George Mousourakis

Comparative Law and Legal Traditions

Historical and Contemporary Perspectives

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Contributing author: Matteo Nicolini

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George Mousourakis
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Ritsumeikan University
Kyoto, Japan

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To Sandy McCall Smith

Preface

At a time when global society is increasingly mobile and legal life is internationalized, the role of comparative law is gaining importance. While the growing interest in this field may well be attributed to the dramatic increase in international legal transactions, this empirical parameter accounts for only part of the explanation. The other part, and at least equally important, has to do with the expectation of gaining a deeper understanding of law as a social phenomenon and a fresh insight into the current state and future direction of one's own legal system. Comparative law enables law students, lawyers and jurists to integrate their knowledge of law into a cultural panorama extending well beyond their own country and provides them with a much broader knowledge of the possible range of solutions to legal problems than familiarity with a single legal order would allow. It allows them to perceive the new features and trends of development in modern legal systems in connection with scientific-technical progress, integration processes and the growing role of transnational and international law. In this way, they can develop the standards and sharpen the analytical skills required to address the challenges they face in a rapidly changing world of unexpected connections. Comparatists unanimously agree that the legal experience accumulated by diverse nations constitutes an inexhaustible source from which one may derive great benefit when conducting any significant reforms of national legislation. It is thus unsurprising that today's lawmakers resort with increasing frequency to a comparative analysis of the solutions found in foreign legal systems. Not only may legislators use comparative law to improve national law. On a smaller scale, judicial and arbitral practice also use comparative law data in addressing particular legal problems. Moreover, comparative law plays an important part in the process of international or transnational unification or harmonization of law.

In response to the internationalization of legal practice and theory, law schools around the world have bolstered their comparative law offerings. Most law schools have introduced into the first-year curriculum a comparative legal studies course, such as introduction to the comparative law method, comparative legal traditions or introduction to the study of foreign laws. This type of course aims to introduce some

common concepts that would help students think about big picture issues that are relevant to dealing with the range of more narrowly topical courses. Within the legal subjects that form the core of the curriculum there is greater interest in comparative legal analysis, as well as greater attention to how global developments and international actors and institutions affect the operation of domestic law. A growing number of law schools boast a multiplicity of new course offerings on topics such as comparative constitutional law, comparative criminal law, comparative contract law, comparative commercial law, comparative corporate taxation law, comparative migration and citizenship law, comparative intellectual property law and comparative environmental law. Transnational legal education based on comparative reasoning plays an important role in shaping a new generation of lawyers, public servants and other professionals who recognize and respect cultural diversity in an interconnected world. It is one of the most efficient and effective tools in promoting a spirit that helps students to do away with exceptionalism and provincialism and learn instead to cultivate an attitude of openness and international collaboration.

This book is designed to meet the needs of undergraduate and postgraduate students whose course of studies encompasses comparative law, legal history and jurisprudence. Its primary aim is to provide clear and informed accounts of many central topics in comparative law. There are essays on the nature and scope of comparative legal inquiries and the relationship of comparative law to other fields of legal study, the uses of comparative law in law-making and the administration of justice, the origins and historical development of comparative law, the concepts of legal tradition and legal culture and the classification of legal systems into families of law, and the historical evolution and defining features of some of the world's predominant legal traditions. The book also deals with theoretical aspects of comparative law, such as the problem of comparability of legal institutions and the topics of legal transplants, harmonization and convergence of laws. The essays may be read in conjunction or as self-contained studies. It should be noted that the book assumes that its readers may not necessarily be experienced researchers or seasoned comparatists. It therefore discusses fundamental issues relating to the nature of comparative law, and devotes some attention to reviewing the salient features of the relevant literature dealing with definitional, terminological, methodological and historical questions. As long as it is remembered that the book is not intended as a complete textbook of comparative law, and is therefore likely to be used in conjunction with other resources, it has a place in rendering comparative law and the study of legal traditions more accessible to readers in many diverse fields of legal learning.

The impetus of this book emanated from a series of undergraduate and graduate lectures I gave at universities in Australia, New Zealand, Europe and Japan over the past several years. Portions of the present work have also been presented at conferences and academic colloquia, and the opinions of commentators and audiences have frequently helped me reformulate some of my ideas more clearly. I am particularly indebted to the contributing author of the book, Professor Matteo Nicolini, for the many hours he devoted to the preparation of his chapter and his cooperation in bringing this volume to fruition. I must acknowledge the excellent work of Professor Csaba Varga of the Pázmány Péter Catholic University and the Institute for Legal

Studies of the Hungarian Academy of Sciences, some of whose publications I relied on in certain areas. I also wish to thank Professor Reinhard Zimmermann of the Max Planck Institute for Comparative and International Private Law in Hamburg; Professor Martin Avenarius, Director of the Institute of Roman Law at the University of Cologne; Professor Elisabeth Holzleithner of the Institute for Legal Philosophy, Law on Religion and Culture at the University of Vienna; Ms Christina Schmid, Director of the Swiss Institute of Comparative Law in Lausanne; Professor Nigel Simmonds of the University of Cambridge; Professor Hitoshi Saeki of the University of Tokyo and Professor Donata Gottardi of the University of Verona and for their generosity in allowing me access to the library resources and other research facilities of their institutions. Special mention must also go to my friends and colleagues Professor Kenneth Palmer of the University of Auckland, Professor Alberto Cadoppi of the University of Parma and Professor Koshi Yamazaki of Kanagawa University for their continuing encouragement and support. Finally, I wish to express my gratitude to the Kinugasa Research Centre at Ritsumeikan University and the Institute of Comparative and Transnational Law for the financial grants they provided in support of this project, and to my publishers for their cooperation and courteous assistance.

Kyoto, Japan
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George Mousourakis

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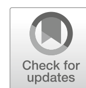
Chapter 1
Introducing Comparative Law



1.1 Nature and Scope of Comparative Law

The term comparative law does not denote a specific branch of positive law, or a body of rules governing a particular field of social activity. When we speak, for instance, of the comparative law of marriage, we do not refer to a set of rules regulating relations between husband and wife; we merely refer to the fact that the marriage laws of two or more countries have been subjected to a process of comparison with a view to ascertaining their differences and similarities. The term 'comparative law' denotes, therefore, a form of study and research whose object is the comparison of legal systems with a view to obtaining knowledge that may be used for a variety of theoretical and practical purposes. 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] As the above definitions suggest, 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.[3]

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[1]Zweigert and Kötz (1987), p. 2.

[2]See Bogdan (1994), p. 18. For a closer look consider Samuel (2014), p. 8 ff.

[3]Although the terms 'comparative law', *droit comparé*, *diritto comparato*, *derecho comparado*, *Rechtsvergleichung* are generally understood to refer to the branch of knowledge concerned with the comparison of legal systems, the name 'comparative law' has semantic nuances. There are

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Law, the object of comparative law, may be defined as a formally recognized and enforceable body of rules and institutions aimed at regulating the behaviour of citizens in their relations with one another and the community as a whole. Law seeks to make society more stable or orderly. It proceeds from the assumption that people are likely to conflict with and even hurt each other, deliberately or accidentally. So, it sets up a framework of compulsion based on the assumption that people have a general duty not to cause harm to each other. If they do, the law threatens them with something painful or unpleasant, like being punished or having to pay compensation. A second goal of the law is to provide facilities for people to make their own arrangements (for example, buy and sell goods, make wills, take employment etc). Thirdly, the law provides means by which disputes about what the law provides and whether it has been breached can be peacefully settled. Taking these goals together, we may say that the law not only threatens those who act contrary to its rules, but also promises to safeguard people's interests or rights. Finally, a very important aim of the law is to settle how a community or country is to be governed (its constitution), what duties it owes its citizens, and what duties they owe to it.[4] The various rules of law by means of which the above goals are pursued fall into two broad categories: public law and private law. The former is that branch of the law that determines and regulates the organization and functioning of a state, as well as the state's relationship with its citizens. It embraces the rules of constitutional law, administrative law and criminal law. Private law, on the other hand, consists of the rules governing individuals and regulating their personal and proprietary relationships. It comprises the law of persons and family law, the law of property, the law of contract, the law of tort and the law of succession. Furthermore, there are fields of law combining public and private law elements such as, for example, employment or labour law, competition law and business law. 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 particular legal rules or branches of substantive or procedural law. It also encompasses the study of law as

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considerable divergencies to be observed not only among the various languages, but even within a single language. Some scholars who regard comparative law as 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. On the other hand, those who regard comparative law as an independent discipline with its own special subject consider the name 'comparative law' appropriate. According to K. Kerameus: "Because law is not only a reference but is the very field of our study, the traditional term of comparative law is fully justified and suitably reflects the field of our scholarly endeavours." "Comparative Law and Comparative Lawyers: Opening Remarks", (2001) 75 *Tulane Law Review* 859, at 867. And see Örücü (2004), p. 14.

[4]Professor Hart draws a distinction between primary rules of obligation, which are concerned with what people must do, requiring a certain conduct and making it obligatory (for example, the rules of criminal law); and secondary rules, which enable people to change rules (e.g. by legislation) and bring rules into operation (e.g. by contract). Moreover, there is the secondary rule of recognition, which enables us to recognize an activity as law. Consider Hart (1961), pp. 77–96. According to Merryman (1998), p. 773.

a broader social phenomenon and the historical, social, economic, political and cultural milieu in which legal rules and institutions emerge and develop. In this way, comparative law offers valuable insights into the nature of law, its origins and development, the purposes which it serves, the values it pursues, the ways in which it impacts upon the structure and function of society, its conceptual schemes and intellectual constructions.

As already noted, comparative law is concerned with the comparison of different systems of law. The term 'system of law' expresses the fact that law is constituted by numerous interconnected elements, which should be considered from the viewpoint of their functional interdependence.[5] Systems of law are concerned with relations between agents (human, legal, unincorporated and otherwise) at a variety of levels. Functioning at a territorial state level are the legal systems of nation-states and sub-national (e.g. the legal systems of the individual states within federal states) or sub-state jurisdictions (e.g. the bye-laws of counties or municipalities and the laws of ethnic communities within states which enjoy a degree of autonomy). At an international level, public international law governs relations between sovereign states and sets the limits for the exercise of state power in the light of generally recognized norms. At an international or transnational level also operate human rights law, refugee law, international environmental law, international commercial law (*lex mercatoria*), transnational arbitration and other systems. It is important to note that no legal system is complete, self-contained or impervious. Co-existing legal systems interact in complex ways: they may compete or conflict; sustain or reinforce each other; and often they influence each other through interaction, imposition, imitation and transplantation. In particular, national legal systems have become interconnected through the operation of international and transnational regimes in a variety of ways. They are subject to, and modified by, international conventions and treaties, trade regulations and various inter-state agreements. Some countries harmonize their laws, coordinate their fiscal policies, and agree to recognize each other's judgments or cooperate in antitrust enforcement. Of course, not all laws and legal practice have developed in this direction and large areas of the law are untouched by internationalizing trends. The national legal systems still retain vital importance, notwithstanding the increasingly important role of international and transnational regimes.

1.1.1 Comparative Law: Method or Science?

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the social and biological sciences and a renewed

[5] Related to the term 'legal system' is the term 'legal order' (*Rechtsordnung, ordre juridique*). When the latter term is used, emphasis is attached to the role played by the human agency in the formation and development of law.

interest in history and linguistics during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to tracing broad patterns of legal progress common to all 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".[6] 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.[7]

However, in the first half of the twentieth century the view prevailed among scholars that comparative law is no more than a *method* to be employed for diverse purposes in the study of law.[8] According to this view, comparative law is simply a means to an end and therefore the purpose for which the comparative method is utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as an independent discipline to the uses of the comparative method in the study of law. 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

[6]Bernhöft (1878), pp. 36–37. And see Rothacker (1957), p. 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.

[7]See Dannemann (2019), pp. 390, 392.

[8]The co-called 'method theory' has been advocated by a number of eminent comparatists, including Frederick Pollock, René David and Harold Cooke Gutteridge. See Siems (2018), pp. 6–7. Consider also Hall (1963), pp. 7–10.

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.[9] 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 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.[10]

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.[11] 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.[12] 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

[9]See in general Gutteridge (1946), p. 4. See also his *Le droit comparé, Introduction à la méthode comparative dans la recherche juridique et l'étude du droit* (Paris 1953), 20.

[10]H. C. Gutteridge, ibid at 10. And see Langrod (1957), pp. 363–369.

[11]According to J. H. Merryman, a distinction may be made between 'professional' and 'academic' comparative law scholarship. By professional comparative law scholarship, he means "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 behavior. These are categories of convenience and are not mutually exclusive." (1998) 21 *Hastings International and Comparative Law Review* 771, 772.

[12]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 Coing (1956), pp. 569, 670. On the view that comparative law constitutes both a science and a method consider Winterton (1975), p. 69.

to an abstract scheme of elements and relations.[13] In this respect, one might say that comparative law is part of legal science, using the term 'science' to describe a discourse that functions at one and the same time within 'facts' and within the conceptual elements that make up 'science'. And the goal of legal comparison as a science is to bring to light the differences existing between legal models, and to contribute to the knowledge of these models.[14] 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 really more confined. Naturally it does, however, support the other branches of legal science and is itself supported by them.[15]

1.2 Forms of Comparative Legal Inquiry

Notwithstanding the remarkable growth of transnational and international legal 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 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

[13] As the German jurist Anselm von Feuerbach has observed, "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 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." *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 Hug (1932), p. 1054. Consider also Barreau (1995), p. 51.

[14] See on this Sacco (1991a), p. 8; Sacco (1991b), p. 389; Samuel (1998), p. 817.

[15] 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. Thus, Alan Watson defines comparative law as "the study of the relationship between legal systems or between rules of more than one system . . . in the context of a historical relationship. [The study of] the nature of law and the nature of legal development." *Legal Transplants: An Approach to Comparative Law* (Edinburgh 1974; 2nd ed. Athens, Ga, 1993), 6–7.

science, which continues to maintain a national character.[16] 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.[17] 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.[18] However, the rise of the nation-states in the course of the eighteenth and nineteenth centuries 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.[19] 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 the concentration of scholars on their own national systems of law and on their printed legal texts. Modern comparative law emerged in the late nineteenth 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.

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[16]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.

[17]David (1988), p. 42 ff. And see the discussion in the chapter on the civil law tradition below.

[18]As J. H. 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 1985), 9.

[19]The influential German Historical School of the nineteenth 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, (Berlin 1840), 14. And see, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1840), 8.

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.[20] It might also be said that the task of legal doctrine or legal dogmatics[21] is to examine particular legal orders at a quite concrete level, whereas comparative law 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.[22]

Comparative law scholarship is concerned with different levels of concretization or abstraction.[23] Depending on the level of concretization or abstraction on which a

[20]This reflects the Aristotelian view of the legal order as a result partly of natural regularities and laws, and partly of the human will.

[21]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.

[22]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.

[23]And see the discussion on the distinction between macro-comparison and micro-comparison in the chapter of the comparative law method below.

comparative study is conducted, a distinction is made between institutional or primary comparison, systematic comparison and global comparison. The institutional or primary comparison is concerned with the description, analysis and evaluation of a particular legal institution or rule. A legal institution may be considered from a number of different perspectives: historical, when one examines the development of the institution over time; sociological, when one considers the institution's operation in diverse socio-cultural environments; and normative-dogmatic, when the focus of the inquiry is on semantic and juristic aspects of the institution. The systematic comparison is concerned with the comparative examination of a set of legal institutions or rules pertaining to a particular branch of the law (e.g. private law). In this type of comparative study special attention is given to the interrelationship and interaction between the institutions under consideration and the general principles governing the relevant legal field. Finally, global comparison is concerned with the comparison of entire legal systems or legal traditions.[24] 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.[25] The various factors are not independent of each other but rather are interrelated or interdependent and the scale and complexity of their operation vary from society to society and from country to country.

Comparative law encompasses a variety of different, although often overlapping, studies: the study of two or more legal systems with a view to ascertaining their similarities and differences; the systematic analysis and evaluation of the solution which two or more systems offer for a particular legal problem; studies concerned with uncovering the causal relationship between different legal systems; anthropological and sociological studies into the ways in which different people experience legal norms and practices; and historical studies examining the legal evolution of diverse societies or countries. It should be noted, at this point, that comparative law embraces both the study of foreign law and the findings of a comparative study.

[24]J. H. 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 observers 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.

[25]See Rodière (1979), p. 4 ff; Agostini (1988), p. 10 ff.

Knowledge of foreign law is a necessary prerequisite for 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 includes also 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 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 (as some early comparatists suggested), 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 from their universal recognition among the nations of the world.[26] 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 one's own country. Any study of foreign law may be said to be implicitly comparative in so far as all descriptions of foreign law are trying to make the law of one system intelligible for those trained in a different system. However, such intuitive or implicit comparisons can hardly be regarded as comparative law, and this applies also to incidental and disconnected comparisons sometimes made in legal literature. For a study to qualify as a comparative study it is essential that the comparative approach to the legal systems, institutions or rules under examination is made explicit. As Bogdan points out, "one cannot begin to speak about comparative law until the purpose with the work is to ascertain (and possibly also to further process) the similarities and differences between the legal systems, i.e. when the comparison is not merely an incidental by-product. . . .It is the comparison that is the central element of the comparative work."[27] 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.

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[26]This common body of law is listed among the sources of public international law under the Statute of the International Court of Justice. See Chap. 2 below.

[27]*Comparative Law* (Deventer 1994), 21, 57. According to K. Zweigert and H. Kötz, in order for a study to be regarded as a comparative law inquiry there must be "specific comparative reflections on the problem to which the study is devoted." This is best done by the comparatist stating the essential of foreign law, country by country, as a basis for critical comparison, concluding the exercise with suggestions about the proper policy for the law to adopt, which may require him to reinterpret his own system. *An Introduction to Comparative Law* (Amsterdam and New York 1977), 5. Consider also Reitz (1998), pp. 617, 618. For a closer look at the comparative method see Chap. 5 below.

Comparison is about identifying and explaining the similarities and differences between legal systems or aspects thereof. But for a comparative inquiry to be meaningful the objects of comparison (*comparatum* and *comparandum*) must share certain common features that can serve as a common denominator—a so-called *tertium comparationis*. Contemporary comparatists recognize that the legal institutions under consideration must be comparable to each other with respect to function: they must be designed to deal with the same problem. This common function furnishes the required *tertium comparationis* that renders comparison possible. Thus, a comparatist should normally devote considerable effort to exploring the extent to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. For instance, a comparative study in the area of constitutional law might ask how and to what extent each country under examination implements the ideal of the rule of law. Either one legal system has the same legal rule or institution as another, or it has different rules or institutions performing the same function, or it does not appear to address the problem at all. A diligent search for differences and similarities ought to encompass all of those possibilities. An inquiry into function presupposes a consideration of how each legal system works together as a whole. By asking how one system of law may achieve more or less the same result as another system without using the same terminology or even the same rule or procedure, the comparatist is forced to consider the interrelationships between diverse fields of law as well as the broader socio-cultural context in which law operates.[28]

1.3 Relationship of Comparative Law to Other Fields of Legal Study

In carrying out their tasks, comparatists rely heavily on insights drawn from several other disciplines in the fields of law, social sciences and the humanities. At the same time, comparative law supplies invaluable models, experience and resources to scholars and practitioners working in a diversity of fields. Exploring the relationship of comparative law with other fields of study assists our understanding of comparative law as a distinct discipline and elucidates the ways in which it interacts with other disciplines, especially how it contributes to, benefits from or overlaps with them. The list of disciplines to which comparative law is commonly related includes: legal history; legal philosophy; sociology of law; public international law; and private international law (conflict of laws). The list of pertinent disciplines could easily be enlarged.[29]

[28]See on this Grossfeld (1990). For a closer look at the comparability issue see relevant discussion in Chap. 5 below.

[29]Other disciplines closely connected with comparative law include legal anthropology, the economic analysis of law, comparative politics, comparative cultural studies and comparative

1.3.1 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."[30]

Legal history explores the sources of legal phenomena and the evolution of legal systems and individual legal institutions in different historical settings. It is concerned with both the history of a single legal order and the legal history of many societies, the universal history of law. The role of the comparative method in this field is particularly important. As Frederic William Maitland pointed out, "history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history. (. . .) an isolated system cannot explain itself, still less explain its history."[31] By comparatively examining systems of law at different stages of development, legal historians attempt to trace the evolution of legal institutions on a broader level and the historical ties that may exist between legal orders. The comparative method is also utilized in connection with time-related or diachronic comparisons within one and the same legal order (for instance a comparison between German law or an institution thereof in the eighteenth century and today). A comparative perspective is as indispensable to the historical study of law as legal history is to the study and comparison of contemporary legal systems. Without the knowledge derived from historical-comparative studies it is impossible to investigate contemporary legal institutions, since these are to a great extent the product of historical conditions, borrowings and mutual influences of legal systems in the past.[32]

However, notwithstanding the interconnection of 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. With regard to methodology, legal history and historiography exhibit a fairly high degree of sophistication and consistency, whilst comparative law remains largely underdeveloped. One reason for this is that legal historians have generally extensive training and high professional standards by contrast to comparative lawyers, who often have no graduate training in comparative law. With respect to legal history's objectives, the primary focus is on understanding the past (and, by reflection, the present), whilst the utility of its findings for current legal practice is largely neglected. The comparative study

linguistics. On the relationship between comparative law and public international law and comparative law and private international law see Chap. 2 below.

[30]Friedrich (1963), pp. 233–234.

[31]Maitland (1911), pp. 488–489.

