Charting the Domain of Comparative Law: A Jurisprudential and Interdisciplinary Approach

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Abstract

The starting point of comparative law is often the detection of similar social problems in diverse legal orders. The question that arises is whether there are common features or, conversely, differences in the ways in which these problems are approached and handled. How can these similarities or differences be explained? Scholars today advocate broader approaches to the comparative study of legal systems – approaches that extend beyond the traditional 'law as rules' perspective, which is mainly concerned with the analysis and ordering of statutory enactments and court decisions while paying little attention to contexts that do not have a strictly practical nature. They recognize that law and the understanding of law involves much more than the description and analysis of statutory enactments and judicial decisions. Law cannot be fully understood unless it is placed in a broad philosophical, historical, social, political, and cultural context. This paper examines fundamental issues pertaining to the nature and scope of comparative law as a distinct discipline and discusses different theoretical approaches to its subject matter adopted by contemporary comparatists. The paper explores in particular the relationship between comparative law and other fields of legal study and seeks to elucidate the ways in which comparative law contributes to, benefits from, or overlaps with them.

Defining Comparative Law

Comparative law is traditionally defined as a form of study 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. In the words of Zweigert and Kötz, comparative law is "an intellectual activity with law as its object and comparison as its process."(1) Comparative law embraces: the comparing of legal systems with the purpose of detecting their differences and similarities; working with the differences and similarities that have been detected (for instance explaining their origins, evaluating the solutions utilized in different legal systems, grouping legal systems into families of law or searching for the common core of the systems under comparison); and the treatment of the methodological problems that arise in connection with these tasks, including methodological problems connected to the study of foreign law.(2) The scope of comparative law encompasses the study of all branches of law and all types of legal rule. But the subject-matter of comparative law extends beyond the study of legal rules or branches of substantive or procedural law. It also encompasses the study of law as a broader social phenomenon and the

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（1） K Zweigert and H Kötz, *An Introduction to Comparative Law* (2nd ed, Clarendon Press, Oxford, 1987) 2.

（2） M Bogdan, *Comparative Law* (Kluwer, Deventer, 1994) 18. For a closer look consider G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, Oxford, 2014) 8 ff.

historical, social, economic, political, and cultural milieu in which legal rules and institutions emerge and develop. It is clear from the above that the scope of comparative law is extremely broad, and its subject-matter can never be treated in an exhaustive manner, for one can hardly imagine all the possible purposes and dimensions of legal comparison.

For an intellectual enterprise to be regarded as a comparative study, it must meet certain conditions. The first point to note here is that comparative law involves drawing explicit comparisons between two or more legal systems or aspects thereof. One engaged in the study of a foreign legal system can hardly avoid making comparisons between foreign legal institutions and those of her own country. Any study of foreign law may be said to be implicitly comparative in so far as all descriptions of foreign law are trying to make the law of one system intelligible for those trained in a different system. However, such intuitive or implicit comparisons can hardly be regarded as comparative law, and this applies also to incidental and disconnected comparisons sometimes made in legal literature. For a study to qualify as a comparative study it is essential that the comparative approach to the legal systems, institutions or rules under examination is made explicit. As Michael Bogdan points out, "one cannot begin to speak about comparative law until the purpose with the work is to ascertain (and possibly also to further process) the similarities and differences between the legal systems, i.e., when the comparison is not merely an incidental by-product. …It is the comparison that is the central element of the comparative work."(3) According to Konrad Zweigert and Hein Kötz, for a study to be regarded as a comparative law inquiry there must be "specific comparative reflections on the problem to which the study is devoted." This is best done by the comparatist stating the essentials of foreign law, country by country, as a basis for

（3） M Bogdan, *Comparative Law* (Kluwer, Deventer, 1994) 21 & 57.

critical comparison, concluding the exercise with suggestions about the proper policy for the law to adopt, which may require him to reinterpret his own system.(4)

Framing the inquiry in clearly comparative terms makes one think hard about each legal system being compared and about the precise ways in which they are similar or different. This does not of course mean that the independent study of foreign law is unprofitable. Indeed, besides being a valuable form of legal scholarship in its own terms, such study is an important starting point of any comparative inquiry. In this respect, an important aim of comparative law is to supply the tools which would allow one to access with relative certainty foreign law and to derive the information one needs to deal with a particular legal problem. Besides the study of foreign law, comparative law also includes the results or conclusions of a comparative inquiry. In so far as these results confirm the existence of general principles of law recognized by the legal systems of the world, one might view comparative law as a potential source of an international or transnational body of positive law. Although this body of law cannot be regarded as an independent branch of positive law, it may be said to constitute a *sui generis* or special form of positive law – a system of valid legal norms which differs from the norms laid down by national legislators in that its authority is derived partly from its universal recognition among the nations of the world.(5)

Comparative Law: Method or Science?

Notwithstanding the remarkable rise of transnational and international legal

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（4） K Zweigert and H Kötz, *An Introduction to Comparative Law* (North Holland Publishing, Amsterdam New York and Oxford, 1977) 5. Consider also JC Reitz, "How to Do Comparative Law" (1998) 46 *American Journal of Comparative Law* 617, 618. For a closer look at the comparative method see chapter 3 below.

（5） This common body of law is listed among the sources of public international law in the Statute of the International Court of Justice. See chapter 2 below.

orders in recent decades, law is primarily a national phenomenon closely connected with the birth of the modern state. The lawyer, unlike the doctor, the mathematician, or the physicist, is bound to carry out his tasks within the confines of his or her own jurisdiction. Judicial decisions are for the most part based on national statutory or case law, whilst foreign laws and cases have no binding force and are not implemented by domestic courts. The same holds for much of contemporary legal science, which continues to maintain a national character.(6) But this was not the case some centuries ago, during the Renaissance age, when Roman law was studied and taught in a uniform manner in the great universities of Continental Europe.(7) To jurists of that period legal particularism represented an evil, which they tried to remove by adopting Roman law as the common basis of European legal science. But there were no temporal or spatial restrictions on the relevance of legal material and, in carrying out their tasks, the jurists studied and compared an extraordinary variety of legal norms and systems including Roman and canon law, Germanic customary law, tribal and feudal regimes, biblical commands and natural law precepts. Their theories were based on an assumption of a universal social consensus expressed in the idea of rational law. The immense literature generated by medieval and later jurists formed the basis of what became known as the common law (*ius commune*) of Continental Europe.(8) However, the rise of the nation-states during the 18th and 19th centuries

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（6） From the end of the nineteenth century English analytical jurisprudence focused increasingly on fundamental concepts of English law rather than of laws in general. A similar tendency towards particularism prevailed in the United States, where legal theory and literature concentrated mainly on American legal issues and institutions. The same tendency, although not always as pronounced, may be discerned in countries of Continental Europe where, after the rise of codification, legal science became associated with the construction of conceptual models and theories of legal reasoning and interpretation rooted in particular national systems of law.

