

# Legal Comparatism in Classical Antiquity and the Early Modern Age: Tracing the Origins of the Comparative Law Discourse

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## INTRODUCTORY

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

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

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.<sup>1</sup> Comparative law, as a method of legal science and as an academic discipline, is a product of modern Western thought. This does not mean, however, that legal comparison, as a form of cognition involving the study of foreign laws, had no place in earlier civilizations. Since early antiquity people have observed that the legal norms of different societies were not identical. These diverse norms were sometimes taken into consideration when new legal rules and institutions were being developed. The rationale appears to be that the laws of states or communities that were particularly dominant or perceived as being more advanced were deliberately imitated or adopted by other states or communities, and this process was probably repeated in various parts of the world. This paper examines the role of legal comparatism in ancient, medieval and early modern European legal thought and practice with the view to tracing some key ideas that contributed to the rise of comparative law. Special attention is given to the development of the comparative approach to law in the Renaissance and Enlightenment eras—a period marked by the emergence of the scientific method, the decline of feudalism and the rise of the modern nation-state and national legal systems.

## LEGAL COMPARATISM IN GREEK AND ROMAN ANTIQUITY

In ancient Greece, the comparison of different systems of law was a source of inspiration for both lawmakers and philosophers. In the domain of legislative practice, many examples point to the frequent adoption of legal norms by one Greek city-state from another. These include the so-called 'homicide laws' of Attica, which were imitated by a number of Greek cities; the legislation of Charondas, a celebrated lawgiver of Catania in Sicily, which was adopted by several Greek colonies in Sicily and Southern Italy; the legislation of Solon in Athens, elements of which were incorporated into the civil law of Alexandria; and a fragment of the assembly proceedings of Antinoopolis in Egypt, which demonstrates the application in that city of the marriage laws from the city of Naucratis. References to legal comparison can also be found in the works of philosophers. For instance, Plato (429–348 BC) in his *Laws* discussed the laws of several Greek and other city-states in formulating the basic political structure and laws of an ideal city named Magnesia.<sup>2</sup> Similarly, in his *Politics* Aristotle (384–322 BC) considered the constitutions of 158 Greek city-states before settling on his three preferred forms of government (monarchy, aristocracy, and constitutional government or 'polity') and their corrupt versions (tyranny, oligarchy, and democracy).<sup>3</sup>

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2 The third book of the *Laws* discusses the origins and evolution of political systems, and attempts to draw lessons for the legislator from the histories of several actual states, including Athens, Sparta, Argos, Crete and Persia.

3 Of this work, probably composed by members of Aristotle's school, only a small part has survived (the *Athenian Constitution*). For a closer look see E. Bodenheimer, *Jurisprudence: the Philosophy and Method of the Law* (Cambridge

Although it is unclear whether the conclusions of this work were based on extensive empirical study or were the product of largely speculative thinking informed by a more causal empirical knowledge, there is little doubt that Aristotle's general approach was empirical, rooted in observations on how people actually governed themselves. Furthermore, scholars agree that Aristotle adopted the comparative method and that what he and his students were doing should be regarded as a form of comparative constitutional law. In this connection, reference should also be made to Theophrastus (372–287 BC), a student of Aristotle, who composed a work containing an exposition of the laws of Athens as compared with those of other city-states. From the fragment of this work handed down to us it appears that Theophrastus' approach was in a sense quite modern, since it involved an attempt to bring to light the broad principles underpinning the various laws and then to draw attention to particular rules that conflicted with them.<sup>4</sup>

The notion that comparative material may furnish a basis for the justification of positive law was embraced by Greek philosophers, such as Plato and Aristotle, in face of the legal particularism that prevailed in the

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Mass.: Harvard University Press, 1974), 6–10, 13–14; C. Donahue, "Comparative Law before the Code Napoleon", in M. Reimann and R. Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 3 ff; W.B. Ewald, "Aristotle", in D.S. Clark (ed.), *Encyclopedia of Law and Society: American and Global Perspectives* (Thousand Oaks, Calif.: Sage Publications, 2007), 1, 92–93; R. G. Mulgan, *Aristotle's Political Theory: An Introduction for Students of Political Theory* (Oxford: Clarendon Press, 1977), 60–77, 116–38. And see Aristotle, *Politics*, E. Barker trans., (Oxford: Oxford University Press, 1995).

4 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford: Oxford University Press, 1998), 49.

Greek world at that time. The fact that every city-state (*polis*) had a legal system of its own, led some thinkers, notably the Sophists, to draw the conclusion that law is a voluntary creation of man depending entirely on the public opinion in each particular *polis* community. There is no question here of law being grounded in a divine natural order. All law is positive law, a product of popular opinion in a particular time and place.<sup>5</sup> Aristotle's view of law represents a combination of sophistical legal thinking with its concomitant voluntarism and Platonic natural law, which allowed a philosophical deduction of a rational, ideal law. Aristotle construes law as an ontologically unitary phenomenon: all law is the law of the *polis*.<sup>6</sup> But the comparative study of law reveals certain common

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5 This approach drew support from the doctrine of the Sophist philosopher Protagoras, that "man is the measure of all things". This is understood to mean that all knowledge is relative to the person seeking it. What *seems* to each person *is* as far as he is concerned. Reality exists only in relation to one's own feelings and convictions. The Sophists pointed out that customs and standards of behaviour earlier accepted as universal and absolute, and of divine creation, were in fact local and relative. It was against this view that Plato's work was directed. What Plato objected to was the general tendency in the Sophist thinking to make relative the very norms that should possess absolute binding force. For him, law and the laws are an object of free philosophical speculation, and they can be derived only from reason and the idea of the good. Every right law is merely an approximation to the eternal truths—an imperfect reproduction of the idea of law and justice. From this notion (associated with Plato's famous theory of forms) derives the stand of natural law thinking that regards values as having an eternal existence and an eternal veracity.

6 Greek thinkers believed that the concept of a state (*polis*) is inconceivable unless the concept of law (*nomos*) is simultaneously thought of (see, e.g., Plato, *Laws* I 644d). The meaning of this is that the state is identified with a particular type of legal order and is also identified by reference to its laws. This is evident from the close connection between the laws and the

features in different legal orders. These features are not incidental; they point to the fact that in similar circumstances it would be rational to enact laws of this kind.<sup>7</sup> In the Hellenistic and Roman periods the notion that juridical life was restricted to the *polis* was gradually abandoned under the influence of the Stoic philosophy. The Stoics contemplated a *cosmopolis*: an all-embracing, universal community permeated by a divine, rational principle (*Nous, Logos*), in which all men are equal and equally capable of achieving the perfect moral life. According to them, natural law, as founded on divine reason, is universally valid, immutable and has the force of law *per se*, i.e. independently of human positivisation. Compliance with its rules is a prerequisite for attaining justice, as the

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'community of citizens', the '*universitas civium*', the latter being endowed with a common will expressed through the legal order. The law is connected with the state because it makes it an object of knowledge. It may be described as the mould, which bestows regularity and normality on the life of a given society. In this respect, the origin of law cannot be separated from the development of the community as a whole. This implies that legal development is basically a social one. At the same time, the development of the community is eminently rational, since the community may be grasped through its legal order. This account perfectly agrees with the analysis of the origin and development of the law in Plato's *Laws* III.