[32]As commentators have observed, comparative legal history is 'vertical comparative law', while the comparison of modern systems is 'horizontal comparative law'. Consider on this Ewald (1995), pp. 1889, 1944.

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.[33]

1.3.2 Comparative Law and Legal Philosophy

Broadly speaking, legal philosophy, also known as legal theory or jurisprudence,[34] 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.[35] One of its principal objects is the analysis of the characteristic elements of law that distinguish it from other systems of rules and standards and from other social phenomena. A distinction is made between *normativist* (logical), *sociological* and *axiological* (evaluative) theories of law. In spite of their differences, all types of theory have universalism in common: they aim to systematize, to find a general means of explanation to enable the discernment of legal phenomena irrespective of time and place. Even if it is admitted that different legitimate approaches to legal phenomena exist, something is considered as the inevitable starting-point, and this is often declared as the ontological essence of law. The questions, 'what is law?', 'how is law cognizable?' and 'what methods can be used for testing propositions concerning law?' must be coherent in a certain manner. A link abides between ontology, epistemology and the methodology of law. There are different possible

[33]For a closer look at the relationship between comparative law and legal history consider Gordley (2019), p. 754.

[34]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.

[35]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., (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 Orianne (1990), p. 73 ff.

ontologies: law is norms (a *normativist* ontology); or law is fact, a social or (also) a psychological phenomenon (a *realist* ontology). But whether law is considered as a matter of norms or of facts, it must be acknowledged that it involves values: law reflects certain values or it is a means for achieving certain desired social states of affairs or goals. Thus, one might declare that law has three aspects: rules, behaviour (social context) and values. These aspects must be tied together in some manner for a claim of universality to possess substance, and different theories attain this in different ways. For example, in Marxist theory the uniting factor is *materialism*, dialectical and historical. Other theories construe this factor as the existentialist concept of *experience*.[36] 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 level of language. Norms, behaviour and values are interpreted together. Interpretation is a linguistic phenomenon, even though in the sphere of law it also pertains to the social regulation of human behaviour. Secondly, a uniting factor exists at the level of epistemology and methodology. The social interest of knowledge is another essential link that connects (or may connect) the different aspects of law.

Commentators agree that comparative law is of great value in empirically testing the propositions of legal theory.[37] Such propositions can be assessed on the basis of concrete comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order—indeed, most legal theorists seem to assume a deductive universality of analysis. The starting-point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse orders. How should these similarities or differences be explained? Here one must take into account that certain matters antecede the norms of valid law, such as concepts that impart regulatory information and certain universal problems with respect to which norms take a stand (the way these problems are conceived is connected with their conceptual shaping).[38] 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,

[36]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, H. L. A. Hart's conception of legal obligation, although somewhat more complex, derived from the observation of people's actual practices analysed in terms of 'the internal point of view' crucial to their comprehension of and participation to these practices. Consider: *The Concept of Law* (Oxford 1961; 2nd ed. 1997).

[37]Consider, e.g., Lawson (1977), p. 59.

[38]One might perhaps say that there is a dialectical relationship between concepts and problems.

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.[39] Intentional action can be 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 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.[40] As the scope of their work extends beyond merely descriptive inquiries to the study of broader theoretical

[39]According to O. Weinberger, "Institutional facts. . .are in a peculiar way complex facts: *they are meaningful normative constructs and at the same time they exist as elements of social reality.* They can only be recognised when understood as normative mental constructs and at the same time conceived of as constituent parts of social reality. As a meaningful normative construct, the law is the object of hermeneutic analysis. The real existence of the legal system is conditioned by a multitude of different circumstances: the law exists in the consciousness of people, meshes in with interconnections of behaviour-patterns and expectations, has standing relationships towards social institutions and observable events." MacCormick and Weinberger (1986), p. 113. Consider also Searle (1969), p. 51; Anscombe (1958), p. 69.

[40]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." "The Dialectic of General Jurisprudence and Comparative Law", (1977) *Juridical Review* 238, 249. See on this Ewald (1995), p. 1889.

issues, comparative law and legal philosophy would unavoidably tend to overlap, even though their point of emphasis is different.[41]

1.3.3 Comparative Law and Legal Sociology

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

One fundamental difference between legal sociology and comparative law is that the former is primarily a descriptive social science, whilst comparative law also concerns itself with the question of how the law ought to be by comparatively examining the legal rules and institutions of diverse systems.[42] Nevertheless, there are many points of overlap between the two disciplines, since both are engaged in charting the extent to which law influences and shapes human behaviour and the role played by law in the social scheme of things. It is thus unsurprising that comparatists need legal sociology as much as legal history and legal philosophy. In so far as comparative law seeks to understand the similarities and differences between legal systems, and the way in which 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

[41]For an interesting perspective on the relationship between comparative law and legal philosophy see Ewald (1998), p. 701.

[42]Zweigert and Kötz (1977), pp. 9–10. Consider also Watson (1974), p. 183. However, this way of looking at the two disciplines has recently been called into question. See relevant discussion in Riles (2019), p. 772.

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.[43]

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.

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[43] 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. Rheinstein (1987), p. 28. For a closer look at Weber's views on legal sociology see his *Economy and Society*, ed. G. Roth and C. Wittich, (Berkeley 1978), 641–900. And see White (2001), p. 40. For a closer look at the relationship between comparative law and legal sociology see Riles (2019), p. 772.

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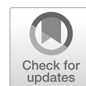
Chapter 2
Assessing the Potential of Comparative Law in Expanding Legal Frontiers



2.1 Introduction

During the last few decades there has been an increasing tendency among legal professionals and jurists to look beyond their own borders. While the growing interest in foreign and transnational legal systems may well be ascribed to the dramatic growth of international transactions, this empirical parameter accounts for only part of the explanation. The other part, at least equally important, pertains to the expectation of gaining a deeper understanding of law as a broader socio-cultural phenomenon and a fresh insight into the current state and future direction one's own legal system. Most legal professionals are situated within their own native legal culture and are conversant with the law of the land that they have grown up with and become accustomed to. They are familiar with the substantive and procedural rules of their system and may tend to assume that the solutions it provides to legal problems are the best. Sometimes they may be right. But they are likely just as often to be wrong. Being confined in one's own legal culture can be insulating and distorting. The comparative study of foreign laws opens up avenues by which to know and assess diverse socio-legal cultures and traditions, different normative orders that shape people, institutions and society in particular historical contexts.[1] It enables lawyers and jurists to integrate their knowledge of law into a cultural panorama extending well beyond their own country and provides them with a much broader knowledge of the possible range of solutions to legal problems than familiarity with a single legal order would allow. In this way, they can develop the standards and sharpen the analytical skills required to address the challenges they face in a rapidly changing world.[2]

[1]Grossfeld and Eberle (2003), pp. 291, 292.

[2]As Aharon Barak, former president of the Supreme Court of Israel, remarked: "When a national jurist – a judge, a professor of law, or an attorney – is confronted with the need to understand a legal phenomenon – for example, "what is law?"; "what is a right?"; "what is a legal person?"; "what is

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Since its inception as an academic discipline in the late nineteenth century, scholars have offered various suggestions on the actual and potential functions and uses of comparative law. These may be classified under four main headings: (a) comparative law in legal education; (b) comparative law as an aid to legislation and the reform of law; (c) comparative law as a tool of judicial interpretation; and (d) comparative law as a means of facilitating the unification or harmonization of law.[3]

2.2 Comparative Law in Legal Education

The practice of law has traditionally entailed the mastery of a single country's laws and practices. Likewise, a traditional legal education focused exclusively on the sources, and the substantive and procedural rules of a particular domestic legal order. However, in the last few decades, with the emergence of a global market for capital, goods and services, tremendous developments are taking place in the global economic landscape. Financial services, telecommunications, manufacturing, e-commerce and investments are all areas where the process of globalization continues to develop at a rapid rate. Legal practitioners today have to work in this rapidly changing economic environment. The domestic insularity in which many lawyers in the past could practice their profession is no longer sustainable as the interconnectedness between countries and legal systems continues to grow. This interconnectedness extends, of course, beyond the domain of the economy to embrace environmental and human rights issues and matters such as migration and transnational crime. Even areas of law with a strong domestic focus, such as criminal law and family relations increasingly involve international and cross-border issues. The integration of the global economy, the rise of transnational problems like climate change and terrorism, the need for governments to collaborate to regulate increasingly mobile people, money and goods all point toward legal transnationalism. Today's lawyers must be able to provide advice on antitrust and competition, consumer protection, environmental and employment law issues for each country in which their clients conduct business. Transactional lawyers are expected to follow

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the relationship between morality and law?" – that jurist is certainly permitted, and it is even desirable, to examine the understanding of legal phenomena and legal concepts beyond his national framework. These are all universal aspects which cross-national boundaries, and in order to understand them, it is worthwhile to turn to all thought which has been developed on the subject, be its geographical origin as it may. So did our forefathers through the years. And so did Holmes, Cardozo (judges), Roscoe Pound, Hohfeld, Fuller, Llewellyn (professors), and many others. They did not shut themselves inside of their national borders. The entire world was before them." "Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia", speech for the Fulbright Convention, 29 January 2006. Consider also Siems (2018), p. 28; Schadbach (1998), p. 331.

[3]Zweigert and Kötz (1998), pp. 13–31; de Cruz (1999), pp. 18–24.

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 treaties, conventions and other international agreements in the areas of international trade, human rights and criminal law. Governments around the world increasingly rely on lawyers and jurists to interpret a complex body of international law and to advise and advocate on behalf of national interests.[4]

In response to the internationalization of legal practice, law schools around the world have bolstered their comparative and transnational law offerings and developed new study abroad and joint-degree programs. Most law schools have introduced into the first-year curriculum a comparative legal studies course, such as introduction to the study of foreign laws, comparative legal traditions or methodology of comparative law. This type of course aims to introduce some common concepts that would help students think about 'big picture' issues[5] that are relevant to dealing with a range of more narrowly topical themes. Furthermore, a growing number of law schools boast a multiplicity of new course offerings on topics such as comparative constitutional law; comparative criminal law; comparative corporate taxation law; comparative commercial law; comparative contract law; comparative migration and citizenship law; comparative intellectual property law; and comparative environmental law. Within the legal subjects that form the core of the law curriculum there is greater interest in comparative legal analysis and greater attention is given to how global developments and international actors and institutions affect the operation of domestic law.[6]

Moreover, an increasing number of law schools provide opportunities for their students to conduct their studies in a transnational legal environment, wherein they are exposed to different legal cultures, systems of rules and approaches to resolving

[4]Consider on this issue Glenn (2000–2001), p. 977. And see von Mehren (2001), p. 1215.

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

[6]V. Grosswald Curran notes that "In terms of teaching law, the issue arises as to whether comparative law should be viewed as a methodological tool to be incorporated across the spectrum of law school courses, or whether it should continue as a separate, substantive law course." She concludes that "[comparative law] should do both, that comparatists should promote the methodological aspects of their analysis as a recommended approach for discussions of domestic law throughout the law school curriculum, and similarly that they should focus on their methodology when teaching courses that involve officially distinct legal cultures. . . . The study of foreign legal systems should be preserved as a comparative law offering because, among others, such an undertaking highlights the comparative process, and facilitates the acquisition of comparative methodological skills which will enhance the students' analytical abilities." "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", (1998) 46 *American Journal of Comparative Law* 657, 661.

legal problems.[7] Accessibility of transport and technological innovations permit today's legal classroom to be mobile, allowing students to study overseas or online through the use of teleconferencing and other forms of electronic communication.[8] The effect of globalization on legal scholarship has also been transformative. In virtually every field of legal study, there is greater interest in comparative analysis, greater cross-border collaboration among scholars and more extensive engagement in projects abroad. One reason for these developments is that the global integration of the economy, technological innovation and new ideas about regulation and governance are creating similar pressures on domestic legal regimes and producing similar problems to which legal systems must respond. We are in the midst of a cultural shift in which social, economic and political issues are globally intertwined and law itself has acquired enhanced significance. Problems that we used to think of as primarily issues of politics, culture or economics are increasingly 'juridified', that is, conceived as legal matters, articulated in terms of legal rights and duties, and litigated before courts and other tribunals. These and innumerable other changes reflect a shift away from the old paradigm. If there is a link among all of these changes, it might be the sense that we are in the midst of a transformation so profound that we can neither continue to deliver nor undergo legal education on a 'business as usual' basis.

Comparative and transnational law programs involve the comparative study of legal systems and institutions both from a historical (diachronic) and contemporary (synchronic) perspective, embracing legal systems with common roots, as well as systems with different origins. Through this study, students can gain a better insight into the ways in which legal rules and institutions emerge; the socio-cultural factors by which they are conditioned; and the different forms they assume. They have an opportunity to fathom the interaction of different disciplines (for example, when they consider the interface between law and politics) and to connect these to the development and operation of legal rules in diverse socio-cultural contexts. Comparative law thus contributes to a better understanding of law in general and of one's own legal system in particular and encourages a more critical assessment of the functions and goals of the rules one is studying.[9] Without the aid of legal comparison a student

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

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

[9]K. Zweigert and H. Kötz argue that the study of only one legal system cannot not reach the level of a true academic inquiry: "It may indeed be that the mere interpretation of positive rules of law in the way traditionally practised by lawyers does not deserve to be called a science at all, whether intellectual or social. Perhaps legal studies only become truly scientific when they rise above the actual rules of any national system, as happens in legal philosophy, legal history, the sociology of law, and comparative law." *An Introduction to Comparative Law*, 3rd ed., (Oxford 1998), 4. On the

becomes accustomed to regarding the solutions to legal problems provided for by his or her own system as the only possible ones, or as original to his or her system, when in fact they may have foreign roots. Comparative law makes it possible for one to see one's own legal system in a broader perspective and from a certain distance.[10] It allows one to recognize that foreign legal concepts and institutions may significantly differ from those inherent within one's own system and yet still be valid; to consider how the same rules produce different outcomes in different contexts; and to see how different rules entail similar results because of the different ways in which people resort to and interpret the law.[11] In this way, students can become much more receptive to understanding fundamental values and processes that different cultures utilize in legal reasoning. Although, naturally, students will focus on the mainstream features and substantive rules of their own system, the recognition of diversity in legal thinking and a wider knowledge of the possible range of solutions to legal problems gleaned from other jurisdictions will prepare them to deal more effectively with new and complex issues of legal theory and practice.

2.3 Uses and Limits of Comparative Law in Lawmaking and Adjudication

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

Comparative law is particularly important in the field of legislation, especially when a new law or a modification of an existing one is proposed.[12] In today's complex society the lawmaker is often faced with difficult problems. Instead of guessing possible solutions and risking less appropriate results, he or she can draw on the enormous wealth of legal experience that the comparative study of laws provides. As Rudolf Jhering remarked, "the reception of a foreign legal institution is not a matter

value of comparative law as a means of broadening legal knowledge see also: Yntema (1956), pp. 899, 901; Paton (1972), p. 41.

[10]See Fletcher (1998), p. 683; Muir-Watt (2000), p 503.

[11]As K. Zweigert and H. Kötz remark," it is the general educational value of comparative law that is most important: it shows that the rule currently operative is only one of several possible solutions; it provides an effective antidote to uncritical faith in legal doctrine; it teaches us that what is often presented as pure natural law proves to be nothing of the sort as soon as one crosses a frontier, and it keeps reminding us that while doctrine and categories are essential in any system, they can sometimes become irrelevant to the functioning and efficacy of the law in action and degenerate into futile professional games." *An Introduction to Comparative Law*, 3rd ed., (Oxford 1998), 21–22. Consider also Siems (2018), pp. 2–3. For a closer look at the role of comparative law in legal education see Demleitner (2019), p. 320; Reimann (2012), pp. 14–15. And see Péteri (2002), p. 243; Gordley (2001), p. 1003.

[12]Dannemann (2019), pp. 408–409.

of nationality, but a matter of usefulness and need. No one bothers to fetch a thing from afar when one has one as good or better at home, but only a fool would refuse a good medicine just because it did not grow in his own back garden."[13] It is thus unsurprising that legislators, when considering different possible approaches to resolving a particular problem, often take into account how the same or a similar problem has been dealt with in other jurisdictions. The adoption of a foreign legal rule would normally presuppose that the rule has generally proved effective in its country of origin and that it is deemed capable of producing the desired results in the country contemplating its adoption. Furthermore, in most cases it may prove impossible to adopt a foreign rule without significant modifications because of differences pertaining, for example, to the court structure, legal process and legal reasoning, as well as more general socio-cultural, political and economic differences between the two countries.

The use of legal comparison for legislative purposes is as old as the phenomenon of statutory law itself. A well-known example of such use is when the Romans visited a number of foreign (especially Greek) city-states which they felt could provide them with models of laws worth embodying into their own code of laws (this compilation, known as the Law of the Twelve Tables, was published in *c.* 450 BC).[14] The rise of modern comparative law as a science and as an academic discipline was largely precipitated by the desire on the part of national authorities to embark on the study of foreign laws as a means of designing or improving domestic legislation.[15] A well-known example of drawing inspiration from foreign law pertains to the Prussian company law of 1843, which was partly based on the French Commercial Code of 1807, the earliest legislative enactment on companies.[16] Other examples include the notion of income tax, which originated in England and was imitated by German and other Continental European legislators in the early nineteenth century; the Austrian anti-trust law, which provided the model for the German cartel law of 1923; and the Swedish institution of the ombudsman, which was adopted in many countries around the world. Moreover, several ideas in the German Civil Code were derived from the Swiss Law of Obligations of 1881, and German civil procedure borrowed much from Austrian law. The wholesale adoption of civil law codes across Europe and other parts of the world during the nineteenth and twentieth centuries is also a well-known phenomenon. In particular, the French Civil Code of 1804 (*Code civil des francais*) served as a model for the civil codes of many

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[13] *Geist des römischen Rechts*, I, 9th ed., (Aalen 1955), 8 ff; quoted in Zweigert and Kötz (1987), p. 16. And see Siems (2018), pp. 4–5.

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

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

[16] In 19th century Germany a number of legal unification projects in the fields of private law, criminal law and the law of procedure drew on extensive comparative research into the laws of other countries. See on this Drobnig and Dopffel (1982), p. 253 ff.

countries, including Italy, Spain, Portugal, Poland, Romania, Bolivia, Mexico, Quebec and Louisiana. The Swiss Civil Code of 1907 was adopted in Turkey (1926), and the drafts of the German Civil Code of 1900 (*Burgerliches Gesetzbuch* or BGB) influenced the civil codes of Japan, Korea, Brazil, Switzerland, Austria, Hungary and Greece. The civil codes of the Netherlands (1992) and Québec (1994), and the German law of obligations of 2002, as well as the new codes in the areas of civil, commercial and criminal law enacted in former communist countries of Central and Eastern Europe were also based on extensive comparative law research.

Furthermore, all contemporary constitutions have been inspired or influenced by foreign sources. In some countries, the adoption of foreign norms in the domain of constitutional law was preceded by a detailed and critical learning process; whilst in others the relevant process was less profound. In general, the tendency to borrow in this field has been more prominent at times of a general transition of the legal-political system, such as, for example, in the aftermath of the Second World War, or the period following the collapse of the communist regimes in Eastern Europe.[17] A state in the process of drafting a new constitution is particularly susceptible to external influences and this may be partly due to its eagerness to abandon norms associated with an overthrown political regime or a disappointing constitutional experience. The practice of borrowing from other constitutions has the advantage of offering a fresh start to the country, but it is not without risks. As in other areas of law, if the process of borrowing foreign norms at such a formative stage is uncritical, the adopted norms may be profoundly alien to the history and culture of the recipient country.

In general, contemporary law-making and law reform are characterized by a sort of eclecticism. This takes the form of using comparative law to investigate approaches and solutions to legal problems in more than one country and then integrate the findings of this research into the drafting of new legislation.[18] In Continental European countries such research is usually initiated by the ministry of justice and carried out by experts in comparative law research institutes or suitably qualified civil servants. In the United Kingdom comparative law finds its way into the legislative process mainly through the work of the English and Scottish Law Commissions. Section 3(1)(f) of the Law Commissions Act 1965, which created the two law reform commissions, states that one of the functions of the Law Commissions is "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of their functions," (i.e. systematically developing and reforming the law of England and Scotland).[19]

[17]On the concept of transition see, e.g., Teitel (2002).

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

[19]Consider, e.g., the English Law Commission's report on 'Privity of Contracts: Contracts for the Benefit of Third Parties'. Besides surveying the laws of other common law countries, the Commission also recognized that a factor in support of legal reform in this field was that "the legal

An important aspect of the commissions' work is to inquire into the function of legal rules and the context within which they operate and, after consultation with local and foreign experts, to ascertain whether or not the rules have been successful in achieving the objectives they were designed for. In the United States, the American Law Institute, established in 1932, carries out a wide range of comparative law research aimed at law reform and general restatement of laws. The Institute's Model Penal Code, for example, draws on legal experience derived from several jurisdictions. Similarly, in the field of competition law, the federal legislature was inspired by European legal models in reviewing the Sherman Antitrust Act of 1890.[20] However, in comparison with European countries, the influence of foreign law on American law-making seems to play a less prominent role. This is probably connected with the fact that inter-state comparison within the United States is regarded as much more important than comparison with foreign legal systems.