（7） R David, *Les grands systèmes de droit contemporains* (9th ed, Dalloz, Paris, 1988) 42 ff. And see the discussion in the chapter on the civil law tradition below.

and the subsequent movement for the codification of national laws put an end to legal unity in Europe and the universality of European legal science. Whether one stressed the will of the nation as a source of law or said that law expressed the organic development of the 'national spirit', law came to be considered a predominantly national phenomenon.(9) Nationalism, historicism and the rise of codification created a sources-of-law doctrine, which tended to exclude rules and decisions that had not received explicit recognition by the national legislator or the national judiciary. Moreover, the rise of nationalism and legal positivism favoured concentration of scholars on their own national systems of law and on their printed legal texts. Modern comparative law emerged in the late 19th century primarily as a response to problems caused by the fragmentation of national laws. Its principal goal was to restore a measure of legal unity and lay the foundations of a science of law that would have the universal character of a genuine science.

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the social and biological sciences and a renewed interest in history and linguistics during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to

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（8） As JH Merryman has remarked, "There was a common body of law and of writing about law, a common legal language and a common method of teaching and scholarship". *The Civil Law Tradition* (2nd ed, Stanford University Press, Stanford, 1985) 9.

（9） The influential German Historical School of the 19th century challenged the natural law notion that the content of the law was to be found in the universal dictates of reason. It claimed that the law was a product of a people's spirit (*Volksgeist*), just as much as was its language, and thus particular to every nation. According to Friedrich Carl von Savigny, a leading representative of the school, "positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*). …[I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law." *System des heutigen römischen Rechts*, Vol. I (Veit, Berlin, 1840) 14. And see, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr, Heidelberg, 1840) 8.

tracing broad patterns of legal progress common to all societies. The notion of organic evolution of law as a social phenomenon led scholars to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the idea of law. As Franz Bernhöft remarked, "comparative law seeks to teach how peoples of common heritage elaborate the inherited legal notions for themselves; how one people receives institutions from another and modifies them according to their own views; and finally, how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in short, within the systems of law, for the idea of law".[(10)] In the late the nineteenth century, the French scholars Édouard Lambert and Raymond Saleilles, motivated by a universalist vision of law, advocated the search for what they referred to as the 'common stock of legal solutions' from amongst all the advanced legal systems of the world. This idea was introduced at the First International Congress of Comparative Law, held in Paris in 1900, which also adopted the view of comparative law as an independent and substantive science concerned with unravelling the patterns of legal development common to all advanced nations.[(11)]

However, in the first half of the twentieth century the view prevailed among

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(10) F Bernhöft, "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft" (1878) 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1 at 36-37. And see E Rothacker, "Die vergleichende Methode in den Geisteswissenschaften" (1957) 60 *Zeitschrift für vergleichende Rechtswissenschaft*, 13 at 17. According to Giorgio del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." "L' unité de l' esprit humain comme base de la comparaison juridique" (1950) 2 (4) *Revue internationale de droit comparé*, 686 at 688.

(11) See G Dannemann, "Comparative Law: Study of Similarities or Differences?" in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (2nd ed, Oxford University Press, Oxford, 2019) 390 & 392.

scholars that comparative law is no more than a *method* to be employed for diverse purposes in the study of law.(12) According to this view, comparative law is simply a means to an end and therefore the purpose for which the comparative method is utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as a distinct academic discipline to the uses of the comparative method in the study of law.(13) By focusing on the uses of the comparative method, comparatists divided their activities into categories, such as 'descriptive comparative law' or '*comparative nomoscopy*', signifying the mere description of foreign laws; '*comparative nomothetics*', concerned with the comparative evaluation of legal systems; '*comparative nomogenetics*' or 'comparative history of law', focusing on the evolution of legal norms and institutions of diverse systems; 'legislative comparative law', referring to the process whereby foreign laws are invoked for the purpose of drafting new national laws; and 'applied comparative law' or 'comparative jurisprudence', with respect to which the aim of the comparative study may be, for instance, to assist a legal philosopher in constructing abstract theories of law, or a legal historian in tracing the origins and development of legal concepts and institutions.(14) Such divisions do not militate against the basic unity of the comparative method. As Harold Gutteridge pointed out, comparative law is not fragmentary in nature: it does not

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（12） The co-called 'method theory' has been advocated by several eminent comparatists, including Frederick Pollock, René David, and Harold Cooke Gutteridge. See M Siems, *Comparative Law* (2nd ed, Cambridge University Press, Cambridge, 2018) 6-7. Consider also J Hall, *Comparative Law and Social Theory* (Louisiana State University Press, Baton Rouge, 1963) 7-10.

（13） Scholars who regard comparative law as a mere method and empty of content of its own draw attention to the fact that in some languages the relevant subject is referred to as 'comparison of laws' (*Rechtsvergleichung*) or 'law compared" (*droit comparé*) and argue that the term 'comparative law' should be abandoned. See E Örücü, *The Enigma of Comparative Law* (Springer, Dordrecht, 2004, repr. 2013) 14.

consist of a patchwork of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, understood as a method, is that it can be applied to all types and fields of legal inquiry. It is equally employed by the legal philosopher, the legal historian, the judge, the legal practitioner, and the law teacher, and covers the domain of both public and private law.(15)

One might say that those who construe comparative law as a method and those who view it as a science look at it from different angles. When speaking of 'laws' and 'rules', the former appear to have in mind normative 'laws' and 'rules' – the things that legal professionals commonly work with. The latter, on the other hand, tend to perceive law primarily as a social and cultural phenomenon, and the relationship between law and society as being governed by 'laws' or 'rules', which transcend any one particular legal system. As John Henry Merryman has observed, a distinction may be made between 'professional' and 'academic' comparative law scholarship. Professional comparative law scholarship embraces "the sort of work that is principally of interest and value to lawyers, judges and legislators professionally engaged in dealing with concrete legal questions. Academic [comparative law] can be divided into humanistic and scientific. Humanistic scholarship is in the tradition of philosophical, historical, and literary description, narrative, interpretation, analysis, and criticism. … scientific [refers to] scholarship that seeks to educe generalizations that can be used as the basis for explanations of and predictions about social-legal

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(14)　See in general HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press, Cambridge, 1946, repr. 2015) 4. See also his *Le droit comparé, Introduction à la méthode comparative dans la recherche juridique et l'étude du droit* (LGDJ, Paris, 1953) 20.

(15)　Gutteridge, ibid at 10. And see G Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique" (1957) 9 *Revue internationale de droit comparé*, 363-69.

behavior. These are categories of convenience and are not mutually exclusive."[16] One might declare that, at its simplest level, that of the description of differences and similarities between legal systems, the comparative method allows us to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example where the socioeconomic and political structures, historical background and cultural patterns that underpin legal institutions and rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations which become progressively more scientific in nature.[17] One might argue that a sharp dichotomy between science and method can be epistemologically dangerous, since there is no science without method. And what connects the two is the model whose aim is to relate the experience of the real world to an abstract scheme of elements and relations. As Anselm von Feuerbach has remarked, "The richest source of all discoveries in every empirical science is comparison and combination. Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature be recognized in an exhaustive manner. Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most

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（16） JH Merryman, "Comparative Law Scholarship" (1998) 21 *Hastings International and Comparative Law Review* 771, 772.