- 7 As Aristotle elaborates in Book 5 of the *Nicomachean Ethics*: "There are two kinds of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive (···) [L]aws that are not natural but man-made are not the same everywhere, because forms of government are not the same either; but everywhere there is only one natural form of government, namely that which is best". Although Aristotle seems to have accepted that there is a natural and universal right and wrong, apart from any human ordinance or convention, he fell short of developing a natural law theory.

essence of law in a broad sense. In this respect, one might say that the universal recognition of a legal principle among nations (as revealed by the comparative study of laws) may be taken to constitute *prima facie* (although not conclusive) evidence that such principle emanates from natural law.<sup>8</sup>

A well-known example of an alleged foreign influence on the drafting of legislation from the early Roman period concerns the Law of the Twelve Tables, the oldest compilation of Roman law, enacted in the middle of the fifth century BC. Both the writings of the orator and philosopher Cicero (106–43 BC) and the jurist Gaius (2nd century AD) appear to suggest that they believed the apparent legend that, before work on the law code commenced, a three-member commission was sent to Greece to learn from the laws of the famous Athenian lawgiver Solon and those of other Greek city-states. Contemporary historians now accept that it is unlikely that a delegation was sent to Greece. This view draws support from the fact that the preserved fragments of the Law of the Twelve Tables reveal very little that can be traced directly to a Greek influence, although certain parallels with the laws of other early societies are observed.<sup>9</sup> However, as the story of the Twelve Tables

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8 In the words of C. J. Friedrich, “the most that can be admitted is that there is a presumption in favor of the contention that a legal institution found in diverse *civitates* is part of the law of nature”. *The Philosophy of Law in Historical Perspective* (Chicago: University of Chicago Press, 1963), 32.

9 The Law of the Twelve Tables does have some elements in common with Athenian law, but these are not of the kind that could suggest a direct influence. The relevant provisions that, according to Cicero, were extracted from the laws of Solon pertain mainly to the settling of disputes between neighbours, the right of forming associations (*collegia*) and restrictions on displays at funerals. See Cicero *de leg.* 2. 23. 59; 2. 25. 64.

indicates, the influence of the Greek civilization on Roman culture is undeniable.

The tendency that prevailed among the Roman jurists was to focus exclusively on the domestic law of Rome.<sup>10</sup> They sought to preserve this law, while also developing it by devising new ways for the practical use of its doctrines and institutions in a satisfactory manner. But they did not consider that their tasks should encompass an analysis of law from ethical, historical or other more general viewpoints, nor were they directly interested in the laws and customs of other nations. They sustained a conservative attitude and demonstrated an almost total lack of interest in legal concepts and norms originating externally or divergent from the Roman legal system as they understood it. Nevertheless, comparative inquiries into the laws and customs of different peoples appear to have played a part in the formation of the so-called 'law of nations' (*ius gentium*), the body of Roman law that regulated economic relations between Roman citizens and foreigners.

From an early period the Romans realised that certain institutions of their own domestic law (*ius civile*) also existed in the legal systems of other nations. As contracts of sale, service and loan, for example, were recognised by many systems, it was assumed that the principles governing these were everywhere in force in the same way. The Romans deemed that those institutions that Roman law had in common with other legal systems belonged to the law of nations (*ius gentium*) in a

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10 Like other ancient peoples, the Romans observed the personality of the laws principle, whereby each person lived by the law of their community. Thus, the Roman *ius civile* (the civil law of the Roman state) was the law that applied exclusively to Roman citizens, and the term *ius civitatis* denoted the legal rights to which only Roman citizens were entitled.



broad sense. But this understanding of the *ius gentium* was of little practical value for the Roman lawyer, for the specific rules governing the operation of such generally recognised institutions differed from one legal system to another. When the Romans began to trade with foreigners they must have realised that their own domestic law was an impossible basis for developing trading relations. Foreign traders too had little inclination to conform to the tedious formalities of the Roman *ius civile*. Some common ground had to be discovered as the basis for a common court, which might adjudicate on claims of private international law, and this common ground was found in the *ius gentium*, or the law of nations in a narrow, practical sense. Thus, in contrast to the *ius civile* as the law that applied exclusively to Roman citizens, the term *ius gentium*, in a narrow, practical sense, came to signify that part of Roman law governing relations between citizens and foreigners, and between foreigners belonging to different states. This body of law was constructed from the edicts of the *praetor peregrinus*, the special magistrate dealing with legal disputes involving foreigners and, to a lesser degree, from the edicts of provincial governors. Attending to disputes involving people of diverse national backgrounds would have been difficult without employing rules based on common sense, expediency and fairness that were confirmed by general and prevalent usage among many communities. In contrast to the *ius civile*, the *ius gentium* was thus characterized by its simplicity, adaptability and emphasis on substance rather than form. For that reason, not only foreigners but also Roman citizens often relied on it as a means for resolving legal disputes. Moreover, elements of the *ius gentium* entered the edict of the *praetor urbanus* (the magistrate in charge of the administration of the *ius civile*) and thereby the domain of the domestic Roman law. However, it was

only in the classical period of Roman law (the early imperial period) that the further development of the *ius gentium* was influenced by comparative inquiries, and therefore was denationalized and turned into a form of ‘universal law’. This was accomplished by a combination of comparative jurisprudence and rational speculation.<sup>11</sup> It was now claimed that the Roman *ius gentium* was binding upon all inhabitants of the empire, because it was also natural law based on natural reason. This was justified by reference to its universal validity (i.e. in the Roman *orbis terrarum*).

In light of the above discussion, it is unsurprising that the second century AD jurist Gaius declares that Roman law is based in part on the law of nations (*ius gentium*), which he defines as “the law that natural reason establishes among all mankind [and] is observed by all peoples alike”.<sup>12</sup> “Thus”, he continues, “the Roman people observe partly their own particular law [and] partly that which is common to all peoples”.<sup>13</sup> Although he does not provide a detailed schema whereby one can discern which legal institution belongs to the former and which to the latter category, he gives us enough markers so that we can have a reasonably good idea of what he regarded as domestic Roman law (*ius proprium Romanorum*) and what as *ius gentium* (or *ius commune*). For instance, acquiring title by delivery (*traditio*) from the owner was an institution of the *ius gentium* (which he identifies with *ius naturale*), whilst acquiring title by mancipation (*mancipatio*) was an institution of domestic

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11 See T. Mommsen, *Römisches Staatsrecht* (Leipzig: S. Hirzel, 1887), 606.

12 Gaius, *Institutes*, 1. 1.

13 Ibid. Consider also *Digest of Justinian*, 41. 1. 1 pr., 9. 3 (Gaius).

Roman law (*ius civile*).<sup>14</sup> Furthermore, the partnership (*societas*) that was contracted by simple agreement (*consensus*) among the parties was an institution of the *ius gentium*, while the partnership among heirs that in early times prevailed in Rome pertained only to Roman citizens.<sup>15</sup> One may discern behind Gaius' and other jurists' remarks a comparative effort. Unfortunately, however, the process by which the comparison was carried out was not committed to writing or, if it was, it has not survived. In all probability, that process had occurred prior to Gaius' time, and he merely reports some of the conclusions.

A curious comparative work, dating from the later imperial age, is the *Lex Dei quam praecipit Dominus ad Moysen* ('The divine law which the Lord commanded unto Moses'), also known as *Collatio legum mosaicarum et romanarum* ('A Comparison between Mosaic and Roman Laws'). The exact date of this work is unclear, but the main body of the text appears to have been compiled in the first half of the fourth century.<sup>16</sup> The work

14 Gaius, *Institutes*, 2. 65. The *mancipatio* was a highly formal procedure employed when ownership over certain types of property, referred to as *res Mancipi*, was transferred. *Res Mancipi* included land and buildings situated in Italy, slaves and draft animals, such as oxen and horses. All other objects were *res nec Mancipi*. The ownership of *res nec Mancipi* could be passed informally by simple delivery (*traditio*).

