Rethinking Comparative Law's Potential for Expanding Legal Perspectives

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Introductory

During the last few decades there has been an increasing tendency among lawyers and jurists to look beyond their own fences. While the growing interest in foreign legal systems may well be attributed to the dramatic increase in international transactions, this empirical parameter to the growth of comparative legal studies accounts for only part of the explanation. The other part, at least equally important, is the expectation of obtaining a deeper understanding of one's own legal system through the study and comparison of legal norms, institutions and principles found in foreign systems. Following a brief overview of the development of modern comparative law, this paper will appraise the principal functions or purposes of comparative law as a method and as an academic discipline. Its aim is to emphasize the general utility of comparative law today as an important vehicle in understanding and addressing the challenges which jurists and legal practitioners face in a rapidly changing world of unexpected connections.

The rise of modern comparative law

Comparative law, as a distinct discipline, emerged in the nineteenth

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century.[1] This development was precipitated by a number of factors. Of particular importance was the consolidation of the idea of the nation-state and the proliferation of national legal codes; the growing interest in the study of social phenomena in a broader historical and comparative context; and the expansion of international commercial relations, which brought litigants, lawyers and judges into contact with foreign legal systems.[2]

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1 In the seventeenth and eighteenth centuries, as national systems of law began to burgeon, European jurists focused their attention on the study and mastery of their own domestic law, rather than on comparative analyses. Despite the absence of a systematic practice of comparative law, a number of scholars stressed the importance for lawyers of the need to look outside their own systems of law in order to make a true assessment of their worth. The English philosopher and jurist Bacon, for example, drew attention to the value of the comparative study of laws in the context of the attempts made under King James the First to unify the laws of England and Scotland. The German philosopher Leibnitz proposed a plan for the creation of a 'legal theatre' (*Theatrum legale*), where the legal systems of all nations at different times could be portrayed and compared - though this idea was never realized. Hugo Grotius (1583-1645), a leading representative of the School of Natural Law, used the method of comparative law to place the ideas of natural law on an empirical footing. In 1748, Charles-Louis de Secodat, baron de la Brède et de Montesquieu, published his famous work *On the Spirit of the Laws* (*de l'esprit des lois*) wherein he compared a number of legal orders and structured his understanding of law on propositions relating to the reasons accounting for the differences among these orders. Many scholars regard Montesquieu as one of the most important precursors of modern comparative law. As Gutteridge has remarked, it was Montesquieu "who first realized that a rule of law should not be treated as an abstraction, but must be regarded against a background of its history and the environment in which it is called upon to function." H. C. Gutteridge, *Comparative Law*, (Cambridge University Press, Cambridge, 1949) 6.

2 The growing interest in comparative law during this period is reflected in the establishment of various organizations and scholarly societies concerned with the furtherance of comparative law research, such as the

In the late eighteenth and early nineteenth centuries, national ideas, historicism, and the movement towards the codification of law[3] gave rise to a sources-of-law doctrine that tended to exclude rules and decisions which had not received explicit recognition by the national legislator or the national judiciary.[4] Whether one stressed the Will of the Nation as a source of law, or held that law expressed the organic development of the National Spirit, law came to be considered a national phenomenon.[5] In this respect, foreign law was not regarded as authoritative; it might only provide, through legal science, examples and technical models (it was still relevant in *de lege ferenda* connections).[6] Indeed, one of the chief objectives of

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Société de Législation Comparée in France; the Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre in Germany; and the English Society for Comparative Legislation in England.

3 The process towards the codification of the law began in the eighteenth century with the introduction of the Bavarian (1756) and Prussian (1794) Civil Codes, and continued in the nineteenth century with the codification of the law in France, Austria, Italy, Switzerland and Germany.

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

5 The influential German historical school of the nineteenth century challenged the natural law conception that the content of the law was to be found in the universal dictates of reason. In reality, it claimed, the law was a product of the history and culture of a people, of the *Volksgeist*, just as much as was its language, and thus particular to every nation. According to Friedrich Carl von Savigny, one of the leading representatives of this school, "Positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*). …[I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law…". *System des heutigen römischen Rechts*, Vol. I, (Veit, Berlin, 1840) 14.

6 A certain universalism was typical of the nineteenth century *laissez-*

comparative law during the nineteenth century was the systematic study of foreign laws and legal codes with the view to developing models to assist the formulation and implementation of the legislative policies of the newly established nation-states. In the era of what is known as the 'industrial revolution', an extraordinary growth of legislative activity was stimulated by the need to modernize the state and address new problems generated by technical and economic developments. In drafting codes of law, the national legislators increasingly relied on large-scale legislative comparisons that they themselves undertook or mandated. Interest in the comparative study of laws, especially in the field of commercial and economic law, was also precipitated by the expansion of economic activities and the growing need for developing rules to facilitate commercial transactions at a transnational level. The growth of interest in comparative law during this period is manifested also by the increasing emphasis on comparative law as a subject in legal education.

By the early twentieth century comparative law was associated with a much loftier goal, namely the unification of law or the development of a common law of mankind (*droit commun de l'humanité*) as declared at the first International Congress of Comparative Law held in Paris in the summer of 1900. At that Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of different national laws, of concepts and principles common to all 'civilized' legal systems, i.e. universal concepts and principles that constitute a relatively ideal law — a kind of natural law with a changeable character.[7] According to Édouard Lambert, a unity of

faire economic theory. It advocated free trade. As far as questions of internal economic policy were concerned, empirical materials were relied upon irrespective of their provenance. Even though the interests of industry and trade were partly international, the basic presupposition was a strong liberal state, which would warrant internal discipline.