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

nearly related to us and those farthest removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country."[(18)] One might say that comparative law is part of legal science, using the term 'science' to describe a discourse that functions at one and the same time within 'facts' and within the conceptual elements that make up 'science'. And the goal of legal comparison as a science is to bring to light the differences existing between legal models, and to contribute to the knowledge of these models.[(19)] Scientific comparative law is distinctive among the branches of legal science in that it depends primarily on the comparative method, whereas other branches may place greater emphasis on other methods of cognition available, such as empirical induction or a priori speculation. Thus, although comparative law is sometimes identified with legal sociology, it is more confined. Naturally, it does, however, support the other branches of legal science and is itself supported by them.[(20)]

（18） A von Feuerbach, *Blick auf die deutsche Rechtswissenschaft, Vorrede zu Unterholzner*, *Juristische Abhandlungen* (München 1810), in *Anselms von Feuerbach kleine Schriften vermischten Inhalts* (Osnabrück 1833) 163; cited in W Hug, "The History of Comparative Law" (1932) 45 (6) *Harvard Law Review* 1027 at 1054. Consider also H Barreau, *L' épistémologie* (3rd ed, Presses universitaires de France, Paris, 1995) 51.

（19） See on this R Sacco, *La comparaison juridique au service de la connaissance du droit* (Economica, Paris, 1991) 8; "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 (1) *American Journal of Comparative Law* 24-25, 389; G Samuel, "Comparative Law and Jurisprudence" (1998) 47 *International and Comparative Law Quarterly* 817.

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

Types of Comparative Legal Inquiry

Comparative legal studies may be considered from three viewpoints: *idealistic*, *realistic* and *particularistic*. From the idealistic viewpoint, legal order is perceived as a normative matter that is present in the factual legal order although it cannot be identified with it. The realistic perspective, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic approaches are concerned with the problem of *generalization*. The study of legal orders brings to light innumerable differences and similarities. Idealistic universalism seeks to discover the *ideal of law*, which is present in all legal orders; realistic universalism seeks to reveal the *sociological laws* governing legal phenomena. In spite of their theoretical juxtaposition, both approaches have universalism in common: they are not content with mere description but want to *systematize*, to find out general means of explanation to account for legal phenomena irrespective of time and place. Those who follow a *particularistic* approach to comparative law claim that general schemes are too abstract to serve as goals of study. This approach, quite common in the practice of comparative law, tends to reduce comparative law to a detailed description of different legal orders. From this point of view, comparison is only a translation of diverse legal rules into one language. In most cases, however, some kind of intermediate position between universalism and particularism is sought, in so far as it is recognized that there exist both general and particular features in every legal order.[21] It might also be said that the task of legal doctrine or legal dogmatics[22] is to examine particular legal orders at a quite concrete level, whereas comparative law

（21） This reflects the Aristotelian view of the legal order as a result partly of natural regularities and laws, and partly of the human will.

represents a higher step. Although the scope of comparative law is broader than that of legal dogmatics, it is narrower than the scope of legal theory. In this respect, comparative law can be construed as an intermediate link between legal dogmatics and legal theory. While legal theory strives towards a universalist knowledge of law, as does legal sociology from a different perspective, comparative law is by its own nature forever bound to vacillate between the general and the particular. The comparative law approach may be described as dialectical since it focuses on the interrelationship between general explanatory principles and concrete observations made when the principles are applied in practice.[(23)]

Comparative law scholarship is concerned with different levels of concretization or abstraction.[(24)] Depending on the level of concretization or abstraction on which a comparative study is conducted, a distinction is made between institutional or primary comparison, systematic comparison, and global comparison. The institutional or primary comparison is concerned with the description, analysis and evaluation of a particular legal institution or rule. A legal institution may be considered from a number of different perspectives: historical, when one examines the development of the institution over time; sociological, when one considers the institution's operation in diverse socio-cultural environments; and normative-

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（22） Legal doctrine or legal dogmatics (*Rechtsdogmatik*) consists in the description of legal materials, such as statutes, precedents etc. Although an exposition of this kind may embody sociological, philosophical, moral, historical, and other considerations, its focus is on the interpretation and systematization of valid law.

（23） This view of comparative law derives support from the notion, shared among comparatists, that comparison is meaningful only when the objects being compared share certain general features, for instance with respect to function, that can serve as a common denominator (*tertium comparationis*). See relevant discussion in the chapter on the comparative law method below.

（24） And see the discussion on the distinction between macro-comparison and micro-comparison in chapter 3 below.

dogmatic, when the focus of the inquiry is on semantic and juristic aspects of the institution. The systematic comparison is concerned with the comparative examination of a set of legal institutions or rules pertaining to a particular branch of the law (e.g., private law). In this type of comparative study special attention is given to the interrelationship and interaction between the institutions under consideration and the general principles governing the relevant legal field. Finally, global comparison is concerned with the comparison of entire legal systems or legal traditions.[(25)] Elucidating the similarities and differences between systems of law presupposes consideration of a variety of exogenous and endogenous (to the legal system) factors, some permanent other transient. These factors include: origins and historical development; socio-cultural environment; political and economic ideology and structures; physical and geographical features; the hierarchy of legal sources; the structure of the judicature; the enforcement of law; legal education; the role of legal profession; legal science; and style of legal reasoning.[(26)] The various factors are not independent of each other but rather are interrelated or interdependent and the scale

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（25） JH Merryman draws a distinction between text-centered and system-centered comparative law scholarship. The former identifies law with authoritative texts and focuses on legal rules or norms – hence Merryman refers to this kind of scholarship as 'rule-comparison'. In this respect, a legal institution is understood as a structured body or rules (e.g., the institution of property, the institution of contract etc.) and the term 'legal system' is used to denote the body of rules in force in a particular jurisdiction. From the viewpoint of system-centered comparative law scholarship, on the other hand, 'legal system' is understood to mean "the complex of social actors, institutions and processes referred to by members and observes of a society as 'legal' or 'juridical' or as directly related to or forming part of 'law' or 'the legal system' or the 'juridical order'. These interrelated people, institutions and processes constitute a social subsystem that is the society's legal system." "Comparative Law Scholarship" (1998) 21 *Hastings International and Comparative Law Review* 771, 775.

（26） See R Rodière, *Introduction au droit comparé* (Dalloz, Paris, 1979) 4 ff; E. Agostini, *Droit comparé* (PUF, Paris, 1988) 10 ff.

and complexity of their operation vary from society to society and from country to country.