15 Gaius, *Institutes*, 3,154–154a.

16 The *Collatio legum mosaicarum et romanarum* was first edited in the sixteenth century but more materials were added later based on two manuscripts discovered in the nineteenth century. The standard modern edition is that of Th. Mommsen included in his *Collectio librorum iuris anteiustiniani* (apud Weidmannos, 1890), III; see also G. Baviera, in S. Riccobono, G. Baviera, C. Ferrini, G. Furlani and V. Arrangio-Ruiz (eds), *Fontes iuris romani anteiustiniani* (Florence: A. G. Barbera, 1968), II, 543–89. For commentary consider E. Volterra, *Collatio legum mosaicarum et*

is divided into titles, each of which starts with a quotation from the first five books of the Old Testament (especially the maxims of Moses) followed by extracts from the works of the classical Roman jurists Paulus, Ulpianus, Papinianus, Modestinus and Gaius, and imperial constitutions from the Gregorian and Hermogenian Codes. Ostensibly, the purpose of this work was to compare some selected Roman norms, mainly of a penal character, with related norms of Mosaic law to demonstrate that Roman law, in its basic principles, was consistent with Mosaic law and that it in some sense implemented the latter law.<sup>17</sup>

## LEGAL COMPARATISM IN THE MIDDLE AGES

After the demise of the Roman Empire in the West, the once universal system of Roman law was replaced by a plurality of legal systems. The Germanic tribes that settled in the lands of the former Roman Empire lived according to their own laws and customs, while the Roman portion of the population and the clergy remained governed by Roman law. This entailed a return to the ancient principle of the personality of law: the law applicable to a person was determined not by the territory they happened to live in but by the people or ethnic group to which they

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*romanarum*, Memorie della R. Accademia nazionale dei Lincei: Classe di scienze morali, storiche e filologiche, 6.3.1 (Rome, 1930); G. Barone-Adesi, *L'età della Lex Dei*, Pubblicazioni dell'Istituto di diritto romano e dei diritti dell'Oriente mediterraneo, 71 (Naples: Jovene, 1992).

17 The author of this work remains unknown, although the attempted comparison of Roman and Mosaic law suggests that he was probably of Jewish origin.

belonged.<sup>18</sup> To facilitate the administration of the law in their territories, some Germanic kings ordered the compilation of legal codes containing the personal Roman law that regulated the lives of many subjects. Among the most important compilations of Roman law that appeared during this period were the *Lex Romana Visigothorum* (506 AD), the *Edictum Theoderici* (late fifth century AD) and the *Lex Romana Burgundionum* (517 AD). The coexistence of Roman and Germanic laws within the same territory gave rise to an awareness of the differences between these systems as well as the opportunity for comparison. That some form of legal comparison was carried out is reflected in the influence that Roman law exercised on the various codes of Germanic law that appeared in the West during this period. The most important Germanic codes embrace the *Codex Euricianianus*, enacted about 480 by Euric the Visigothic king and drafted with the help of Roman jurists; the Salic Code (*Pactus legis Salicae*) of the Franks, composed in the early sixth century; the *Lex Ribuaria*, promulgated in the late sixth century for the Franks of the lower and middle Rhine region; and the *Lex Burgundionum*, issued in the early sixth century for the inhabitants of the Burgundian kingdom. Of the above codes, the Visigothic and Burgundian Codes reflect a stronger Roman influence than the Salic and Ripuarian Codes.

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18 When Justinian reincorporated Italy into the empire (553 AD), his legislation was introduced to this realm. However, its validity was only sustained for a brief period as most of the Byzantine territories in Italy fell to the Lombards in 568 AD. After that time, Justinian's legislation only applied in those parts of Italy that remained under Byzantine control. The rest of Italy displayed a similar pattern to Gaul and Spain as Roman law continued to exist through the application of the personality of the laws principle.

In the course of time, as the fusion of the Roman and Germanic elements of the population progressed, the division of people according to their ethnic origin tended to break down. The system of personal laws was gradually superseded by the conception of law as entwined with a particular territory: a common body of customary norms (a mixture of debased Roman and Germanic law) now governed all persons living within a particular territory. In this way, the diversity of laws no longer persisted as an intermixture of personal laws, but as a variety of local customs. Nevertheless, awareness of different sources of law and occasional attempts at laying diverse sources side by side appear to have continued throughout the early middle ages.<sup>19</sup>

From the early eleventh century, the growth of trade, commerce and industry and the return of a measure of order to Europe precipitated a revival of interest in the study of law. Although the legal revival tended at first to concentrate on the systematic exposition of native

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19 In this connection reference should be made to the so-called 'code' of the Anglo-Saxon King Alfred (849–899). See P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, (Oxford: Blackwell, 1999), 265–85.

Germanic (especially Lombard) law,<sup>20</sup> it also embraced feudal law<sup>21</sup> and canon law, which were already part of the legal scene in Western Europe, as well as aspects of pre-Justinianic Roman law. However, by the end of the eleventh century the *antiqui*, the jurists concerned with the study of Germanic law, were superseded by the *moderni*, whose interest lay primarily in Roman law. From the eleventh to the thirteenth century, the systematic analysis and interpretation of the Roman law of Justinian was the exclusive preoccupation of the jurists from the famous law school of Bologna, known as the school of the Glossators.<sup>22</sup> The jurists'

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20 After the annexation of the Lombard kingdom by the Frankish Empire during the reign of Charles the Great (742–814) Lombard law continued to apply in northern Italy. At Pavia, the centre of Lombard Italy, a school of Lombard law was established probably as early as the ninth century. The study of Lombard law was based primarily upon the *Liber Papiensis*, a work composed probably in the early years of the eleventh century (this compilation contained materials dating from the Edict of Rothari, the basic statement of Lombard Law, published in 643). Reference should also be made here to the *Lombarda* or *Lex Langobarda* and the *Expositio ad Librum Papiensem* that combined materials drawn from Lombard and Roman sources with special reference to the Institutes, the Code and the Novels of Justinian.

21 During this period, a sourcebook of feudal law, referred to as *Libri feudorum*, was used for study in Northern Italy, although it is unclear where.

22 The law-school of Bologna owed its rise and early fame to Irnerius and thus this jurist came to be regarded as the founder of the school, although he does not appear to have been the first teacher there—the first public course of law at Bologna was delivered in 1075 by the Pavian jurist Pepo (Joseph), who was probably a teacher of Irnerius. Among the successors of Irnerius, the most notable were Bulgarus, Martinus Gosia, Jacobus and Ugo (renowned as the 'four doctors of Bologna'), Azo, Vacarius, Rogerius, Placentinus, John Bassianus, Odofredus and Accursius. In the late twelfth

work of interpretation was closely aligned with their methods of teaching and it was executed by means of notes (*glossae*) that elucidated difficult terms of phrases in a text, and provided the necessary cross-references and reconciliations that rendered the text usable.<sup>23</sup> The missing element

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century, Rogerius founded the law school of Montpellier in France (probably together with Placentinus) and this institution became an important centre of legal learning. Vacarius, a Lombard, travelled to England around the middle of the twelfth century and commenced teaching civil law at Canterbury. In 1149, he composed his *Liber pauperum* that comprised a collection of texts from the Code and the Digest of Justinian accompanied by explanatory notes. The aim of this work was to introduce the Roman law of Justinian to the poorer students in England. The greatest of the late Glossators was Franciscus Accursius, who dominated the law school of Bologna during the first half of the thirteenth century. Around the middle of the thirteenth century, he produced his famous *Glossa Ordinaria* that existed as an extensive collection or *apparatus* of glosses from earlier jurists covering the entire Justinian codification and supplemented by his own annotations. The *Glossa Ordinaria* represented the culmination of the Glossators' work and gained rapid acceptance in Italy as the standard commentary on Justinian's texts, providing guidance for those engaged in the teaching and practice of law.