7 "Conception et objet de la science juridique du droit compare", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, 1905-1907, I, 167 at 173.

general purpose can be detected in similar legislation from different states, in spite of the absence of such unity at the level of the rules embodied in the legislation. It is thus possible to discern a common basis of legal solutions and establish a 'common legislative law'. Lambert described the purpose of comparative law as the promotion of the convergence of national legal systems through the elimination of the accidental differences in the laws of peoples at similar stages of socio-cultural and economic development. He believed, in other words, that the comparative study of the laws of nations that are on the same level of development might reveal the common characteristics of the legal measures adopted in particular legal systems. This study may also divulge the removable discrepancies originating from the contingencies of historical evolution and not from the 'political or moral attitudes' of the nations whose legal systems are compared. The ideal of legal unification was also stressed at the twentieth anniversary of the International Association for Comparative Law and National Economics, held on the eve of the First World War in Berlin, where it was proclaimed that the association would continue to strive for the harmonization of law under the principle, "through legal comparison towards legal unification."[8] This statement reflects the hopes of early comparatists concerning the establishment of a future world law by relying upon the methods of comparative law.[9]

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

9 One should note that the universalist aspirations for the establishment of, or a return to, legal unity are reflected in comparative legal scholarship already present in the nineteenth century. As already noted, by that time national ideas and the great codifications of the law in Europe had put an end to the *ius commune Europaeum*, leading to the establishment of diverse national legal orders. When comparing different systems of law, many jurists of that time had idealist, rational, liberal and enlightened motives. Believing in the basic unity of human nature and human reason, they sought to identify, through the comparative

A second strand of universalism, connected with the development of comparative law as a branch of legal science or a scientifically worked out and systematically applied method, was historicism, which in the nineteenth century became the basic paradigm of almost all sciences. The primary objective of legal-historical comparison was to reveal the objective laws governing the process of legal development and, following the pattern of the Darwinian theory of evolution, to extend the scope of these laws of

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study of foreign laws, the best solutions to legal problems that the national legislator could adopt. To them, the fact that laws and legal codes differed suggested that not all the various drafters fully grasped the precepts of reason in relation to certain common problems. Thus, they saw their chief task to be the elimination of confusion with a view to bringing to light the legal solutions that right reason would support. To them, legal rationalism, legal universalism and the uniqueness of solutions all pointed to the same unitary idea: the *Ius Unum*. Despite the decline of the idea of natural law, many scholars still believed in a universal truth, hidden behind historical and national variations, which could be brought to light through the comparative study of legal systems. In the words of the German philosopher Wilhelm Dilthey, "As historicism rejected the deduction of general truths in the humanities by means of abstract constructions, the comparative method became the only strategy to reach general truths." "Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften" in *Gesammelte Schriften*, Vol. VII, (4th edn. Göttingen, 1965, first published in 1910) 77 at 99. In 1852, Rudolf von Ihering deplored the degradation of German legal science to "national jurisprudence", which he regarded as a "humiliating and unworthy form of science", and called for comparative legal studies to restore the discipline's universal character. See Ihering, *Des Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Vol. I, (9th edn, Scientia-Verlag, Aalen, 1955) 15. See in general R. David, *Traité élémentaire de droit civil compare: Introduction à l'étude des droits étrangers et à la méthode comparative*, (Librairie générale de droit et de jurisprudence, Paris, 1950), 111; M. Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts*, (Steiner, Stuttgart, 1998), 7-8, 12, 24; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987) Chapter 4, 52ff.

development to social phenomena. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the 'idea of law'.[10] Of particular importance to the development of comparative and historical jurisprudence was Sir Henry Maine's work on the laws of ancient peoples (*Ancient Law*, 1861), wherein he applied the comparative method to the study of the origins of law that Charles Darwin had employed in his *Origin of the Species* (1859). By establishing the link between law, history and anthropology, Maine drew attention to the role of the comparative method as a valuable tool of legal science. According to him, comparative law as an application of the comparative method to the legal phenomena of a given period could play only a secondary or supporting role as compared to the real science of law, i.e. a legal science historical and comparative in character. While comparative law, as opposed to the properly so-called jurisprudence, is concerned with the analysis of law at a certain point of time, historical-comparative jurisprudence focuses on

10 According to Franz Bernhöft, "[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, the idea of law". "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1878, 1 at 36-37. And see E. Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft* 13 at 17; According to G. del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." "L' unité de l' esprit humain comme base de la comparaison juridique", (1950) *Revue internationale de droit comparé*, 688.

the idea of *legal development* or the dynamics of law. But it was F. Pollock, Maine's disciple and successor in his scientific endeavours, who synthesized science and comparative law by drawing attention to the connection or interrelationship between the 'static' point of view of comparative law in a narrow sense and the 'dynamic' approach of historical jurisprudence. To him, jurisprudence itself must be both historical and comparative ; in this respect, comparative law plays more than a merely secondary or supporting role, it has a distinct place in the system of legal sciences.[11]

The works of nineteenth and early twentieth century scholars,

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11 As F. Pollock remarked, "It makes no great difference whether we speak of historical jurisprudence or comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." "The History of Comparative Jurisprudence", (1903) 5 *Journal of the Society of Comparative Legislation*, 74 at 76. The influence of this school of though is reflected in more recent discussions of the nature and aims of the comparative study of laws. Thus, according to M. Rotondi, comparison is one of two methods (the other being the historical method) whose combination can give us a comprehensive knowledge of law as a universal social phenomenon. Legal science relies upon these methods in order to detect and construe the (natural) laws governing the evolution of this phenomenon. In searching for relations between different legal systems, or families of legal systems, one seeks to discover, to the extent that this is possible, certain stable features in this evolutionary process that may allow one to foreshadow future developments concerning the character and orientation of legal systems and branches of law. "Technique du droit dogmatique et droit compare", (1968) *Revue internationale de droit comparé*, 13. And according to H. E. Yntema, comparative law, following the tradition of the *ius commune* (*droit commun*), as an expression of the deep-rooted humanist vision concerning the universality of justice, and based on the study of historical phenomena, seeks to discover and construe in a rational way (*en termes rationnels*) the common elements of human experience relating to law and justice. In the world today the primary task of comparative law is to elucidate the conditions under which economic and technological development can take place within the framework of the Rule of Law. "Le droit comparé et l' humanisme", (1958) *Revue internationale de droit comparé*, 698.

