significance. Questions that we used to think of as primarily issues of politics, policy, culture or economics are increasingly 'juridified', that is, conceived as legal matters, discussed in terms of legal rights and litigated before courts and other tribunals. These and myriad other changes reflect an unsettling of the old paradigm. If there is a link among all of these changes, it might be the sense that we are in the midst of a transformation so foundational that we can neither continue to deliver nor undergo legal education on a 'business as usual' basis.

Comparative and transnational law programs involve the comparative study of legal systems and institutions both from a historical (diachronic) and contextual (synchronic) perspective, embracing both legal systems with common roots (such as English common law), as well as systems with different origins. Through the comparative study of legal systems, students gain a better insight into the ways in which legal rules and institutions emerge; the socio-cultural factors by which they are conditioned; and the different forms they assume. They have an opportunity to fathom the interaction of different disciplines (for example, when the student considers the interface between law and politics) and to connect these to the development and operation of legal rules in diverse socio-cultural contexts. Comparative law thus contributes to a better understanding of law in general and of one's own legal system in

particular and encourages a more critical assessment of the functions and goals of the rules one is studying.[43] Without the aid of legal comparison a student becomes accustomed to regarding the solutions to legal problems provided for by his or her own system as the only possible ones, or as original to her system, when in fact they may have foreign roots. Comparative law makes it possible for one to see one's own legal system in a broader perspective and from a certain distance.[44] It allows one to recognize that foreign legal concepts and institutions may significantly differ from those inherent within one's own system and yet still be valid; to consider how the same rules produce different outcomes in different contexts; and to see how different rules entail similar results because of the different ways in which people appeal to and interpret the law.[45] In this way, students can become much more receptive to

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43 Zweigert & Kötz argue that the study of only one legal system cannot not reach the level of a true academic inquiry: "It may indeed be that the mere interpretation of positive rules of law in the way traditionally practised by lawyers does not deserve to be called a science at all, whether intellectual or social. Perhaps legal studies only become truly scientific when they rise above the actual rules of any national system, as happens in legal philosophy, legal history, the sociology of law, and comparative law." *An Introduction to Comparative Law* (3rd edn, Oxford: Oxford University Press, 1998), 4. On the value of comparative law as a means of broadening legal knowledge see also: H.E. Yntema, "Comparative Legal Research: Some Remarks on 'Looking out of the Cave'", 54(7) *Michigan Law Review* (1956), 899, 901; G.W. Paton, *A Textbook of Jurisprudence* (Oxford: Clarendon Press, 1972), 41.

44 See G.P. Fletcher, "Comparative Law as Subversive Discipline", 46 *American Journal of Comparative Law* (1998), 683; H. Muir-Watt, "La fonction subversive du droit comparé", *Revue internationale de droit compare* (2000), 503.

45 As Zweigert and H. Kötz remark," it is the general educational value of

understanding fundamental values and processes that different cultures utilize in legal reasoning. Although, naturally, students will focus on the mainstream features and substantive rules of their own system, the recognition of diversity in legal thinking and a wider knowledge of the possible range of solutions to legal problems gleaned from other jurisdictions will prepare them more effectively to face new and complex issues of modern legal theory and practice. Although there are, of course, other ways in which law students can acquire international understanding, experience and knowledge of foreign laws and legal systems, such as study abroad programs and international moot court competitions, there is no substitute for the formal study of comparative law. From a more political point of view, transnational legal education based on comparative reasoning should help shape a new generation of lawyers, public servants and other professionals who recognize and respect cultural diversity in an interrelated world. Transnational legal education could be one of the most efficient and effective tools in promoting a spirit that helps students to do away with exceptionalism and provincialism and learn instead to cultivate an attitude of openness and international collaboration.

While we are only beginning to figure out what a transnational

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comparative law that is most important: it shows that the rule currently operative is only one of several possible solutions; it provides an effective antidote to uncritical faith in legal doctrine; it teaches us that what is often presented as pure natural law proves to be nothing of the sort as soon as one crosses a frontier, and it keeps reminding us that while doctrine and categories are essential in any system, they can sometimes become irrelevant to the functioning and efficacy of the law in action and degenerate into futile professional games." *An Introduction to Comparative Law* (3rd edn,, Oxford: Oxford University Press, 1998), 21-22.

legal education should look like, certain things are already clear. First, an array of different frameworks is likely to be needed to analyze social and political issues in a transnational world; for this reason, myriad forms of legal analyses – economic, socio-legal, critical, feminist, third-world, for example – may provide useful tools to illuminate different facets of these issues. Second, legal rules and institutions can operate in both similar and remarkably varied ways in different places. In order to calculate the effects of legal rules on different groups, different interests and different values in contexts that are both similar and dissimilar to those at home, we need to consider how economic, historical, and cultural factors all affect the design and operation of legal rules and institutions. For these reasons, there is a parallel move underway toward greater interdisciplinarity in law teaching and legal scholarship, one that is likely to become stronger in tandem with the internationalization of legal education and legal practice.