23 This method was by no means new-it had been relied upon by earlier medieval scholars and was similar to that used by the jurists of the law-schools of Constantinople and Beirut during the later imperial era. On the school of the Glossators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London: Butterworths, 1994), 42 ff; P. Vinogradoff, *Roman Law in Medieval Europe* (Oxford: Clarendon Press, 1929, repr. Union, N.J.: Lawbook Exchange, 2001), 32 ff; J. A. Clarence Smith, *Medieval Law Teachers and Writers* (Ottawa: University of Ottawa Press, 1975); R. L. Benson and G. Constable (eds), *Renaissance and Renewal in the Twelfth Century* (Cambridge, Mass.: Harvard University Press, 1982); D. Tamm, *Roman Law and European Legal History* (Copenhagen: DJOF, 1997), 203-6; P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 45 ff; E. Cortese, *Il rinascimento giuridico medievale*



in the Glossators' approach was the historical dimension; they attached little import to the facts that Justinian's codification was compiled more than five hundred years before their own time and was mainly composed of extracts deriving from an even earlier date. Instead, they perceived it as an authoritative statement of the law that was complete in itself as demonstrated by their rational methods of interpretation. They devoted little attention to the fact that the law actually in force was very different from the system embodied in it. Indeed, the Glossators rarely mention the existence of bodies of law different from the ones they are expounding. Nevertheless, their new insight into the ancient texts galvanised the development of a true science of law that had a lasting influence on the legal thinking and practice of succeeding centuries.

During the same period, canon law also became the object of systematic study. The task of the canonists was to amalgamate and harmonize the mass of canons contained in earlier canonical collections, and this involved eliminating contradictions and updating matters as necessary. Their ultimate aim was to develop, expand and systematise canon law as an independent body of law and not merely as a set of rules for ecclesiastics. The work that succeeded in transforming canon law into a complete system was the *Decretum or Concordia discordantium canonum*, composed by Gratian (a Bolognese monk) around the middle of the twelfth century. The *Decterum Gratiani*, as this work became known, was both a code of and a treatise on canon law. It presented in a systematic way and without inconsistencies and contradictions the rules

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(Rome: Bulzoni, 1992); W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne: Böhlau, 2001), 230 ff; H. Lange, *Römisches Recht im Mittelalter, I: Die Glossatoren* (Munich: C. H. Beck, 1997).

governing priesthood, ecclesiastical jurisdiction, Church property, marriage and the sacraments and services of the Church. Gratian's method of arranging the materials was similar to that followed by the drafters of Justinian's Institutes.<sup>24</sup> Although it was published as an unofficial private work, Gratian's *Decretum* was soon recognized as an authoritative statement of the canon law as it stood in his era. Like the codification of Justinian, it became the object of systematic study in the universities. Students could obtain their degree either in civil law or in canon law, or they could qualify as bachelors of both civil and canon law. In carrying out their work, the canonists relied heavily on Roman law, especially in areas with respect to which the basic canonical sources were deficient. As the Church was held to live by Roman law, it is unsurprising that whole branches of Roman law were incorporated into the canonical system. A particularly noteworthy development of this period was the creation of a system of Romano-canonical procedure, the result of a combined effort of canonist and civilian jurists, which furnished the basis of the procedural system prevailing in civil law systems today.<sup>25</sup>

By the end of the thirteenth century, jurists had shifted attention from the purely dialectical analysis of Justinian's texts to the need to develop contemporary law. This development is associated with the emergence of a new breed of jurists in Italy, the so-called Post-Glossators

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24 For a closer look see A. Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000).

25 See on this R. C. van Caenegem, "History of European Civil Procedure", *International Encyclopedia of Comparative Law* (Tübingen: J.C.B. Mohr, 1973), 16.2.

or Commentators.<sup>26</sup> Their primary interest was adapting the Roman law of Justinian, as explained by the Glossators, to the new social and economic conditions of their own era. The positive law enforced by the courts at that time comprised Roman law, the customary law of Germanic or feudal origin, the statute law of the Holy Roman Empire of the German Nation (established in the tenth century AD) and the self-governing municipalities, and canon law. The integration of these bodies of law into a unitary system was the concern of the Commentators. The result was the creation of a system of law in which the non-Roman element was, so to speak, Romanized. In carrying out their work, the commentators examined the statutes and customs of diverse states, and when they found it impossible to reconcile them with their learning, they simply recognized that they were different. But the commentators did not rest content with merely acknowledging the existence of differing bodies of law; they also sought to explain why there might be such differences and, on this basis, develop a system to deal with conflicts of

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26 The new school with chief centres at the universities of Pavia, Perugia, Padua and Pisa, reached its peak in the fourteenth century and prevailed in the fifteenth and sixteenth centuries. The most influential of the Commentators embraced Bartolus de Saxoferrato (1314–1354) and his pupil Baldus de Ubaldis (1327–1400). Bartolus' commentary on the whole of Justinian's codification was acknowledged as a work of authority and extensively used by legal practitioners and jurists throughout Western Europe. On the school of the Commentators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London: Butterworths, 1994), 59 ff; P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 71–74; D. Tamm, *Roman Law and European Legal History* (Copenhagen: DJOF, 1997), 206–8; F. Wieacker, *A History of Private Law in Europe* (Oxford: Clarendon Press, 1995), 55 ff; W. Kunkel/M. Schermaier, *Römische Rechtsgeschichte* (Cologne: Böhlau, 2001), 232 ff.

laws.

Medieval (and later) jurists regarded contemporary legal particularism as an evil, which they tried to remove by adopting Roman law as the common basis of European legal science. Their method involved both *auctoritas* and *ratio*, but *ratio* here does not refer to natural reason but to Aristotelian logical inference. As true medieval men, they construed Justinian's texts in the same way as theologians construed the Bible, or contemporary philosophers construed the works of Aristotle. Just as Aristotle was regarded as infallible and his statements as applicable to all circumstances, so the texts of Justinian were also regarded by the jurists as sacred and as the repository of all wisdom.<sup>27</sup> The law developed by the Glossators and the Commentators, as the product of a synthesis between non-Roman elements and the glossed Roman law, achieved universal validity as *ratio scripta* and was received in nearly all European countries; thus it became the 'common law' (*ius commune*) of Continental Europe. Like the Latin language and the universal Church, the *ius commune* was an aspect of the unity of the West at a time when there were no strong centralized political administrations and no unified legal systems, but rather a perpetual contest among the competing and often overlapping jurisdictions of local, feudal, ecclesiastical, mercantile and royal authorities. It should be noted, however, that the process of reception was complex and characterized by a lack of uniformity. The reception of Roman law in different parts of

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27 In the realm of philosophy this period corresponded with the full flowering of medieval scholasticism. The scholastic method, as applied to law, sought to expose the general principles of the law so as to erect a comprehensive theory of law.

Europe was affected by local conditions, and the actual degree of Roman law infiltration varied considerably from region to region. In parts of Southern Europe, such as Italy and Southern France, where Roman law was already part of the applicable customary law, the process of reception may be described as a resurgence, refinement and enlargement of Roman law. On the other hand, the process of reception in Germany and other Northern European regions was prolonged and, in its closing stages, much more sweeping.

## PIONEERS OF COMPARATIVE LAW IN THE RENAISSANCE AND ENLIGHTENMENT ERAS

In medieval and even later times, there was no clear connection between the state and legal order. Thus, a state could accommodate the existence of several legal orders within the same territory. The federal constellations, a characteristic feature of feudalism, were not yet based on the idea of national interest; their role was only instrumental. On the other hand, the interests of commerce and agriculture were more stable as expressing relatively permanent structural elements of society. In relation to them, national frontiers were immediately relevant. From the sixteenth century onwards, the feudal nobility was defeated by a central power, which represented also the interests of the growing urban middle class and the lower gentry. As a result, the idea of legislation as a means of centripetal policy gained ground. The idea of a national social consensus-the notion that the members of a nation had common interests-became a basic assumption.