which endeavoured to conceptualize legal phenomena on a historical-comparative plane, paved the way for the recognition of comparative law as a science and an academic discipline, and as a scientific method for the study of different legal systems. At the same time, the reasons for the rapid development of comparative law into an academic discipline should be sought, above all, in its practical aims. As noted, historical reality itself exerted a strong influence on the growth of comparative law. The internationalization of the economy, the development of international relations, the growth of transnational trade and commerce, and the expansion of colonialism led to legal science being forced to transcend the framework of national law and this placed comparative law on a practical foundation. Thus the purely theoretical approach to comparative law was combined with the practical one. It was considerations of a practical nature that led a number of countries to incorporate comparative law into the system of higher legal education and to introduce research programmes into the study of foreign laws.

A great deal has changed since jurists, such as Lambert and Saleilles, envisaged a world governed by a common body of laws shared by all 'civilized' nations. The sheer diversity of cultural traditions and ideologies, the problems dogging European unification (despite the tremendous push for European unity furnished by the treaties establishing the European Economic Community[12] and the European Union),[13] and the difficulties surrounding the prospect of convergence of the common and civil law have given rise to a great deal of scepticism regarding the feasibility of this ideal. Nevertheless, quite a few comparatists today still espouse a universalistic approach either through their description of laws or by looking for ways in which legal unification or harmonization at an international or transnational level may be achieved.[14] The current interest in

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

13 The Maastricht Treaty (1992).

14 A good example is Rudolf Schlesinger's common core theory, according to which "even in the absence of organized [legal] unification efforts, there exists a common core of legal concepts and precepts shared by some, or

matters concerning legal unification and harmonization is connected with the phenomenon of globalization — a phenomenon precipitated by the rapid rise of transnational law, the growing interdependence of national legal systems and the emergence of a large-scale transnational legal practice. The need for uniform legal regulation is much more intensely felt in the field of economic law, especially in view of the huge increase of international and transnational business transactions in recent years.

The changes in the legal universe that have been taking place in the last few decades have increased the potential value of different kinds of comparative law information and thereby urged new objectives for the comparative law community. In many countries the work of comparative law scholars plays an important part in the preparation of legislation aimed at promoting concordance of domestic law with other legal systems and transnational and international regimes. In the field of comparative jurisprudence, we witness a growing number of efforts that aim at clarifying the theoretical basis for the international or transnational unification and harmonization of law. The comparative method, which was earlier applied in the traditional framework of domestic law, is now being adapted to the new needs created by the ongoing globalization process, becoming broader and more comprehensive with respect to both its scope and goals.

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even by a multitude, of the world's legal systems...At least in terms of actual results — as distinguished from the semantics used in reaching and stating such results — the areas of agreement among legal systems are larger than those of disagreement...[T]he existence and vast extent of this common core of legal systems cannot be doubted". R. B. Schlesinger (et al), *Comparative Law : Cases－Text－Materials*, (5th edn, Foundation Press, Mineola NY, 1988) 34-35, 39. See also R. David and J. Brierley, *Major Legal Systems in the World Today*, (3rd edn, Stevens, London, 1985) 4-6.

Comparative law and legal knowledge

At a time when our world society is increasingly mobile and legal life is internationalized, the role of comparative law is gaining importance. Comparative law enables jurists to integrate their knowledge of law into a cultural panorama extending well beyond their own country. By comparing the legal systems of different countries, jurists can develop a more profound understanding of law as a social phenomenon; they gain an insight into the ways in which legal rules and institutions emerge, the socio-cultural facts by which they are conditioned and the different forms they assume. This knowledge will enable them to develop the standards and sharpen the analytical skills required for the critical appraisal of their own legal system. Besides providing the jurist with a much broader knowledge of the possible range of solutions to legal problems than the study of a single legal order would present, comparative law gives the jurist an opportunity to fathom the interaction of different disciplines and to connect these to the development and operation of legal rules, for example, when one considers the interface between law and history.

More specifically, scholars agree that comparative legal studies have performed valuable services in empirically testing the propositions of legal theory.[15] These propositions can be tested on the grounds of concrete comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal culture — indeed, most legal theorists seem to assume a deductive universality of analysis. As Paton pointed out, it is impossible to comprehend jurisprudence without comparative law, since all schools of jurisprudence (whether historical, philosophical, sociological or analytical) rely on the comparative method.[16] The knowledge legal theorists depend on

15 F. H. Lawson, *The Comparison: Selected Essays*, (North-Holland Pub. Co, Amsterdam, 1977) II, 59.

16 G. Paton, *A Textbook of Jurisprudence*, (Clarendon Press, Oxford, 1972) 41. It should be noted that in civil law thinking there is no real equivalent

when seeking to devise tools for a proper construction of legal phenomena cannot be gained by an examination of a single legal system, since law transcends national boundaries, or without a comparison. If theories about the nature and purpose of law are to claim any universal validity, they must be capable of encompassing many if not all systems of law; in turn, this suggests that a detailed study of at least a range of legal systems is a necessary prerequisite. Comparative law, like legal history, legal sociology and legal philosophy, allows the jurist additional perspectives towards a more complete understanding of law as a social phenomenon and, by enriching their intellectual repertory, enables the greater accomplishment of their tasks. It introduces concepts, styles, organizations and categorizations previously unknown, and opens unsuspected possibilities in the very notion of law, thus enabling jurists to address more effectively the legal, social and political issues that modern legal systems strive to resolve.