3.2 Comparative Law as an Aid to Legislation and the Reform of Law

Comparative law is particularly important in the field of legislation, especially when a new law or a modification of an existing one is proposed. In today's complex society the lawmaker is often faced with difficult problems. Instead of guessing possible solutions and risking less appropriate results, he can draw on the enormous wealth of legal experience that the comparative study of laws provides. As Rudolf Jhering remarked, "the reception of a foreign legal institution is not a

matter of nationality, but a matter of usefulness and need. No one bothers to fetch a thing from afar when one has one as good or better at home, but only a fool would refuse a good medicine just because it did not grow in his own back garden."[46] It is thus unsurprising that legislators, when considering different possible approaches to resolving a particular problem, often take into account how the same (or a similar) problem has been dealt with in other jurisdictions. The adoption of a foreign legal rule would normally presuppose that the rule has generally proved effective in its country of origin and that it is deemed capable of producing the desired results in the country contemplating its adoption. Furthermore, in most cases it may prove impossible to adopt a foreign rule without significant modifications because of differences pertaining, for example, to the court structure and legal process, as well as more general socio-cultural, political and economic differences between the two countries.

The use of legal comparison for legislative purposes is as old as the phenomenon of statutory law itself. A well-known example of such use is when the Romans visited a number of foreign (especially Greek) cities which they felt could provide them with models of laws worth embodying into their own code of laws (this compilation, known as the Law of the Twelve Tables, was published in c. 450 BC).[47] The rise of modern comparative law as a science and as an academic discipline was largely precipitated by the desire on the part of national authorities to

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46 *Geist des römischen Rechts*, I (9th edn. 1955), 8 ff; quoted in K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd edn, Oxford: Oxford University Press, 1987), 16.

47 Similarly, the Code of Hammurabi, a Babylonian law code dating back to c. 1700 BC, is presumably based on laws then prevailing in the Near East.

embark on the study of foreign laws as a means of designing or improving domestic legislation.[48] A well-known example of drawing inspiration from foreign law pertains to the Prussian company law of 1843, which was partly based on the French Commercial Code of 1807, the earliest legislative enactment on companies.[49] Other examples include the notion of income tax, which originated in England and was imitated by German and other Continental European legislators in the early 19th century; the Austrian anti-trust law, which provided the model for the German cartel law of 1923; and the Swedish institution of the ombudsman, which was adopted in many countries around the world. Moreover, several ideas in the German Civil Code were derived from the Swiss Law of Obligations of 1881, and German civil procedure borrowed much from Austrian law. The wholesale importation of civil law codes into other countries during the 19th and 20th centuries is also a well-known phenomenon. In particular, the French Civil Code of 1804 (*Code civil des francais*) served as a model for the civil codes of many countries in Europe, South America and other parts of the world, including Italy, Spain, Portugal, Poland, Romania, Bolivia, Mexico, Quebec and Louisiana. The Swiss Civil Code of 1907 was adopted in Turkey (1926), and the

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48 The discipline of legislative comparative law (legislation comparée), as developed by the Société de Législation Comparé (established in 1869), promoted the comparative study of foreign law codes in France and several other countries.

49 In 19th century Germany a number of legal unification projects in the fields of private law, criminal law and the law of procedure drew on extensive comparative research into the laws of other countries. See on this, U. Drobnig and P. Dopffel, "Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber", 46 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1982), 253 ff.

drafts of the German Civil Code of 1900 (*Burgerliches Gesetzbuch* or BGB) influenced the civil codes of Japan, Korea, Brazil, Switzerland, Austria, Hungary and Greece. The new civil codes of the Netherlands (1992) and Québec (1994), and the new German law of obligations of 2002, as well as the new codes in the areas of civil, commercial and criminal law enacted in former communist countries of Central and Eastern Europe were also based on extensive comparative law research. In general, contemporary law-making and law reform are characterized by a sort of eclecticism. This takes the form of using comparative law to investigate approaches and solutions to legal problems in more than one country and then integrate the findings of this research into the drafting of new legislation.[50] In Continental European countries such research is usually initiated by the ministry of justice and carried out by experts in comparative law research institutes or suitably qualified civil servants. In the United Kingdom comparative law finds its way into the legislative process mainly through the work of the English and Scottish Law Commissions. Section 3(1)(f) of the Law Commissions Act 1965, which created the two law reform commissions, states that one of the functions of the Law Commissions is "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of their functions," (i.e. systematically developing and reforming the law of England and Scotland).[51] An

50 This tendency is evident, for example, in the new Civil Code of Holland, which came into effect in 1992. In carrying out their work, the Dutch drafters relied not only on a variety of Continental European models, but also on models derived from Common law countries, as well as from international treaties and conventions.

51 Consider, e.g., the English Law Commission's report on 'Privity of

important aspect of the commissions' work is to inquire into the function of legal rules and the context within which they operate, and, after consultation with local and foreign experts, to ascertain whether or not the rules have been successful in achieving what they were designed for. In the United States, the American Law Institute, established in 1932, carries out a wide range of comparative law research aimed at law reform and general restatement of laws. The Institute's Model Penal Code, for example, draws on legal experience derived from several jurisdictions. Similarly, in the field of competition law, the federal legislature was inspired by European legal models in reviewing the Sherman Antitrust Act of 1890.[52] However, in comparison with European countries, the influence of foreign law on American law-making seems to play a less prominent role. This is probably connected with the fact that inter-state comparison within the United States is regarded as much more important than comparison with foreign legal systems.

As the above examples show, most new legislation enacted in Europe and elsewhere is preceded by at least some comparative law research, and every legal system in the world today embodies borrowed or imported elements. It is important to note that the most common way in which foreign legal models find their way into national law is through

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Contracts: Contracts for the Benefit of Third Parties'. Besides surveying the laws of other Common law countries, the Commission also recognized that a factor in support of legal reform in this field was that "the legal systems of most of the member states of the European Union recognize and enforce the rights of third party beneficiaries under contracts." (See Law Com. No 242, 1996, 41.) The report led to the enactment of the Contracts (Rights of Third Parties) Act 1999.