Comparative Law and Contextual Legal Studies

The study of law is divided into two broad and interconnected areas, one practical and one theoretical. Practical legal studies are concerned with the rules of the legal system and the procedures through which these rules are created, applied, and enforced. They are of particular interest to lawyers, judges and other professionals engaged in the administration of law. Scholars engaged in the theoretical study of law advocate broader approaches to legal systems – approaches that extend beyond the traditional 'law as rules' perspective, which is mainly concerned with the analysis and ordering of statutory enactments and court decisions while paying little attention to contexts that do not have a strictly practical nature. They point out that law and the understanding of law involves much more than the description and analysis of rules and judicial decisions. Law cannot be fully understood unless it is placed in a broad philosophical, historical, social, political, and cultural context. Law is a complex practice to understand because laws and legal systems exist both as sets of facts about what people do or have done in the past and also as a set of reasons that people take to direct how they should act. To legal practitioners the nature of legal reasoning, which concerns how we find the applicable law, may seem of more relevance than more abstract philosophical questions about the nature of law. However, one cannot fully understand and explain legal reasoning without grasping, in some sense at least, what it is for something to be a law or for a legal system to exist, as well as what purposes such a system serves.

Comparative law supplies invaluable models, experience and resources to scholars and practitioners working in a diversity of legal fields. Furthermore,

exploring the relationship between comparative law and other legal fields assists our understanding of comparative law as a distinct discipline and elucidates the ways in which it interacts with other forms of study, especially how it contributes to, benefits from, or overlaps with them. In this connection, disciplines such as legal philosophy or jurisprudence, legal sociology and legal history deserve special attention.

Comparative Law and Legal Philosophy

Broadly speaking, legal philosophy, also known as legal theory or jurisprudence,[(27)] is the general study of law as a type of social practice that societies adopt and maintain. It is concerned with general theoretical questions about the nature of law and legal rules, about the relationship of law to morality and justice, and about law's social nature.[(28)] Legal philosophy aims to explain not the law of any particular

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（27） Legal philosophy is referred to as jurisprudence in England and other common law countries. French and other civilian lawyers use the term jurisprudence as the equivalent of that which English lawyers call case-law.

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

society, which ordinary doctrinal study addresses, but instead to explain law in general – the idea or concept of law. Within its scope fall four interrelated sets of questions: (1) questions of force and justice: much of legal philosophy is concerned with the way in which force or violence are intimately related to the need for and practice of law;[29] (2) questions concerning the establishment and maintenance of the authority of law as a means of social control;[30] (3) questions of value and order: the concern of these questions is with finding a measure to order the manifold practices of law – such a measure could be thought of in terms of politics (the social and historical practices of law) or in terms of ethics (the justice and injustice of law);[31] (4) questions of legal judgment: legal philosophy devotes considerable energy in seeking to explain the nature of judicial decision-making and the conditions that must be met in order for a judgment to be a judgment according to law.[32] Legal philosophy works at the level of describing, explaining, and evaluating law the practices of law. It examines the working of legal doctrine and connects law to other discourses of the world (philosophical, sociological, historical, anthropological, psychological, etc).

Three main schools of thought or traditions in legal philosophy can be

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(29) Such force or violence could be immediate and physical (e.g., being arrested by a member of the police), or it could be the violence that follows from a judicial decision (e.g., sending a person to prison, or fining them). Furthermore, the notion of force can refer to the historical violence that establishes a political-legal regime (e.g., the violence used against indigenous people in some countries, such as New Zealand, Canada, and Australia, to establish and maintain the dominant Western legal system. These examples raise the question of whether and how law mediates between force and justice: is it possible that law is, or could be, the measure of the relation between force and justice?

(30) The question 'is this a valid law?' is a question of authority.

(31) Questions of value and order often focus on the ways in which the categories of legal thought are organized so as to offer a sound vision of social and human relations.

(32) Jurisprudential questions of judgment focus on the values and order of law, as well as on the norms governing the practice of adjudication.

discerned: (a) conceptual or analytical reasoning about law; (b) normative or value-based reasoning about law; and (c) historical, sociological, or contextual analysis about law. These schools of thought differ from each other in terms of how they construct the subject-matter of legal philosophy but are not necessarily incompatible with each other. Conceptual or analytical jurisprudence claims to be acting in the name of scientific rationalism – its object is the logic of law. What is articulated as law is an abstract scheme of axiomatic principles. These principles could be either peculiar to law or could be derived from social institutions. Much of analytical jurisprudence is concerned with the clarification of the meaning of the term 'law' and of terms embodying fundamental legal concepts (e.g., right, duty, ownership, contract, tort, legal personality etc).[33] The demand of normative jurisprudence is to provide an ethical measure with which to evaluate the practice of law in both its general and particular manifestations. In this respect, the life of law is based not so much on a system of logic but on a system of values. In other words, it is moral knowledge about the law that this school of thought makes available for thought. Normative analyses of law range from analyses which ground law on moral values, on social values or on political values.[34] Finally, historical, sociological, or contextual analyses of law view law as a system existing and appearing within specific social and historical contexts. Sociological theories of law, in particular, stress that legal

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（33） In the English-speaking world, the systematic analysis of legal concepts was begun by the 18th century philosopher Jeremy Bentham (author of *The Principles of Morals and Legislation* (1789) and *The Limits of Jurisprudence Defined* (1782)) and was developed further by his student John Austin in his works *The Province of Jurisprudence Determined* (1832) and *Lectures on the Philosophy of Law* (1863). Modern forms of analytical jurisprudence have been developed by HLA Hart, by the German jurist Hans Kelsen, author of *The General Theory of Law and State*, and by jurists influenced by the philosophy of language. Analytical jurisprudence is associated with legal positivism – the theory that claims that there is no necessary connection between law and morality.

norms cannot be properly understood unless they are examined in the light of social facts – including the intentions, interests and evaluations of social agents.

Associated with the above is the distinction between *normativist* (logical), *axiological* (evaluative) and *sociological* theories of law. Despite their differences, all types of theory have universalism in common: they aim to systematize, to find a general means of explanation to enable the discernment of legal phenomena irrespective of time and place. Even if it is admitted that different legitimate approaches to legal phenomena exist, something is considered as the inevitable starting-point, and this is often declared as the ontological essence of law. The questions, 'what is law?', 'how is law cognizable?' and 'what methods can be used for testing propositions concerning law?' must be coherent in some way. A link abides between ontology, epistemology, and the methodology of law. There are different possible ontologies: law is norms (a *normativist* ontology); or law is fact, a social or (also) a psychological phenomenon (a *realist* ontology). But whether law is considered as a matter of norms or of facts, it must be acknowledged that it involves values: law reflects certain values, or it is a means for achieving certain desired social states of affairs or goals. Thus, one might declare that law has three aspects: rules, behaviour (social context) and values. These aspects must be tied together in some manner for a claim of universality to possess substance, and different theories attain this in different ways.[35] One might say that the uniting links between the different aspects of law are located on more than one level. First, these aspects are united at the

(34) Normative jurisprudence is primarily concerned with questions of 'ought', not just with questions of 'is'. In philosophy, questions of ought are sometimes called 'teleological' (from the Greek word *telos*, which means end), deontological (from the Greek word *deon*: ought to be done), ethical, or are grouped under theories of justice or theories about the purpose of law. Normative jurisprudence asks questions such as: Are the state's claims of authority to lay down legal rules and enforce them always justified or warranted? What direction should decisions aimed at law reform take? Can a person legitimately refuse to comply with the law?