Reference should also be made in this connection to the use of

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as such to jurisprudence, as the term is generally understood in common law countries, i.e. the study of theories concerning the nature of law and legal phenomena (in French the word *jurisprudence* denotes case law). Civil law jurists draw a distinction between legal philosophy, concerned with the values underpinning legal institutions and rules, and general theory of law, which focuses on the basic concepts, methods, classification schemes and instruments of the law. In the words of Bergel, "general theory of law starts out from the observation of legal systems, from the 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 the essence so as to discover the meta-legal signification, the values that it has to pursue, the sense in relation to a total vision of man and the world". J.-L. Bergel, *Théorie générale du droit*, (2nd edn, Dalloz, Paris, 1989) 4. In addition, legal science (*scientia juris*) is understood to encompass positive law organized in such a way that it rationalizes, scientifically, both law as an empirical object and legal science itself.

comparative analyses in the field of legal history. The history of law explores the sources of legal phenomena and the evolution of legal systems and individual legal institutions in different historical contexts. It is concerned with both the history of a single legal order and the legal history of many societies, the universal history of law. By comparing different systems of law at diverse stages of development, legal historians attempt to trace the evolution of legal institutions as well as the historical ties that may exist between legal systems. Furthermore, the comparative method can be utilized in connection with time-related (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. Historical analyses of law utilizing the comparative method are essential for the further development of law today. Without the knowledge derived from historical-comparative legal studies it is impossible to investigate contemporary legal institutions, as these are to a considerable extent the product of historical conditions and mutual influences of legal systems in the past.

Moreover, comparative law is a valuable source of knowledge for sociologists of law. The sociology of law goes beyond national frameworks and considers the social functions of law with a view to discovering the common and special social conditions existing in various legal systems. Special attention is paid to the role that social and economic conditions, political structures, cultural attitudes and geographic factors play in legal development. Comparative law helps sociologists of law to understand how different legal solutions to certain societal problems function in practice. On the other hand, comparatists rely on information provided by sociologists of law to explain, among other things, the similarities and differences between legal systems and the way in which a particular legal rule or institution operates in reality in different countries. Furthermore, comparatists often draw on the work of sociologists of law to answer questions concerning the comparability of certain rules or institutions, and when assessing the legal solutions adopted in different systems.

Finally, comparative law facilitates communication across the borders of legal systems and can assist the development of an

international legal language, and the production of bi-lingual or multi-language law dictionaries. Comparing different systems of law necessitates the crossing of linguistic borders, even when the same base language is used in more than one legal system. Each legal system uses language in its own ways; it has its own patterns of representation and communication, utilizing, for example, particular levels of abstraction, styles and values that favour particular kinds of arguments. Comparative inquiries into these patterns, preferences and expectations promote a better comprehension of the interconnectedness of language to law in diverse socio-cultural contexts. These inquiries also facilitate the acquisition of analytical skills that enable jurists from different legal cultures to achieve a shared understanding of their respective intentions, positions and views. This can gradually lead to the formation of an international legal terminology — an essential prerequisite for, among other things, the harmonization or unification of law at a regional or international level.

Comparative law as an aid to legislation, law reform and the judicial interpretation of law

One type of interest pertaining to knowledge and explanation in comparative law is associated with the traditional comparison *de lege lata* and/or *de lege ferenda*. Pursuant to this comparison are searches for models (both conceptual and substantial) for the interpretation of current law, or for the formulation and implementation of legal policy. As noted earlier, the study of comparative law contributes to a better understanding of one's own legal system. Without the aid of legal comparison, a jurist becomes accustomed to regarding their own system's legislative and doctrinal solutions as the only possible ones or as original to their system, when in fact they may have foreign roots. Comparative law makes it possible for jurists to see their own legal system in a broader perspective and from a certain distance. In this way, they can understand more precisely the origins, nature and function of established legal institutions and develop a

greater sensitivity in resolving legal problems. This increased understanding of one's own legal system is particularly important in the field of legislation, but also in cases where lawyers work *de lege ferenda*, as when a legal reform is proposed or when a precedent is created by a judge.

Whether in the form of general studies or reports dealing with specific laws or aspects thereof, comparative law can have great value in connection with creating new legislation. In today's complex society the lawmaker is often faced with difficult problems. Instead of guessing possible solutions and risking less appropriate results, a lawmaker can draw on the enormous wealth of legal experience by the study of foreign laws. As Rudolf Jhering once remarked, "[T]he 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."[17] It is thus not surprising that legislators, when considering different possible approaches to resolving a legal problem, often take into account how the same (or a similar) problem is dealt with in other jurisdictions. Many countries have enacted statutes and legal codes in various areas of the law based on the results of comparative research. For example, German legislators adopted the notion of income tax that originated from England, and the doctrine of proper allowances for dealings between related enterprises (also adopted in Germany) derives from the Internal Revenue Code of the United States. A number of ideas in the German Civil Code come from the Swiss Law of Obligations of 1881, and German civil procedure borrowed much from Austrian law. Examples of such borrowings are found in the legal systems of many European countries, such as Italy, Spain, Greece and Portugal. In England, statute law requires the English

17 *Geist des römischen Rechts*, I, (9th edn. 1955), 8f; quoted in K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (Clarendon Press, Oxford, 1987) 16.

Law Commission to produce information from foreign legal systems, whenever this is seen to assist the performance of its function of systematically developing or reforming the law. Moreover, Western legal models have been adopted and adapted by many countries in Asia, Africa and the Americas, as well as Russia and other former socialist nations. This often entailed the formation of hybrid systems where Western legal institutions co-exist with indigenous laws and customary norms.

Of course, whenever a proposal is put forward to adopt a foreign legal rule, a legislator must first consider whether the rule has proved efficient in its country of origin when dealing with the specific problem at hand and then, second, whether it will produce the desired effects in the country contemplating its adoption. In many cases it may prove impossible to adopt, without important modifications, a rule that was successful in a foreign country because of differences pertaining, for example, to the court system and the legal process, as well as the more general differences regarding the socio-economic, political and cultural environment in which the rule would have to fit.