52 For more examples see G.A. Zaphiriou, "Use of Comparative Law by the Legislator", 30 *The American Journal of Comparative Law* (1982), 71 ff.

academic legal writing. It is largely legal scholars who take up a point from some foreign legal system, make it part of the domestic debate and thus bring it to the attention of the legislative bodies in their respective countries. Legal scholarship tends to be more susceptible to foreign influence than is the judiciary or the legal profession, as evidenced, for example, by the fact that the reception of Roman law in Continental Europe first occurred in the field of legal science.

3.3 Comparative Law as a Tool of Judicial Interpretation

The comparative study of foreign laws is of practical significance to courts and the judicial process when judges are faced with the task of interpreting legal rules, or filling gaps in legislation or case law. Legal systems recognize that, in the interests of legal certainty, courts should decide cases according to their own domestic law, but matters not covered by a statutory provision or case law authority will inevitably arise. When this occurs, comparative law can point to a range of approaches and possible solutions to the problem at hand. Even though foreign laws and court decisions are not considered binding, they can be regarded as highly informative or even persuasive.[53] This is particularly true when a judge is dealing with legal rules, concepts and principles that have been borrowed or adopted from other jurisdictions. An influence of comparative law on national courts can be observed in almost every legal system, even though significant differences exist

53 Consider H.P. Glenn, "Persuasive Authority", 32 *McGill Law Journal* (1987), 261 ff; B. Markesinis, "Comparative Law in Search of an Audience", 53 *Modern Law Review* (1990), 1.

between the various countries.

With the exception of the United States, where there is considerable resistance to the influence of foreign sources in the domestic legal system,[54] in Common law countries the exchange of legal ideas at the

54 In his dissenting opinion in the case of *Roper v. Simmons*, which concerned the constitutionality of the juvenile death penalty, Justice Antonin Scalia of the Supreme Court of the United States presented the following argument with regard to the use of foreign legal materials in judicial decision-making: "The basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand. In fact, the Court itself does not believe it. (...) To begin with, I do not believe that approval 'by other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment. (...) What these foreign sources 'affirm', rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. 'Acknowledgment' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment – which is surely what it parades as today." 543 U.S. 2005, *Roper v. Simmons*, dissenting opinion of Justice Scalia, pp. 16-23. According to A. Levasseur, with the exception of Louisiana, the relevance of foreign and comparative law in American courts "is almost nil". See "The Use of Comparative Law by Courts", in U. Drobnig & J.H.M van Erp (eds), *The Use of Comparative Law by Courts* (The Hague e. a.: Kluwer Law International, 1999), 333. This does not mean, however, that there are no examples of state courts or of the United States Supreme Court referring to foreign legal sources. For example, in the above-mentioned case of *Roper v Simmons* the Court held that the execution of offenders who were under the age of eighteen at the time of the commission of the crime was a violation of the Eighth Amendment. According to the majority of the Court, this view drew support from the fact that executing juvenile offenders violated several international treaties and that "the overwhelming weight of

judicial level is generally encouraged and cross-citations between common law courts in different jurisdictions are frequent.[55] In these countries, the principal criterion for the selection of foreign judgments is legal family and thus the sources most often referred to come from Common law systems. The accessibility of the relevant legal materials with respect to language and availability provides a further reason for judges to consider such sources first. To a lesser extent, a foreign court's standing and prestige can supply an additional reason for judges to take this court's case law into account. In this respect, judges sometimes refer to judgments of the highest courts in Germany, France, Italy and the Netherlands. However, the problems of language and availability constitute a significant obstacle to the use of legal materials from non-Common law sources.

As compared with courts in Common law jurisdictions, courts in Continental European or Civil law countries are generally reluctant to look for inspiration outside their national legal framework. This can be explained by reference to differences between the respective legal cultures as regards the style of judicial reasoning and process of decision-making. The style of judicial reasoning that prevails in Common law countries allows judges to express their personal socio-political views freely and utilize teleological (consequentialist) arguments – including arguments derived from comparative law – to buttress their legal conclusions. On the other hand, the deductive method of judicial

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international opinion [was] against the juvenile death penalty". Consider also *Roe v. Wade*, 410 US 113 (1972).

55 See on this E. Mak, "Why Do Dutch and UK Judges Cite Foreign Law?", 70 (2) *Cambridge Law Journal* (2011), 420 ff.

reasoning that predominates in Civil law jurisdictions leaves little room for judges to look beyond their own law into foreign systems for justification of their decisions. Civil law judges do not create their own legal constructions, but borrow them from legal science. It is therefore largely through legal science and legal scholarship that foreign law is brought to their attention. It is important to note, however, that considerable differences prevail between Continental European legal systems as regards the way in which national courts approach foreign law. In Germany it is not uncommon for the highest court to utilize foreign legal sources to support its arguments, even though the number of cases in which this actually happens is rather limited. Furthermore, the use of such sources in judicial deliberations largely concerns references to jurisdictions with a shared legal heritage, such as Switzerland and Austria, while there are only a few cases in which French, Italian, English and American law is cited. The situation in France is very different. In French case law there are hardly any references to foreign legal sources. This is unsurprising, as the decisions of the French Supreme Court (*Cour de Cassation*) in particular are not extensively reasoned and often do not even include references to French legal doctrine or case law. The same holds for Belgium, the Netherlands and Greece, where the sparse references to foreign law are only in the most general terms.[56] However, one should be careful not to draw the