As the above examples show, most new legislation enacted in Europe and elsewhere is preceded by at least some comparative law research, and every legal system in the world today embodies borrowed or imported elements. It is important to note that the most common way in which foreign legal models find their way into national law is through academic legal writing. It is largely legal scholars who take up a point from some foreign legal system, make it part of the domestic debate and thus bring it to the attention of the legislative bodies in their respective countries. Legal scholarship tends to be more susceptible to foreign influence than is the judiciary or the legal profession, as evidenced, for example, by the fact that the reception of Roman law in Continental Europe first occurred in the field of legal science.[21]

2.3.2 Comparative Law as a Tool of Judicial Interpretation

The comparative study of foreign laws is of practical significance to courts and the judicial process when judges are faced with the task of interpreting legal rules, or filling gaps in legislation or case law. Legal systems recognize that, in the interests of legal certainty, courts should decide cases according to their own domestic law, but matters not covered by a statutory provision or case law authority will inevitably arise. When this occurs, comparative law can point to a range of approaches and possible solutions to the problem at hand. Even though foreign laws and court decisions are not considered binding, they can be regarded as highly informative

systems of most of the member states of the European Union recognize and enforce the rights of third party beneficiaries under contracts." (See Law Com. No 242, 1996, 41.) The report led to the enactment of the Contracts (Rights of Third Parties) Act 1999.

[20] For more examples see Zaphiriou (1982), p. 71 ff.

[21] On the influence of comparative law on domestic law see in general Smits (2019), p. 502. Consider also Harmathy (1999), p. 159.

or even persuasive.[22] This is particularly true when a judge is dealing with legal rules, concepts and principles that have been borrowed or adopted from other jurisdictions. An influence of comparative law on national courts can be observed in almost every legal system, even though significant differences exist between the various countries.[23]

With the exception of the United States, where there is considerable resistance to the influence of foreign sources in the domestic legal system,[24] in common law countries the exchange of legal ideas at the judicial level is generally encouraged and cross-citations between common law courts in different jurisdictions are frequent.[25] In these countries, the principal criterion for the selection of foreign judgments is legal family and thus the sources most often referred to come from common law systems. The accessibility of the relevant legal materials with respect to language and availability provides a further reason for judges to consider such sources first. To

[22]Consider Glenn (1987), p. 261 ff; Markesinis (1990), p. 1. And see Siems (2018), pp. 4–5.

[23]According to Lord Steyn, former Lord of Appeal in Ordinary in the U.K., a function of comparative law "is to throw light on the competing advantages and disadvantages of feasible solutions thereby showing what in the generality of cases is the most sensible and just solution in a difficult case. It enables courts to re-examine the merits and demerits of legal institutions in a rigorous manner." "The Challenge of Comparative Law", (2006) (8) 1 *European Journal of Law Reform* 3, 5. In the words of Zweigert and Kötz, "Comparative law is an 'école de vérité' which extends and enriches the 'supply of solutions' and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place." *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 15.

[24]In his dissenting opinion in the case of *Roper v. Simmons*, which concerned the constitutionality of the juvenile death penalty, Justice Antonin Scalia of the Supreme Court of the United States presented the following argument with regard to the use of foreign legal materials in judicial decision-making: "The basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand. In fact, the Court itself does not believe it. (. . .) To begin with, I do not believe that approval 'by other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment. (. . .) What these foreign sources 'affirm', rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. 'Acknowledgment' of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment – which is surely what it parades as today." 543 U.S. 2005, *Roper v. Simmons*, dissenting opinion of Justice Scalia, pp. 16–23. According to A. Levasseur, with the exception of Louisiana, the relevance of foreign and comparative law in American courts "is almost nil". See "The Use of Comparative Law by Courts", in U. Drobnig and J. H. M. van Erp (eds), *The Use of Comparative Law by Courts* (The Hague 1999), 333. This does not mean, however, that there are no examples of state courts or of the United States Supreme Court referring to foreign legal sources. For example, in the above-mentioned case of *Roper v Simmons* the Court held that the execution of offenders who were under the age of eighteen at the time of the commission of the crime was a violation of the Eighth Amendment. According to the majority of the Court, this view drew support from the fact that executing juvenile offenders violated several international treaties and that "the overwhelming weight of international opinion [was] against the juvenile death penalty". Consider also *Roe* v. *Wade*, 410 US 113 (1972).

[25]See on this Mak (2011), p. 420 ff.

a lesser extent, a foreign court's standing and prestige can supply an additional reason for judges to take this court's case law into account. In this respect, judges sometimes refer to judgments of the highest courts in Germany, France, Italy and the Netherlands. However, the problems of language and availability constitute a significant obstacle to the use of legal materials from non-common law sources.

As compared with courts in common law jurisdictions, courts in Continental European or civil law countries are generally reluctant to look for inspiration outside their national legal framework. This can be explained by reference to differences between the respective legal cultures as regards the style of judicial reasoning and process of decision-making. The style of judicial reasoning that prevails in common law countries allows judges to express their personal socio-political views freely and utilize teleological (consequentialist) arguments—including arguments derived from comparative law—to buttress their legal conclusions. On the other hand, the deductive method of judicial reasoning that predominates in civil law jurisdictions leaves little room for judges to look beyond their own law into foreign systems for justification of their decisions. Civil law judges do not create their own legal constructions, but borrow them from legal science. It is therefore largely through legal science and legal scholarship that foreign law is brought to their attention. It is important to note, however, that considerable differences prevail between Continental European legal systems as regards the way in which national courts approach foreign law. In Germany it is not uncommon for the Federal Constitutional Court (*Bundesverfassungsgericht*) to utilize foreign legal sources to support its arguments, even though the number of cases in which this actually happens is rather limited. Furthermore, the use of such sources in judicial deliberations largely concerns references to jurisdictions with a shared legal heritage, such as Switzerland and Austria, while there are only a few cases in which French, Italian, English and American law is cited. The situation in France is very different. In French case law there are hardly any references to foreign legal sources. This is unsurprising, as the decisions of the French Supreme Court (*Cour de Cassation*) in particular are not extensively reasoned and often do not even include references to French legal doctrine or case law. The same holds for Belgium, the Netherlands and Greece, where the sparse references to foreign law are only in the most general terms.[26] However, one should be careful not to draw the conclusion that foreign legal sources have no relevance at all to judicial decision-making in these countries. In Continental European countries which have a system of Advocates-General advising the Supreme Court, it is in the opinion of that official that one often finds comparative references to foreign and international statutory and case law. When the court makes an explicit reference to the part of the Advocate-General's opinion containing

[26]It should be noted here that even when references to foreign legal systems are made, these are often limited to the interpretative analyses of statutory provisions offered by scholars. The legislative enactments to which these analyses pertain, the socio-cultural environment in which the relevant provisions operate as well as the comparison of this environment with that of the recipient country, are either not considered at all or, when they are considered, never appear in the court's judgment.

references to foreign legal sources, an influence of foreign law becomes evident.[27] It should be noted, finally, that despite the differences that exist between European countries as regards the use of foreign and comparative law, a certain degree of convergence can currently be observed with respect to the national judicial treatment of the European Court of Human Rights and EU law.[28]

As already noted, the need to consult foreign legal sources usually arises when a court is faced with a gap in the law or when the meaning of the relevant statutory enactment is unclear. Although courts could seek to resolve such problems exclusively within a domestic framework by utilizing long-established interpretive techniques (textualism, intentionalism, purposivism), the increasing use of comparative arguments in recent years reflects a growing feeling among the judiciary (especially that of the higher courts) that it may be counter-productive not to seek to benefit from foreign experience, in particular when similar or identical problems arise in different countries.[29] Thus, for example, the question whether 'immaterial damages' should be awarded in cases involving infringement of privacy, which was not addressed by the German Civil Code, was answered in the affirmative by the highest German civil and constitutional courts after consideration of foreign law.[30] Furthermore, the German Supreme Court determined that statements made by a person accused of an offence during a police interview were not admissible as evidence if the accused had not been informed of his right to remain silent and of his right to legal representation. The Court drew support for its decision from the American case of *Miranda v. Arizona* of 1966 as well as from English, French and Dutch law.[31] In addressing the question of whether land rights should be given to aboriginals the High Court of Australia made extensive references to other legal systems, citing fourteen cases in favour of its decision, only three of which were Australian.[32] Similarly, the Supreme Court of Canada referred extensively to foreign, in particular American, case law when deciding which rights aboriginal people should have.[33] In *Fairchild* v. *Glenhaven Funeral Services*[34] the English House of Lords departed from the normal rules concerning causation in a case where a person suffering from a disease caused by exposure to asbestos would be unable to show which of several employers had caused his condition. Besides relying on common law authority, the House referred to legal sources from France, Germany, Norway and the Netherlands.[35] The list of pertinent examples could easily be extended.

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[27]Consider on this issue Drobnig (1999), pp. 3–21.

[28]Martinico and Pollicino (2010).

[29]Koopmans (1996), p. 549.

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

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

[32]High Court of Australia, *Mabo and Others v. State of Queensland* (1992) 107 ALR 1.

[33]*Inter alia* in *Van der Peet* v. *The Queen* (1996) 2 SCR 507.

[34][2003] 1 AC 32.

[35]See on this matter Scherpe (2004), p. 164 ff.

However, one should not infer from the foregoing that that voluntary recourse to foreign legal authorities is common in hard or controversial cases. There are many such cases in which judges do not refer to foreign law at all, even though this would have been useful. This might be explained partly by reference to institutional factors and partly by reference to individual approaches of judges to judicial decision-making. A judge's personal views concerning his role vis-a-vis the legislature and the executive unavoidably influence the margin of discretion he considers that he has in a hard case.[36] Furthermore, judges may have different views regarding the place foreign laws and legal experiences can or should have in the decision-making process. These diverse opinions and attitudes are related to the educational background and legal training of judges, their degree of interaction with colleagues and legal scholars, and their personal views concerning the exercise of judicial discretion in the interpretation of laws.[37]

2.3.2.1 The Role of Comparative Law in International Courts

Public international law is the body of law that governs relationships involving states as well as intergovernmental or supranational organizations and other entities regarded as 'international persons'. It is a huge field dealing with issues such the use of armed force, human rights, international trade, the law of the sea, environmental issues, global communications and even outer space. Comparative law, on the other hand, is concerned with comparatively examining problems and institutions originating from two or more systems of law or with comparing entire legal systems with a view to acquiring a better understanding thereof. At first glance, there is little that connects these two fields. This is mainly because public international law is perceived as a relatively uniform system providing little, if any, opportunity to compare anything. Although comparing the public international law system itself with other legal regimes, including domestic ones, might be very informative,[38] comparatists tend to focus largely on national systems and have by and large neglected public international law as an object of study. This does not mean, however, that comparative law is of no practical use to public international law.

In this connection reference may be made to Article 38(1)(c) of the Statute of the International Court of Justice, which lists the 'general principles of law recognized by civilized nations' as one of the sources of public international law. Implicit in the idea of general principles of law as a source of public international law is the authority of a set of normative propositions that are valid across the spectrum of the different socio-political systems of the world, when all stylistic, technical and cultural differences have been accounted for. As commentators observe,

[36]Consider on this Barak (2006), p. 118.

[37]See Posner (2008). On the role of comparative law in judicial decision-making consider in general Andenas and Fairgrieve (2015).

[38]Consider on this Reimann (2001), p. 1103.

comparative law plays a part in the work of discovering and elucidating these 'general principles of law' that international and, occasionally, national courts are required to apply.[39] However, the role of comparative law in this respect should not be exaggerated, since serious comparative study to ascertain such general principles on a worldwide scale would be a nearly impossible task. Firstly, there is the problem of determining which legal systems should be considered. If priority is given to a few systems to the exclusion of others, questions may arise over the integrity and objectivity of the relevant judicial process. Secondly, questions arise as to whether certain domestic law concepts and principles are comparable or capable of being transposed into international law decisions. It is thus unsurprising that comparative law is rarely employed in practice here.[40]

Comparative law is more often utilized in connection with certain sub-categories of international law that have evolved over the last few decades. For instance, in interpreting the European Convention on Human Rights the European Court of Human Rights has frequently resorted to a comparative study of member state laws in order to ascertain the meaning and ambit of treaty provisions.[41] Similarly, the European Court of Justice has been using the comparative method in interpreting European Union law and in seeking to arrive at decisions by assessing solutions provided by various legal systems.[42]

Furthermore, the comparative method is often utilized in the field of transnational criminal law. Extradition to a foreign state usually presupposes that the act for which extradition is sought corresponds to a criminal offence of certain gravity under the penal law of the requested country. Moreover, punishment cannot be imposed for an act committed abroad if the act is not punishable under the law of the country in which it was committed; nor can the punishment imposed for an offence committed abroad exceed the maximum punishment provided by the law of the country in

[39] According to R. B. Schlesinger, the phrase 'general principles of law recognized by civilized nations', "refers to principles which find expression in the municipal laws of various nations. These principles, therefore, can be ascertained only by the comparative method." *Comparative Law: Cases, Text, Materials*, 5th ed., (Mineola NY 1988), 36. See also Schlesinger (1957), p. 734; David and Jauffret-Spinosi (2002), p. 7. See also Kiss (1980), p. 41.

[40] For a closer look see: Cheng (1953), p. 392; Zimmerman et al. (2006), pp. 259–261 (notes). Consider also Bothe and Ress (1980), p. 61.

[41] See on this Mahoney (2004), p. 135.

[42] In the *Nold* judgment, for instance, the Court expressed the view that "fundamental rights form an integral part of the general principles of law (. . .) In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States" (*Nold* v *Commission*, case 4-73, 14 May 1974, para 13). The Court has used the comparative method in diverse fields of law and in connection with a variety of legal issues. Consider, e.g., *Algera*, joined cases 7/56, 3/57 to 7/57, 12 July 1957; *Hansen and Balle* v *Hauptzollamt de Flensburg*, case 148/77, 10 October 1978; *Zelger* v *Salinitri*, case 129/83, 7 June 1984; *CECA* v *Ferriere Sant'Anna*, case 168/82, 17 May 1983; *Orkem*, case 374/87, 18 October 1989. And see Kakouris (1999), p. 100 ff; Pescatore (1980), p. 337.

which the offence took place. To determine such matters a comparison between the laws of the requesting and requested countries is necessary.

Finally, comparative law can be relied on to elucidate differences between legal cultures and thus help one understand the predilections and mental attitudes that determine how people in different parts of the world think about and react to law, including public international law. An understanding of these differences is essential to the larger international law objectives of maintaining peace and security and promoting international cooperation.[43]

2.3.2.2 Comparative Law and Private International Law

Private international law, also known as conflict of laws, is a form of private law consisting of the rules that determine the law to be applied by courts or other authorities in cases involving more than one legal order. Although these rules are primarily of national origin, by their very nature they have a transnational scope and aspire to promote international decisional harmony, i.e. uniformity of results regardless of forum. The role of comparative law in relation to private international law is twofold: first, it assists legislators with the drafting of new conflict of laws rules; secondly, it is used by courts during the process that leads to the application of foreign law or the recognition and enforcement of foreign judicial decisions and judgments. One might say that as the actual operation of private international law depends to a large extent on comparative law, it provides the latter with practical legitimacy.[44]

Comparative law is particularly important in the process of drafting or codifying national conflict of laws rules. Because of the supranational and technical nature of these rules, private international lawyers and legislators routinely seek advice from comparative law scholars familiar with foreign legal systems. The same holds with respect to the drafting of international conflict of laws conventions.[45] This pervasiveness of comparative law in the sphere of legislation has entailed a high degree of international uniformity in the domain of private international law, at least with respect to basic principles and general rules. For instance, during the last few decades European Union countries have moved closer to the harmonization of their conflict of laws rules in the context of the Europeanization of private international law process. The comparative study of European legal systems has been an indispensable part of this process—a natural consequence of a long-standing academic tradition that has led to the sharing of legal ideas and concepts all over the Continent.

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[43] David and Jauffret-Spinosi (2002), p. 6. On the role of comparative law in the domain of international law consider Reimann (2012), p. 18 ff; Bermann (2012), p. 241 ff; Andenas and Fairgrieve (2015), Part 3.

[44] See on this von Bar (1987), p. 1, n. 123 et seq.

[45] Of particular importance in this respect is the Hague Conference on Private International Law.

Furthermore, where private international law rules require the application of foreign law, judges rely on comparative law to identify, make intelligible and correctly apply the relevant foreign laws. This is particularly true with respect to those countries that do not recognize the automatic application of the *lex fori* (the law of the country of the court) in resolving conflict of laws cases and in countries (such as, e.g., Germany, Austria, Switzerland and Italy) where judges are expected to apply foreign law *ex officio*.[46] The need for comparison is acknowledged even if, eventually, judges revert to the *lex fori*. With the development of content-orientated choice of law rules, comparative analyses are often necessary in order to actually apply the forum's conflict of laws rules, especially as such rules often employ terms the proper interpretation of which requires an understanding of their respective meanings in all the legal systems involved in a case.[47] Moreover, many private international law conventions explicitly require that courts interpreting their provisions consider what other jurisdictions have done, so that uniformity of meaning is maintained. Although the process of obtaining such knowledge does not in itself amount to comparative law in a strict sense, the application of conflict of laws rules presupposes comparisons between different systems of law, even if these comparisons are not always made explicit in the relevant judgment.[48] It is thus correct to say that, even in its practical, day-to-day operations, "no system of private international law can escape involvement with the discipline of comparative law".[49]

2.4 Comparative Law and the Unification or Harmonization of Laws

Since its beginnings as a distinct discipline, comparative law has been associated with the goal of unification or harmonization of law.[50] It should be noted here that whilst unification contemplates the substitution of two or more legal systems with

[46]Consider Hartley (1996), p. 271; de Boer (1996), pp. 223–447; Reimann (1995), p. 159 ff.

[47]This is referred to as the problem of 'qualification' or 'characterization'. See on this Rabel (1931), p. 241. And see Reimann (2006), pp. 1384–1347.

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

[49]von Mehren (1977–1978), pp. 32, 33. For a closer look at the role of comparative law in private international law consider Reimann (2012), pp. 15–18; Reimann (2019), p. 1339; Fauvarque-Cosson (2001), p. 407; de Boer (1994), p. 15.

[50]Dannemann (2019), pp. 390, 407–408.

one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards."[51] In the First International Congress of Comparative Law, held in Paris in 1900, jurists like Lambert and Saleilles stressed the practical function of comparative law as being to furnish the foundation for the unification of those national legal systems that have attained the same level of development or civilization. The aim would then be to create an international common law from the common elements of the national systems that would in time replace those systems. Early comparative law scholars challenged law's seeming parochialism and promoted comparative law in the name of cosmopolitan, internationalist, humanist and socially progressive visions. They meant comparative law to be applied, and dedicated themselves to far-reaching projects of legal unification.[52]

The world has undergone great changes since early comparative law scholars envisaged a world governed by a common body of laws shared by all 'civilized nations.' The wide diversity of legal cultures and ideologies, the ongoing problems dogging European unification and the difficulties surrounding the prospect of convergence of common and civil law systems have given rise to a great deal of scepticism regarding the feasibility of this ideal. Nevertheless, quite a few comparatists today still espouse a universalist approach either through their description of laws or by looking for ways in which legal unification or harmonization at an international or regional level may be achieved. For instance, Zweigert and Kötz assert that harmonization, at least at a European level, is a desirable political objective with respect to which comparative law furnishes an essential starting-point. They draw attention, in particular, to the role of comparative law as a tool for "the development of a private law common to the whole of Europe."[53] According to these authors: "The advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus, unified law promotes greater legal predictability and security."[54] A notable step in this direction was taken in 1989, when the European Parliament adopted a resolution stating its long-term goal to develop a uniform European Code of Private Law.[55] Furthermore, during the last three decades, several groups of

[51]Kamba (1974), p. 501. Consider also Siems (2018), p. 5.

[52]See Zweigert and Kötz (1998), p. 3. Consider also Gutteridge (1946), pp. 11–22.

[53]Zweigert and Kötz (1998), p. 16.

[54]Ibid. 25.

[55]Resolution A2159/89 of the European Parliament on action to bring into line the private law of the Member States, [1989] OJ C158/400. Reference should also be made in this connection to a report published by the Directorate General for Research of the European Parliament in 1999, under the title 'The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need

academic lawyers from throughout Europe have been engaged in projects concerned with the harmonization of law in various fields of European private law.[56]

Comparative law has played and continues to play a significant role in projects concerned with legal integration or the harmonization of law at an international or regional level. These projects are designed to reduce or eradicate, as far as possible and desirable, the discrepancies and inconsistencies between national legal systems by inducing them to adopt uniform legal rules and practices. In pursuance of this objective, uniform rules are usually drawn up on the basis of research conducted by comparative law experts; these rules are then incorporated in transnational or international treaties obliging the parties to adopt them as part of their domestic law. However, the practical efficiency of unification or harmonization projects is necessarily circumscribed by the legal structures, institutions and procedures existing within the participating nations, which ultimately determine the degree of uniformity in the interpretation and application of the relevant rules.[57] Despite the difficulties surrounding the implementation of harmonization schemes, there have been some notable successes, especially with respect to countries that closely cooperate with each other, such as the member countries of the European Union, and with respect to certain areas of law, such as international commercial law, transportation law, intellectual property law and the law of negotiable instruments. In general, legal unification or harmonization is sought to be achieved through the use of international institutions. Such institutions include the International Institute for the Unification of Private Law in Rome (UNIDROIT)[58]; the UN Commission on

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for a European Civil Code.' See European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series JURI 103 EN (1999).

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

[57]Merryman and Clark (1978), p. 58.

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

International Trade Law (UNCITRAL)[59]; the European Committee on Legal Cooperation[60]; the Hague Conference on Private International Law[61]; the World Intellectual Property Organization (WIPO)[62]; the International Labour Organization[63]; the

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Goods (The Hague, 1964); the Convention providing a Uniform Law on the Form of an International Will (Washington, 1973); the Convention on Agency in the International Sale of Goods (Geneva, 1983); the UNIDROIT Convention on International Financial Leasing (Ottawa, 1988); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995); the UNIDROIT Model Law on Leasing (2008); and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009). Consider also Bonell (2006).