The study of foreign laws can also be valuable when courts and other authorities interpret and apply the legal rules of their own legal system. The comparative method is often relied upon by judges for filling the gaps in the legislation or case law. In so far as a judge, in filling a gap in the law, is expected to decide in the way in which the legislator would have decided, then the question is: how does a modern legislator reach their decisions? As already noted, a legislator often reaches their decisions by taking into account information about foreign systems provided by comparatists. Often judges seek to justify their decisions by pointing to the fact that a similar approach has been adopted in other jurisdictions — a justification based on comparative law. This is especially true when a judge interprets and applies rules that have been adopted from other legal systems, as well as the rules introduced as a result of international unification or harmonization of law.

Comparative law as an aid to the unification or harmonisation of laws

Another type of interest in comparative law is connected with the goal of integration, or at least harmonization and cooperation at a transnational or international level. Although the ideological bases of integrative schemes can be accepted or rejected, an understanding of the concept and objectives of integration is essential. There are two basic aspects to the idea of integration, connected with contemporary perspectives on the relationship between the state and law. The first aspect relates to the development of supra-national organizations, 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. The question of whether state law should be granted priority over international law, or whether the two bodies of law are inter-reducible (monistic and pluralistic theories of international law) has attracted great attention in recent years. But monistic and pluralistic interpretations of international law do not stem only from the theoretical shaping of the concept of valid law. In the background there are important questions concerning society and law. Is the content of international law a set of international relations, or are the relations basically national as well? What are the goals of integration — whose interests do they express?[18] If it is recognized that the goal of integration reflects particular interests, should they be acknowledged? The forms of integration cannot be reduced, however, to the social process of integration if one wishes to retain sight of some important aspects:

18 For example, it is sometimes said that integration promotes the supra-national interests of large multinational companies.

the forms play an independent role, which is conditioned by the adoption of a broader legal framework as the basic common denominator of integrated law.

Comparative law today plays an important part in the preparation of projects aimed at the unification or harmonization of laws at a transnational or international 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 common legal rules and practices. In pursuance of this objective, uniform rules are often drawn up on the basis of work by experts in comparative law that are then incorporated in transnational or international treaties obliging the parties, as a matter of international law, to adopt the uniform rules as part of their domestic law. It sometimes occurs, however, that the adopted uniform rules are not constructed in the same manner by the courts in the various countries, so that the whole effort fails to produce the desired effect. Despite the difficulties arising in connection with unification or harmonization efforts, there have been some notable successes, especially within countries that closely cooperate with each other, such as the member countries of the European Union, and within certain areas of law, such as international commercial law, transportation law, intellectual property law and the law of negotiable instruments.

There are numerous organizations involved in the unification of law and they have produced many draft uniform laws. These include the League of Nations and the United Nations, the European Union and many professional organizations that have convened international conferences in order to conclude international treaties. In connection with the latter, one could mention the International Institute for the Unification of Law (UNIDROIT); the UN Commission on International Trade Law (UNCITRAL); the Council of Europe Committee for Legal Cooperation; the International Labour Organization; the Comité maritime international; the International Civil Aviation Organization (ICAO); and the Paris and Bern international conferences for the protection of intellectual property. The subject matter of such schemes of legal unification or

harmonization pertained for the most part to matters and institutions of private law, both civil and commercial, as well as to issues of civil procedure. Only some of these were designed to become domestic legislation, while the majority were concerned with the regulation of inter-state transactions. Moreover, only some were ratified by interested states. Illustrations include the 1930 and 1931 International Conventions on Uniform Laws for Bills of Exchange and Promissory Notes and Cheques; the maritime law conventions; transport law (especially, air transport law ratified by a large number of states); intellectual property; labour law and others. Other examples embrace the UNCITRAL International Arbitration Rules; the EC Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which also constitutes domestic law; and the 1980 UN Vienna Convention on a Uniform Law of Sales, that is already accepted in many countries.[19] Several important drafts have also been compiled by UNIDROIT (Principles on International Commercial Contracts, published in 1994) and various EC Commissions.

Comparative law and public international law

There is a close connection between comparative law and public international law, the law governing relationships between states. According to Article 38 of the Statute of the International Court of Justice, among the sources of law that the International Court may use are 'the general principles of law recognized by civilized nations'. The comparative method plays an important part in the work of discovering and elucidating these 'general principles of law' that international and, occasionally, national courts are required to apply.[20]

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19 This refers only to international transactions, leaving intact domestic law provisions. The Convention was the first project undertaken by UNIDROIT and was based on extensive comparative research carried out at the Institute of Foreign and Private International Law in Berlin.

20 According to R. B. Schlesinger, the phrase 'general principles of law recognized by civilized nations', "refers to principles which find

However, the task of identifying, on the basis of the comparative method, legal principles that are in reality universally accepted is beset with serious difficulties. First, there is the problem of determining which legal systems should be considered. If priority is given to a few legal systems to the exclusion of others, questions may arise over the reliability of the relevant judicial process as a means of resolving international or transnational disputes. Comparisons between the legal systems of states belonging to the same regional system are on a surer footing, as the everyday work of the institutions of the European Union and decisions of the European Court of Justice demonstrate. Secondly, questions may arise as to whether certain domestic law concepts and principles are comparable or capable of being transposed into international law decisions.[21] Although it remains unclear which legal principles are in reality universally accepted or capable of application at an international level, there is sufficient material in the domestic law of the members of the international community for the international judge to perform a law-making function. Of particular importance in this respect is 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 constitutes a reliable method of identifying common or general legal principles, and plays an important part in projects

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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, Foundation Press, Mineola NY, 1988) 36. Reference may also be made in this connection to Article 215 of the Treaty of Rome 1957, by which the EEC was established. This Article provides that the non-contractual liability of the Community shall be governed by 'the general principles common to the laws of the Member States.'