56 It should be noted here that even when references to foreign legal systems are made, these are often limited to the interpretative analyses of statutory provisions offered by scholars. The legislative enactments to which these analyses pertain, the socio-cultural environment in which the relevant provisions operate as well as the comparison of this environment with that of the recipient country, are either not considered at all or, when

conclusion that foreign legal sources have no relevance at all to judicial decision-making in these countries. In Continental European countries which have a system of Advocates-General advising the Supreme Court, it is in the opinion of that official that one often finds comparative references to foreign and international statutory and case law. When the court makes an explicit reference to the part of the Advocate-General's opinion containing references to foreign legal sources, an influence of foreign law becomes evident.[57] It should be noted, finally, that despite the differences that exist between European countries as regards the use of foreign and comparative law, a certain degree of convergence can currently be observed with respect to the national judicial treatment of the European Court of Human Rights and EU law.[58]

As already noted, the need to consult foreign legal sources usually arises when a court is faced with a gap in the law or when the meaning of the relevant statutory enactment is unclear. Although courts could seek to resolve such problems exclusively within a domestic framework by utilizing long-established interpretive techniques (textualism, intentionalism, purposivism), the increasing use of comparative arguments in recent years reflects a growing feeling among the judiciary (especially that of the higher courts) that it may be counter-productive not to seek to benefit from foreign experience, in particular when similar

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they are considered, never appear in the court's judgment.

57 Consider on this issue U. Drobnig, "The Use of Comparative Law by Courts", in U. Drobnig & J.H.M van Erp (eds), *The Use of Comparative Law by Courts* (The Hague e. a.: Kluwer Law International, 1999),

58 G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Groningen: Europa Law Publishing, 2010).

or identical problems arise in different countries.[59] Thus, for example, the question whether 'immaterial damages' should be awarded in cases involving infringement of privacy, which was not addressed by the German Civil Code, was answered in the affirmative by the highest German civil and constitutional courts after consideration of foreign law.[60] Furthermore, the German Supreme Court determined that statements made by a person accused of an offence during a police interview were not admissible as evidence if the accused had not been informed of his right to remain silent and of his right to legal representation. The Court drew support for its decision from the American case of *Miranda v. Arizona* of 1966 as well as from English, French and Dutch law.[61] In addressing the question of whether land rights should be given to aboriginals the High Court of Australia made extensive references to other legal systems, citing fourteen cases in favour of its decision, only three of which were Australian.[62] Similarly, the Supreme Court of Canada referred extensively to foreign, in particular American, case law when deciding which rights aboriginal people should have.[63] In *Fairchild* v. *Glenhaven Funeral Services*[64] the English House of Lords departed from the normal rules concerning causation in a case where a person suffering from a disease caused by exposure to asbestos would be unable to show

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59 T. Koopmans, "Comparative Law and the Courts", 45 I*nternational and Comparative Law Quarterly* (1996), 549.

60 BGH 5 March 1963, BGHZ 39, 124 and BVerfG 14 February 1973, BVerfGE 34, 269.

61 BGH [1992] *Neue Juristische Wochenschrift* 1463.

62 High Court of Australia, *Mabo & Others v. State of Queensland* (1992) 107 ALR 1.

63 *Inter alia Van der Peet* v. *The Queen* (1996) 2 SCR 507.

64 [2003] 1 AC 32.

which of several employers had caused his condition. Besides relying on common law authority, the House referred to legal sources from France, Germany, Norway and the Netherlands.[65] The list of pertinent examples could easily be extended.

However, one should not infer from the foregoing that that voluntary recourse to foreign legal authorities is common in hard or controversial cases. There are many such cases in which judges do not refer to foreign law at all, even though this would have been useful. This might be explained partly by reference to institutional factors and partly by reference to individual approaches of judges to judicial decision-making. A judge's personal views concerning his role vis-a-vis the legislature and the executive unavoidably influence the margin of discretion he considers that he has in a hard case.[66] Furthermore, judges may have different views regarding the place foreign laws and legal experiences can or should have in the decision-making process. These diverse opinions and attitudes are related to the educational background and legal training of judges, their interaction with colleagues and legal scholars, and their personal views concerning the exercise of judicial discretion in the interpretation of laws.[67]

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65 See on this matter Jens M. Scherpe, "Ausnahmen vom Erfordernis eines strikten Kausalitätsnachweises im englischen Deliktsrecht", 12 *Zeitschrift für Europäisches Privatrecht* (2004), 164 ff.

66 Consider on this A. Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 118.

67 See in general R. Posner, *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008).

3.4 Comparative Law and the Unification or Harmonization of Laws

Since its beginnings as a distinct discipline, comparative law has been associated with the goal of unification or harmonization of law. It should be noted here 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".[68] In the First International Congress of Comparative Law, held in Paris in 1900, jurists like Lambert and Saleilles stressed the practical function of comparative law as being to furnish the foundation for the unification of those national legal systems that have attained the same level of development or civilization. The aim would then be to create an international common law from the common elements of the national systems that would in time replace those systems. Early comparative law scholars challenged law's seeming parochialism and promoted comparative law in the name of specific cosmopolitan, internationalist, humanist and socially progressive visions. They meant comparative law to be applied, and dedicated themselves to far-reaching projects of legal unification.

The world has undergone great changes since early comparative law scholars envisaged a world governed by a common body of laws shared by all 'civilized nations'. The wide diversity of legal cultures and ideologies, the ongoing problems dogging European unification and the

68 W.J. Kamba, "Comparative Law: A Theoretical Framework", 23 *International and Comparative Law Quarterly* (1974), 485 at 501.