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

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

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

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

[63]The International Labour Organization is a UN specialized agency which seeks to bring together governments, employers and workers to set labour standards, develop policies and devise programmes. It carries out its work through three main bodies (The International labour Conference,

Comité Maritime International[64]; and the International Civil Aviation Organization (ICAO).[65] Most of the relevant projects pertain to matters of private law, both civil and commercial. Only some of the legal rules developed were designed to become domestic legislation, while the majority were concerned with the regulation of inter-state transactions.

An important aspect to the idea of legal integration or harmonization relates to the development of supra-national entities, or the aim of diminishing the traditional relations between state power and the legal regulation of society. Consider the European Union, for example. This organization embodies the idea of a non-state legislative power, whose rules and legal policy objectives are accorded priority over those of its individual member states. This may be perceived not only as an expression of a certain interpretation of an integration ideology, but also as a starting-point for a new perspective on legal theory. In the background lie important questions concerning the relationship between law and society: What are the goals of integration—whose interests do they express? If it is recognized that the goals of integration reflect certain interests, should they be acknowledged? The general assumption is that legal integration schemes are part of a coherent plan designed to facilitate economic transactions through the establishment of a legal structure that encourages enterprise and reduces costs. Although the principal motive appears to be economic, the forces driving legal integration are fundamentally political and cultural, and therefore closely connected with the institutional framework in which integration takes place.[66] The comparative method may be indispensable to the design and implementation of legal integration schemes, but the purpose of such schemes cannot be fully understood without consideration of this framework.

Legal integration, in theory at least, entails that the resultant uniform law would incorporate the best elements from diverse legal systems and that this would be beneficial to all the countries concerned. In practice, however, the risk is that marginal but significant and useful legal categories from smaller legal systems would be lost and that larger systems would predominate; thus, the final result would be more akin to a form of 'legal imperialism' than harmonization. It is thus unsurprising that not all comparative law scholars, let alone all lawyers, consider legal integration desirable. Some have argued that in so far as we are capable of understanding one another's legal systems, interpret our laws and communicate effectively, then harmonization becomes less, rather than more appealing. With respect to the issue of European legal integration, in particular, it is noted that a

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the Governing body and the Office), which comprise governments', employers' and workers' representatives.

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

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

[66]See on this Rosett (1992), p. 683 ff.

common European private law would be an important symbol of European unity and could entail benefits for both the businessman and the individual citizen.[67] However, as a socio-cultural phenomenon, law is always linked to the culture of a particular society—legal norms and their socio-cultural context are interconnected. Thus, if a historically developed and functioning system of national law were to be replaced by a supranational and largely alien body of law merely for the sake of symbolism, European unity would be weakened rather than strengthened. A legal integration scheme imposed without sufficient attention to the diverse cultural traditions in which it should apply would be just as meaningless and counterproductive as doing away with the national languages and the imposition from above of a single 'official' language for the whole of Europe.

Besides the active programmes for the unification or harmonization of law (briefly discussed above), there are other ways by which legal integration might be brought about, namely by the transplantation of legal institutions and by 'natural convergence'.[68] As a branch of legal science, comparative law is concerned with elucidating these processes.

Legal transplantation involves a system of law incorporating a legal rule or institution adopted from another legal system.[69] It may also pertain to the reception of an entire body of law or legal system, which may occur in a centralist or piecemeal way. Transplantation may occur voluntarily by, for instance, the borrowing or imitation of a foreign legal model; or involuntarily, as when a country is conquered or colonized and has a foreign legal system imposed on its inhabitants. Examples of transplantation include the reception of Roman law in Continental Europe; the diffusion of English law in the colonies and dominions of the British Empire; and the adoption of the French and German Civil Codes by countries in Europe and other parts of the world. The political influence of the state whose law is adopted, as well as the perceived quality and prestige of the adopted law often play an important part in a reception process. In many cases, foreign rules or doctrines are 'borrowed' in the context of legal practice itself, because they fill a gap or meet a particular need in the importing country. The success of a legal transplantation depends on a country's receptivity to foreign law, as determined by historical, cultural, social and economic factors.[70] In this respect one should consider, in particular, the form of the imported law (whether it is a written, customary or judge-made law); linguistic and other

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[67]Taupitz (1993).

[68]Merryman and Clark (1978), pp. 51–67.

[69]The phenomenon of legal transplantation as a factor conducive to the convergence of legal systems has attracted much attention in recent years, especially since the publication in 1974 of A. Watson's book *Legal Transplants: An Approach to Comparative Law*. According to this author, the term 'legal transplants' refers to "the moving of a rule (. . .) from one country to another, or from one people to another". See *Legal Transplants: An Approach to Comparative Law* (Edinburgh 1974; 2nd ed. Athens, Ga, 1993), 21. And see Chap. 7 below.

[70]Some systems are relatively open to the idea of external influence, whilst others (notably the United States of America) are characterized by aversion towards this idea. See on this issue Palmer (2001), p. 1093. One should note here that resistance to the borrowing of foreign legal norms and

cultural links that may exist between the donor and recipient countries, especially common features of legal culture; and the countries' level of political and economic development. According to Alan Watson, comparative law, construed as a distinct intellectual discipline, is primarily concerned with the study of the historical relationships between legal orders and the destinies of legal transplants in different countries.[71] On this basis, he argues, one may identify the factors explaining the change or immutability of law.[72] He asserts that comparative law (which he distinguishes from the study of foreign law) can enable those engaged in law reform to better understand their historical role and tasks.[73] It can provide them with a clearer perspective as to whether and to what extent it is reasonable to appropriate from other systems and which systems to select; and whether it is possible to accept foreign legal rules and institutions with or without modifications.[74]

The theory of natural convergence is based on the assumption that the legal systems of societies will tend to become more alike as the societies themselves become more like one another over time. There is a degree of uniformity with respect to the emergence of certain needs as societies progress through similar stages of development and a natural tendency exists towards imitation, which may be precipitated by a desire to accelerate progress or pursue common political and socio-economic objectives.[75] It may be true that each legal culture is the product of a unique combination of socio-cultural and historical factors. Nevertheless, it is equally true that collective cultural identities are formed through interaction with others and no culture can claim to be entirely original.[76] According to Giorgio del Vecchio, "the basic unity of human spirit makes possible the effective communication between peoples. Law is not only a national phenomenon; it is, first and foremost, a human phenomenon. A people can accept and adopt as its own a law created by another people because, in the nature of both peoples, there exist common

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practices is not correlated with a tendency not to export legal institutions (as manifested by the fact that American law has exercised strong influence on other legal systems).

[71] *Legal Transplants*, supra note 69, at 6.

[72] *Legal Transplants*, supra note 69, at 21. Watson concludes that the moving of a rule or a system of law from one country to another has been shown to be the most fertile source of legal development, since "most changes in most systems are the result of borrowing." (Ibid. 94).

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

[74] It should be noted here that gaining inspiration from ideas and practices that prevail in other systems does not pertain to state institutions only. The practice of transplantation is often adopted by other agents, such as commercial lawyers, human rights activists, NGOs and others. See on this Slaughter (2004), pp. 239–240. Consider also Glenn (2001), p. 977. And see relevant discussion in Chap. 7 below.

[75] On the so-called 'law of imitation' and its role in the evolution of social institutions see Tarde (1890). And see Allen (1964), p. 101 ff.

[76] See on this Levi-Strauss (2001), p. 103 ff.

demands and needs which [often] find expression in law".[77] The German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in certain 'unpolitical' areas of private law (such as commercial and property transactions and business dealings) the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (*praesumptio similitudinis*).[78] This presumption, he claims, can serve as a useful tool in the comparative study of legal systems. An examination of the functions of law in Western countries reveals a host of similarities with respect to legal culture and the practice of law, derived from a common legal ideology and shared objectives.[79] Moreover, a common international culture is arising as a result of increased international communication and travel, the internationalization of trade and business, the operation of international organizations and a growing awareness of shared global concerns (e.g., environmental pollution, climatic change, etc).[80] It is argued that if it is true that legal rules emanate

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[77]del Vecchio (1960), pp. 493, 497. As Albert Hermann Post, one of the founders of the School of Comparative Anthropology (*Rechtsethnologie*), has remarked, "there are general forms of organization lying in human nature as such, which are not linked to specific peoples. (. . .) [F]rom the forms of the ethical and legal conscience of mankind manifested in the customs of all peoples of the world, I seek to find out what is good and just. (. . .) I take the legal customs of all peoples of the earth as the manifestations of the living legal conscience of mankind as a starting-point of my legal research and then ask, on this basis, what the law is". *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte: Leitgedanken für den Aufbau einer allgemeinen Rechtswissenschaft auf sociologischer Basis* XI (Oldenburg 1884). According to Post, ["C] omparative-ethnological research seeks to acquire knowledge of the causes of the facts of the life of peoples by assembling identical or similar phenomena, wherever they appear on earth and by drawing conclusions about identical or similar causes". *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (Oldenburg 1880), citations at 12–13. And see Post (1886); Maine (1866). See also Siems (2018), p. 35 ff.

[78]Zweigert (1966), p. 5ff; Zweigert and Kötz (1987), p. 36. In this connection, reference should made to what is known as 'common core research': a form of research that seeks to bring to light the highest common factor of an area of substantive law in a number of countries, or of laws from a number of countries within the same legal family. Common core research is invariably construed as combining the substantive claim for universality and the particular methods applied to achieve its objective. This form of research constitutes a reliable method of identifying shared legal principles, and plays an important part in projects concerned with the international or regional unification or harmonisation of law. See Schlesinger (1961), p. 65 ff; *Formation of Contracts: A Study of the Common Core of Legal Systems* (Dobbs Ferry NY 1968); *Comparative Law*, 4th ed., (Mineola, N.Y. 1980), 36ff.

[79]Merryman and Clark (1978), p. 60.

[80]According to Thijmen Koopmans, "In the nineteenth century history was very much the fashion, in particular on the Continent: history of the codes, pre-existing Roman law traditions, Poitier on obligations, etc. Our own (20th) century discovered society; it wondered how the law works, what its economic context is and how legal decisions can be adjusted to social needs; and it saw the judge as a kind of decision maker, or even a 'social engineer'. The twenty first century may become the era of comparative methods . . .Our problems in society increase as our certainties in religious, moral and political matters dwindle; and more and more problems are common problems. The search for common solutions is only slowly beginning." "Comparative Law and the Courts", (1996) 45 *International and Comparative Law Quarterly* 545, 555.

as a response to social needs (according to the socio-functional view of law), the emergence of a global society will almost inevitably bring about a greater degree of convergence among legal systems.[81]

2.5 Comparative Law and Comparative Lawyering

With the growth of interest in sociological or functional jurisprudence in recent times, jurists have sought to broaden the scope of legal inquiry. As it is often observed, law is not only law in the books; it is also law in action. This being so, it becomes evident that one needs to examine the operation of all the institutions involved in the legal structure, including those concerned with law as related to behaviour. Legislatures and the courts are two of those institutions, but there are others, notably the lawyer and the law office. A tremendous number of important decisions affecting human conduct are made by lawyers in law offices. Such decisions, and the manner in which they direct behaviour, are significant aspects of the legal system. The development of the notion of preventive law demonstrates the importance of the lawyering function. That notion derives from the idea that factual behaviour frequently determines the ultimate legal result.[82] If a person signs his or her name on a certain document, that signature, for legal purposes, can become the factual basis for determining certain legal rights and obligations. These legal rights and obligations will be different if the individual concerned does not sign, or signs a document with different words on it. As this suggests, lawyers, when appropriately consulted, make decisions that can guide clients into channels that prevent, or minimize, the risk of future litigation. The effect of this preventive law function of the lawyer on the legal system and on society as a whole, though probably not measurable, is nevertheless substantial. Even in matters involving dispute resolution, the traditional province of the judicial branch, it can safely be said that lawyers resolve more disputes than do the courts. Every settled case reduces the burden on the court system and, at the same time, contributes to a less cumbersome ordering in society.[83]

The growing awareness of the significance of the lawyering function has had a significant effect on expanding the scope of comparative law. As already noted, a primary objective of comparative law is the comparative study of statutory and case law. By means of such study societies can acquire knowledge that enables them to

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[81] See King (1997), p. 119; Ferrari (1990), p. 63; Markesinis (1994); Zimmerman (1995), p. 1. For a critical perspective on this issue see Legrand (1996), pp. 52–61. A number of scholars have raised the question of whether or not 'natural convergence' is simply a euphemism for what they call 'Western legal imperialism'. See on this issue von Mehren (1971), p. 624; Knieper (1996), p. 64; Whitman (2009), p. 313.

[82] 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* (Berkeley 1959), 214.

[83] For a discussion of the role of the legal profession see, in general, Abel and Lewis (1995); Cain and Harrington (1994).

improve their legal systems and laws. This laudable goal is equally relevant with respect to comparative lawyering. Research regarding the role of the legal profession in different countries can be useful in a number of ways. On the practical side, such research can reveal methods that may be utilized to improve the various aspects of the lawyering function. For example, in many countries increasing attention is being given to the issue of cost reduction in the operations of law offices. Cost reduction is deemed necessary especially in order to increase the utilization of the law office as the place for the practice of preventive law and also as a site for dispute resolution. The ultimate aim is the satisfactory performance of the objectives sought by clients. If the client's objective is, for instance, the purchase of property, a comparative examination of the methods used by lawyers in different societies could facilitate the development of ideas for improvement, even to the extent that lawyer services and lawyer costs might be regarded as non-essential to the objectives sought to be accomplished. On the theoretical side, a comparative study of legal systems that involves empirical research of law office practice could prove very rewarding. When comparing legal practices in diverse societies one may seek to assess the extent to which such practices are reflective of different legal rules. It is probable that the practices under consideration are not necessarily determined by law but are explainable on other grounds, such as economic factors or cultural tradition. Consideration of theoretical aspects of comparative lawyering might thus prove valuable in elucidating the relationship between positive law and custom, and between positive law and social behaviour. Moreover, such a theoretical approach might be instructive in appraising the utility and potential social impact of proposed legislation.

Involvement in comparative lawyering presupposes consideration of definitional issues relating to the meaning and scope of lawyering in different societies.[84] Quite certainly, the label 'lawyer', 'counsellor', 'barrister' and the like[85] cannot be controlling. Regardless of the term by which the relevant activity is identified, our principal objective is to compare similar functions in diverse societies. What then is the essential definition of lawyer and lawyering?[86] In one country a particular activity is performed by a person licensed as a 'lawyer', while the comparable activity in another country is performed by a person licensed as a 'notary', and in a third country, the activity in question may be accomplished without resort to a licensed person. The definitional problem may be further complicated merely because the same activity in one and the same society might be lawfully carried out by a person licensed as a lawyer, or another licensed as a notary, or performed without the aid of either. Or, with respect to some kinds of activities, the client has a choice of employing a lawyer or a non-lawyer to represent him or her in the relevant

[84]One area in which definitional problems frequently arise is the 'unauthorized practice of law', i.e. the provision of legal services by persons who are not licensed as legal practitioners.

[85]Other labels include 'counsel', 'advocate', 'attorney', 'claims agent', 'marriage counsellor' and 'tax advisor'.

[86]This question is crucial in relation to the study of lawyering in countries where those classified as 'lawyers' perform only a small portion of the legally oriented processes of society.

proceedings. When such apparent discrepancies are put into the mixture of ingredients for investigation, we are compelled even further to learn about and understand the lawyering function in connection with the judging function and the legislative function within each country. Thus, comparative lawyering could contribute to a more complete understanding of a legal system and of the socio-cultural factors by which legal practice in all its manifestations is conditioned.

As the above discussion suggests, 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. The goal one seeks to attain is improved administration of the legal structure and improved usefulness of the institutions involved in the practice of law.

2.6 Comparative Law and the Challenges of Globalization

Over the past few decades there has been an explosion of academic writings about globalization. Although, not surprisingly, many issues and interpretations are contested, most scholars understand the term to refer to three processes: economic, technological and normative. These processes are closely interwoven and reinforce each other in powerful ways, entailing complex interactions at many levels ranging from the global to the very local. Of course, the recent transformations in the world system are by no means completely new. What is novel about them in the contemporary period are their extensity, intensity, velocity and impact on states and societies around the world.

A notable effect of globalization has been the growth of what is now commonly referred to as 'transnational law': an umbrella concept embracing all law that regulates actions and events that transcend national borders, including problems arising from agreements made between sovereign states and foreign private parties. Transnational law was originally taken to encompass public and private international law as well as all domestic and foreign law concerned with trans-border issues.[87] In recent years the term is increasingly used to denote the amalgam of common legal principles of domestic and international law or the multidimensional international legal order brought about by the phenomenon of globalization. The rise of transnational law poses new challenges to comparative law. Firstly, comparative law must extend beyond the traditional system of coexisting nation-states, and come to grips with much more intricate and fluid relationships and interactions between a multiplicity of overlapping and intersecting legal orders. Secondly, the scope of comparative law must be broadened to embrace the study of international, transnational and supranational regimes, such as the United Nations, the European Union, human

[87]For an early treatment see Jessup (1956), p. 2. And see Shapiro (1993), p. 37.

rights, the world trade system and environmental protection.[88] 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.[89] 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.[90]

Addressing issues posed by globalization and the growth of transnational law requires the development of a form of scholarship that is more scientific in some ways than the comparative law approach has traditionally been. Such a scholarship would pay greater attention to theory in the broad sense of conceptual structure, in so far as theories are the principal mechanisms for perceiving, understanding and structuring reality. Rethinking comparative law from a global perspective will involve all of the main tasks of legal theory including synthesis; the construction and elucidation of concepts; the development of models, both empirical and normative; and the critical analysis of assumptions and presuppositions underpinning legal discourse. In particular, there is room for a great deal of work on the question of transferability of legal concepts across different cultures in so far as the harmonization of global 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.[91]

The ongoing tendencies of globalization set new challenges for comparative law. In response to these challenges comparative law has diversified and increased in sophistication in recent years, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation-states. But true integration of international and transnational regimes into the comparative law agenda takes more than just adding their description to our inventory of legal systems. It requires that we develop a better understanding of how law works in national, transnational and international contexts and that we explore and shed light on the dynamic interplay between these contexts.[92]

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[88] Reimann (2001), p. 1103.

[89] Consider on this matter Teubner (1997).

[90] See in general, Biddulph and Nicholson (2008), p. 9; Muir Watt (2019), p. 599.

[91] See Werro (2001), pp. 1230–1232; Eberle (2009), pp. 485–486; Gerber (2001), p. 949; Demleitner (1998), p. 647.

[92] 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

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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.

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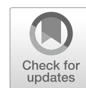
Chapter 3
Tracing the Early Origins of Comparative Law



3.1 Introduction

Comparative law, as a method of legal science and as an academic discipline, is largely 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. From a very early period, people 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.[1] 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 chapter 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 scientific rationalism and the rise of the modern nation-state and national legal systems.

3.2 Legal Comparatism in Classical Antiquity

3.2.1 Ancient Greece

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

[1] Siems (2018), p. 13.

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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 states in formulating the basic political structure and laws of an ideal city named Magnesia.[2] Similarly, in his *Politics* Aristotle (384–322 BC) considered the constitutions of 158 Greek city-states[3] before settling on his three preferred forms of government (monarchy, aristocracy, and constitutional government or 'polity') and their corrupt versions (tyranny, oligarchy, and democracy).[4] Although it is unclear whether the conclusions of this work were based on extensive study of factual material 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.[5]

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 Greek world at that time. The fact

[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]As stated in this work, "Our purpose is to consider what form of political community is best of all for those who are most able to realize their ideal life. We must therefore examine not only this but other constitutions, both such as actually exist in well-governed states, and any theoretical forms which are held in esteem, in order to ascertain which features of them are good and useful." *Politics*, Bk 2, 1.

[4]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 Bodenheimer (1974), pp. 6–10, 13–14; Ewald (2007), 1, 92–93; Mulgan (1977), pp. 60–77, 116–138. And see Aristotle, *Politics*, E. Barker trans., (Oxford 1995).

[5]Zweigert and Kötz (1998), p. 49.

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.[6] 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*.[7] But the comparative study of laws reveals certain common 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 a particular kind.[8]

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

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[6]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 strand of natural law thinking that regards values as having an eternal existence and an eternal veracity.

[7]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 '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.

[8]As Aristotle elaborates in Book 5 of the *Nichomachean 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.

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 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.[9]

3.2.2 Ancient Rome

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 (second 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.[10] However, as the story of the Twelve Tables 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.[11] 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

[9]In the words of Friedrich (1963), p. 32.

[10]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.

[11]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.

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 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. Foreigner 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 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.[12] 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*).

[12] See Mommsen (1887), p. 606.

The second century AD jurist Gaius declares that Roman law was 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".[13] "Thus", he continues, "the Roman people observe partly their own particular law [and] partly that which is common to all peoples".[14] 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 Roman law (*ius civile*).[15] 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.[16] 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.[17] The work 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

[13]Gaius, *Institutes*, 1. 1.

[14]Ibid. Consider also the *Digest of Justinian*, 41. 1. 1 pr., 9. 3 (Gaius).

[15]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*).

[16]Gaius, *Institutes*, 3.154-154a.