21 See M. Bothe and G. Ress, "The Comparative Method and International Law", in W. E. Butler (ed), *International Law in Comparative Perspective*, (Sijthoff & Noordhoff, Leyden, 1980) 61.

concerned with the international or regional unification or harmonization of law.[22]

Comparative law can assist the international lawyer in many other connections. Reference should be made to the drafting and interpretation of transnational or international agreements;[23] the bridging of differences between regional varieties of international law; and the interpretation and application of international or transnational law by national courts.[24]

Comparative law and private international law

The comparative method has an important role in the formulation, interpretation and application of the rules of private international law. Private international law, or conflict of laws, consists of 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 international decisional harmony, i.e. uniformity of results regardless of forum. The role of

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22 See R. Schlesinger, *Formation of Contracts : A Study of the Common Core of Legal Systems*, (Dobbs Ferry, NY, 1968).

23 The European Court of Justice has been relying on the comparative method for interpreting European Community law and in seeking to arrive at decisions by assessing solutions provided by various legal systems. See, e.g., *Da Costa en Schaake NV* [1963] ECR 31; *French Republic v Deroche, Cornet et Soc Promatex–France* [1967] CMR 351.

24 Comparing foreign and domestic law is often necessary in the sphere 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, and the punishment imposed must not exceed the maximum punishment provided there. Determining these issues presupposes a comparison between the domestic law and the law of the foreign country in each individual case.

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 one practical legitimacy.[25]

Comparative law is particularly important during the process of drafting or codifying national conflict of laws rules. Because of the supranational and technical nature of these rules, legislators often seek advice from private international law scholars who are familiar with the laws of foreign legal systems. In Europe, this familiarity is a natural consequence of a long-standing academic tradition that has entailed the sharing of legal ideas and concepts all over the continent. In this respect, private international law acknowledges the importance of comparative law as a means of attaining a better understanding of one's own legal system. During the last three decades, most European countries have codified their conflict of laws rules. This has facilitated comparisons between European legal systems as conflict of laws rules became black-letter rules, contained in statutes rather than in case law; knowledge of these rules is often difficult to obtain abroad.[26]

In the process of dealing with a case involving a conflict of laws, a comparative study of foreign laws may be needed and may ultimately result in the application of a foreign legal rule. This is particularly true in 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, for example, Germany, Austria, Switzerland and Italy) where judges are

25 See C. von Bar, *Internationales Privatrecht, Erster Band, Allgemeine Lehren*, (Beck, Munich) 1987, 1, n.123 et seq.

26 It should be noted here that comparisons also include references to international sources of law, such as, for example, The Hague conventions.

expected to apply foreign law *ex officio*.[27] The need for comparison is acknowledged even if, eventually, judges revert to the *lex fori*. With the development of a content-orientated choice of law rules, comparative analyses are sometimes necessary at a preliminary stage, i.e., in order to apply the forum's conflict of laws rules. Indeed, such rules cannot be applied without some knowledge of all the foreign laws that might possibly apply. Although obtaining such knowledge does not in itself amount to comparative law in a strict sense, the application of foreign law presupposes certain comparisons between different systems of law, even if these comparisons are not always explicit in the relevant judgment.[28] Moreover, as neither foreign legal rules can be applied nor foreign judicial decisions enforced if they are incompatible with fundamental legal principles of the country of the court (e.g. principles concerning matters of public order), a comparison between foreign law and the principles of the *lex fori* is often deemed necessary.

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27 See on this 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*, (Transnational Publishers, Irvington, New York, 1995) 159ff.

28 Consider the situation where a judge must 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 which 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.

Comparative law and comparative lawyering

With the expansion of interest in functional jurisprudence and the sociology of law in recent times, jurists were pushed to broaden the basis of legal inquiry. As it is often stated, law is not only law in the books; it is also law in operation. This being so, it becomes evident that one needs to examine all the institutions involved in the legal structure, including those institutions concerned with law as related to behaviour. Legislatures and the courts are two of those institutions, but there are others, notably the lawyer and the law office. It can be stated that a tremendous number of important decisions affecting human conduct are made by lawyers in law offices. Such decisions, and the manner in which they direct behaviour, are significant aspects of the legal system. The development of the notion of preventive law demonstrates the importance of the lawyering function. That notion derives from the concept that the factual behaviour frequently determines ultimate legal result.[29] If a person signs his or her name on a certain document, that signature, for legal purposes, can become the factual basis for determining certain legal rights and obligations. These legal rights and obligations will be different if the individual concerned does not sign, or signs a document with different words on it. This circumstance means that lawyers, when appropriately consulted, may make decisions that can guide clients into channels that avoid, or minimize, the risk of future litigation. The effect of this preventive law function of the lawyer on the legal system and on society, though probably not measurable, is nevertheless substantial. Even in matters involving dispute resolution, which is the special province of the courts, it can safely be said that lawyers resolve more disputes than do the courts. Every settled case reduces the burden on the court system and, at the same time, contributes to a less

29 As Alf Ross has remarked, "all application of law has as its basis conditioning facts whose existence the judge regards as proved". *On Law and Justice*, (University of California Press, Berkeley, 1959) 214.

burdensome ordering in society.[30]

The growing awareness of the significance of the lawyering function has had an important effect on expanding the scope of comparative law. As already noted, a chief objective of comparative law is the study of comparative written law. By means of such study societies can acquire knowledge that enables them to improve their legal systems and laws. This laudable goal is equally relevant to comparative lawyering. Research regarding the functions of the legal profession in different countries can be useful in a number of different ways. On the practical side, such research can reveal methods that may be utilized to improve the various aspects of the lawyering function. For example, in many countries increasing attention is being given to cost reduction of operations of law offices. Cost reduction is deemed necessary, especially in order to increase the utilization of the law office as the place for the practice of preventive law, as well as a site for dispute resolution. The ultimate aim is the satisfactory performance of objectives sought by clients. Thus, for example, if the client objective is the purchase of property, a comparative study of the methods used by lawyers in different societies could facilitate the development of ideas for improvement, even to the extent that lawyer services and lawyer costs are, or might be, regarded as non-essential to the objectives sought to be accomplished. On the theoretical side, an analysis of a legal system that involves empirical research of law office practice could prove very rewarding.[31] When comparing the legal practices in two societies one may seek to assess the extent to which the different