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 at an international or regional level may be achieved. For instance, Zweigert and Kötz assert that harmonization, at least at a European level, is a desirable political objective with respect to which comparative law is an essential starting-point. They draw attention, in particular, to the role of comparative law as a tool for "the development of a private law common to the whole of Europe".[69] According to these authors: "The advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus unified law promotes greater legal predictability and security".[70] A notable step in this direction was taken in 1989, when the European Parliament adopted a resolution stating its long-term goal to develop a uniform European Code of Private Law.[71] Furthermore, during the last three decades, several

69 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn,, Oxford: Oxford University Press, 1998), 16.

70 *Ibid.* 25.

71 Resolution A2159/89 of the European Parliament on action to bring into line the private law of the Member States, [1989] OJ C158/400. Reference should also be made in this connection to a report published by the Directorate General for Research of the European Parliament in 1999,

groups of academic lawyers from throughout Europe have been engaged in projects concerned with the harmonization of law in various fields of European private law.[72]

Comparative law has played and continues to play a significant role in projects concerned with legal integration or the harmonization of law at an international or regional level. These projects are designed to reduce or eradicate, as far as possible and desirable, the discrepancies and inconsistencies between national legal systems by inducing them to adopt uniform legal rules and practices. In pursuance of this objective, uniform rules are usually drawn up on the basis of research conducted

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under the title 'The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code.' See European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series JURI 103 EN (1999).

72 In this connection reference should be made to the *Principles of European Contract Law*, a work of several European academics working in an independent capacity (the Commission on European Contract Law or 'the Lando Commission') (see *Principles of European Contract Law*, Parts I & II Revised 2000, Part III 2003); the Study Group on a European Civil Code (the successor to the Lando Commission), which prepared several volumes of the *Principles of European Law*; the Acquis Group, focusing on the systematic arrangement of current Community law with a view to elucidating the common structures of the emerging Community private law; the Common Core of European Private Law Project, which has completed several important comparative studies on on European private law; the Academy of European Private Lawyers ('The Gandolfi Project'), which has published a draft European Contract Code inspired by the Italian Civil Code, and a draft Contract Code prepared for the Law Commissions of England and Scotland; the European Group on Tort Law, which has drafted the *Principles of European Tort Law*; and the Commission on European Family Law, which carries out research concerned with the harmonization of family law in Europe.

by comparative law experts; these rules are then incorporated in transnational or international treaties obliging the parties to adopt them as part of their domestic law. However, the practical efficiency of unification or harmonization projects is necessarily circumscribed by the legal structures, institutions and procedures existing within the participating nations, which ultimately determine the degree of uniformity in the interpretation and application of the relevant rules.[73] Despite the difficulties surrounding the implementation of harmonization schemes, there have been some notable successes, especially with respect to countries that closely cooperate with each other, such as the member countries of the European Union, and with respect to certain areas of law, such as international commercial law, transportation law, intellectual property law and the law of negotiable instruments. In general, legal unification or harmonization is sought to be achieved through the use of international institutions. Such institutions include the International Institute for the Unification of Private Law in Rome (UNIDROIT);[74] the UN Commission

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73 J. Merryman and D. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: Bobbs-Merrill, 1978), 58.

74 The UNIDROIT is an independent intergovernmental organization concerned with the harmonization and coordination of private and especially commercial law between states and the formulation of uniform instruments, principles and rules to attain these goals. It was established in 1926 as an auxiliary organ of the League of Nations; after the League's demise, it was re-established in 1940 on the basis of a multilateral agreement (the UNIDROIT Statute). Achievements include: the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964); the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964); the Convention providing a Uniform Law on the Form of an International Will (Washington, 1973); the Convention on Agency in the International Sale of

on International Trade Law (UNCITRAL);[75] the European Committee on Legal Cooperation;[76] the Hague Conference on Private International

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Goods (Geneva, 1983); the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995); the UNIDROIT Model Law on Leasing (2008); and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009).

75 This is the core legal body of the UN systems in the field of international trade law. In establishing the Commission, the UN General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The focus of UNCITRAL's work is the modernization and harmonization of rules on international commercial transactions. Achievements include: the Convention on Contracts for the International Sale of Goods (1980); the Model Law on International Credit Transfers (1992); the Model Law on International Commercial Conciliation (2002); and the Model Law on International Commercial Arbitration (1985 – amended 2006).

76 The European Committee on Legal Cooperation (CDCJ) is an inter-governmental body concerned with the standard-setting activities of the Council of Europe in the field of public and private law. It promotes law reform and cooperation in fields of administrative law, civil law, data protection, family law, information technology and law, justice and the rule of law, nationality, refugees and asylum seekers. The Committee carries out its tasks through the adoption of draft conventions, agreements, protocols or recommendations; the organization and supervision of colloquies and conferences; and the monitoring of the implementation and functioning of international instruments coming within its field of competence. Recent achievements include: the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); and the European Convention on the Adoption of Children (revised, 2008).

Law;[77] the World Intellectual Property Organization (WIPO);[78] the International Labour Organization;[79] the Comité Maritime International;[80] and

77 The Hague Conference on Private International law is an intergovernmental organization concerned with the progressive unification of the rules of private international law. The principal method used to achieve this purpose consists in the negotiation and drafting of multilateral treaties or Conventions in the various fields of private international law (international judicial and administrative cooperation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; jurisdiction and enforcement of foreign judgments). Notable achievements include: the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007); the Convention on Choice of Court Agreements (2005); the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993); the Convention of on the Law Applicable to Contracts for the International Sale of Goods (1986); and the Convention on International Access to Justice (1980).