[17]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* (1890), III; see also Baviera (1968), pp. 543–589; B. Kübler and E. Seckel, *Iurisprudentiae anteiustinianae reliquias in usum maxime academicum compositas a* P. E. Huschke, 6th ed., (Leipzig 1927). For commentary consider E. Volterra, *Collatio legum mosaicarum et romanarum*, Memorie della R. Accademia nazionale dei Lincei: Classe di scienze morali, storiche e filologiche, 6.3.1 (1930); G. Barone-Adesi, *L'età della Lex Dei*, Pubblicazioni dell'Istituto di diritto romano e dei diritti dell'Oriente mediterraneo, 71 (Naples 1992).

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.[18]

3.3 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 belonged.[19] 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 of these codes embrace the *Codex Euricinianus*, 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.

[18]The author of this work remains unknown, although the attempted comparison of Roman and Mosaic law suggests that he was probably of Jewish origin. For a closer look at the role of legal comparatism in Greek and Roman antiquity consider Donahue (2019), pp. 3–7.

[19]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 such sources side by side appear to have continued throughout the Early Middle Ages.[20]

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 Germanic (especially Lombard) law,[21] it also embraced feudal law[22] 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. The jurists' 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.[23] The missing element 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

[20] In this connection reference should be made to the so-called 'code' of the Anglo-Saxon King Alfred (849–899). See Wormald (1999), pp. 265–285.

[21] 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.

[22] 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.

[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.

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 were 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.[24]

During the same period, the law of the Church, or 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 *Decretum 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 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.[25] 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.[26]

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 or Commentators. 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

[24]For a closer look at the School of the Glossators see Chap. 8 below.

[25]For a closer look see Winroth (2000).

[26]See on this van Caenegem (1973), p. 16. 2.

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 laws.[27]

In general, 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.[28] 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.[29]

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[27]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. For a closer look at the School of the Commentators see Chap. 8 below.

[28]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.

[29]For a closer look at the role of legal comparatism in the Medieval age see Donahue (2019), p. 7 ff.

3.4 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[30] 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.[31] In this connection, reference may be made to 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*.[32] In his work he sought to explore the laws and customs of

[30]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.

[31]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 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 humanist movement see also Chap. 8 below.

[32]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.

France in a comprehensive and comparative manner.[33] 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 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 regards such customs as applicable only in those (exceptional) situations to which they clearly pertain. 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 analysing 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*.[34]

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

[33]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.

[34]For a closer look at the role of legal comparatism in sixteenth-century French legal thought see Donahue (2019), p. 3, 13 ff.

to improve the legal system of one's own country.[35] 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,[36] employed the comparative method to place the ideas of natural 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.[37] In this respect, his work is viewed as 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.[38] 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 Pufendorf 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

[35]See F. Bacon, *De dignitate et augmentis scientiarum* (1623), bk. Viii, c.3.

[36]On the School of Natural law see Chap. 8 below.

[37]Selden explored the influence of Roman law on the common law of 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.

[38]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 1944), 298.

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.

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 Secodat, baron de la Brède et de Montesquieu (1689–1755).

3.4.1 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,[39] was concerned with the customary law of his hometown. His next important work was a comprehensive treatise on Roman private law, titled *Pandectae justineaneae 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.[40] In his writings, Pothier sought to overcome the problems for legal practice caused by the fragmentation of the law in France by means of a systematic restatement of fundamental legal concepts and principles.[41] 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 the doctrine concerning the law of France before the Revolution and, for that reason alone, apart from the high esteem in which it was held, it was bound to influence the compilers of the French Civil Code.[42]

Although Pothier was not a particularly original thinker, he possessed an immense knowledge and showed himself thoroughly familiar with the writings of

[39]A revised edition of this work was published in 1760.

[40]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 consomption* (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.

[41]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.

[42]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.

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 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.

3.4.2 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 Descarte'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 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 the 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.[43] 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.[44] 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.[45] 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.[46]

[43]See Berlin (2000), p. 47.

[44]See on this Jayme (2000), p. 20.

[45]On the epistemological foundations of Vico's thought see le Moigne (1999), p. 49.

[46]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, 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 Berlin (2002), pp. 135–136.

3.4.3 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.[47] 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 provide a universal answer, 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 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."[48] Montesquieu further asserts that laws are relative and that there are no 'good' or 'bad' laws in the abstract. Each law must be considered in relation to its background, its surroundings and its antecedents. Only if a law fits well into this framework, it may be regarded as a good law. 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 its origins in the 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

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[47]Montesquieu's work represents an early attempt to construct a theory of positive law and a veritable science of legal history. See Rabello (2000), pp. 147–156.

[48]*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 1949), 6. It should also be noted here that, according to contemporary scholars, Montesquieu's work set the foundations of modern sociology. As L. Pospisil has remarked, "With his ideas of the relativity of law in space as well as in time, and with his emphasis on specificity and empiricism, [Montesquieu] can be regarded as the founder of the modern sociology of law in general and of the field of legal dynamics in particular." *Anthropology of Law: A Comparative Theory* (New York 1971), 138. Consider also Launay (2001), p. 22.

Church.[49] 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 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.[50] 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: republic, 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, 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*,[51] has its roots in the implicit conflict between the French *parlements* and the monarchy.[52] 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

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

[50]See Launay (2001), pp. 22, 24.

[51]See Launay 2001), 22, 25–26.

[52]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.

systems, especially constitutional monarchy, over Asian absolutism and other "primitive" systems,[53] without, however, to support European territorial ambitions for, according to him, such ambitions were the hallmark of absolutism.[54]

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.[55] It is important to note, however, that Montesquieu seeks to detach laws from the fetters of rationalism[56] 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 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 that rests on 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."[57] He adds that "as the civil laws depend on the political institutions, because they are made for the same society,

[53]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 Launay (2001), pp. 22, 37.

[54]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.

[55]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.

[56]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.

[57]*On the Spirit of the Laws*, Book XXIX, 11.

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."[58]

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 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."[59]

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[58] *On the Spirit of the Laws*, Book XXIX, 13.

[59] 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 Hegel (2008), Introduction para. 3, para. 261, para. 273. On the role of legal comparatism in the seventeenth and eighteenth century European legal thought see Donahue (2019) p. 3, 19 ff.

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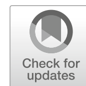
Chapter 4
The Rise of Modern Comparative Law



4.1 Introduction

Comparative law, as a distinct discipline, emerged in the nineteenth century. This development was precipitated by a number of factors. Of particular importance were the consolidation of the idea of the nation-state and the proliferation of national legislation; the expansion of international commercial relations, which brought litigants and legal practitioners into contact with foreign legal systems; and the growing interest in the scientific study of social phenomena in a broader historical and comparative context. A distinction is thus drawn between two types of comparative law: legislative comparative law, when foreign legal systems are considered in the process of elaborating new national laws; and scientific or theoretical comparative law, when the comparative study of diverse legal systems is undertaken with the purpose of gaining an improved understanding of law as a social and cultural phenomenon.[1]

The development and consolidation of the nation-state during the eighteenth and nineteenth centuries and the growth of national legislation brought to an end legal unity in Europe and the universality of European legal science. National ideas, historicism, and the movement towards the codification of law[2] gave rise to a

[1]See Zweigert and Kötz (1987), p. 50.

[2]The first national codes designed to achieve legal unity within one kingdom were compiled in Denmark (1683) and Sweden (1734). The process of codification continued in the late eighteenth and early nineteenth centuries with the introduction of codes in Bavaria (*Codex Maximilianeus Bavaricus*, 1756), Prussia (*Allgemeines Landrecht für die Preussischen Staaten*, 1794) and Austria (*Allgemeines Bürgerliches Gesetzbuch*, 1811). The most important codificatory event of this period was Napoleon's enactment in 1804 of the French Civil Code (*Code civil des francais*). The importance of Napoleon's Code is attributed to not only the fact that it fostered legal unity within France, but also the fact that it was adopted, imitated or adapted by many countries throughout the world. This was partly due to its clarity, simplicity and elegance that rendered it a convenient article of exportation and partly due to France's influence in the nineteenth century.

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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.[3] Whether one stressed the *will of the nation* as a source of law or held that law expressed the organic development of the *national spirit*, law came to be viewed as primarily a national phenomenon.[4] In this context, foreign law could not be regarded as authoritative; it might only provide, through the medium of legal science, examples and technical models for the national legislator (i.e., it was still relevant in *de lege ferenda* connections).[5] One of the chief objectives of comparative law during the nineteenth century was the systematic study of foreign laws and legal codes with the view to developing models to assist the formulation and implementation of the legislative policies of the newly established nation-states. As the industrial revolution in Europe advanced, an extraordinary growth of legislative activity was stimulated by the need to modernize the state and address new problems generated by technical and economic developments. In drafting new statutes and codes of law, the national legislators increasingly relied on large-scale legislative comparisons that they themselves undertook or mandated. Interest in the comparative study of laws, especially in the field of commercial and economic law, was also precipitated by the expansion of economic activities and the growing need for developing rules to facilitate commercial transactions at a transnational level.[6]

By the close of the nineteenth century comparative law was associated with a much loftier goal, namely, the unification of law or the development of a 'common

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[3]The nationalization of the sources of law was due not only to ideological but also to social factors that, in a way, preceded the rise of nationalism. Industrialization and the growth of capitalism were among the conditions that precipitated this development.

[4]The influential German Historical School challenged the natural law notion that the content of law was to be found in the universal dictates of reason. According to Friedrich Carl von Savigny, a leading representative of this school, law is similar to language, ethics and literature in that it is a product of the history and culture of a people, and exists as a manifestation of national consciousness (*Volksgeist*)—it cannot be derived from abstract principles of natural law by logical means alone. In Savigny's words, "positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*). . . .[I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law. . .". *System des heutigen römischen Rechts*, Vol. I, (Berlin 1840), 14. The rise of the Historical School was a manifestation of the general reaction to the rationalism of the School of Natural Law and the political philosophy associated with the French Revolution and the regime of Napoleon. See Chap. 8 below.

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

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

law of civilized mankind' (*droit commun de l'humanité civilisée*), as declared at the first International Congress of Comparative Law held in Paris in the summer of 1900. At that Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of diverse legal systems, of norms and principles common to all civilized mankind. Such universal norms and principles may be taken to constitute the basis of a relatively ideal law—a kind of natural law with a changeable character.[7] The ideal of legal unification was also stressed at the twentieth anniversary of the International Association for Comparative Law and National Economics, held on the eve of the First World War in Berlin, where it was proclaimed that the Association would continue to strive for the harmonization of law under the principle, "through legal comparison towards legal unification."[8] This statement reflects the hopes of early comparatists concerning the establishment of a future world law by relying on the methods of comparative law.

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

[7]"Conception et objet de la science juridique du droit comparé", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, (1905–1907), I, 167 at 173. The unitary and universalistic mentality underpinning proposals presented at the Paris Congress reflected the influence of schools of thought that dominated European legal science in the nineteenth and early twentieth centuries. At the same time, many of the positions advanced at the Congress were in line with new jurisprudential trends emerging as a reaction to legal positivism and the formalism and extreme conceptualism of the traditional approach to law. Examples of such trends include *Zweckjurisprudenz* (focusing on the purposes that legal rules and institutions serve) and *Interessenjurisprudenz* (focusing on societal interests as the chief subject-matter of law), which were precursors of legal realism and the sociology of law. These new approaches are also connected with the development of functionalism in comparative law. On the Paris Congress of 1900 see Sect. 4.4.1 below.

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

rationalism, legal universalism and the uniqueness of solutions all pointed to the same unitary idea: the *Ius Unum*.[9]

A second strand of universalism, connected with the development of comparative law as a branch of legal science or a scientifically devised method, was historicism, which in the nineteenth century became the basic paradigm of almost all sciences. The primary objective of legal-historical comparatism was to reveal the objective laws governing the process of legal development and, following the pattern of the Darwinian theory of evolution, to extend the scope of these laws to other social phenomena. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought to construct evolutionary patterns that would enable them to uncover the essence of the 'idea of law'.[10]

The works of nineteenth century scholars, which endeavoured to explain legal phenomena on a historical-comparative plane, paved the way for the recognition of comparative law as a branch of legal science and a distinct academic discipline. This

[9]Notwithstanding 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 laws. In the words of the German philosopher Wilhelm Dilthey, "As historicism rejected the deduction of general truths in the humanities by means of abstract constructions, the comparative method became the only strategy to reach general truths." "Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften" in *Gesammelte Schriften*, Vol. VII, 4th ed. (Göttingen 1965; first published in 1910), 77 at 99. In 1852, Rudolf von Jhering deplored the degradation of German legal science to "national jurisprudence", which he regarded as a "humiliating and unworthy form of science", and called for comparative legal studies to restore the discipline's universal character. See Jhering (1955), p. 15. See in general David (1950), p. 111; Stolleis (1998), pp. 12, 24; Zweigert and Kötz (1987), p. 52 ff. Consider also Hug (1931–1932), p. 1069; Siems (2018), p. 37.

[10]The influence of this school of though is reflected in more recent discussions of the nature and aims of the comparative study of laws. According to M. Rotondi, comparison is one of two methods (the other being the historical method) whose combination can give us a comprehensive knowledge of law as a universal social phenomenon. Legal science relies upon these methods in order to detect and construe the (natural) laws governing the evolution of this phenomenon. In searching for relations between different legal systems, or families of legal systems, one seeks to discover, to the extent that this is possible, certain stable features in this evolutionary process that may allow one to foreshadow future developments concerning the character and orientation of legal systems and branches of law. "Technique du droit dogmatique et droit compare", (1968) 20 (1) *Revue internationale de droit comparé*, 13. And according to H. E. Yntema, comparative law, following the tradition of the *ius commune* (*droit commun*), as an expression of the deep-rooted humanist vision concerning the universality of justice, and based on the study of historical phenomena, seeks to discover and construe in a rational way (*en termes rationnels*) the common elements of human experience relating to law and justice. In the world today, the primary task of comparative law is to elucidate the conditions under which economic and technological development can take place within the framework of the Rule of Law. "Le droit comparé et l' humanisme", (1958) 10 (4) *Revue internationale de droit comparé*, 698. According to G. del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." "L' unité de l' esprit humain comme base de la comparaison juridique", (1950) 2 (4) *Revue internationale de droit comparé*, 688. See also Bernhöft (1878), pp. 36–37. And see Rothacker (1957), p. 17.

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

4.2 Pioneers of Comparative Law in Germany

In the fifteenth century, the problems generated by the fragmented nature of the law in Germany became intolerable as commercial transactions proliferated between the different territories.[11] Local custom was no longer adequate to meet the needs of a rapidly changing society, and the weakness of the imperial government meant the unification of the customary law by legislative action alone was unthinkable. If a common body of law could not be developed on the basis of Germanic sources, another system offered a readily available alternative, namely Roman law. This idea found support in the newly established German universities, where the teaching of law was based exclusively on Roman and canonical sources whilst Germanic customary law was largely ignored. German jurists regarded Roman law as superior to the native law and existing in force both as written law (*ius scriptum*) by virtue of the imperial tradition and as written reason (*ratio scripta*) due to its inherent value. By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[12] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence.[13] In some parts of Germany (such as Saxony), Germanic customary law survived and certain institutions of Germanic origin were retained in the legislation of local princes and city-states. Legal practitioners and jurists from the sixteenth to the eighteenth century executed the process of moulding into one system

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

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

[13]The Roman law that was received embodied the Roman law of Justinian, especially the Digest or Pandects, as interpreted and modified by the Glossators and the Commentators. This body of law was further modified by German jurists to fit the conditions of the times and thereby a Germanic element was introduced into what remained a basically Roman structure.

Roman and Germanic law. This process led to the development of a new approach to the analysis and interpretation of Roman law—an approach known as *Usus modernus Pandectarum* ('modern application of the Pandects/Digest').[14]

In the early years of the nineteenth century the French Civil Code enacted under Napoleon in 1804 attracted a great deal of attention in Germany and parts of the country adopted this law as Napoleon extended his rule over Europe. The rise of German nationalism during the wars of independence compelled many scholars to express the need for the introduction of a uniform code of law for Germany to unite the country under one modern system of law and precipitate the process of its political unification. In 1814, Anton Friedrich Justus Thibaut (1772–1840), a professor of Roman law at Heidelberg University, declared this view in a pamphlet entitled 'On the Necessity for a General Civil Code for Germany'.[15] Thibaut, a representative of the natural law movement, claimed that the existing French, Prussian and Austrian civil codes could serve as useful models for the German draftsmen. However, Thibaut's proposals encountered strong opposition from the members of the Historical School, headed by the influential jurist Friedrich Carl von Savigny (1779–1861).[16] Proceeding from the idea that law is primarily a product of the history and culture of a people and a manifestation of national consciousness (*Volksgeist*), Savigny argued that the introduction of a German Code should be postponed until both the historical circumstances that moulded the law in Germany were fully understood and the needs of the present environment were properly assessed.[17]

The influence of the Historical School and, perhaps more importantly, the lack of an effective central government, resulted in the abandonment of the early proposals for codification. At the same time, scholarly attention shifted from the largely ahistorical natural law approach to the historical examination of the two main sources of the law that applied in Germany, namely Roman law and Germanic law, in order to develop a true science of law. A group of scholars focused on the study of Germanic law, whilst others (including Savigny) concentrated on the study

[14]The term *Usus modernus Pandectarum* implies that the jurists' purpose was to apply the Roman legal texts in contemporary legal practice. These jurists may to some extent have been influenced by the work of the Humanist scholars of the sixteenth and seventeenth centuries, but they tended to use the Roman texts ahistorically, as just another source of legal norms. However, there was no general agreement among jurists as to which texts actually applied. Leading representatives of this movement include Samuel Stryk (1640–1710), a professor at Frankfurt a.d. Oder, Wittenberg and Halle; Georg Adam Struve (1619–1692); Ulric Huber (1636–1694); Cornelis van Bynkershoek (1673–1743); Arnoldus Vinnius (1588–1657); Gerard Noodt (1647–1725); and Johannes Voet (1647–1713).

[15]Thibaut (1814), pp. 1–32; and see: *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg 1814).

[16]Savigny founded the School in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781–1854).

[17]Savigny elaborated his thesis in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science' (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg 1814).

of Roman law and explored beyond the *ius commune* into the *Corpus Iuris Civilis* and other ancient sources. The latter jurists set themselves the task of studying Roman law to expose its 'latent system', which could be adapted to the needs and conditions of their own society. In executing this task, these jurists (designated Pandectists) elevated the study of the *Corpus Iuris Civilis* and especially Justinian's Digest to its highest level.[18] They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany. The new German civil law, that was finally embodied in the Civil Code (*Burgerliches Gesetzbuch* or BGB) of 1900, was largely the product of the work of the Pandectists. Extra-Pandectist sources exercised little influence on this law, despite the presence of diverse legal systems and law codes (such as the French Civil Code) in German territory, and notwithstanding the considerable amount of comparative law research that preceded the publication of the BGB. Indeed, from the beginning, the study of civil law in Germany has been a largely national affair built upon the *Pandektenrecht*.

The dominance of the Historical School and the conceptual jurisprudence of the Pandectists in nineteenth century German legal thought account for the relative neglect of comparative law in Germany, especially during the period 1840–1870.[19] In the early years of that century, comparative law attracted the interest of a number of jurists, the most eminent of whom was Eduard Gans (1798–1839),[20] who studied law at Berlin, Göttingen and finally Heidelberg, where he attended Hegel's lectures and became thoroughly imbued with the principles of Hegelian philosophy. In his influential work on the law of inheritance,[21] Gans attempted a comparison of a diversity of legal systems (including Ancient Greek and Roman, Scandinavian, Scottish, Portuguese, Chinese, Indian, Hebrew and Islamic)

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

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

[20]Gans is said to be the founder of German comparative law. Consider on this Franklin (1954), p. 141.

[21]Gans (1824–1835).

in the spirit of *Universalrechtsgeschichte* or Universal History of Law. From a philosophical standpoint, the origins of German comparative law can be traced to the work of Hegel, especially his notion of the variety and asymmetry of human civilizations and their constituent institutions, such as law and ethics.[22]

A revival of interest in comparative law occurred in the later part of the nineteenth century. This revival was triggered in part by a practical interest in the study of foreign laws for purposes of legislation and was connected with the movement for the codification and unification of the law in Germany.[23] Extensive comparative law research preceded the German Civil Code of 1900 and other enactments,[24] as well as legislative reforms in the field of criminal law. The rise of interest in comparative law during this period was associated also with a significant growth in historical, sociological and anthropological scholarship. Of particular importance was the rise of ethnological jurisprudence, a field of study combining the perspectives of ethnology and comparative law and concerned with discovering "the origins and early stages of law in relation to particular cultural phenomena."[25] Leading representatives of this field were Albert Hermann Post (1839–1895), Franz Bernhöft (1852–1933) and Josef Kohler (1849–1919).

Post's starting-point was the assumption that society is defined through the evolution of the law and its symbolic practices. If the legal order played a major part in shaping societal culture as a whole, as contemporary anthropologists

[22]According to Hegel, law and ethics are expressions of a historical evolution that is the manifestation of a national spirit, and the various national spirits in their entirety are manifestations of the world spirit. But Hegel's view of law must not be confused or equated with that of the Historical School as represented by Savigny. Although the Historical School, like Hegel, adopted the notion of national spirit, the use made of this concept was fundamentally different. Whereas in the Historical School theory it served as a rather nebulous unifying principle, providing a kind of a general bracket for the study of the development of legal institutions, the national spirit in Hegel's philosophy was given the function of expressing a universal freedom, a principle designated as the manifestation of the world spirit. Philosophy, Hegel says, "concerns itself only with the glory of the idea mirroring itself in the history of the world. [It] escapes to the calm region of contemplation from the weary strife of the passions that agitate the surface of society; that which interests it is the recognition of the process of development which the idea has passed through in realizing itself, the idea of freedom whose reality is the consciousness of freedom and nothing short of it." See Friedrich (1954), pp. 157–158.