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30 For a discussion of the role of the legal profession see, in general, R. L. Abel & P. S. C. Lewis (eds), *Lawyers in Society : An Overview*, (University of California Press, Berkeley CA, 1995) ; M. Cain & C. B. Harrington (eds), *Lawyers in a Postmodern World ; Translation and Transgression*, (New York University Press, New York, 1994) ; W. Wesley Pue & D. Sugarman D. (eds), *Lawyers Culture and the Cultural Significance of Lawyers : Historical Perspectives*, (Ashgate, Brookfield VT, 1999).

31 The relationship of the educational process to the law office process should also be noted in this connection.

practices are reflective of different written law. It is probable that the practices under consideration are not necessarily determined by the law, but are explainable on other grounds, such as economic factors or cultural tradition. The theoretical aspects of the study of comparative lawyering might thus prove valuable in elucidating the relationship between written law and custom, and between written law and social behaviour.[32] Moreover, such a theoretical approach might be instructive in appraising the utility and potential social impact of proposed legislation.

Involvement in comparative lawyering presupposes consideration of definitional issues relating to the meaning and scope of lawyering in different societies.[33] Quite certainly, the label 'lawyer', 'counsellor', 'barrister', 'solicitor' and the like,[34] cannot be controlling. Regardless of the name by which the relevant activity is identified, our principal objective is to compare similar functions in diverse cultures. What then is the essential definition of lawyer and lawyering?[35] In one country a particular activity is performed by a person licensed as a

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32 The gap that often exists between written law and 'living law' is often commented on. See, e.g., E. Ehrlich, *Fundamental Principles of the Sociology of Law*, English translation W. L. Moll, (Arno Press, New York, 1975, repr. of the 1936 edition).

33 One area in which definitional problems have frequently arisen is the "unauthorized practice of law", i.e. the provision of legal services by persons who are not licensed as legal practitioners.

34 Other labels include *counsel, advocate, attorney, insurance adjuster, claims agent, marriage counsellor, tax advisor*.

35 This question is crucial in relation to the study of a country, such as Japan, where those classified as 'lawyers' perform only a small portion of the legally oriented processes of society. See on this T. Hattori, "The Legal Profession in Japan: Its Historical Development and Present State", in Von Mehren (ed), *Law in Japan—The Legal Order in a Changing Society*, (Harvard University Press, Cambridge, 1963) 145. Many commentators have pointed out the role played by various 'non-lawyers' in the administration of the law. These include law trained corporate employers, patent agents, tax agents, judicial scriveners, administrative scriveners, certified public accountants and notaries.

'lawyer'; while the comparable activity in another country is performed by a person licensed as a 'notary'; and in a third country, the activity in question may be accomplished without resort to a licensed person. The definitional problem may be further complicated merely because the same activity in one and the same society might be lawfully carried out by a person licensed as a lawyer, or another licensed as a notary, or performed without the aid of either. Or, with respect to some kinds of activities, the 'client' has a choice of employing a lawyer or a non-lawyer to represent him in the relevant proceedings. When such apparent discrepancies are put into the mixture of ingredients for investigation, we are compelled even further to consider the merits and validity of the administration of the legal structure of any given society. We are required to learn about and understand the lawyering function, as well as the judging function and the legislative function within each country. Thus, the study of comparative lawyering could contribute to a more complete understanding of a legal system and of the socio-cultural facts by which legal practice in all its manifestations is conditioned.

Comparison of the tasks that lawyers perform requires the acquisition of information concerning the relevant activities. There are several approaches to the method of accumulating the necessary data. Some of these approaches overlap, but each may be considered and assessed separately.

Some procedures involving lawyers in one country are analogous to procedures or practices in another country. Consider, for instance, a comparison of lawyer involvement in such things as the purchase and sale of land, divorce and succession after death. The practices in these matters likely differ in various countries. Inquiry can be conducted in two or more countries to obtain data on the basis of which comparisons can be made. Preliminary investigation reveals that, as to land transactions, in some jurisdictions the transaction may be largely lawyer-controlled, in another the relevant documents are drafted by a notary public, in another lawyers or notaries are involved only indirectly. Divorce, generally a court process, involves lawyers, but the extent of their

participation varies. There may be a tendency in such proceedings to reduce lawyer participation in some countries. Succession after death involves vastly different procedures in different countries; in some (e.g. Germany) there is a kind of immediate succession without lawyer participation, while in others (e.g. the United States) lawyer participation is virtually mandatory.

Furthermore, it is possible to assemble information concerning lawyer operations by direct inquiry of lawyers regarding their tasks. An investigator familiar with the practices in one country in which lawyers are not involved may be entirely unfamiliar with the notion that in another country lawyers are employed. Moreover, inquiry that seeks to explore lawyers' activities in this fashion might reveal practices of law office operations not otherwise apparent. Thus, broadly stated, the customary method of practice in civil law countries seems to be solo practice, or at most two or three lawyers in one office.[36] Law offices in the United States reach enormous sizes by comparison.[37] Very probably, the difference in the legal system is not the underlying explanation for such a difference; yet, that kind of difference might have a substantial bearing on the uses of lawyers, the cost of employing lawyers, and the extent of their influence on law and society.[38]

One might also approach empirical research in the lawyering function using the client (or potential client) and their objectives as the starting point. Thus, for instance, the purchase and sale of property, divorce and succession after death, each can be considered from the client perspective. What are the steps necessary to

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36 Commentators point out that the number of law partnerships in Germany and other civil law countries has increased in recent years.