78 The World Intellectual Property Organization is a United Nations agency dedicated to developing an international intellectual property system. It seeks to: harmonize national intellectual property legislation and procedures; provide services for international applications for industrial property rights; provide legal and technical assistance to countries; and facilitate the resolution of private intellectual property disputes.

79 The International Labour Organization is a UN specialized agency which seeks to bring together governments, employers and workers to set labour standards, develop policies and devise programmes. It carries out its work through three main bodies (The International labour Conference, the Governing body and the Office), which comprise governments', employers' and workers' representatives.

80 This non-governmental organization is concerned with maritime law and related commercial practices; its object is to contribute to the unification of maritime law in all its aspects.

the International Civil Aviation Organization (ICAO).[81] Most of the relevant projects pertain to matters of private law, both civil and commercial. Only some of the legal rules developed were designed to become domestic legislation, while the majority were concerned with the regulation of inter-state transactions.

An important aspect to the idea of legal integration or harmonization relates to the development of supra-national entities, or the aim of diminishing the traditional relations between state power and the legal regulation of society. Consider the European Union, for example. This organization embodies the idea of a non-state legislative power, whose rules and legal policy objectives are accorded priority over those of its individual member states. This may be perceived not only as an expression of a certain interpretation of an integration ideology, but also as a starting-point for a new perspective on legal theory. In the background lie important questions concerning the relationship between law and society: What are the goals of integration – whose interests do they express? If it is recognized that the goal of integration reflects certain interests, should they be acknowledged? The general assumption is that legal integration schemes are part of a coherent plan designed to facilitate economic transactions through the establishment of a legal structure that encourages enterprise and reduces costs. Although the principal motive appears to be economic, the forces driving legal integration are fundamentally political and cultural, and therefore closely

81 The ICAO is a UN Specialized Agency seeking to promote secure and sustainable development of civil aviation through cooperation amongst its member States. The charter of ICAO is the Convention on International Civil Aviation, drawn up in Chicago in December 1944, and to which each ICAO Contracting State is a party.

connected with the institutional framework in which integration takes place.[82] The comparative method may be indispensable to the design and implementation of legal integration schemes, but the purpose of such schemes cannot be fully understood without consideration of this framework.

Legal integration, in theory at least, entails that the resultant uniform law would incorporate the best elements from diverse legal systems and that this would be beneficial to all the countries concerned. In practice, however, the risk is that marginal but significant and useful legal categories from smaller legal systems would be lost and that larger systems would predominate; thus the final result would be more akin to a form of 'legal imperialism' than harmonization. It is thus unsurprising that not all comparative law scholars, let alone all lawyers, consider legal integration desirable. Some have argued that in so far as we are capable of understanding one another's legal systems, interpret our laws and communicate effectively, then harmonization becomes less, rather than more appealing. With respect to the issue of European legal integration, in particular, it is noted that a common European private law would be an important symbol of European unity and could entail benefits for both the businessman and the individual citizen.[83] However, as a socio-cultural phenomenon, law is always linked to the culture of a particular society – legal norms and their socio-cultural context are interconnected. Thus, if a historically developed and functioning system of national law were to be

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82 See on this A. Rosett, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law", 40 *American Journal of Comparative Law* (1992), 683 ff.

83 J. Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* (Tübingen: J.C.B. Mohr, 1993).

replaced by a supranational and largely alien body of law merely for the sake of symbolism, European unity would be weakened rather than strengthened. A legal integration scheme imposed without sufficient attention to the diverse cultural traditions in which it should apply would be just as meaningless and counterproductive as doing away with the national languages and the imposition from above of a single 'official' language for the whole of Europe.

Besides the active programmes for the unification or harmonization of law (discussed above), there are other ways by which legal integration might be brought about, namely by the transplantation of legal institutions and by 'natural convergence'.[84] As a branch of legal science, comparative law is concerned with elucidating all these processes.

Legal transplantation involves a system of law incorporating a legal rule or institution adopted from another legal system.[85] It may also

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84 J. Merryman and D. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: Bobbs-Merrill, 1978), 51-67.

85 The phenomenon of legal transplantation as a factor conducive to the convergence of legal systems has attracted much attention in recent years, especially since the publication in 1974 of A. Watson's book *Legal Transplants: An Approach to Comparative Law*. According to this author, the term 'legal transplants' refers to "the moving of a rule (…) from one country to another, or from one people to another". See *Legal Transplants: An Approach to Comparative Law* (2nd edn, Athens, Ga.: University of Georgia Press, 1993), 21. To illustrate this, he mentions a set of rules concerned with matrimonial property, which traveled "from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, [and] from California to other states in the western United States." *Ibid.*108. He adds that if one considers a range of legal systems over a long period of term "the picture that emerge[s] is of continual massive borrowing (…) of rules." *Ibid*. 107. Consider also A. Watson, "Aspects of Reception of Law", 44 *American Journal of Comparative Law*

pertain to the reception of an entire body of law or legal system, which may occur in a centralist or piecemeal way. Transplantation may occur voluntarily by, for instance, the borrowing or imitation of a foreign legal model; or involuntarily, as when a country is conquered or colonized and has a foreign legal system imposed on its inhabitants. Examples of transplantation include the reception of Roman law in Continental Europe; the diffusion of English law in the colonies and dominions of the British Empire; and the adoption of the French and German Civil Codes by countries in Europe and other parts of the world. The political influence of the state whose law is adopted, as well as the perceived quality and prestige of the adopted law often play an important part in a reception process. In many cases, foreign rules or doctrines are 'borrowed' in the context of legal practice itself, because they fill a gap or meet a particular need in the importing country. The success of a legal transplantation depends on a country's receptivity to foreign law, as determined by historical, cultural, social and economic factors. In this respect one should consider, in particular, the form of the imported law (whether it is a written, customary or judge-made law); linguistic and other cultural links that may exist between the donor and recipient countries, especially common features of legal culture; and the countries' level of political and economic development. According to Alan Watson, comparative law, construed as a distinct intellectual discipline, is primarily concerned with the study of the historical relationships between legal orders and the destinies of legal transplants in different countries.[86] On this basis, he argues, one may identify the factors

(1996), 335.