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

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

[25]Adam (1958), p. 192. The new interest in ethnological jurisprudence and related matters was given a focus in the *Zeitschrift für Vergleichende Rechtswissenschaft*, founded in 1878.

recognized, then a historical approach to the study of law could engender a really scientific model of explanation only if it was able to integrate indigenous legal practices into a universal theory of legal evolution. The focus of Post's scholarly endeavours was the construction of a general science of law on an anthropological basis. He describes what he refers to as 'the universal law of mankind' in terms of diverse forms of social organization, on the grounds that the law is a function of 'social formations' brought about by the 'spirit' or 'mentality' of a people. The historical and comparative study of laws received a considerable impetus through ethnology, which Post describes as "that new science which deals with the life of all nations according to a method arising purely from natural sciences and which has embraced into its realm all peoples on earth."[26] According to him, comparative ethnology enabled jurists to discover "far-reaching parallels in the laws of all peoples on earth which could not be reduced to accidental correspondence, but which could only be regarded as emanations of the common nature of mankind."[27] Ethnological jurisprudence thus focuses on the discovery of those legal norms and institutions which can be found among all peoples of the world.[28] It should be noted that, although Post adopts a functional view of law as a product of a particular socio-psychological order, his work is concerned more with the systematic ordering of the bewildering multitude of customary laws than with explaining the evolution of legal systems.[29]

Another prominent figure in German ethnological jurisprudence was Franz Bernhöft, who, together with Georg Cohn, edited the first volume of the Journal of Comparative Jurisprudence (*Zeitschrift für Vergleichende Rechtswissenschaft*) in 1878.[30] Bernhöft stressed the importance of expanding the scope of comparative jurisprudence beyond the study of the Roman and Germanic legal systems, the focus of the German Historical School. A legal science based on consideration of these two systems alone would be incomplete, just as it would be incomplete a science of comparative linguistics based on the study of only two languages. Moreover, Bernhöft drew attention to the value of the comparative study of foreign laws as an aid to legislation and, in particular, the codification of law in Germany. But, for him, the ultimate aim of comparative jurisprudence was to bring to light the general laws governing the development of law and to apply them to the history of particular

[26] Post (1894), I, 2.

[27] Post (1894), I, 4.

[28] Post (1894), I, 7. Post views law as a universal phenomenon. "There is no people on earth without the beginnings of some law. Social life belongs to human nature and with every social life goes a law." Ibid., at 8.

[29] For an in-depth discussion of Post's work within the framework of nineteenth century scientific thinking consider Kiesow (1997).

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

nations.[31] It is important to note, however, that Bernhöft's definition of comparative jurisprudence did not extend beyond law in the strict sense of the word, i.e. positive law. From this viewpoint, customs may be seen as belonging to a merely preliminary stage in the development of law, and thus they could be considered only insofar as they have contributed to the formation of positive law.

The problematic distinction between peoples with and without law was called into question by Josef Kohler, who became editor of the above-mentioned *Zeitschrift für Vergleichende Rechtswissenschaft* in 1882. Although he had a distinguished career in legal practice as a judge and an expert in the fields of commercial and incorporeal law, Kohler was convinced that the scope of jurisprudence extended beyond practical problems and goals to the study of law as a social and cultural phenomenon.[32] His work in comparative law was at first concerned with the comparison between German law and the legal systems of other European states, as well as the United States. Furthermore, he examined the structure of legal orders in non-independent territories, mainly those under the protection of the German Reich (*Schutzgebieten*).[33] Although he initially adopted Post's theory of legal evolution, according to which the European legal systems represented the highest level of a 'natural' course of legal development, he later departed from it and recognized that law evolves in diverse ways as an interdependent element of the mental and material culture of a particular people.[34] He thus adopted the view that the construction of a 'universal' science and history of law would presuppose a broader study that would embrace the laws and customs of peoples from all parts of the world and consider the development of diverse legal institutions on a comparative basis. In his voluminous work, consisting of more than 2300 scientific publications (including books, articles and reviews), he describes and explores the laws of peoples in all corners of the earth.[35] In seeking to build the foundation of a truly

[31]In Bernhöft's words, "[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, for the idea of law." "Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft", (1878) 1 *Zeitschrift für vergleichende Rechtswissenschaft*, 1 at 36–37.

[32]See on this Grossfeld and Theusinger (2000), p. 696.

[33]Consider Grossfeld and Wilde (1994), p. 59.

[34]Nevertheless, he often expressed the view that non-European peoples should adopt and evolve according to the European model. See Grossfeld and Wilde (1994), p. 73.

[35]Of special interest are his works on the laws of indigenous peoples, such as the Indians, Aztecs and Papuans. In a well-known article on the law of the Australian Aborigines he expressed the view that these people, however 'primitive' their economic life may be, "possess law. They have legal institutions that are put under the sanction of the general public, for law exists before any organization of the state, before any court or any executory performance exists: it exists in the hearts of the people as a feeling of what should be and what should not be. . . .Although it may be left to the single individual to obtain justice for himself, and although there may be no possibility to obtain a formal decision on the question of right or wrong, law manifests itself in that the

universal science of law, he extended the scope of his inquiry to include as many societies as possible, no matter how 'primitive' or 'advanced' they may appear to have been. However, Kohler's scholarly efforts came up against serious problems resulting from the relative scarcity of reliable sources of information on the laws and customs of non-European peoples at the turn of the nineteenth century. In an attempt to address this problem, he sought the support of the German Imperial Government, and especially the branch of the Foreign Office (Auswärtiges Amt) dealing with indigenous peoples in German overseas territories. As there were no trained ethnologists among the German colonial officials who could supply the required information, Kohler resorted to the questionnaire method, which had first been applied in Germany for field research in ethnological jurisprudence by Albert Post. In 1897 he published his questionnaire that the German colonial administration sent out to all the German colonies. It contained 100 groups of questions pertaining to matters of criminal law, personal and family law, law of property and procedural law, and was designed to elicit answers on how such matters were dealt with by customary mechanisms at the community level.[36] Kohler organized the material contained in the relevant responses into six reports, which he published in the *Zeitschrift für Vergleichende Rechtswissenschaft* from 1900 onwards.

Kohler's work in ethnological jurisprudence was further developed by a number of distinguished scholars, most of whom shared his historical-comparative outlook, such as Richard Thurnwald (1869–1954), regarded as the founder of modern legal ethnology or, as it is otherwise called, anthropology of law; Leonhard Adam (1891–1960), editor of the *Zeitschrift für Vergleichende Rechtswissenschaft* from 1919 to 1938; and Hermann Trimborn (1901–1986). Thurnwald viewed law as a function of the conditions of life and mentality of a society that should be understood functionally in the context of a cultural system. He observed that in the relatively small communities of indigenous peoples the connection of law with other cultural functions is much closer than the one that exists in complex societies with a highly

community as a whole not only approves or disapproves of the act of the individual, but also supports the one who is believed to have justice on his side in his pursuance and exercise of law." "Über das Recht der Australneger", (1887) 7 *Zeitschrift für vergleichende Rechtswissenschaft* 7, 321. Consider also Kohler (1895), p. 1.

[36]See on this issue Grossfeld and Wilde (1994), p. 69. It should be noted that the questionnaire method, notwithstanding its advantages, was beset by a number of problems. Most of were derived from the fact that the questionnaire was prepared by jurists according to the categories of European law, which bore little or no affinity to the legal notions and practices of the indigenous peoples under consideration. This problem was further exacerbated by linguistic and communication difficulties. It is thus unsurprising that the answers received often bore little or no relation to the 'living law' of the people concerned. Kohler was aware of the limitations of the questionnaire method and thus insisted that a general description of the country and people in their ethnological and economic aspects, in particular with regard to their religion, language, history, tales and stories, should precede their answers to the juridical questions. See his "Fragebogen zur Erforschung der Rechtsverhältnisse der sogenannten Naturvölker, namentlich in den deutschen Kolonialländern", (1897) 12 *Zeitschrift für Vergleichende Rechtswissenschaft*, 427.

differentiated division of labour.[37] From this viewpoint, he stressed the great diversity of laws in indigenous societies—a diversity that reflects the variability of the cultural milieu in all its aspects.[38] Thurnwald's book titled *The Beginning, Change and Configuration of Law* (*Werden, Wandel und Gestaltung des Rechts*), represents an effort to cover in a systematic way the entire field of legal anthropology on a comparative basis.[39] Adam defined the subject of ethnological jurisprudence as lying between the disciplines of jurisprudence and ethnology, with its focus being on the laws and customs of non-European peoples.[40] His approach is elaborated in his work "Ethnological Jurisprudence" ("Ethnologische Rechtsforschung"), included in the *Textbook of Ethnology* (*Lehrbuch der Völkerkunde*), the third edition of which was edited by himself and Trimborn in 1958. According to Trimborn, ethnological jurisprudence constitutes an exclusively historical science and, as such, is part of a general or universal history of law.[41] In his well-known works on the laws and customs of pre-Columbian Peru he applied his cultural-historical method of ethnological jurisprudence to a concrete example.[42]

4.2.1 Ernst Rabel

The recognition of comparative law as an academic discipline in Germany was largely the result of the efforts of Ernst Rabel (1874–1955), regarded as one of the

[37]Thurnwald (1934), p. 2 ff.

[38]In view of this fact, Thurnwald argues that indigenous law "cannot be opposed to the law of peoples with higher civilizations as something uniform. . . .This follows from the mere fact that the political organization [of indigenous societies] shows a great diversity; from the homogenous democratic associations of hunting-and-gathering tribes, through the agglomeration of ethnic groups, to stratification according to descent and according to social and occupational characteristics, and from chieftainship without [formal] authority up to the sacred sovereign and the rationalistic despot." *Werden, Wandel und Gestaltung des Rechts im Lichte der Völkerforschung*, *Die menschliche Gesellschaft in ihren ethno-soziologischen Grundlagen*, Vol. 5, (Berlin 1934), 16.

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

[40]As Adam explains, "one should imagine jurisprudence and ethnology as two intersecting circles; the segment belonging to both circles constitutes ethnological jurisprudence. However, ethnological jurisprudence has hardly anything to do with legal dogmatics or with 'analytical jurisprudence' of the highly developed legal systems; therefore, it belongs predominantly to ethnology." "Ethnologische Rechtsforschung" in Adam and Trimborn (1958), p. 189, 190.

[41]See Trimborn (1928), p. 416, 420 ff.

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

world's most eminent legal comparatists.[43] Rabel was born and grew up in Vienna, where he was exposed to the artistic and intellectual movements that swept that city at the turn of the twentieth century. He studied law at the University of Vienna, where he was profoundly impressed by Ludwig Mitteis, a leading legal historian and expert in Roman law.[44] It was from Mitteis that Rabel learned the significance of the historical-comparative study of law and acquired the methodological tools with which he would engage the comparative study of legal systems.[45] After graduation, he worked as an apprentice in his father's law office and also completed his doctorate in law under the supervision of Mitteis. In 1899 Rabel followed Mitteis to Leipzig where, after he completed his *Habilitation* (1902), taught Roman law and German Private Law. In 1906 Rabel was appointed to a professorship in Basel, where he had the opportunity to familiarize himself with the new Swiss civil law. After Basel, his academic career took him to Kiel (1910), Göttingen (1911), Munich (1916)[46] and then to Berlin (1926), where he established the Kaiser Wilhelm Institute for Comparative and International Private Law.[47] Moreover, Rabel served as a judge both in Germany and at an international level. He was a member of the German-Italian Mixed Arbitral Tribunal (1921–1927), which heard reparation claims against the German Reich and private contract claims arising out of wartime conditions. Furthermore, he served as an ad hoc judge at the Permanent Court of International Justice in the Chorzow Cases (1925–1927) and as a member of the Permanent German-Italian (1928–1935) and German-Norwegian (1929–1936) Arbitral Commissions. This blend of German and foreign as well as academic and judicial experience shaped Rabel's work, which from an early stage utilized the comparative method. From 1927 to 1936 Rabel edited the Journal of Foreign and International Private Law (*Zeitschrift für ausländisches und internationales Privatrecht*), which now bears his name, and produced a number of important comparative law works, especially in the field of the law of sales. In 1928 he proposed to the League of Nations' Institute for the Unification of Private Law (now UNIDROIT) that it adopt the unification of the law of international sales of goods as one of its principal projects. The Institute entrusted Rabel and his colleagues at the Berlin Institute for Comparative and International Private Law with the task of carrying out an extensive

[43]See Rheinstein (1956), p. 185.

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

[45]See on this Gerber (2001), p 190, 192.

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

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

comparative law investigation with a view to developing a uniform sale of goods law for worldwide application. The first draft of this law was published in 1935. A year later, Rabel published the first volume of his seminal work *Das Recht des Warenkaufs* (The Law of the Sale of Goods), which provided a comprehensive analysis of his findings in this field.

Rabel's career took a downward trend after the National Socialists came to power in 1933. Since he was of Jewish descent, he became target of the new regime, which stripped him of certain positions he held, including the directorship of the Kaiser Wilhelm Institute, and prohibited him from publishing scholarly works. To escape persecution, he immigrated to the United States in 1939 (at the age of 65) and continued his work as a research scholar with the support of the American Law Institute. On behalf of this Institute, he authored a monumental work in four volumes titled "The Conflict of Laws: A Comparative Study," a true masterpiece lying at the intersection of comparative law and private international law.[48] He also held research positions at the University of Michigan Law School, which published his "Conflict of Laws" as part of its Legal Studies series,[49] and Harvard University, where he completed the fourth volume of the above-mentioned work. With the exception of his treatise on the conflict of laws, Rabel's comparative law scholarship in English is not very extensive. Nevertheless, he made a significant contribution to the development of comparative law and conflict of laws studies in the United States and some of his students, such as Max Rheinstein and Friedrich Kessler, became leading figures in the field of comparative law in that country.[50] In 1950 Rabel returned to Germany and lived in Tübingen, where he was made honorary professor at the local university. He also spent some time at the Free University of Berlin, which appointed him professor emeritus.[51]

Rabel's scholarship extends over a wide range of topics: Roman law, Egyptian papyrology, German legal history, private law, public international law, private international law and, above all, comparative law. He believed that comparative law could provide a large palette of tools for the resolution of fundamental legal problems facing Europe, in general, and Germany, in particular.[52] He saw comparative law as having three distinct though interconnected aspects: the first aspect is concerned with the historical evolution of legal systems and the interrelations

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

[49]During his stay at this university he received advice and editorial assistance from Hessel Yntema, a distinguished comparative law scholar, and other members of the Law School. See Thieme (1986), pp. 251, 268.

[50]See Gerber (2001), pp. 190, 207–208. Both Rheinstein and Kessler immigrated to the United States after the National Socialists came to power in Germany. The former was appointed professor of law at the University of Chicago, and the latter held a professorship at Yale University.

[51]For a closer look at Rabel's career see: Kegel (1990), p. 1; Kleinheyer and Schröder (1983), p. 346 ff; Rheinstein (1956), p. 185.

[52]See Thieme (1986), pp. 251, 305.

between them[53]; the second aspect pertains to the study of contemporary legal orders and the elucidation of their differences[54]; and the third aspect, combining legal history, jurisprudence and philosophy of law, seeks to bring to light profound truths about the development and social impact of laws.[55] However, Rabel never fully developed the third aspect of comparative law.

Rabel maintained that the principal goal of comparative law is 'pure science.' Its centrality lay in the fact that all specific uses of comparative law, as a form of 'applied' science, flow from it. Although he was never very precise about what he meant by 'science', often he seems to construe the term broadly as the self-conscious and disciplined search for knowledge (*Erkenntnis*). For him, the subject of the relevant scientific inquiry is the legal rule (*Rechtssatz*).[56] As he explains, "legal comparison means that the legal rules of one state (or other law-prescribing community) are analyzed in connection with those of another legal order or a number of legal orders from the past and the present."[57] Although Rabel viewed comparative law as a science, he also stressed the practical utility of its methods. This combination of the academic and practical aspects of comparative law shaped his approach and also distinguished it from those of past and contemporary comparatists. Rabel sought to develop methods and tools that would enable lawyers to better understand the foreign legal problems they faced and respond to them effectively. His scholarly endeavours were also directed at encouraging students to immerse themselves in the details of specific legal situations and thereby gain valuable knowledge of how such situations were dealt with in diverse legal systems. Moreover, his methods were aimed at producing better law through the clarification of the concepts of legal language and the improvement of the solutions to societal problems available to decision makers. It is important to note here that for Rabel the formal language of

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

[54]This was the focus of his research after 1916.

[55]In a paper published in 1919, Rabel remarked that this third aspect "penetrated philosophy, where historical and systematic legal science, together with legal philosophy, examine the deepest issues of the evolution and impact of law." "Das Institut für Rechtsvergleichung an der Universität München", (1919) 15 *Zeitschrift für Rechtspflege in Bayern*, 2. In an article discussing the reach and functions of comparative law, Rabel remarks that "the subject matter of thinking about legal problems must be the law of the entire world, past and present, the law's interrelation with soil, climate and race, with the historical destiny of peoples (war, revolution, the formation of states, subjugation), with religious and ethical beliefs, the ambition and creativity of individuals; the needs of production and consumption; the interests of strata, parties, classes. Intellectual trends of every kind are at work . . .the congruity of adapted paths of law, and not least the search for an ideal state and an ideal law. All of these are mutually dependent in social, economic and legal design. The law of every developed people dazzles and trembles under the sun and the wind in a thousand hues. All these vibrating bodies together form a whole which nobody has yet perceived and understood." "Aufgabe und Notwendigkeit der Rechtsvergleichung", (1924) 13 *Rheinische Zeitschrift für Zivil- und Prozessrecht*, 279, 283.

[56]The term *Rechtssatz* does not have a direct translation in English. The closest translation is probably 'legal rule,' understood here in the broader sense of 'authoritative legal proposition'. See Rabel (1937), pp. 77–190.

[57]Rabel (1924), pp. 279, 280.

legal rules and principles divulged little about how problems are actually solved and thus reliance on language alone is likely to obscure rather than shed light on what is happening. The correct way to acquire information about a foreign legal system is to ask how the relevant rules and principles related to and addressed a concrete factual situation. In this way, Rabel shifted the methodological focus of comparative law to the specific societal functions of rules and thus laid the foundations of what is now regarded as the basic methodological principle of comparative law, namely, the principle of functionality.[58]

4.3 The Origins of Comparative Law in England

During the nineteenth century, Great Britain was a major colonial power that embraced a great variety of peoples and places and about a quarter of the globe's population. The Judicial Committee of the Privy Council, sitting in London, operated as the highest court of appeal for all countries and territories of the British Empire. Apart from dealing with appeals from other common law jurisdictions, this court heard appeals from jurisdictions applying Hindu and Islamic laws (India); Singalese and Tamil laws (Ceylon); Chinese law (Hong Kong, the Malay States, Sarawak and Borneo); Roman-Dutch law (Ceylon, South Africa and Rhodesia); elements of the French Napoleonic Code embodied in the Canadian Civil Code of 1866 (Quebec); Norman customs (The Channel Islands); and Asian and African customary laws. It should be noted here that, according to the English model of colonial governance, imperial control was indirect and existing local laws and customs remained in force, except to the extent they were specifically displaced by English legislation (this occurred mainly in the fields of public and criminal law).[59]

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[58]See relevant discussion in Chap. 5 below. It should be noted that, although Rabel often emphasizes the importance of method, in the broad sense of a carefully devised plan about how one achieves a set of goals, he did not elaborate a detailed methodology. What he proposes as a methodology consists of some generally defined principles that would serve the goals of comparative law as he identified them. In form, his methodology has many elements in common with the historicist methodology in the social sciences that prevailed in Germany from the 1880s until the First World War. From this viewpoint, 'method' was a matter of in-depth examination of trends and patterns in the evolution of society and economy and not a matter of theoretical construction of methodological principles. Consider on this D. J. Gerber, "Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language", in Riles (2001), pp. 198–199. On the development of comparative law in Germany consider Schwenzer (2019), p. 54.

[59]Although indigenous legal systems continued to apply, they were in the course of time profoundly influenced by English law. The same occurred in countries under the control of other Western colonial powers, such as France and Holland. On the issue of Western legal expansion see Mommsen and de Moor (1992), Benton (2002). Where settlement took place in lands of no previous settlement (a rather curious notion), English (or Western) law was taken to be imported with the settlers themselves. When this occurred, indigenous populations and local laws were essentially ignored, for purposes of establishing a territorial law, by almost all European powers, including England.

Under these circumstances, there was a need for "a more ready access to the sources from whence an acquaintance might be derived with those systems of foreign jurisprudence, which [were] most frequently presented to the consideration of an English tribunal."[60]

Among the earliest attempts at applying the comparative method to practical aspects of law are Burge's *Commentaries on Colonial and Foreign Laws*, written for legal practitioners and published in 1838[61]; and Levi's *Commercial Law* (1852), an extensive treatise comparing the commercial laws of Britain with the laws and codes of other mercantile countries, including those of ancient Rome.[62] In 1848, the House of Commons' Select Committee proposed that Chairs in international, comparative, administrative and English law should be established at the universities, but it was some years before this proposal was implemented. By the late nineteenth century, as the common law became entrenched, now in its larger Commonwealth existence, comparative law came to be recognized as a form of science, even though it never acquired the profound scientific character of its Continental counterpart.[63]

4.3.1 Henry Maine

Of particular importance to the development of comparative law in England was Sir Henry Maine's work on the laws of ancient peoples (*Ancient Law*, 1861), wherein the author applied the comparative method to the study of the origins of law that Charles Darwin had employed in his *Origin of the Species* (1859). Maine (1822–1888), the founder of the English historical school of law, was born in

[60]Burge (1838), p. v.