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

Commentators agree that comparative law can be of great value in empirically testing the propositions of legal philosophy.[36] Such propositions can be assessed by

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（35） For example, in Marxist theory the uniting factor is *materialism*, dialectical and historical. Other theories construe this factor as the existentialist concept of *experience*. This reflects a school of thought in epistemology known as *empiricism*. Empiricism is usually defined as the thesis that all knowledge (or at least all knowledge of matters of fact as distinct from purely logical relations between concepts) is obtained by means of sensory experience through inductive reasoning. Empiricists argue that sense experience is the primary source of our ideas and hence of knowledge. The development in the 17th and early 18th centuries of what is referred to as the British empiricist school of philosophy (represented by Locke, Berkeley, and Hume) was closely connected with the growth of experimental science. Empiricism has characteristically seen the acquisition of knowledge as a slow, piecemeal process, endlessly self-correcting and limited by the possibilities of experiment and observation. One should note, in this connection, that much of contemporary British legal theory has its roots in the tradition of philosophical empiricism – the philosophical position that no theory or opinion can be accepted as valid unless verified by the test of experience. In this context normativity, both in law and morals, is understood and explained in terms of social practices observable in the world. The nineteenth century jurist John Austin, for example, defined law in terms of a command supported by a sanction and as presupposing the habitual obedience of the bulk of a community to the commands of a sovereign himself not habitually obedient to anyone else. See: *The Province of Jurisprudence Determined* (London 1832; repr. 1954). Similarly, HLA Hart's conception of legal obligation, although somewhat more complex, derived from the observation of people's actual practices analysed in terms of ‘the internal point of view’ crucial to their comprehension of and participation to these practices. Consider: *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012).

（36） Consider, e.g., FH Lawson, *The Comparison: Selected Essays* (North-Holland Publishing Co., Amsterdam and New York, 1977) II, 59.

reference to concrete comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order – most legal theorists seem to assume a deductive universality of analysis. The starting point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse orders. How should these similarities or differences be explained? Here one must take into account that certain matters antecede the norms of valid law, such as concepts that impart regulatory information and certain universal problems with respect to which norms take a stand (the way these problems are conceived is connected with their conceptual shaping).[(37)] Comparative law proceeds from the following two assumptions: (a) law is not only a manifestation of will but is also socially established – hence one cannot compare wholly incidental legal regulations on a purely formal basis; (b) law stems from social relations, but it cannot be entirely reduced to them, for otherwise one should not compare law at all but only the basic facts which the law expresses. There is an *intentional* element in law; its 'facts' are not 'brute facts' but *institutional* facts, which should be construed in their social context.[(38)] Intentional action can be

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(37)　One might perhaps say that there is a dialectical relationship between concepts and problems.

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

interpreted with the assistance of a scheme involving goals, i.e. states of affairs which have certain properties justifying their perception as valuable; and epistemic conditions, i.e. knowledge concerning, among other things, social structures, possible means and means-goals relations. It is insufficient to compare the form and the factual content of a legal institution to some similar institution in another legal order. There is an evaluative component attached to facts and concepts, and this should not be ignored. Furthermore, an analysis of social power is also needed when an intentional model is used to understand and explain legal institutions. Such an analysis may complement both normativist and realist approaches to comparative law. One should ask: which social group possesses the power to impose its own world-picture – its knowledge, beliefs, and desires regarding society – as the ground for legal norms and their application? After addressing this question, one can proceed to an analysis of those factors that have led to the normative modelling of society through law in certain way.

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

they are essential moments of legal knowledge, different sides of the same coin. General jurisprudence without comparative law is empty and formal; comparative law without general jurisprudence is blind and non-discriminating. General jurisprudence with comparative law is real and actual; comparative law with general jurisprudence is selective and clear-sighted."(39)

Comparative Law and Philosophy of International Law

The role of comparative legal inquiries in addressing general theoretical issues concerning the nature and scope of public international law has attracted considerable attention in recent years. Of particular interest is the way in which explicit or implicit comparisons between domestic and international legal systems, rules and principles may be utilized to explain the nature and scope of international law in the light of general theories of law. As much as legal philosophers disagree about the nature of law, they generally agree that there actually *is* a thing called law. This is not the case, however, with respect to international law, the body of rules governing relationships involving states, intergovernmental organizations and other entities regarded as international legal persons. An inquiry into the nature of the international legal system usually starts with the question of the legal quality of international law. Whilst most international lawyers would quickly declare the question moot or not worth thinking and arguing about, doubts about the legal quality of international law have the

(39)　R Tur, "The Dialectic of General Jurisprudence and Comparative Law" (1977) 22 *Juridical Review* 238, 249. For an interesting perspective on the relationship between comparative law and legal philosophy see W Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'" (1998) 46 *American Journal of Comparative Law* 701. And see W Ewald, "Comparative Jurisprudence (1): What Was it Like to Try a Rat?" (1995) 143 *University of Pennsylvania Law Review* 1889.

potential to influence contemporary thinking about and attitudes towards international law.

The jurisprudence of international law has long been influenced by the command theory of law, developed by the English legal philosopher John Austin in his classic work *The Province of Jurisprudence Determined* (1832). According to Austin, in contrast with domestic law, international law does not stem from the command of a sovereign but is set by general opinion and enforced by moral sanctions only. International law is therefore not deemed to be positive law but only a form of positive morality. Herbert Hart is the legal philosopher who most effectively refuted Austin's denial of international law's legal validity. At the same time, Hart asserted that international law could not be regarded as a legal system because of the differences in form between domestic law and international law, in particular due to the absence of an international legislature, of courts with compulsory jurisdiction, of centrally organized sanctions and of a uniform rule of recognition. According to him, in contrast with domestic law, which can be characterized as a legal system, international law is a mere set of primary rules and, in this respect, resembles the simple form of social structure found in primitive societies.(40) Hart's legal theory raises a host of definitional and conceptual issues about public international law. Since legal positivism remains among the most influential theoretical approaches to law, it seems natural to engage with one of the most influential contemporary legal positivists and one of the few legal philosophers who approached international law from the perspective of analytical jurisprudence.

More recently, Ronald Dworkin, Hart's successor to the Chair of Jurisprudence at Oxford University and a leading figure in contemporary philosophy of law and political philosophy, sought to extend his theory of political morality from the

（40） HLA Hart, *The Concept of Law* (3rd ed, Clarendon Press, Oxford, 2012) ch. 10.

domestic to the international domain by comparing and drawing certain parallels between the two domains.[41] Dworkin argues that the principles governing the international legal system are not fundamentally different from those underpinning domestic legal systems. He even goes so far as to assert that the moral title to govern a particular territory is based on the principles that permeate the international system and that, therefore, the legitimacy of the domestic legal system is inextricably linked with the legitimacy of the international system. In other words, if convictions concerning the legitimacy of government power and the role of human rights constitute the most fundamental part of political morality at the domestic level, then it is reasonable to assume that this also holds at the level of international political morality. Taking the concept of legitimacy as his starting-point, Dworkin sought to develop a foundational theory of international law, one that would account for the roots of law in political morality.