In the sixteenth century, the homologation of customary law in

France<sup>28</sup> prompted jurists to employ the comparative method in the study of law. This method had already been common among the French humanists, who are also credited with the invention of the modern historical method.<sup>29</sup> In this connection, reference may be made to

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28 In order to reduce the confusion caused by the multiplicity of customs, King Charles VII ordered the compilation of the customs of all regions of France in his Ordinance of Montils-les-Tours in 1453. Although the direction proved largely ineffectual, it was repeated by subsequent monarchs and most of the customary law had been committed to writing by the end of the sixteenth century. Although the publication of the customs removed much of the confusion caused by local differences, legal unity was certainly not achieved. In addition to the differences between Northern and Southern France, considerable regional diversity persisted even within each of the main territorial divisions.

29 The chief aim of the humanist scholars was the rediscovery of the Roman law existing in Roman times by applying the historical method instead of the scholastic method of the medieval Commentators. The method adopted by the Humanist scholars in France for the study of Roman law became known as *mos gallicus* (in contradistinction with the *mos italicus* of the Bolognese jurists) or *Elegante Jurisprudenz*. The humanists' approach to Roman law as a historical phenomenon inspired the appreciation of the jurists for the differences between Roman law and the law of their own era. By drawing attention to the historical and cultural circumstances in which law develops, the humanists prepared the ground for the eventual displacement of the Roman *ius commune* and the emergence of national systems of law. On the history and influence of the humanist movement see P. Stein, *Roman Law in European Legal History* (Cambridge: Cambridge University Press, 1999), 75 ff; D. Maffei, *Gli inizi dell'umanesimo giuridico* (Milan: Giuffrè, 1956); D. Kelley, *Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance* (New York: Columbia University Press, 1970); O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London: Butterworths, 1994), ch. 10; M. P. Gilmore, *Humanists and Jurists: Six Studies in the Renaissance* (Cambridge, Mass.: Harvard University Press, 1963); F. Wieacker, *A History of Private*

Coquille's work *Institution au droit des Francois*, published in 1607. Guy Coquille (1523–1603) studied humanities in Paris and law in Padua and Orleans and practiced law in the customary courts of Nivernais, where he worked as an advocate for the local *Parlement*.<sup>30</sup> In his work he sought to cover the laws and customs of France in a comprehensive and comparative manner.<sup>31</sup> His *Institution* begins with the titles of the homologated custom of Nivernais, stating the rules of that custom relating to each title and also comparing them with relevant rules prevailing in other regions. For instance, in the title on marital property, he notes that the rule applying in Nivernais is that a married woman must obtain her husband's consent in order to make a testament. He then proceeds to say that the same rule applies in the territory of Burgundy, whilst in Rheims, Auxerre, Berry and Poitou the rule is to the contrary. Once the conflict has been identified, Coquille (like other jurists of this era) proceeds to ask: what is the 'true rule' that should be applying in such cases? His answer to this question is that the correct rule is that a testament cannot depend on the will of another person, for this is the nature of a testament. He seeks to justify this view by

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*Law in Europe* (Oxford: Clarendon Press, 1995), 120 ff.

30 The *parlements* were regional judicial and legislative bodies in France's *Ancien Regime*: the social and political system that prevailed in France under the late Valois and Bourbon dynasties from the fifteenth century to the time of the French Revolution in the later eighteenth century. There were twelve *parlements*, with the largest one being based in Paris and the rest in the provinces. The relevant offices could be transferred by inheritance or acquired by purchase.

31 It should be noted that the comparative method was not universally employed by sixteenth-century French jurists, at least not as broadly as Coquille used it.

reference to certain passages in the Digest of Justinian. Although this is not taken to render the custom of Nivernais or Burgundy invalid, it limits the scope of the relevant rule: if the custom is abolished, then the rule has no force because the *ius commune* provides otherwise. Furthermore, a rule that departs from the *ius commune* is regarded as introducing a kind of privilege, exercisable only by those persons to whom it has been given. In other words, Coquille does not deny that customs contrary to the *ius commune* exist, but requires that it be clearly stated and considers it applicable only in those (exceptional) situations to which it clearly pertains. A similar approach was followed by the Italian jurists of the fifteenth century when they were faced with statutes that were contrary to the *ius commune*: such statutes were narrowly construed. Occasionally, Coquille adopts the view that a customary rule is flat-out wrong, either because it goes against higher principles or because it does not correspond with social reality (this argument is usually only hinted at). Fifteenth century Italian jurists, on the other hand, hardly ever employ arguments of the latter type. But Coquille and other French jurists of this period go beyond the earlier Italian jurists in another respect: they seek to find common principles that underpin the divergent French customs when no reference to the *ius commune* can be made. Furthermore, they utilize principles and methods of the *ius commune* in analyzing a customary system of law that, unlike the statutory enactments of the Italian city-states, was not regarded as being founded on the *ius commune*.

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. 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 Francis Bacon (1561–1626), for example, proposed the development of a system of universal justice by means of which one might assess and seek to improve the legal system of one's own country<sup>32</sup>. However, although he asserted that the propositions of this system should be based, at least to some extent, on the study of diverse systems of law, he set them down without buttressing them with foreign legal material. The German philosopher Gottfried Wilhelm von Leibniz (1646–1716) 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,<sup>33</sup> employed the comparative method to place the ideas of natural

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32 See F. Bacon, *De dignitate et augmentis scientiarum* (1623), bk. VIII, c.3.

33 The School of Natural law challenged the supreme authority that medieval jurists had accorded to the codification of Justinian. It did so on the grounds that the *Corpus Iuris Civilis* was an expression of a particular legal order whose rules, like those of any other system of positive law, must be assessed in the light of norms of a higher order, eternal and universally valid—the norms of Natural law. Natural law was construed as rational in its content, since its norms could be discovered only by the use of reason, logic and rationality. It was also regarded as common to all humankind of all times and possessing a higher moral authority than any system of positive law. From this point of view, the Natural Law scholars rejected certain 'irrational' features of the Roman legal system, such as the remnants of the old Roman formalism in the *Corpus Iuris Civilis*, as being specific to the Roman system of social organization and restricted in time. At the same time, however, they recognized that Roman law contained many rules and principles that reflected or corresponded to the precepts of natural law—rules and principles that they regarded as the product of

law on an empirical footing. Believing that the universal propositions of natural law could be proved, not only by mere deduction from reason but also by the fact that certain legal rules and institutions were recognized in all legal systems, he used legal material from diverse countries and ages to illustrate and support his system of natural law. Other members of the Natural Law School who utilized this method include John Selden (1584–1654), Samuel von Pufendorf (1632–1694) and Christian von Wolff (1679–1754). Selden, a celebrated lawyer and a man whose legal opinions ranked high among his contemporaries, stressed the importance of the comparative study of laws which, he believed, should be based on a profound understanding and knowledge of the history of legal institutions in different countries and ages.<sup>34</sup> In this respect, his work is viewed as

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logical reasoning on the nature of man and society, rather than the expression of the legal development of the Roman state. Many legal principles espoused by Roman jurists appeared as suitable materials to use for establishing a rational system of law. Regarding their methodology, the Natural Law scholars, relied on deductive reasoning to extract from a small number of general concepts abstract principles of universal application, which could form the basis for developing an orderly and comprehensive system of law. The Natural Law School, with its system-building approach to law, prompted a renewed interest in codification as a means of integrating the diverse laws and customs of a national territory into a logically consistent and unitary system. On the rise and influence of the School of Natural law see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London: Butterworths, 1994), ch. 13; J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), ch. 6; F. Wieacker, *A History of Private Law in Europe* (Oxford: Clarendon Press, 1995), ch. 15; P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 107–110; D. Tamm, *Roman Law and European Legal History* (Copenhagen: DJOF, 1997), 231 ff.