[61]Burge (1838). According to Rabel, the range and quality of Burge's work made it useful as a substitute for a basic text on comparative private law.

[62]Leone Levi, *Commercial law, its principles and administration, or, The mercantile law of Great Britain: compared with the codes and laws of commerce of the following mercantile countries: Anhalt, Austria ... Wurtemburg, and the Institutes of Justinian*, (London 1850–1852). See also L. Levi, *Commercial Law of the World* (London 1854). It should be noted that Levi was one of the first scholars in the English-speaking world to propose the international unification of commercial law through the method of comparative law. His treatise is illustrative of the belief shared by most comparatists at that time that legal convergence was both the inevitable and desirable outcome of economic globalization. As Levi put it, "to bring these separate rules into contact with each other, and to study these great monuments of legislation and philosophical research, will furnish materials for arriving at those universal principles which form the common law for all nations. In an epoch when commercial relations embrace the greatest public and private interests, when nationalities are all but blended into each other, when work, improvement, and welfare are all-prevailing ideas; and when the rapidity of communication demands in a corresponding degree security and protection; the revision of the laws, statutes, usages, and customs of all countries becomes imperative. As nations approach one another, each is enabled to profit by the common experience; and it is of the utmost importance to watch carefully all innovations, and to mark the reason and the starting point of all essential and permanent progress." *Commercial law, its principles and administration,* ibid. vii.

[63]See on this matter, Gutteridge (1949).

Scotland and was educated at Cambridge University. After his graduation in 1844 he accepted the position of tutor at Trinity College, a position he held until he was appointed professor of civil law at Cambridge in 1847. In 1850 he was called to the bar and 2 years later accepted appointment as reader in Roman law and jurisprudence at the Inns of Court. He also served for some years as legal member of the council of the viceroy of India (1863–1869) and as vice-chancellor of the University of Calcutta. After his return to England in 1869, he was appointed to the chair of historical and comparative jurisprudence at the University of Oxford. He held this position until 1877, when he was elected master of Trinity Hall Cambridge and ended his career as professor of international law at Cambridge.

Maine was among the first scholars to argue that law and legal institutions must be studied historically if they are to be properly understood.[64] In his *Ancient Law* he proposed what may be described as an evolutionary theory of law, complete with a pattern of growth to which all systems, though geographically or chronologically so remote from one another as to exclude the possibility of extraneous influence, could be shown to conform. By drawing on knowledge of Greek, Roman, biblical and other ancient legal systems, as well as on native institutions of contemporary India, he reached the conclusion that different societies tend to develop, so far as their legal life is concerned, by passing through certain stages that are the same everywhere. He asserted that the earliest stage was in one sense pre-legal: king-priests uttered judgments about actual disputes, which contained a strong religious element. The next stage involved the crystallizing of these judgments into custom, of which the oligarchies that had succeeded the early monarchs acted as custodians. The third stage, usually associated with a popular movement to overcome the oligarchic monopoly of expounding the law, is that of the codes.[65] At this point some societies cease to progress further, since their legal institutions are unable to evolve new dimensions beyond the bounds of their petrified codes. These societies, which Maine called 'static,' are contrasted with the 'dynamic' ones, i.e. those societies that had the ability to adapt their legal systems to novel circumstances. To meet the needs derived from such circumstances, the latter societies employ three mechanisms of change, namely, fictions, equity and legislation. Although Maine's scheme has been found by later scholars to rest on evidence too weak to support such far-reaching generalizations, some of his insights have been particularly enlightening. Probably the most celebrated of them is his view of the way in which dynamic or progressive societies evolve:

[64]As commentators have observed, Maine's approach reflects the influence of Carl von Savigny's theory of the genesis and foundation of law, as well as the current interest in evolution, triggered by the publication of Charles Darwin's masterpiece *The Origin of Species* in 1859. A further, remoter influence has been Hegel's philosophy of history, which might have suggested to Maine the notion of uniform principles of development. See Stone (1966), p. 120. And see Janssen (2000), pp. 164–165.

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

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

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

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

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

[66] *Ancient Law* (London, New York and Toronto 1931, repr. 1946), 139–140.

[67] See, e.g., Janssen (2000), p. 168.

[68] See Janssen, ibid., at 166.

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

In 1894, a Chair of Legal History and Comparative Law was founded at the University College, London and shortly afterwards the English Society of Comparative Legislation was established, which meant that there were now a number of similar societies on both sides of the Channel. Apart from the establishment of research institutes, scholarly journals and a national committee on comparative law, a positive parliamentary initiative designed to encourage the comparative study of laws occurred in 1965, with the enactment of the Law Commissions Act. This Act created two law reform commissions, an English and a Scottish Law Commission, whose function is, among other things, to obtain information from foreign legal systems, as appears likely to facilitate their function of systematically developing and reforming the law.[70] A further stimulus for comparative legal studies to take place occurred when Great Britain joined the European Community (EC) on 1 January 1973.[71]

4.4 Legal Thinking and the Growth of Comparative Law in France

Nineteenth century French legal scholarship has contributed significantly to the rise of modern comparative law. Special reference should be made here to a group of jurists (referred to as *juristes inquiets* or 'anxious jurists') who, despite their political differences, shared a common concern (*inquiétude*) about the growing discrepancy between the formalism and extreme conceptualism of the traditional legal system and a rapidly changing social reality. Among the principal representatives of this group were Raymond Saleilles (1855–1912) and François Gény (1861–1959). Important turning-points in the development of comparative law in France include the establishment of a chair of comparative legal history at the College of France in 1831; the creation of a chair of comparative criminal law at the University of Paris in 1846; and the founding of the French Society of Comparative Legislation (*Société*

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

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

[71]On the growth of comparative law in Great Britain see Cairns (2019), p. 111.

française de législation comparée) in Paris in 1869.[72] In 1876 the French Ministry of Justice set up an office of foreign and international law (*Office de législation étrangère et de droit international*), which employed the comparative method in the investigation of problems of private international law. In the 1890s comparative civil law began to be taught in Paris,[73] and in 1900 the first International Congress of Comparative Law was organized by Raymond Saleilles and Édouard Lambert in the context of the Paris World Fair.

Raymond Saleilles initially taught legal history at the Universities of Grenoble (1884) and Dijon (1885–1895). In 1895 he moved to Paris where he first held the chair of comparative criminal law and afterwards the newly created chair of comparative civil law.[74] Saleilles was able to introduce French jurists to the laws and legal cultures of diverse countries and thus made a significant contribution to the advancement of comparative law in his country. He viewed comparative law as an important methodological tool and, at the same time, as a means by which one could illuminate law as a social and historical phenomenon transcending national boundaries. Moreover, he believed that familiarity with a range of legal systems and their processes of development makes possible a more complete understanding of one's own legal system and opens up new and unsuspected possibilities for both national legislators and judges in dealing with concrete legal problems.[75]

Saleilles was familiar with several civil law and common law systems, but was particularly conversant with German legal thinking, especially the spirit and methodology of the German Historical School, which he introduced in France through his teaching and extensive writings.[76] According to him, the Historical School was successful in demonstrating that law evolved through adaptation of legal rules and principles to the demands of social reality. In this respect, the judiciary is entrusted with the important function of adjusting the law to constantly changing socio-economic conditions.[77] Saleilles believed, further, that changes in the field of law reflected also the interests of and ongoing conflicts among diverse social, economic and political groups according to what he saw as 'laws of evolution'.[78] A defining moment in the development of his thought—a moment at which he recognized the

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

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

[74]For an overview of Saleilles career consider Gaudemet (1912), p. 161; Beudant et al. (1914).

[75]See Saleilles (1905), p. 68 ff.

[76]Reference may be made here to his *Essai d'une théorie générale de l'obligation d'après le projet de code civil allemand*, which appeared in 1890, and his *De la déclaration de volonté: contribution à l'étude de l'acte juridique dans le Code civil allemand*, published in 1901. In 1901 Saleilles commenced work on an annotated translation of the German Civil Code (BGB).

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

[78]See Saleilles (1902), pp. 80, 94–95.

inadequacy of the socio-historical determinism of the German Historical School—came with his realization that the relation between social reality and legal institutions was not merely a relation of cause and effect. Rather, legal institutions were unavoidably value-laden, and as such they had to correspond not only to material interests and related conflicts in society, but also to prevailing ideals and values. However, ideals and values exhibit an internal logic and consistency and, as a consequence, legal institutions are not simply determined by social forces, but themselves help to shape the social value system. Furthermore, Saleilles dismissed the rigid dogmatism and exaggerated conceptualism of the German Historical School, which he criticized for neglecting fundamental principles of justice and equity in favour of logical abstraction and the correct reckoning with conceptions.[79] This approach reflects the position of the circle of the French *Juristes Inquiets*, of which Saleilles was a leading member.

The *juristes inquiets* emerged in late nineteenth century, a period that saw the culmination of the industrial revolution that had begun in the eighteenth century; the consolidation of capitalism and the free market economic system; the growth of new technologies and methods of production; the expansion of the factory system; and the rapid growth of population in urban centres. These developments were accompanied by the rise of a new social class of wage labourers who were engaged in industrial production, the proletariat. The living conditions of the working masses were extremely harsh, while the gap between them and the wealthy capitalist class continued to grow. Under these circumstances, social and political conflicts frequently broke out, as society struggled to come to terms with problems that ensued from the unequal distribution of wealth and the rise of corporate cartels, unemployment, economic depression and urbanization. In this context of rapid socio-economic change, many jurists believed that the traditional legal system was incapable of keeping up with social reality and of producing credible solutions. The term *juristes inquiets* was introduced by Paul Cuche, a professor of law at the University of Grenoble, who in 1929 stated that the 'inquietude' of that period derived from the discordance between the fundamental concepts of law, expressing the individualism of the old regime, and the emerging interest in solidarity, which arose from the changing social and political conditions.[80]

By proposing a series of changes capable of addressing the growing imbalance between the legal system and social reality, the *juristes inquiets* hoped to prevent social rebellion and avoid the coming of socialism, which they regarded as a form of nihilistic anarchism or equated with the desire to place society under the absolute control of the state.[81] Thus, starting from the assumption that both freedom and regulation amounted to forms of state intervention, Saleilles sought to advance

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

[80] Cuche (1929), p. 57. On a political level, the movement of the *juristes inquiets* comprised a rather heterogeneous assortment of ideological affiliations.

[81] See on this Arnaud (1975).

solutions which preserved a minimum of individualism while still promoting social reforms grounded on the notion of mutual collective assistance. To accomplish their goals, the *juristes inquiets* devised the concept of French legal classicism or Exegetic School (*École de l'exégèse*),[82] which they used as a basis for explaining how nineteenth century French jurists approached the law. Although the nineteenth century jurists said to belong to this school never believed that they shared a common ideology or method, they tended to recognize that legislation, as the incarnation of the state, furnished both the substantive norms and the institutional mechanisms that were necessary to arrive at the correct solution to any legal problem.[83]

According to the *juristes inquiets*, the legal formalism of the *École de l'exégèse* manifested itself in the sphere of private law in two main ways. First, it was argued that the members of this school proceeded from the erroneous premise that the civil code constituted a complete legal system in which all analytically derived propositions had been integrated into an internally coherent and gapless body of rules.[84] This way of looking at the legal system prompted them to reject the notion that contradictory results could potentially be attained, for recognition of this possibility entailed the risk of indeterminacy and uncertainty within the legal order. The *juristes inquiets* sought to demonstrate that the formalism of the *École de l'exégèse* had overestimated the ability of legal abstractions to produce clear and indisputable outcomes, and proposed as an alternative a 'sociologically' minded jurisprudence.[85]

[82]The term *École de l'exégèse* was introduced in 1904 by E. Glasson on the centennial anniversary of the promulgation of the French Civil Code and was made widely known through the works of J. Bonnecase who, however, recognized that the relevant school of thought had been in existence from the early nineteenth century. See Bonnecase (1929), pp. 359, 366. And see Hakim (2002).

[83]For a closer look see Belleau (1997), pp. 379, 383 ff.

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

[85]The *juristes inquiets* rejected the notion that one could solve any legal problem simply by literally applying the language of the civil code to a given factual situation on three grounds: the limitations of language—it was inherent in the nature of language in general and legislative language in particular that it would often be unclear or ambiguous; the foreseeability of future situations—legislation could neither be universal nor timeless for it could not foresee all possible events or future changes; and the consequences of legislative void—the classical claim that the intent of the legislator was that whatever the Code did not explicitly prohibit it meant to permit was nonsensical and circular. For a close look see Belleau (1997), pp. 379, 383 ff.

Second, the *juristes inquiets* asserted that the jurisprudence of the *École de l'exégèse* supported an individualist ethic that tended to sacrifice collective interests in favour of ideologically conservative legal doctrines. In its place, they proposed the 'social' as the basis for a substantive agenda for dealing with the exaggerated individualism of private law. The *juristes inquiets* endeavoured to show that in many cases the method of the *École de l'exégèse* was incapable of producing unequivocal results, and that the classicists' claim to be able to resolve legal problems by relying on a logically necessary induction of 'constructs' was false. They argued that the process of constructing 'constructs' was largely subjective and guided by extra-juristic considerations rather than pure logic.[86]

The *juristes inquiets* made a significant contribution to the development of legal thought not only in France but also in countries belonging to the common law family. It is noted, in particular, that their critical views on what they portrayed as a rigidly formal and positivist legal classicist school are reflected in the thinking of the advocates of American legal realism and sociological jurisprudence, such as Roscoe Pound, Benjamin Cardozo and Morris Cohen.[87]

4.4.1 The Paris International Congress of Comparative Law of 1900

An important landmark in the development of modern comparative law was the International Congress of Comparative Law organized by the French Society of Comparative Legislation (*Société française de législation comparée*) and held in Paris from July 31 to August 4 1900, during the Paris World Fair and the International Congress of Higher Education. The Congress regulations prepared by the Society divided the program into six sections, with the greatest emphasis being placed on general theory and method,[88] and selected French as the official Congress language.[89] The French jurist Édouard Lambert, a former student of Raymond Saleilles[90] and professor at the Faculty of Law at Lyon, was entrusted with the task of elaborating the theoretical and methodological aspects of the new discipline.

[86]For a critical view of the *juristes inquiets'* argument consider Jamin (2000), pp. 733, 736. See also Engle (1997), pp. 359, 363.

[87]Consider, e.g., Pound (1908), pp. 605, 611–612; Cardozo (1925), pp. 103, 105; Cohen (1933), pp. 553, 575–578.

[88]Article 8.

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

[90]As Lambert's doctoral supervisor, Saleilles had introduced the former to the *juristes inquiets*' movement and their jurisprudential critique of the *École de l'exégèse.* As a member of this group of jurists, Lambert appears to have adopted a much more radical stand in the common project of

The Congress was declared to have four principal objectives.[91] First, from the viewpoint of comparative legal science, it would determine the methods that were most appropriate to use in analyzing diverse systems of legislation. Comparative law deals with this task in three stages, namely, observation, comparison, and adaptation. Observation proceeds from the thesis that the legislative text is nothing without interpretation, and that interpretation itself is nothing without consequences. Comparative law thus must look beyond the letter of the law in order to bring to light those consequences. At the second stage, comparative law examines the rational rapprochement among diverse systems of national legislation, considering their technical-juridical forms and concepts as well as their practical implications. In light of this analysis, a predominant type can then be singled out and used as a model for other national legislatures. At the third stage, comparative law adapts the selected model to national, social, and environmental conditions and significant cultural traditions. At this stage of the process it is difficult to formulate in advance any clearly defined general laws. Here, historical knowledge can play an important supplementary role to comparative law. Such knowledge is particularly useful in identifying examples of inadequate legislation and artificial adaptations, as well as in illuminating the conditions and methods that enable legislation to be successfully integrated into existing national law and the life of a people. These techniques can also be utilized to develop new theoretical models and justify the legitimacy of judicial construction of legal rules. When applied to legislation, legal doctrine and judicial interpretation the above-mentioned three stages of comparative law might lead, at least in part, to the development of a 'common law of civilized mankind' ('*droit commun de l'humanite civilisee*').

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

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

Édouard Lambert presented the report on general theory and method for the first part of the Congress. He also summarized reports that drew attention to the importance of foreign law translations, especially for lawyers engaged in matters of private international law. It was recognized, however, that although translation work

critique. This stand is reflected in his assessment of François Gény's influential treatise *Méthode d'interprétation et sources en droit privé positif* (1899), which he criticizes as much too restrained in its attack on the conceptualism of the *École de l'exégèse* and as "not daring . . .to rebel openly against the dogma of law's fixity." See Lambert (1900), pp. 216, 230.

[91] These objectives were stated in a report prepared by Saleilles and addressed to the organizing commission of the Congress. See Saleilles (1900), pp. 228–236.

constitutes an important prerequisite of legal comparison, comparative law required much more than mere knowledge of foreign law.

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

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

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

> [C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.[92]

Lambert also referred to the issue of legal education reform, arguing that the teaching of comparative law should be given the same attention as that of domestic civil law, since the only way to understand living law is to bring to light its historical

[92]"Conception générale et definition de la science du droit comparé", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, (1905–1907), I, 26.

development, its conceptual affinity with the laws of neighbouring countries and the social and economic reasons that justify its rules.[93]

Raymond Saleilles, commenting on the general meaning and definition of comparative law and in the final report that he delivered at the Congress' closing session, expressed the view that comparative law could conceptually be approached in two different ways. First, it could be regarded as a subsidiary science to each branch of law. In this respect, as far as national legislation is concerned, the primary task of comparative lawyers would be to study foreign laws with a view to formulating proposals for the adoption of 'better' enactments or the improvement of existing domestic legislation.[94] This goal could be accomplished either through scholarly doctrine, disseminated by means of legal instruction and scholarly publications, or through judicial interpretation embodied in published court decisions. Second, comparative law could be viewed as an independent science with its own objectives, rules of operation and methods. Saleilles observed that there is a general and gradual convergence in legal evolution around the world and pointed out that history and sociology offer useful insights for comparative law methodology. As an independent discipline, comparative law is concerned not with what law should be, but with discovering fundamental similarities among diverse national legal systems. In Saleille's words: "[the goal of comparative law] should be to retrieve from the mass of particular legal institutions a common fund, that is the points of rapprochement that may be discovered from apparently diverse elements. These points constitute the essential identity of universal legal life."[95]

The principal difference between Saleilles and Lambert is that, according to the former, one can detect a common basis in all civilized peoples (*fond commun de l'humanité civilisée*), which could replace the old concept of natural law. Saleilles asserted that the detailed study of all legal systems, from all times and in all places, would reveal the general laws explaining the rise, development and demise of legal institutions. Lambert, on the other hand, denied that universal and eternal laws could be discovered and embraced the view that comparative legislation (*législation comparée*) could only reveal a common basis for those countries that had attained a similar level of social and economic development. Thus, according to him, for the discovery of a 'common legislative law' (*droit commun législatif*) it was sufficient to study existing legal systems at such a level of development.[96]

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

[94]According to Jamin, both Saleilles and Lambert saw comparative law as the principal means for the renewal and enhancement of French legal thought. See Jamin (2000), pp. 733, 743. Consider also Jamin (2002), p. 701.

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

[96]It should be noted, in this connection, that Lambert regarded the codification of law as a mark of a legal system at a high level of development. It is thus unsurprising that he expressed doubts as to

According to Saleilles, the distinct science of comparative law would analyze the law-making function in three stages. At the first stage it would critically examine each selected foreign enactment from a social and economic perspective. At the second stage, it would seek to discover common elements susceptible to an evolutionary process observable in many countries. Finally, at the third stage, it would attempt to determine one or more 'ideal forms' for a given legal institution, which would inform and direct the development of legal policy of diverse nations with similar social and economic conditions. This approach to the matter could lead to the formation of a 'common law of the civilized mankind' (*droit commun de l'humanité civilisée*); in other words, it would make possible the construction of a unitary law out of diverse legal particularities.[97]

It should be noted here that a number of jurists at the Congress expressed the view that a uniform law, or a common law of civilized humanity, cannot be achieved, for diversity and competition are inevitable facts of life. According to Andre Weiss, probably Saleilles' most arduous critic, "the uniformity of laws is not feasible, nor is it desirable... It is a chimera today to impose a single law for all men, a dangerous chimera. A law is not an abstract formula, forged a priori, appropriate without distinction for all; it is a concrete rule destined to apply to such and such situation, obliged to take account of certain conditions, which are not the same in all places, as well as differences in races and social institutions."[98] Other participants argued that comparative law, by working with differences, has the potential of promoting a competitive and gradual adaptation of law. In this respect, different countries might be seen as 'laboratories of experience' for other countries and legislation, legal doctrine and judicial jurisprudence in each nation could progress toward a common process leading to a universal legal science. However, it is important that the areas and issues with respect to which unification is feasible are correctly identified and engaged with.[99]

Notwithstanding the objections raised against the notion of a 'common law of civilized mankind', commentators agree that the positions advanced at the Paris Congress offered a fresh start for the discipline of comparative law.[100] Until that

whether non-codified or common law systems, such as the English, should be included in comparative law studies. See on this Michaels (2002), pp. 97, 101.

[97]For a closer look at the work of Saleilles and Lamberts consider Jamin (2002), p. 701.

[98]Weiss (1900), pp. 417, 420.

[99]For an account of the conference proceedings and the positions advanced at the Paris Congress see Clark (2001), p. 871.