The dominant paradigm of international law has its origins in the so-called 'Westphalian' system of international order, according to which the sovereign power of nation-states might be limited by the voluntary acts of state institutions (voluntarism). Positivist legal theorists have struggled to find the Hartian concepts of Rule of Recognition and secondary rules in the domain of international law. A solution to this problem has recently been proposed by assuming that the principle of state consent can serve as the basis of an international Rule of Recognition, as expressed by Article 38(1) of the Statute of the International Court of Justice.[42] This Article refers to the rules that are 'expressly recognized by the contesting states'[43] ,

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(41)　His analysis on this issue, presented in his posthumous work "A New Philosophy for International Law", (2013) 41 (1) *Philosophy & Public Affairs* 2-30.

(42)　See, e.g., S Besson, "Theorising the Sources of International Law" in S Besson and J Tasioulas (eds) *The philosophy of international law* (Oxford University Press, Oxford, 2010) 163-186.

(43)　Art 38(1)(a) International conventions both general or particular.

general practices that are 'accepted as law'[44] and 'general principles of law' that are 'recognized by civilized nations'[45] as being the principal sources of international law relied upon by the International Court of Justice.[46] Dworkin accepts that the consent model of international law addresses the paradox of the contemporary state system: a sovereign state can be a subject of law because the state has consented to be bound by law. He argues, however, that the consent model of international law is radically defective, for this model entails the potential to bind states that have not granted consent.[47] One of the principal objectives of international law is to curb the threat some states pose to others and this objective cannot be met unless we discard the straitjacket of state-by-state consent. What then is the key principle of international law that allows us to say that international law cannot be ignored or set aside regardless of consent? Dworkin asserts that the moral basis of international law is grounded in legitimacy and requires states to accept shared constraints on their sovereign power. The justification for coercive political power arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself. The principles that apply to the international system are in fact part of the coercive system that sovereign states impose on their own citizens – hence the standing duty of states to improve their own political legitimacy includes an obligation to try to improve the overall international system.

Dworkin described international law as fragile, still nascent and in critical condition. He pointed out that a clear theoretical account of international law's basis

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（44） Art 38 (1)(b) International customary law.

（45） Art 38(1)(c) The law of civilized nations (or *ius gentium*).

（46） Even the concept of peremptory norms, or *ius cogens*, is brought under the umbrella of consent via Article 53 of the Vienna Convention on the Law of Treaties (1969).

（47） This occurs through the medium of customary law and the general principles of law shared by 'civilised nations.' Such an approach has the effect of undermining the axiomatic place of consent and therefore the proposed jurisprudential basis of the entire consent model.

was needed in order to determine what international law actually holds on practical questions. The situation where international military action, such as the NATO intervention in Kosovo, could be declared illegal under international law but upheld as a morally mandatory act of international civil disobedience was an example for Dworkin of a dangerous outcome of the two systems approach to law and morality. The unity of value, or a single-system conception of law views law as a distinct part of political morality because of the requirements of procedural justice or its special structuring principles.(48) These impose specific moral standards of legitimacy(49) and fairness(50) upon the law which arguably enhance certainty and accountability for both domestic and international law.(51)

Comparative Law and Sociology of Law

In the late nineteenth century, there emerged a strand of thought which identified law as a fundamentally social plenomenon and set out to investigate the differing and evolving social forms in which law has appeared. Law was subsumed within wider social and historical structures, variously referred to as ‘primitive’, ‘matriarchal’, ‘patriarchal’, ‘civilized’. ‘modern’, ‘capitalist’, ‘protesant’, and so on.

（48） See R Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge Mass, 2011) 5, 408, 411.

（49） Also referred to by Dworkin as ‘fair governance’ or ‘democracy’.

（50） Also referred to by Dworkin as ‘just outcome’.

（51） Although there is not much detail given by Dworkin, the principle of just outcome is concerned with precedent, reliance, fair play and fair notice. It is interesting to note that Dworkin’s structural fairness principles that also place weight on convention, expectation and history bear some resemblance to Lon Fuller’s inner morality of law. See L Fuller, *The Morality of Law* (2nd ed, Yale University Press, New Haven, 1969), Part II: The Morality that Makes Law Possible.

Furthermore, there was also a concern to analyse law as tied to specific empirical and local social and institutional contexts. The sociological study of law, as it had been developed by the classical sociologists of the late nineteenth and early twentieth centuries, paved the way for the development of sociology of law - a specialty devoted to the study of law in the discipline of sociology. The sociology of law is defined as the study of the relationship between law and society, including the role played by law and legal process in effecting certain observable forms of behaviour; the values associated with law; and the collective beliefs and intuitions that relate to these values.(52) A sociological account of law normally hinges on three closely interrelated assumptions: (a) law cannot be understood except as a 'social phenomenon'; (b) an analysis of legal concepts provides only a partial explanation of 'law in action'; and (c) law is one form of social control. Legal sociology goes beyond national frameworks and considers the social functions of law with a view to discovering the common and special social conditions existing in diverse countries. The contemporary sociology of law not only expanded the scope of sociological knowledge to encompass patterns and mechanisms of law in a variety of social settings, but it also contributed to way in which other social sciences developed their respective approaches to law and brought these various perspectives together under the banner of a law and society tradition.

A fundamental difference between legal sociology and comparative law is that the former is primarily a descriptive social science, whilst comparative law also

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(52) Roger Cotterrell describes the sociology of law as "the systematic, theoretically grounded, empirical study of law as a set of social practices or as an aspect or field of social experience." "Sociology of Law", in *Encyclodedia of Law and Society: American and Global Perspectives* (Sage, Thousand Oaks, Ca, 2007) 1413. According to this author, scholars interested in the study of law have often turned "to sociology of law to escape the narrow disciplinary outlook of academic law." *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, Aldershot, 2006) 6.

concerns itself with the question of how the law ought to be by comparatively examining the legal rules and institutions of diverse systems.(53) Nevertheless, there are many points of overlap between the two disciplines, since both are engaged in charting the extent to which law influences and shapes human behaviour and the role played by law in the social scheme of things. It is thus unsurprising that comparatists need legal sociology as much as legal philosophy and legal history. In so far as comparative law seeks to understand the similarities and differences between legal systems, and the way in which legal rules and institutions operate in practice, a sociological approach can add significant descriptive depth and explanatory potential. Such an approach invites one to look not only at the law in the books but also at the law in action and helps the comparatist understand legal rules, institutions, and processes as results of social conditions, political structures and economic realities – in short, it opens the comparatist's eyes to the social contingency of law. It should be noted, however, that the extent to which comparative law may benefit from legal sociology would depend on the view of law a comparatist adopts. If this view is fundamentally positivist and doctrinal so that law is construed as a system of rules and principles, the distance between the two disciplines tends to increase and legal sociology is of little use to comparative law. On the other hand, if the comparatist's approach to law is pragmatic and sociological, the distance between the two fields becomes very small, and a sociological perspective forms an integral part of comparative law.(54)

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(53)　K Zweigert and H Kötz, *An Introduction to Comparative Law* (North Holland Publishing, Amsterdam New York and Oxford, 1977) 9-10. Consider also A Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1974) 183. However, this way of looking at the two disciplines has recently been called into question. See relevant discussion in A Riles, "Comparative Law and Socio-legal Studies" in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (2nd ed, Oxford University Press, Oxford, 2019) 772.