34 Selden explored the influence of Roman law on the common law of

marking the beginning of comparative legal history. Pufendorf was the first modern legal philosopher who elaborated a comprehensive system of natural law comprising all branches of law.<sup>35</sup> His work exercised an influence on the structure of later codifications of law, in particular on the 'general part' that is commonly found at the beginning of codes and in which the basic principles of law are laid down. Drawing on the work of Leibniz and Pufendorf, Wolff proposed a system of natural law that he alleged to make law a rigorously deductive science. His system exercised considerable influence on the eighteenth and nineteenth-century German codifiers and jurists, as well as on legal education in German universities. Although their methods differed, both Puffendorf and Wolff sought to base their theories partly on deduction and partly on observation of facts. Although their approach is different from that employed by modern comparatists, some aspects of their work can be described as comparative in the sense that they occasionally rely on examples drawn from diverse systems of law to support the premises on which they worked.

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England and applied the comparative method in the *History of Tithes*, one of his best-known works, and in his treatises on Eastern legal systems.

35 Pufendorf is best known for his book *De jure naturae et gentium* (on the Law of Nature and Nations, 1672). His earlier work *Elementa jurisprudentiae universalis* (Elements of a Universal Jurisprudence, 1660) led to his being appointed to a chair in the Law of Nature and Nations especially created for him at the University of Heidelberg. As E. Wolf remarks, in his work "Pufendorf combines the attitude of a rationalist who describes and systematizes the law in the geometrical manner with that of the historian who rummages through the archives and who explores historical facts and personalities." *Grosse Rechtsdenker der deutschen Geistesgeschichte* (Tübingen: Mohr, 1944), 298.

Elements of the comparative method can also be detected among Enlightenment thinkers who were only partially members of the Natural Law School, such as Robert-Joseph Pothier (1699–1772), as well as among authors who did not belong to this School, such as Giovanni Battista Vico (1668–1744) and, in particular, Charles-Louis de Secodot, baron de la Brède et de Montesquieu (1689–1755).

### *Pothier*

Pothier was born and studied in Orleans, where he served as judge and, from 1749, as university professor. His first major work, *La coutume d'Orléans avec des observations nouvelles*, published in 1740,<sup>36</sup> was concerned with the customary law of his hometown. His next important work was a comprehensive treatise on Roman private law, titled *Pandectae justineanae in novum ordinem digestae cum legibus codicis et novellae* (1748–1752). This was followed by a series of works on a diversity of legal institutions.<sup>37</sup> In his writings, Pothier sought to overcome the problems for legal practice caused by the fragmentation of the law in France by

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36 A revised edition of this work was published in 1760.

37 These included his *Traité des obligations I et II* (1761–1764); *Traité du contrat de vente* (1762); *Traité des retraits* (1762); *Traité du contrat de constitution de rente* (1763); *Traité du contrat de louage*; (1764); *Traité du contrat de société* (1764); *Traité de cheptels* (1765); *Traité du contrat de prêt de consommation* (1766); *Traité du contrat de dépôt et de mandat* (1766); *Traité du contrat de natissement* (1767); *Traité du contrat de mariage I et II* (1766); *Traité du droit de domaine de propriété* (1772); and *Traité de la possession et de la prescription* (1772). Pothier's works were widely used by jurists and lawyers throughout the eighteenth and nineteenth centuries. An important collection of these works in 11 volumes was published by Dupin in 1824/25.

means of a systematic restatement of fundamental legal concepts and principles<sup>38</sup>. In this way he contributed a great deal to the process of unification of private law in France. His work is regarded as the last expression of doctrine concerning the law of France before the Revolution and, for that reason alone, apart from the high esteem in which he was held, it was bound to influence the compilers of the French Civil Code.<sup>39</sup>

Although Pothier was not a particularly original thinker, he possessed an immense knowledge and showed himself thoroughly familiar with the writings of Commentators such as Bartolus, Humanists such as Cujas and Natural Lawyers such as Pufendorf. He devoted his enormous energy and organizing ability into gaining a profound understanding of French law as it was in the period preceding the Revolution, going beyond mere description to give new proportions to French law, especially in the fields of the law of property and law of obligations. In these fields it is unsurprising that the superior method of Roman law, with which Pothier was so thoroughly acquainted, came to dominate the largely disorganized and fragmented customary law. This, however, does not mean that he neglected the latter law. Although he

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38 For example, in his treatise on the institution of ownership Pothier shows how, in a feudal system that encompassed several forms of property and related entitlements, the fundamental Roman law concept of property could be employed to overcome, in theory at least, many of the discrepancies of the current system.

39 The Civil Code adopted many of the legal solutions proposed by Pothier, especially in the field of the law of obligations. The drafters of the Code also adopted the systematic structure preferred by Pothier, which goes back to the classical Roman jurist Gaius and was followed by Emperor Justinian: persons; things (including obligations and succession); and actions.

holds a central place in the mainstream of the civilian tradition, he adopted a great deal from the customary law. Like medieval jurists, Pothier cites and accurately reports rules and principles derived from many different legal systems: divine law, natural law, Roman law, Salic law and the customary law of France. Nevertheless, he was not concerned with exploring and explaining the differences and similarities between these systems. Rather, his effort was primarily directed at reconciling all of these systems into one coherent whole. Thus, in contrast to other thinkers of this period, it is difficult to see a connection between Pothier and modern comparatists.

### *Vico*

Vico was born in Naples, Italy, and spent most of his professional life as professor of rhetoric at the University of Naples. He was trained in jurisprudence, but read widely in classics, philology, and philosophy, all of which informed his highly original views on history, historiography, and culture. His thought is most fully expressed in his mature work, the *Scienza Nuova or The New Science*, first published in 1724. Although he initially adopted the methods of Grotius and Descartes, he subsequently departed from them and developed his own theory of *scienza* (science or knowledge). Against Cartesian philosophy, with its emphasis on clear and distinct ideas, the simplest elements of thought from which all knowledge could be derived a priori by way of deductive rules, Vico argued that full knowledge of any thing involves discovering *how* it came to be what it is as a product of human action. For him, the main drawback of Descartes's hypothetico-deductive method is that it renders phenomena that cannot be expressed logically or mathematically as mere illusions. The reduction

of all facts to the ostensibly paradigmatic form of mathematical knowledge is a form of “conceit,” which arises from the fact that “man makes himself the measure of all things” and that “whenever men can form no idea of distant and unknown things, they judge them by what is familiar and at hand.” In view of this limitation, Vico maintains, one is obliged to recognize that phenomena can only be known via their origins or causes. In his *New Science*, he seeks to develop a conception of science that would allow one to understand the facts of the human world without either reducing them to mere contingency or explaining them by way of speculative ideas of the kind generated by traditional metaphysics. To this end, he introduces a distinction between ‘the true’ (*il vero*) and ‘the certain’ (*il certo*): the former, as being eternal and universal, is the object of knowledge (*scienza*), whilst the latter, as connected with human consciousness (*coscienza*), is particular and individuated. From this point of view, he argues that philosophy contemplates reason, whence comes knowledge of the true, while history in a broad sense (philology) observes the empirical phenomena of the world arising from human choice: the languages, customs and actions of people that make up civil society. When combined, philosophy and history can yield a full knowledge of both the universally true and the individually certain.