37 This is not a universal phenomenon in the United States, however, and there are many sole practitioners.

38 Lest it be misunderstood, the large law office is not necessarily confined to law practice for wealthy clients, there being currently the development of large law offices serving middle and law income clients. See on this B. Christensen, *Lawyers for People of Moderate Means*, (American Bar Association, Chicago, 1970).

accomplish an end result in one legal order as compared with another? To what extent are intermediary persons, or institutions, involved in the process? Where there are differences with respect to the employment of lawyers are these differences explainable by reference to differences in positive law or other factors?[39] This client-oriented approach is valuable, as it can furnish a measure by which the lawyering function in different societies can be assessed. The client seeks his or her objectives qualitatively, at the lowest cost possible in time, energy and money, and with the desire to secure stability as to his or her legal situation thus minimizing the risk of legal trouble in the future.

Finally, it is important to note that the design of a research project in the field of comparative lawyering is a highly intellectual pursuit, requiring exploration into a vast array of questions, not the least of which is the determination of the criteria by which the lawyering function is to be evaluated. As society never stands still and changes occur as we pursue our inquiry, the study is never ending, but is always revealing. What one seeks is improved administration of the legal structure, and improved usefulness of the institutions identified as 'the practice of law'.

Comparative law and the challenges of globalization

Over the past two decades there has been an explosion of academic writings about globalization. Although, not surprisingly, many issues and interpretations are contested, most scholars understand the term

39 As comparatists have observed, the formal system of law in the United States differed considerably from that of the former Soviet Union, yet in both systems lawyers' activities on behalf of their clients exhibited a similar pattern. Where the comparison of the American legal profession with Soviet judicial personnel revealed the most striking dissimilarities was not in the nature of the activities and responsibilities of the two groups, but in the degree of independent influence which each exercises in its respective activity.

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, as commentators have noted, 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.

The phenomenon of globalization gives rise to questions concerning the way in which comparatists acquire, process and transfer legal information. Of particular importance is the question of how can one acknowledge and integrate cultural diversity vis-à-vis the risks induced by parochialism and provincialism. One major issue appears to be how to devise a better understanding amongst lawyers that law within the Western sense of the world is not the only way to define and interpret norms of social behaviour.[40]

With respect to legal knowledge, two goals are of particular importance: developing effective tools for interpreting legal information and better understanding the processes by which scholars and practitioners acquire, process and transmit such information. A key aspect of the enterprise is the effective structuring of knowledge and information about foreign legal systems. This invites 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 structuring information. An important requirement in this respect is the interaction of a community of scholars working towards the same ends, incrementally relating particular knowledge and projects to each other. Legal scholars pursuing this agenda will often benefit from the learning methods, strategies and techniques of other disciplines.

40 Consider on this U. Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems", (1977) 45 *American Journal of Comparative Law*, 5.

Political science, economics, sociology, history and anthropology, for example, are each likely to provide insights that will assist the study of how institutions and communities influence legal decisions, while cognitive science and psychology can shed light on the ways in which information is acquired, structured and transmitted by both individuals and communities.

As the above discussion suggests, globalization intensifies the need for a revival of general jurisprudence and a rethinking of comparative law from a global perspective. Rethinking comparative law will involve all of the main tasks of legal theory including synthesis, the construction and elucidation of concepts, the development of theories, both empirical and normative, providing guidance to various kinds of participants, including comparatists, 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 specific legal concepts across different cultures in so far as the harmonization of global statistics about law requires reasonably transferable concepts. In this respect, the need for understanding diversity in a world driven by trends toward global law becomes increasingly important.

To the extent that cultural diversity is a reality, law is bound to be defined in diversified terms. However, there is a great deal of uncertainty about what cultural diversity actually means and about the extent to which diversity is or should be reflected in legal choices. For example, on a European level, jurists run into such problems in connection with the project of unification of private law. The view that legal transplants are impossible[41] is probably too extreme and betrays an exaggeration of cultural diversity, at least on a European level. On the other hand, the statement that law and society are not in close relationship is also quite obviously an oversimplification.[42] In my view, to deny the possibility or the

41 See P. Legrand, "The Impossibility of Legal Transpants", (1997) 4 *Maastricht Journal of European and Comparative Law*, 111.

42 A. Watson, *Legal Transplants : An Approach to Comparative Law*, (2nd

desirability of legal transplants contradicts the teachings of history and is at odds with the need for legal integration in certain world regions. Of course, recognizing the nomadic of transplantable character of legal rules cannot imply that change in the law is independent from the workings of any social, historical or cultural substratum. What is needed, in other words, is to find a middle road.

One of the most important challenges that globalization poses is related to the necessity to define the tools that will prevent or minimize Western hegemonic thinking. Jurists 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. Comparatists are the first who must learn to change their attitudes so that they can guide their colleagues who deal only on the local level.

The ongoing tendencies of globalization and regional integration today set new challenges for comparative law scholarship. In response to these challenges comparative law has diversified and increased in sophistication in recent years. It is on the way to becoming largely international, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation states. But taking into account international and transnational regimes takes more than adding their description to our catalogue of legal systems. It requires that we develop a better understanding of how legal norms and institutions emerge and operate at the national, transnational and international levels, and that we explore the interplay between these levels. Moreover, the careful examination of function and context needs to be complemented by methods and

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edn, University of Georgia Press, Athens GA, 1993) 108. On the view that law is the result of the social needs of a given society see in general W. Friedmann, *Law in Changing Society*, (Stevens, London, 1959) ; M. Damaska, *The Faces of Justice and State Authority : A Comparative Approach to the Legal Process*, (Yale University Press, New Haven, 1986) ; L. M. Friedman, *A History of American Law*, (Simon and Schuster, New York, 1973, 2005) 595.

techniques designed to enable legal professionals to operate effectively in new and diverse contexts.