86 *Legal Transplants, ibid.* 6.

explaining the change or immutability of law.[87] He asserts that comparative law (which he distinguishes from the study of foreign law) can enable those engaged in law reform to better understand their historical role and tasks. It can provide them with a clearer perspective as to whether and to what extent it is reasonable to appropriate from other systems and which systems to select; and whether it is possible to accept foreign legal rules and institutions with or without modifications.[88]

The theory of natural convergence is based on the assumption that the legal systems of societies will tend to become more alike as the societies themselves become more like one another over time. There is a degree of uniformity with respect to the emergence of certain needs as societies progress through similar stages of development and a natural tendency exists towards imitation, which may be precipitated by a desire to accelerate progress or pursue common political and socio-economic objectives.[89] It may be true that each legal culture is the product of a

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87 *Legal Transplants, ibid.* 21. Watson concludes that the moving of a rule or a system of law from one country to another has been shown to be the most fertile source of legal development, since "most changes in most systems are the result of borrowing." (*Ibid.* 94). And see A. Watson, *Legal Origins and Legal Change* (London: Hambledon Press, 1991); "Comparative Law and Legal Change", 37 *Cambridge Law Journal* (1978), 313; R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", 39 *American Journal of Comparative Law* (1991), 1 and 343.

88 Despite the rather far-reaching nature of some of his statements, it is important to observe that Watson has generally confined his studies, and the deriving theory of legal change, to the development of private law in Western countries.

89 On the so-called 'law of imitation' and its role in the evolution of social institutions see G. Tarde, *Les Lois de l'Imitation* (Paris: Alcan, 1890). And see C. K. Allen, *Law in the Making*, (Oxford: Clarendon Press, 1964), 101 ff.

unique combination of socio-cultural and historical factors. Nevertheless, it is equally true that collective cultural identities are formed through interaction with others and no culture can claim to be entirely original.[90] According to Giorgio del Vecchio, "the basic unity of human spirit makes possible the effective communication between peoples. Law is not only a national phenomenon; it is, first and foremost, a human phenomenon. A people can accept and adopt as its own a law created by another people because, in the nature of both peoples, there exist common demands and needs which [often] find expression in law".[91] The German comparatist Konrad Zweigert, cites many examples from various legal systems, to

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90 See on this C. Levi-Strauss, *Race et histoire* (Paris: Albin Michel, 2001), 103 ff.

91 G. del Vecchio, "Les bases du droit comparé et les principes généraux du droit", (1960) 12 *Revue internationale de droit comparé*, 493, 497. As Albert Hermann Post, one of the founders of the School of Comparative Anthropology (*Rechtsethnologie*), has remarked, "there are general forms of organization lying in human nature as such, which are not linked to specific peoples. (…) [F]rom the forms of the ethical and legal conscience of mankind manifested in the customs of all peoples of the world, I seek to find out what is good and just. (…) I take the legal customs of all peoples of the earth as the manifestations of the living legal conscience of mankind as a starting-point of my legal research and then ask, on this basis, what the law is". *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte: Leitgedanken für den Aufbau einer allgemeinen Rechtswissenschaft auf sociologischer Basis* (1884) XI. According to Post, ["C]omparative-ethnological research seeks to acquire knowledge of the causes of the facts of the life of peoples by assembling identical or similar phenomena, wherever they appear on earth and by drawing conclusions about identical or similar causes". *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (1880), citations at 12-13. And see A.H. Post, *Einleitung in das Studium der ethnologischen Jurisprudenz* (1886); H. Maine, Ancient Law (3rd edn, 1866).

argue that in certain 'unpolitical' areas of private law (such as commercial and property transactions and business dealings) the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (*praesumptio similitudinis*).[92] This presumption, he claims, can serve as a useful tool in the comparative study of legal systems. An examination of the functions of law in Western countries reveals a host of similarities with respect to legal culture and the practice of law, derived from a common legal ideology and shared objectives.[93] Moreover, a common international culture is arising as a result of increased international communication and travel, the internationalization of trade

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92 K. Zweigert, *Des solutions identiques par des voies différentes* (1966) *Revue internationale de droit comparé*, 5 ff; K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (2nd ed, Oxford; Oxford University Press, 1987), 36. In this connection, reference should made to what is known as 'common core research': a form of research that seeks to bring to light the highest common factor of an area of substantive law in a number of countries, or of laws from a number of countries within the same legal family. Common core research is invariably construed as combining the substantive claim for universality and the particular methods applied to achieve its objective. This form of research constitutes a reliable method of identifying shared legal principles, and plays an important part in projects concerned with the international or regional unification or harmonisation of law. See R.B. Schlesinger, "The Common Core of Legal Systems - An Emerging Subject of Comparative Study", in K. Nadelmann, A. von Mehrin and J.N. Hazard (eds), *XXth Century Comparative and Conflicts Law: Legal Essays in Honour of Hessel E. Yntema*, (1961), 65; *Formation of Contracts: A Study of the Common Core of Legal Systems* (Dobbs Ferry NY, Oceana Publications, 1968); *Comparative Law* (4th edn, Mineola, N.Y.: Foundation Press, 1980), 36ff.