In his work Vico attempts to develop a science that, drawing on the history of the ideas, customs and deeds of mankind, would disclose the universal principles governing human nature. This requires tracing human society back to its origins with a view to revealing a common human nature and a universal pattern through which all nations progress. Nations need not develop at the same pace, but they all pass through certain distinct stages and evolve through a constant and uninterrupted order of causes and effects. Vico emphasizes the cyclical

feature of historical development: society progresses towards perfection, but without reaching it (thus history is “ideal”), interrupted as it is by a break or return to a relatively more primitive condition.<sup>40</sup> Out of this reversal, history begins its course anew, albeit from the irreversibly higher point which it has already reached. Furthermore, he observes that nations adopt, independently from one another, largely identical norms based on the common sense of mankind (*senso comune del genero umano*). This observation is based on an anthropological theory according to which under certain circumstances people tend to act in a similar manner.<sup>41</sup> In many respects, Vico’s approach is similar to that of modern comparatists, who do not confine themselves to the mere comparison of legal rules and institutions but also examine the broader historical and socio-cultural context within which such rules and institutions are born and evolve.<sup>42</sup> For him the historical and comparative study of diverse cultures and nations is crucial to understanding the processes through which civilizations emerge, develop and decline.<sup>43</sup>

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40 See I. Berlin, *Three Critics of the Enlightenment: Vico, Hamann, Herder* (London: Pimlico, 2000), 47.

41 See on this E. Jayme, *Rechtsvergleichung und Fortschrittsidee in Rechtsvergleichung-Ideengeschichte und Grundlagen von Emerico Amari zur Postmoderne* (Heidelberg: Miller, 2000), 20.

42 On the epistemological foundations of Vico’s thought see J.-L. le Moigne, *Les epistimologies constructivistes* (2nd edn, Paris: Presses universitaires de France, 1999), 49.

43 In his conception of history Vico employs what may be described as an early version of the so-called ‘reification theory’, a form of ‘alienation’ (*Entfremdung*), according to which for long periods of time people are dominated by entrenched beliefs (especially religious beliefs), laws and institutions which, although created by human beings, derive their authority from the illusion that they are objective, eternal and universal,



*Montesquieu*

Montesquieu studied law at the University of Bordeaux and, from 1716, held the office of *Président à Mortier* in the Parlement of Bordeaux, which was at the time mainly a judicial and administrative body. In 1748, he published his famous work *On the Spirit of the Laws (de l'esprit des lois)*, in which he sought to explain the nature of laws and legal institutions<sup>44</sup>. According to Montesquieu, positive law is oriented towards the idea of justice. But since positive law constitutes only an approximation (rather than a realization) of justice, the question presents itself upon what basis such an approximation can be envisaged. In addressing this question, Montesquieu departs from the natural law tradition, which sought to give a universal answer to this question, and proposes that every people must formulate its laws in accordance with its own particular spirit, as shaped by the historical, sociological, political and economic conditions in which it develops. From this point of view, the key to understanding different legal systems is to recognize that they should be adapted to a variety of diverse factors. In particular, laws should be adapted “to the people for whom they are framed, to the nature and principle of each government, to the climate of each country, to the quality of its soil, to

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just like the laws of nature. According to him, the ‘common mind’ or collective consciousness of each people or nation regulates social life in a way that reflects the prevailing beliefs. See on this I. Berlin, *Three Critics of the Enlightenment: Vico, Hamann, Herder* (London, Pimlico, 2000), 135–136.

44 Montesquieu’s work represents an early attempt to construct a theory of positive law and a veritable science of legal history. See A. M. Rabello, “Montesquieu et la codification du droit privé (le code Napoléon)”, (2000) 52 (1) *Revue internationale de droit comparé*, pp. 147–156.

its situation and extent, to the principal occupation of the natives... [Laws] should have relation to the degree of liberty the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs... [Laws] have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.”<sup>45</sup> Montesquieu’s approach is, then, similar to that of modern empirical social science, although this does not mean that his account is value-free.

Montesquieu’s relativistic approach to laws and legal systems had origins in sixteenth century, when French Huguenot thinkers called in question the universal authority of Roman law as well as the universal power of the Roman Catholic Church.<sup>46</sup> The same period is marked by the conflict between traditional Catholics who opposed the French monarchy and those moderate Catholics who, while remaining faithful to the king, sought to strike a compromise between Catholics and Protestants by limiting the power of the Catholic Church. One might

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45 *De l’esprit des lois*, Book 1, Ch. 3. As H. 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.” *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1949), 6. It should also be noted here that, according to contemporary scholars, Montesquieu’s work set the foundations of modern sociology. Consider on this R. Launay, “Montesquieu: the Specter of Despotism and the Origins of Comparative Law”, in A. Riles (ed.) *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 22.

46 The Huguenots were French Protestants who, due to religious persecution, were forced to flee France to other countries in the sixteenth and seventeenth centuries.

say that three key elements of Montesquieu's work, namely legal relativism, the search for the historical origins and legal foundations of the French monarchy and the comparative examination of legal and social institutions have their roots in sixteenth century French thinking. Furthermore, in contrast to seventeenth century Natural Law School writers, Montesquieu's work is marked by the great increase in the cultural and geographical range of the examples used, a product, without doubt, of the greater knowledge that was reaching Europe of countries like China, Japan and India.<sup>47</sup> Thus, less attention is given to examples from antiquity, although these are certainly not lacking.

Behind Montesquieu's relativistic perspective lies a consistent and general principle pertaining to the distinction between three forms of government: the republic, the monarchy and despotism. These are in turn grouped according to whether they are founded on law or not: republic and monarchy are taken to rest on law, whilst despotism does not. What this implies is that law, and especially constitutional law, is particularly important. Thus, whether the doctrine of the separation of powers, as devised by Montesquieu, operates in a monarchical or in a republican context, it is imperative that the powers are clearly separated by the basic law and are fixed with respect to their respective functions and provinces. Only when these conditions are met, can political freedom be warranted.

It would appear that Montesquieu himself was undecided about the choice between monarchy and republic, but the evidence suggests that,

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47 See R. Launay, "Montesquieu: the Specter of Despotism and the Origins of Comparative Law", in A. Riles (ed.) *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 24.

in the final analysis, he preferred constitutional monarchy as it existed in England. Besides the separation of powers, a further element is particularly important for this form of government, namely the existence of intermediary powers. Montesquieu particularly draws attention to the role of courts like the French *parlements*, estates and other local corporations. Indeed, one might declare that his criticism of absolute monarchy, as it emerges from his *On the Spirit of the Laws*,<sup>48</sup> has its roots in the implicit conflict between the French *parlements* and the monarchy.<sup>49</sup> Montesquieu sought to defend the *parlements* and the interests of the aristocracy that they represented, by drawing a comparison between France and Western Europe in general with other societies and forms of government that existed in Europe in the past or prevailed in other parts of the world. His chief concern was to demonstrate the supremacy of European political systems, especially constitutional monarchy, over Asian absolutism and other “primitive” systems,<sup>50</sup> without, however, to support European territorial ambitions

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48 See R. Launay, “Montesquieu: the Specter of Despotism and the Origins of Comparative Law”, in A. Riles (ed.) *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 25–26.

49 The great majority of the members of these bodies belonged to the French aristocracy and tended to react with hostility whenever the monarchy introduced measures taken to undermine their own privileges.