In recent decades comparatists have been drawing on the sociological perspective in many diverse contexts: the study of non-Western and traditional legal systems and the comparative examination of legal cultures; the study of the role of customary norms, especially in countries formerly under colonial rule; the debate concerning efforts to export Western notions of legality and the rule of law to developing countries; the debate concerning the relative autonomy of law in the context of the so-called 'legal transplants' theory; and, in recent years, the scholarship on global legal pluralism and the role of supranational and non-state law.

Comparative Law and Comparative Lawyering

With the growth of interest in legal sociology, scholars have sought to broaden the scope of legal inquiry. Particular attention is given to the operation of institutions concerned with law as related to social behaviour, such as legislative bodies and the courts. In recent years the scope of the inquiry has been expanded to include the lawyer and the law office. Decisions made by lawyers in law offices and the way in which they affect behaviour are a significant aspect of the legal system. The growth

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(54) One should note here that much of the comparative method is derived from the work of Max Weber, one of the founders of modern sociology. Weber's theory has influenced the work of many distinguished comparatists, including Max Rheinstein, who declared that whenever comparative law delves into the social function of law, it becomes legal sociology. M Rheinstein, *Einführung in die Rechtsvergleichung* (Beck, Munich, 1987) 28. For a closer look at Weber's views on legal sociology see his *Economy and Society*, ed. G Roth and C Wittich, (University of California Press, Berkeley, 1978) 641-900. And see AA White, "Max Weber and the Uncertainties of Categorical Comparative Law" in A Riles (ed) *Rethinking the Masters of Comparative Law* (Hart Publishing, Oxford and Portland, 2001) 40. For a closer look at the relationship between comparative law and legal sociology see A Riles, "Comparative Law and Socio-Legal Studies" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed, Oxford University Press, Oxford, 2019) 772.

of the notion of preventive law demonstrates the significance of the lawyering function. Preventive law is associated with the idea that factual behaviour often determines the ultimate legal result.(55) If a person signs his or her name on a particular document, that signature can become the factual basis for establishing certain legal rights and obligations. These rights and obligations would be different if the individual concerned did not sign or if he or she signed a document with different words on it. As this suggests, lawyers, when appropriately consulted, make decisions that can guide clients into channels that may prevent or minimize the risk of litigation. The effect of this preventive function of the lawyer on the legal system and the society as a whole, although very difficult to measure is, nevertheless, significant. Even in the domain of dispute resolution it can safely be said that lawyers resolve more disputes than do the courts. Every settled case reduces the burden on the judicial system and, at the same time, contributes to a less unwieldy ordering in society.

The growing awareness of the significance of the lawyering function has had a significant effect on the scope of comparative law. On a practical level, comparative research on the workings of the legal profession in different countries can reveal methods that may be employed to improve the lawyering function, e.g., by reducing the cost of lawyer services and thus enhancing the role of the law office as a site for extrajudicial dispute resolution. On a theoretical level, the comparative study of legal practices in diverse societies could provide valuable insight on the extent to which such practices reflect the impact of different social and cultural norms. Comparative lawyering might thus elucidate the relationship between positive or enacted law and custom, and between positive law and social behaviour. Moreover, it might be instructive in appraising the utility and potential social impact of proposed legal

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

reform programmes. Comparative lawyering is a highly intellectual pursuit that invites consideration of a vast array of issues, not the least of which is the determination of the criteria by which the lawyering function is to be assessed. As society never stands still, the relevant inquiry is never ending, but is always revealing.(56)

Comparative Law and Legal History

It has long been recognized that law and history are closely linked. The history of the Western civilization, in particular, would be inconceivable without law. As Carl Joachim Friedrich remarked, "from feudalism to capitalism, from Magna Carta to the constitutions of contemporary Europe, the historian encounters law as a decisive factor."(57)

Legal history is the study of how law and legal systems have evolved and why they have changed. It explores the sources of legal phenomena and the development of legal systems and individual legal institutions in different historical settings. According to some scholars, legal history is primarily concerned with the recording of the evolution of laws and the technical explanation of how these laws have changed over time. However, many contemporary scholars view legal history in a more contextualised manner - more in line with the thinking of social historians. They view legal systems as complex systems of rules, institutions, players and symbols,

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（56） For a discussion of the role of the legal profession see, in general, RL Abel and PSC Lewis (eds), *Lawyers in Society: An Overview* (University of California Press, Berkeley and Los Angeles, 1995); M Cain and CB Harrington (eds), *Lawyers in a Postmodern World; Translation and Transgression* (Open University Press, Buckingham, 1994).

（57） CJ Friedrich, *The Philosophy of Law in Historical Perspective* (University of Chicago Press, Chicago and London, 1963) 233-234.

and consider how these elements interact with other social forces to change, adapt, resist or promote certain aspects of human society. Such scholars tend to analyse case histories from the perspective of social-science research, using statistical methods to evaluate, among other things, the impact of class distinctions among litigants, legal professionals and other actors involved in the legal process.

Legal history is closely connected to the history of civilisations and operates in the broader context of social and cultural history. It is concerned with both the history of a single legal order and the legal history of many societies, the universal history of law. The role of the comparative method in this field is particularly important. As Frederic William Maitland pointed out, "history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history. (…) an isolated system cannot explain itself, still less explain its history."[58] By comparatively examining systems of law at different stages of development, legal historians attempt to trace the evolution of legal institutions on a broader level and the historical ties that may exist between legal orders. The comparative method is also utilized in connection with time-related or diachronic comparisons within one and the same legal order. A comparative perspective is as indispensable to the historical study of law as legal history is to the study and comparison of contemporary legal systems. Without the knowledge derived from historical-comparative studies it is impossible to investigate contemporary legal institutions, since these are to a great extent the product of historical conditions, borrowings, and mutual influences of legal systems in the past.[59]

（58） FW Maitland, *Collected Papers* (Cambridge University Press, Cambridge, 1911) 488-489.