93 J. Merryman and D. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: Bobbs-Merrill, 1978), 60.

and business, the operation of international organizations and a growing awareness of shared global concerns (e.g., environmental pollution, climatic change, etc). It is argued that if it is true that legal rules emanate as a response to social needs (according to the socio-functional view of law), the emergence of a global society will almost inevitably bring about a greater degree of convergence among legal systems.[94]

4. Concluding Note: Comparative Law and the Challenges of Globalization

Over the past few decades there has been an explosion of academic writings about globalization. Although, not surprisingly, many issues and

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94 See M. King, "Comparing Legal Cultures in the Quest for Law's Identity", in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997), 119; V. Ferrari, "Socio-legal Concepts and Their Comparison", in E. Oeyen (ed.) *Comparative Methodology* (London: Sage, 1990), 63; B. Markesinis (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford: Oxford University Press, 1994); R. Zimmerman, "Common Law and Civil Law, Amerika und Europa – zu diesem Band", in R. Zimmerman (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht* (Tübingen: Mohr, 1995) 1. For a critical perspective on this issue see P. Legrand, "European Systems are not Converging", 45 *International and Comparative Law Quarterly* (1996), 52-61. A number of scholars have raised the question of whether or not 'natural convergence' is simply a euphemism for what they call 'Western legal imperialism'. See on this issue A. T. von Mehren, "An Academic Tradition for Comparative Law?", 19 *American Journal of Comparative Law* (1971), 624; R. Knieper, "Rechtsimperialismus?", 29 *Zeitschrift für Rechtspolitik* (1996), 64; J.Q. Whitman, "Western Legal Imperialism: Thinking About the Deep Historical Roots", 10 (2) *Theoretical Inquiries in Law* (2009), 313.

interpretations are contested, most scholars understand the term to refer to three processes: economic, technological and normative. These processes are closely interwoven and reinforce each other in powerful ways, entailing complex interactions at many levels ranging from the global to the very local. Of course, the recent transformations in the world system are by no means completely new. What is novel about them in the contemporary period are their extensity, intensity, velocity and impact on states and societies around the world.

A notable effect of globalization has been the growth of what is now commonly referred to as 'transnational law': an umbrella concept embracing all law that regulates actions and events that transcend national borders, including problems arising from agreements made between sovereign states and foreign private parties. Transnational law was originally taken to encompass public and private international law as well as all domestic and foreign law concerned with trans-border issues.[95] In recent years the term is increasingly used to denote the amalgam of common legal principles of domestic and international law or the multidimensional international legal order brought about by the phenomenon of globalization. The rise of transnational law poses new challenges to comparative law. Firstly, comparative law must extend beyond the traditional system of coexisting nation-states, and come to grips with much more intricate and fluid relationships and interactions between a multiplicity of overlapping and intersecting legal orders. Secondly, the scope of comparative law must be broadened to embrace the study of international, transnational and supranational regimes, such

95 For an early treatment see P. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 2.

as the United Nations, the European Union, human rights, the world trade system and environmental protection.[96] And, thirdly, comparative law must look beyond state law and pay attention to non-state legal norms, which play an increasingly important role in the world today.[97] To be able to describe, explain and help to co-ordinate the world's diverse legal orders, comparative law must rethink many of its traditional dichotomies, such as the distinction between national and international or between private and public law, since such dichotomies cannot adequately capture the complexity of this new world environment.

Addressing issues posed by globalization and the growth of transnational law requires the development of a form of scholarship that is more scientific in some ways than the comparative law approach has traditionally been. Such a scholarship would pay greater attention to theory in the broad sense of conceptual structure, in so far as theories are the principal mechanisms for perceiving, understanding and structuring reality. Rethinking comparative law from a global perspective will involve all of the main tasks of legal theory including synthesis; the construction and elucidation of concepts; the development of models, both empirical and normative; and the critical analysis of assumptions and presuppositions underpinning legal discourse. In particular, there is room for a great deal of work on the question of transferability of legal concepts across different cultures in so far as the harmonization of global

96 M. Reimann, "Beyond National Systems: a Comparative Law for the International Age", 75 *Tulane Law Review* (2001), 1103.

97 Consider on this matter G. Teubner (ed.), *Global Law without a State* (Aldershot: Dartmouth, 1997).

statistics about law requires reasonably transferable concepts. In this respect, the need for understanding diversity in a world driven by trends toward global law is vitally important. Reference should be made in this connection to the necessity to define the tools that will prevent or minimize what is sometimes referred to as 'Western hegemonic thinking'. Comparatists need to develop the skills necessary to successfully navigate, interpret and critique laws and legal institutions, while being aware of the dangers of uncritically projecting their own values and assumptions about law onto other societies.

The ongoing tendencies of globalization set new challenges for comparative law. In response to these challenges comparative law has diversified and increased in sophistication in recent years, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation-states. But true integration of international and transnational regimes into the comparative law agenda takes more than just adding their description to our inventory of legal systems. It requires that we develop a better understanding of how law works in national, transnational and international contexts and that we explore and shed light on the dynamic interplay between these contexts.