50 It should be noted here that not all of Montesquieu’s contemporaries subscribed to his notion of “Asian despotism”, and this may be explained by reference to the political differences that prevailed among different classes in society. For instance, Voltaire, who opposed the privileges of the aristocracy and steadfastly supported the monarchy against the power of the *parlements*, spoke very highly of China and other Asian systems of government. Consider on this R. Launay, “Montesquieu: the Specter of Despotism and the Origins of Comparative Law”, in A. Riles (ed.) *Rethinking*

for, according to him, such ambitions were the hallmark of absolutism.<sup>51</sup>

In his work Montesquieu combines a rational principle, namely, that of the constitutional state, with various laws of nature in order to construe the legal system of each society as an expression of its “spirit”. This “spirit” is not elevated to the status of an absolute principle (as in Hegel), but remains relative and, in the final analysis, subject to the abstract measuring rod of a rational justice.<sup>52</sup> It is important to note, however, that Montesquieu seeks to detach laws from the fetters of rationalism<sup>53</sup> and explain them by reference to the nature of things on the ground and in terms of their functions. He identifies nine different kinds of law: the law of nature; divine law; ecclesiastical law; international law; general constitutional law; special constitutional law; the law of conquest; civil law; and family law. These forms of law are taken to constitute disparate legal orders whose principles must be clearly kept apart if one wishes to create sound legal rules. From this general assumption, Montesquieu proceeds to develop a series of important

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*the Masters of Comparative Law* (Oxford: Hart, 2001), 37.

51 It is thus unsurprising that Montesquieu regarded the conquest of America by the Spanish as disastrous for both Spain and the peoples of that continent and opposed similar actions by the Europeans in Asia and Africa.

52 Montesquieu’s notion of the spirit of a nation bears a certain resemblance to Rousseau’s concept of the general will and to some extent corresponds to the modern notion of a system of values or beliefs. According to him, one should not attempt to change the habits and customs of a people by means of laws, for such laws would appear too tyrannical. See *On the Spirit of the Laws*, XIX, 14.

53 The notion that one can arrive at substantial knowledge about the nature of the world by pure reasoning alone and without appeal to any empirical premises.

distinctions between diverse fields of law. The basis of these distinctions appears to be the legislative power establishing the constitution or basic law. However, these distinctions are not rigid, for particular social institutions may feature in more than one legal sphere depending on the possibility of their possessing different legally relevant aspects.

At the beginning of Book XXIX of *On the Spirit of the Laws*, titled “*On the manner of composing laws*”, Montesquieu draws attention to the virtue of moderation as a necessary prerequisite of good legislation. This notion holds a central place in constitutional legal philosophy resting upon the principle of separation of powers. In the same book, the importance for the legislator of the comparative study of the laws of diverse nations is also emphasized. Montesquieu declares that “to determine which of the systems [under comparison] is most agreeable to reason, we must take them each as a whole and compare them in their entirety.”<sup>54</sup> He adds that “as the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether both [nations] have the same institutions and the same political law”.<sup>55</sup>

Montesquieu’s ideas found genuine resonance among later philosophers both in France and abroad. A prominent case in point is Hegel who, in his *Philosophy of Right*, pays tribute to the French thinker in many ways, while at the same time bending the latter’s views in the direction of his own absolute idealism. Thus, in his discussion of the character of law and its relation to the “nature of things”, Hegel declares

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54 *On the Spirit of the Laws*, Book XXIX, 11.

55 *On the Spirit of the Laws*, Book XXIX, 13.

that “natural law or law from the philosophical point of view is distinct from positive law, but to pervert their difference into an opposition and contradiction would be a gross misunderstanding.” He then proceeds to add that in this point “Montesquieu proclaimed the true historical view and the genuinely philosophical position, namely, that legislation both in general and in its particular provisions is to be treated not as something isolated and abstract but rather as a subordinate moment in a whole, interconnected with all the other features which make up the character of a nation and an epoch.” It is only when viewed in this connectedness that laws acquire “their true meaning and hence their justification.” At a later point in the section on constitutional law, Hegel reiterates the praise when he states that it was “Montesquieu above all” who drew attention to both the “connectedness of laws” and the “philosophical principle of always treating the part in its relation to the whole.”<sup>56</sup>

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56 The praise extends also to the notion of a “general spirit” animating political regimes. “We must recognize”, Hegel remarks, “the depth of Montesquieu’s insight in his now famous treatment of the animating principles of forms of government.” This insight is particularly obvious in the discussion of democracy, where “virtue” is extolled as the governing principle, “and rightly so, because that constitution rests in point of fact on moral sentiment seen as the purely substantial form in which the rationality of absolute will appears in democracy.” See G. W. F. Hegel, *Outlines of the Philosophy of Right*, T. M. Knox (trans.), (Oxford: Oxford University Press, 2008), Introduction para. 3, para. 261, para. 273.

## CONCLUDING NOTE: THE RISE OF MODERN COMPARATIVE LAW

Comparative law, as a distinct discipline, emerged in the nineteenth century.<sup>57</sup> 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

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57 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 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: Cambridge University Press, 1949) 6.



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.<sup>58</sup>

In the late eighteenth and early nineteenth centuries, national ideas, historicism, and the movement towards the codification of law<sup>59</sup> 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<sup>60</sup>. 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.<sup>61</sup> In

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58 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 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.

59 The process towards the codification of the law that 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.

60 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.

61 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

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).<sup>62</sup> One of the chief objectives of comparative law during the nineteenth century was the systematic study of foreign laws and legal codes with the view to developing models to assist the formulation and implementation of the legislative policies of the newly established nation-states. In the era of 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.

A further development connected with the rise of comparative law as a branch of legal science 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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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, (Berlin: Veit, 1840) 14.

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

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'.<sup>63</sup> 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.

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63 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", (1878) 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1 at 36–37. And see Rothacker, "Die vergleichende Methode in den Geisteswissenschaften", (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft*, 13 at 17; According to 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." del Vecchio, "L' unità de l' esprit humain comme base de la comparaison juridique", (1950) 2 *Revue Internationale de Droit Comparé*, 688.

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 the idea of *legal development* or the dynamics of law. 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.<sup>64</sup>

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64 As Pollock remarked, "It makes no great difference whether we speak of historical jurisprudence or comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." 'The History of Comparative Jurisprudence', (1903) 5 *Journal of the Society of Comparative Legislation*, 74 at 76. The influence of this school of thought is reflected in more recent discussions of the nature and aims of the comparative study of laws. Thus, according to 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 comparé", (1968) 20 (1) *Revue internationale de droit comparé* 5, 13. And see Herzog, "Les principes et les méthodes du droit pénal comparé", (1957) *Revue internationale de droit comparé*, 337 at 350. And according to Yntema,

The works of nineteenth and early twentieth century scholars, 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.

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

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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) 10 (4), *Revue internationale de droit comparé*, 693 at 698.

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.<sup>65</sup> According to Édouard Lambert, a unity of 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 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."<sup>66</sup> This

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65 "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.

66 See K. v Lewinski, "Die Feier des zwanzigjährigen Bestehens der Internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre", (1914) 9 *Blätter für vergleichende Rechtswissenschaft*

statement reflects the hopes of early comparatists concerning the establishment of a future world law by relying upon the methods of comparative law.<sup>67</sup>

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*und Volkswirtschaftslehre*, suppl. to issue 9, 3.

67 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. 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 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: Vandenhoeck, 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

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<sup>68</sup> and the European Union),<sup>69</sup> and the difficulties surrounding the prospect of convergence of the common and civil law 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 transnational level may be achieved.<sup>70</sup> The current interest in matters concerning legal unification

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universal character. See Ihering, *Des Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Vol. I, (9th edn, Aalen: Scientia-Verlag, 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*, (Paris: Librairie générale de droit et de jurisprudence, 1950), 111; M. Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts*, (Stuttgart: Steiner, 1998), 7–8, 12, 24; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Oxford: Clarendon Press, 1987) Chapter 4, 52 ff.

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

69 The Maastricht Treaty (1992).

70 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 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



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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common core of legal systems cannot be doubted". R. B. Schlesinger, H. W. Baade, M. R. Damaska & P. E. Herzog, *Comparative Law: Cases-Text-Materials*, 5th edn, (Mineola, NY: Foundation Press, 1988), 34–35, 39. See also R. David and J. Brierley, *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*, 3rd edn, (London: Stevens, 1985), 4–6.