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

Notwithstanding the interrelationship between legal history and comparative law, one should not fail to observe certain important differences between these fields with respect to both their methodology and objectives. As far as methodology is concerned, legal history and historiography exhibit a high degree of sophistication and consistency, whilst comparative law remains largely underdeveloped. One reason for this is that legal historians have generally extensive training and high professional standards by contrast to comparative lawyers, who often have no graduate training in comparative law. With respect to legal history's objectives, the primary focus is on understanding the past (and, by reflection, the present), whilst the utility of its findings for current legal practice is largely neglected. The comparative study of law, on the other hand, is pursued not only for knowledge's sake but to a large extent also for its practical utility (for example, in connection with legal reform or the international harmonization of law). One might thus say that legal history is methodologically advanced but of limited practical use, whilst comparative law is methodologically unsophisticated but practically significant. The differences pertaining to their methodology and objectives pose a serious obstacle to the integration of the two disciplines and the development of a true comparative history of law.[60]

Globalization, Legal Transnationalism and Comparative Law

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

(60) For a closer look at the relationship between comparative law and legal history consider J Gordley, "Comparative Law and Legal History" in M. Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed, Oxford University Press, Oxford, 2019) 754.

contested, globalization may be broadly defined as the process of bringing the world together through diverse forms of transnational activity: economic, political, cultural, demographic, technological and so on. The result of globalization is a more unified and interactive planet. The forces of globalization are closely interwoven and reinforce each other in powerful ways, entailing complex interactions at many levels ranging from the global to the very local. The forces of economic globalization, include multinational corporations, global economic institutions like the World Trade Organization (WTO), the International Monetary Fund (IMF), and the World Bank, and global economic policies, such as free trade, that these institutions support and promote. When looking at globalization through a political science lens, the focus tends to be on issues revolving around the demarcation of the globe into nation-states, shifting territorial configurations, global governance, and other forms of supranational social, economic, and legal regulation. The cultural dimension of globalization has also been widely discussed and debated by scholars. Traditionally, cultural anthropologists viewed culture as something that differentiated one group of people from another, an identification of otherness. Today, however, cultural anthropologists also study the ways that global economic and political forces affect local cultures, including domestic legal cultures, arguing that one cannot adequately understand a particular culture by looking at it solely through a local perspective.

As a result of globalization and in particular the growing interconnectedness between national economic systems, the domestic insularity in which lawyers in the past could practice their profession is no longer sustainable. This interconnectedness extends beyond the domain of the economy to embrace environmental and human rights issues and matters such as migration and transnational crime. The integration of the global economy, the rise of transnational problems like climate change and terrorism, the need for governments to collaborate to regulate increasingly mobile people, money and goods all point toward legal transnationalism. Today's lawyers

must be able to provide advice on antitrust and competition, consumer protection, environmental and employment law issues for each country in which their clients conduct business. Transactional lawyers are expected to follow their clients across borders, negotiating mergers among companies with international profiles and securing goods and services from suppliers around the globe. Tax and estate lawyers must be ready to interpret – and where appropriate, to recommend – investments and holdings outside of their clients' home states. Even family law, once the exclusive purview of the domestic legal order, has become internationalized in the context of transnational custody disputes. In the public sector, we have witnessed a blossoming of international conventions and other agreements in the areas of international trade, human rights, and criminal law. A notable effect of globalization has been the growth of what is commonly referred to as 'transnational law'. Transnational law was originally taken to encompass public and private international law as well as all domestic and foreign law concerned with trans-border issues.(61) In recent years the term is increasingly used to denote the amalgam of common legal principles of domestic and international law, or the multidimensional international legal order brought about by the phenomenon of globalization.

The internationalization of legal practice and rise of transnational law pose new challenges to comparative law. Firstly, comparative law must extend beyond the traditional system of coexisting nation-states and come to grips with much more intricate and fluid relationships and interactions between a multiplicity of overlapping and intersecting legal orders. Secondly, the scope of comparative law must be broadened to embrace the study of international, transnational and supranational regimes, such as the United Nations, the European Union, human rights, the world

(61) For an early treatment see P Jessup, *Transnational Law* (Yale University Press, New Haven, 1956) 2. And see M Shapiro, "The Globalization of Law" (1993) 37 *Indiana Journal of Global Legal Studies* 37.

trade system and environmental protection.[62] And, thirdly, comparative law must look beyond state law and pay attention to non-state legal norms, which play an increasingly important role in the world today.[63] To be able to describe, explain and help to co-ordinate the world's diverse legal orders, comparative law must rethink many of its traditional dichotomies, such as the distinction between national and international or between private and public law, since such dichotomies cannot adequately capture the complexity of this new world environment.[64]

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

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

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

(64) See in general, S Biddulph and P Nicholson, "Expanding the Circle: Comparative Legal Studies in Transition" in P Nicholson and S Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff, Leiden and Boston, 2008) 9; H Muir Watt, "Globalization and Comparative Law", in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd ed, Oxford University Press, Oxford 2019) 599; HP Glenn, "Comparative Law and Legal Practice: On Removing the Borders" (2000-2001) 75 *Tulane Law Review* 977; AT von Mehren, "The Rise of Transnational Legal Practice and the Task of Comparative Law" (2001) 75 *Tulane Law Review* 1215.

of legal concepts across different cultures in so far as the harmonization of global statistics about law requires reasonably transferable concepts. In this respect, the need for understanding diversity in a world driven by trends toward global law is vitally important. Reference should be made in this connection to the necessity to define the tools that will prevent or minimize what is sometimes referred to as 'Western hegemonic thinking'. Comparatists need to develop the skills necessary to successfully navigate, interpret and critique laws and legal institutions, while being aware of the dangers of uncritically projecting their own values and assumptions about law onto other societies.(65)

The ongoing tendencies of globalization set new challenges for comparative law. In response to these challenges comparative law is diversifying and increasing in sophistication, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation-states. But true integration of international and transnational regimes into the comparative law agenda takes more than just adding their description to our inventory of legal systems. It requires that we develop a better understanding of how law works in national, transnational, and international contexts and that we explore and shed light on the dynamic interplay between these contexts.(66)

(65) See F Werro, "Notes on the Purpose and Aims of Comparative Law" (2001) 75 *Tulane Law Review* 1225, 1230-32; EJ Eberle, "The Method and Role of Comparative Law" (2009) 8 (3) *Washington University Global Studies Law Review* 451, 485-486; DJ Gerber, "Globalization and Legal Knowledge" (2001) *75 Tulane Law Review* 949; N Demleitner, "Challenge, Opportunity and Risk: An Era of Change in Comparative Law" (1998) 46 *American Journal of Comparative Law* 647.

（66） As Thijmen Koopmans has remarked, “For a long time it looked as though comparative law was a matter for academic research, difficult and, surely, very interesting, beautiful to know something about, but not immediately relevant to the daily life of the law. Over the last ten or fifteen years the legal climate seems to be changing. This evolution may be influenced by the process of European integration; it may also result from the fact that we are living closer together (the ‘global village’ situation); it may finally be an autonomous process, occasioned by the lawyer’s search for fresh perspectives, in particular when completely new legal problems are to be solved.” “Comparative Law and the Courts” (1996) 45 *International and Comparative Law Quarterly* 545 at 545.