[100]As X. Blanc-Jouvan has remarked, the Paris Congress of 1900 "still remains the inescapable reference point for all comparatists, inasmuch as it marked, if not the birth of comparative law (which had long existed before that date), at least the beginning of a true reflection on this new branch of the legal science. It gave a tremendous impetus to the study of foreign and comparative law throughout all the century. Its success was due, to a large extent, to the participation of the most important jurists of the time... They considered all of the main aspects of this discipline: its aims, its uses (and misuses), its means and its functions, its relationship to other branches of law, the way it should be taught, and its impact on the practice of law.... The opinions expressed at the 1900 Congress were, in fact, much more advanced than we often assume, so much so that we are naturally

time, jurists only knew codified legal systems or systems based on the English common law. The codification of law was envisioned as being a product of jurisprudential rationalism, and reason was naturally perceived as unique, universal and non-contradictory. Although law codes diverged, this was attributed to the fact that not all of the code drafters had fully grasped the precepts of reason. Jurists before the 1900 Congress believed that if there were more than one codified solution to a legal problem, only one of them was rational and therefore correct (and that was usually the one adopted by the legal system of the jurist concerned). In the lands where the Romano-canonical legal tradition prevailed, a degree of diversity was permitted and divergent interpretations of a text could arise and persist. However, such differences could be erased through jurisprudential analysis, which made possible the identification of the best solution and thus the return to a unitary idea: the *Ius Unum*. The notion of unity in the law tends to prevail when one espouses the view that comparative law can pave the way to the unification or standardization of law. According to Rodolfo Sacco, this unitary and universalistic mentality is characteristic to comparative scholarship at the earliest stage of its development. On the other hand, a comparative law that recognizes legal diversity does not have any connection with the 'unitary theorem'.[101] However, the pluralistic mentality, which embraces diversity, did not yet exist at the time when Saleilles and Lambert advanced their proposals. After the Paris Congress, the narrow comparative approach based on written codes, judicial decisions and conceptual definitions and focusing primarily on European legal systems was no longer defensible. The norm that was the object of comparative law study was no longer only the formalized norm, and the scope of the discipline was broadened to include systems and forms of law that lay outside the Western legal tradition.[102]

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led to wonder whether, in spite of all appearances and in spite of countless colloquia, books, and articles, we have made any real progress in this field." "Centennial World Congress on Comparative Law: Opening Remarks" (2001) 75 *Tulane Law Review*, 859, 862. Other commentators have argued, however, that the notion of comparative law adopted at the Congress was excessively narrow in its focus. In the words of M. Reimann, "the concept of comparative law that the Paris Congress bequeathed to the twentieth century was extremely narrow. Its was the science of a "*droit commun législatif*." This meant, essentially, the comparison of the private law codes and statutes of continental European countries with the purpose of legal harmonization and unification. Most importantly in our present context, it meant reducing the discipline to the comparison of national legal systems." "Beyond National Systems: A Comparative Law for the International Age", (2001) 75 *Tulane Law Review* 1103, 1105.

[101]See on this matter Sacco (2001), pp. 1159, 1166.

[102]See on this issue, Reimann (2001), p. 1103. Consider also Sacco (2000), p. 340; Stoffel (2001), p. 1195. On the rise and progress of comparative law in France consider Fauvarque-Cosson (2019), p. 29.

4.5 Concluding Remarks

A great deal has changed since Lambert and Saleilles envisaged a common body of laws shared by all 'civilized nations.' The sheer diversity of cultural traditions and ideologies, the problems dogging European unification (despite the tremendous push for European unity furnished by the treaties establishing the European Economic Community[103] and the European Union),[104] and the difficulties surrounding the prospect of convergence of common and civil law systems have given rise to a great deal of scepticism 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[105] at an international or regional level may be achieved.[106] The current interest in matters concerning legal unification and harmonization is to considerable extent connected with the phenomenon of globalization—a phenomenon precipitated by the rapid rise of international economic transactions and the emergence of a large-scale transnational legal practice. The ongoing tendencies of globalization and regional integration today set new challenges for comparative law scholarship, both at a national and international level. In response to these challenges comparative law has diversified and increased in sophistication in recent years. It is on the way to becoming largely international, leaving behind the antiquated view of a neatly compartmentalized world consisting only of nation states. But taking into account international and transnational regimes takes more than adding their description to our catalogue of legal systems. It requires that we develop a better understanding of how legal norms and institutions operate at the national, transnational and international levels, and that we explore the interplay between these levels. Moreover, the careful examination of function and context needs to be complemented by methods and techniques designed to enable legal professionals to operate effectively in new and diverse contexts.

[103]The Treaty of Paris (1951) and the Treaty of Rome (1957).

[104]The Maastricht Treaty (1992).

[105]As previously noted, whilst unification contemplates the substitution of two or more legal systems with one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards." Kamba (1974), p. 501.

[106]An example is Rudolf Schlesinger's common core theory, according to which "even in the absence of organized [legal] unification efforts, there exists a common core of legal concepts and precepts shared by some, or even by a multitude, of the world's legal systems... At least in terms of actual results—as distinguished from the semantics used in reaching and stating such results—the areas of agreement among legal systems are larger than those of disagreement...[T]he existence and vast extent of this common core of legal systems cannot be doubted". Schlesinger et al. (1988), pp. 34–35, 39. See also David and Brierley (1985), pp. 4–6.

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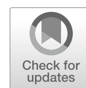
Chapter 5
Some Methodological Issues in Comparative Law



5.1 The Comparative Method

The comparison is a mental process wherein two or more different objects are examined to determine their possible relationships. As an element of the cognition process, comparison cannot be considered separately from other logical means of cognition, such as analysis, synthesis, induction and deduction. Scientific comparison involves three interconnected aspects: a logical method of cognition; a process or cognitive activity; and a cognitive result, i.e. knowledge of a certain kind. It also embraces judgment and evaluative selection, as it is usually concerned with one or some aspects of the objects compared, while abstracting provisionally and conditionally other aspects. Comparison is used in all fields of scientific inquiry, although in each field the comparative method employed has its own distinct features that fulfil the relevant cognitive functions. A distinction may be drawn between the function of comparison as an element of cognition in general, and the comparative method as a relatively autonomous, systematically organized means of research designed to achieve specific aims of cognition.[1]

Comparison is the essence of comparative law. In this context the comparative method is employed with a view to: (a) identifying the similarities and differences between two or more legal systems, or rules or institutions thereof; (b) elucidating the factors on the basis of which these similarities and differences may be explained; and (c) evaluating the legal models under comparison. The comparative method is used on both the descriptive-empirical and theoretical-evaluative levels. It may be applied in a variety of comparative inquiries concerning law, such as inquiries regarding the nature of the sources of law; the ideological foundations of legal institutions; the scope and operation of legal rules and principles; techniques of

[1]On the nature of the comparative process see Jansen (2019), p. 291.

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statutory interpretation; forms of legal procedure; and systems of legal education.[2] The selection of the particular legal systems or aspects thereof to compare naturally depends on the aims of the comparative study and the interests of the comparatist.[3]

A legal comparison may be bilateral (between two legal systems) or multilateral (between more than two systems). It may focus on aspects of substantive law, or on formal characteristics of the legal systems under consideration, e.g. the techniques used in the interpretation of statutory enactments or judicial decisions. The subject of comparison may be legal systems or elements thereof that existed in the past, (diachronic or historical legal comparison) or contemporary systems (synchronic comparison). Moreover, one may choose to compare legal systems of a particular region or transnational or international legal regimes. Comparison within a single state is referred to as internal comparison, in contradistinction to external comparison, i.e. comparison of laws belonging to different national or international legal orders. Internal comparison may pertain not only to federal but also to unitary states, and may be diachronic or synchronic. Mixed legal systems provide interesting materials for internal comparison within a unitary state. Such a comparison is useful for explaining the significance and possible interrelation of the various legal sub-systems within a unitary national legal system.

One can further distinguish between a comparison focusing on entire legal systems, or families of legal systems,[4] and a comparison focusing on individual legal institutions, rules or practices. In the first case, we allude to *macro-comparison*, or comparative law in a broad sense; in the second case, we refer to *micro-comparison*, or comparative law in a narrow sense.[5] Macro-comparison is concerned with those features that determine the general character or style of different legal systems. It examines, for example, the historical origins and evolution of legal systems; the sources of law and their hierarchy; the ways in which legal material is distributed into branches of law; the procedures through which legal problems are addressed and resolved; the roles of those involved in law-making and the administration of justice; legislative techniques; styles of codification; approaches to statutory interpretation;

[2]According to E. Örücü, in all fields of legal study the comparative method is “an empirical, descriptive research design using ‘comparison’ as a technique of cognisance”. See “Methodological Aspects of Comparative Law”, 2006 (8) 1 *European Journal of Law Reform* 29.

[3]As P. de Cruz remarks, “It has been argued by many eminent scholars that systems selected for comparison must be those which are at a similar stage of development, and these [scholars] include Gutteridge, Pollock, and Schmitthoff. Nevertheless, it is usually necessary to select systems or institutions which are at a similar stage of legal development, which will then ensure a baseline of similarity. However, it is not necessary that this is followed in every case, because the choice of legal systems must ultimately depend on the main aims and objectives of the particular comparative investigation.” *A Modern Approach to Comparative Law* (Devender 1993), 36–37. And see Kamba (1974), p. 506 ff. According to K. Zweigert and H. Kötz, it is difficult to speak in general terms about how a comparative law scholar should select legal systems for comparison, since much depends on the precise topic of his or her research. *An Introduction to Comparative Law*, 3rd ed., (Oxford 1998), 42.

[4]On the classification of legal systems into families see Chap. 6 below.

[5]See Dannemann (2019), p. 394.

modes of judicial decision-making; the contribution of legal scholars to the development of law; the division of labour among legal professionals; and forms of legal instruction. Micro-comparison, on the other hand, is concerned with particular legal rules or institutions and the way in which these operate in different systems. Examples of questions falling within the province of micro-comparison include: What factors are relevant to determining the custody of children in divorce cases? Under what conditions is a manufacturer liable for damage caused to others by defective products? How is the issue of compensation addressed in the case of road traffic accidents? What are the rules governing an heir's liability for the debts of the testator? What are the rights of an illegitimate child disinherited by his or her father or mother? What is the basis of liability of a person who allows his or her house to deteriorate to a state that a tile falls from the roof and injures a pedestrian? To what extent is it possible to have a contract foisted on a person because he or she failed to refuse an offer? As Zweigert and Kötz point out, micro-comparative and macro-comparative inquiries are interrelated or interdependent, "for it is only by discovering how the relevant rules have been created and developed by the legislature and the courts and ascertaining the practical context in which they are applied that one can understand why a foreign legal system resolves a given problem the way it does and not otherwise."[6]

Familiarity with the legal rules and institutions one seeks to compare is an essential prerequisite for any meaningful comparison between legal systems. This means that the comparatist must obtain current and accurate information on the relevant aspects of the systems under consideration. However, in order to adequately learn the details of foreign law, one must overcome a number of practical and theoretical problems. In particular, one needs to keep in mind that the study of legal rules and institutions alone is hardly sufficient; it is also necessary that one takes into consideration factors relating to the context within which law operates and develops. This context is not only the material context of sociology, history, economy and politics, but also the ideological context of the law as well as what may be called the 'juridical life', i.e. all elements not pertaining to ideology in a strict sense but, rather, to tradition, to legal style or mentality. Describing foreign law entails more than merely reporting legal rules, and certainly more than simply quoting the wording of statutory enactments. In the first place, one has to determine which legal rules are in force and binding at the time of consideration. This is a formal problem: has a particular rule been abolished or not? But it is also a problem of content: is the rule under examination compatible with a rule of a higher level in the hierarchy of legal sources? If not, the rule should be considered invalid, and thus non-existent in the legal order being studied. However, concluding that the relevant rule is invalid is not simply a descriptive statement; it is the conclusion of an interpretation. This shows the extent to which description and interpretation of legal rules are interrelated. Every description of the law implies a (conscious or unconscious) interpretation of the law. Facts do not simply exist; they are always

[6]Zweigert and Kötz (1987), p. 5. And see Samuel (2014), p. 50.

perceived, described and classified through the eyes of the legal system concerned. Because a factual situation may be constructed in different ways, solutions to problems that appear to be possible in one legal system are not available in another. Legal concepts, categories and techniques on the one hand offer opportunities for resolving problems but on the other render certain solutions impossible. As the above discussion suggests, any legal description of facts is determined by the conceptual framework and rules of a particular legal system, as worked out and systematized in legal doctrine over the years. Such a systematization is carried out by means of the interpretation of the various legal rules on the basis of a number of basic concepts and principles.[7] This indicates that there is a close connection, not only between description and interpretation, but also between interpretation (of a specific rule) and systematization (of a set of rules). Legal doctrine, as concerned with the systematization and description of the law in a particular legal system, is, together with statute law, case law and customary law, an object of the comparative study. Moreover, legal doctrine is important for comparative law, because it is an area in which theories, such as, for instance, theories concerning legal sources, are made explicit, or proposed new theories are being discussed.

Probably the greatest danger facing a comparatist is the tendency to assume, consciously or instinctively, that the legal concepts, norms and institutions he or she is familiar with in his or her own legal system also exist in the foreign system or systems being studied.[8] A comparatist, for instance, may be tempted to take for granted that the courts of the country whose system he or she is examining, similarly to the courts of his or her own country, look for guidance in preparatory legislative materials when seeking to interpret a particular statutory enactment. Such assumptions can often agree with reality, but it is just as often that they are wrong. A basic methodological principle of comparative law is that foreign legal rules, institutions and concepts must be approached or appraised from the viewpoint of the legal order to which they belong. In other words, the comparatist must be able to distance himself or herself from his or her own legal system and its way of thinking, placing himself or herself in the environment of the rules or institutions he or she is considering and using the legal concepts and methods of legal analysis and interpretation used by the lawyers and jurists of the foreign system or systems under consideration. As Zweigert and Kötz have remarked, “one must never allow one’s vision to be clouded by the concepts of

[7]The systematization of the legal materials is always partly determined by the concepts and wording used by the chief sources of law, such as the legislature and the courts.

[8]In the 1970s some Western lawyers asserted that China has no legal system because she has no attorneys in the American or European sense, no independent judiciary and, following the Cultural Revolution, no formal system of legal education. Yet, this is surely to judge a non-Western system by Western standards. What is required when a non-Western system is being studied is not to search for Western institutions, rules or concepts, but to look for the functional equivalents of legal terms and concepts in the system under consideration. In other words, one should ask: by which institutions and methods are the four basic tasks of the law, i.e., social control, conflict resolution, adaptation to social change and norm enforcement, are being performed?

one's own national system."[9] Needless to say, removing oneself from one's own legal system when studying foreign law is not easy, for the legal education one has obtained in one's own country influences to a large extent one's way of thinking and approaching legal problems. False assumptions concerning foreign law naturally result in qualitatively poor and factually incorrect legal comparisons, but these potential difficulties should not discourage one from studying foreign law and making comparisons between different legal systems.[10]

As already noted, the study of foreign law, as a prerequisite of comparative law, depends on one's ability to obtain accurate and up-to-date knowledge about that law, and this in turn means that one must have access to reliable sources of information. It is important that a researcher relies on primary sources of law or authoritative texts, such as statutes, regulations, reports of judicial decisions and the like, although, depending on the goals and scope of the particular study, such materials may be combined with secondary sources, such as comparative law encyclopaedias, introductory textbooks, reference manuals, journal articles etc. A scholar researching a foreign legal system or aspect thereof may find it difficult to understand and make full use of the primary sources without having adequate background knowledge of the system being studied. Besides offering an overview of the legal issues under consideration in their broader legal context, introductory textbooks will normally include references to authoritative texts and other legal sources the researcher needs to consult.

It is important to note in this connection that a successful comparative study presupposes linguistic competence on the part of the comparatist and the ability to translate one world view into another. However, employing the skills of translation in this context is not easy. One needs to be extremely cautious and not assume that a word, concept or idea can be translated perfectly from one culture to another. The meaning of a word, concept or idea must be understood as it is used in its own cultural setting, before it is translated to another legal culture, whether the researcher's own or a different foreign culture. To successfully carry out the task of translation, the comparatist should be able to explain the cultural context the relevant word, concept or idea is situated in. A successful translation presupposes and relies on the prior knowledge and mastery of diverse semiotic systems and linguistic contexts, as well as the ability to determine how to adjust and transfer over a particular world view into another. If this task is accomplished well, translation can

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[9]Zweigert and Kötz (1987), p. 31.

[10]As Zweigert and Kötz observe, "Writers often stress the number of traps, snares, and delusions which can hinder the student of comparative law or lead him quite astray. It is impossible to enumerate them all or wholly to avoid them, even by the device of enlisting multinational terms for comparative endeavours . . . [Even] the cleverest comparatists sometimes fall into error; when this happens the good custom among workers in the field is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right." *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 33.

act as a bridge between cultures, illuminating the differences and similarities that exist between legal orders.[11]

Studying foreign law presupposes not only knowledge of foreign language, but also familiarity with the legal terminology of the legal system being studied. As Harold Gutteridge has pointed out, "the pitfalls of terminology are the greatest difficulty and danger which the student of comparative law encounters in his novitiate."[12] Any form of translation involves the risk of overlooking the conceptual differences between national languages—differences which the comparatist must understand if he or she is to make sense of the objects being compared. A further problem here is that, even within the context of the same national language, words and linguistic structures used in legal terminology often have a different meaning from that which they have in everyday usage. For example, the word 'provocation' in ordinary English usage does not mean exactly the same as it does in English criminal law. Nor does the word 'provocation' in English law necessarily mean the same as the literal translation of 'provocation' in another legal system. Even if basic legal concepts in different countries are similar, different legal terms may be employed, and this may even occur within the same legal family. Conversely, even though the terms used may be identical, their substantive content or actual application may be different. Consider, for example, the term 'equity', used in both civil law and common law countries (*aequitas, equité, Billigkeit*). In civil law jurisdictions judges employ this concept whenever they do not wish to adopt a narrow or formal interpretation of a legal principle, especially when they wish to adapt such a principle to changing socio-economic circumstances. In the English common law tradition, on the other hand, the term 'equity' denotes the distinct body of law that evolved separately from the body of law developed by the common law courts.[13] Other examples of identical terms which mean different things in different systems include 'jurisprudence', which in France refers to case law whilst in England is usually understood to denote the general theory or philosophy of law; 'good faith', which is used as a general clause in German commercial law, but is simply a synonym for honesty and fair dealing in English sale of goods law; and 'Auftrag', roughly translated into English as commission or mandate, which in Swiss law refers to both remunerated and unremunerated commissions, whilst in German law it covers only commissions of the latter type.[14]

According to Walter Kamba, a comparative inquiry may be divided into a descriptive, identification and explanatory stage.[15] At the descriptive stage, one offers a description of the legal institutions, rules and principles the study is concerned with, as well as the relevant social problems and solutions provided by the legal systems under consideration. A proper description must be objective,

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[11] See Grosswald Curran (1998), p. 661. And see Glanert (2014), p. 1.

[12] Gutteridge (1938), p. 403.

[13] See relevant discussion in Chap. 9 below.

[14] Remunerated commissions are referred to in German law as Dienstvertrag or Werkvertrag.

[15] Kamba (1974), p. 485.

i.e. free from critical evaluation, accurate and comprehensive. It is crucial to begin with a description of the legal institutions under comparison that uncovers their construction and intended or unintended consequences. The researcher must take into account all sources of law that the legal systems under consideration regard as authoritative, such as statutory enactments and judicial decisions, as well as the way in which these sources are understood and treated by legislative bodies, courts and academic scholars. Furthermore, he or she must clearly identify the factual situations that the relevant legal institution is designed to address. It is important that the researcher places the institution under consideration in the context of the entire legal system and examines its possible connections with institutions or rules in other areas of the law (such as constitutional provisions, procedural rules or requirements of international legal instruments).[16] Finally, attention must be given to socio-economic, political, ideological, cultural and other 'extra-legal' factors. Consideration of such factors is very important if one is to understand variations in the way in which the institutions under comparison operate in practice.

At the identification stage, the similarities and differences between the systems being compared are identified and set out. At this stage, the comparatist must draw attention to the properties of the legal institutions under consideration and explain how these institutions resemble or are different from one another.

Finally, at the explanatory stage the detected similarities and differences between the legal systems under comparison are explained or accounted for. Consideration of historical, socio-economic, cultural and other extra-legal factors can play a particularly important role at this stage. A historical analysis can reveal whether the legal institutions at issue are home-grown or borrowed from another legal system. On this basis one may conclude that the relevant institutions are similar because they have a common ancestry (e.g. they both derive from Roman law); or because they have developed in parallel or converged. In the case of parallel development, the institutions acquire similar features independently, whilst in the case of convergence they do so through some form of contact or through the mediation of another legal institution. The differences between the institutions under consideration may be explained by reference to the influence of extra-legal factors or as being due to an innovative doctrinal approach adopted by a national law-maker or court.

Although it is not necessary to always follow the above order, all three stages must at some point be considered if the inquiry is to be regarded as a comparative one. According to Kamba, the way in which a comparatist deals with the questions

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[16] As J. C. Reitz points out, "a good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. This inquiry forces the comparatist to consider how each legal system works together as a whole. By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure." "How to Do Comparative Law", (1998) 46 *American Journal of Comparative Law* 617. 621–622.

he or she encounters at each stage of the comparative process depends on three factors: (i) the comparatist's jurisprudential outlook, i.e. his or her general attitude to law[17]; (ii) the socio-cultural context of the legal systems under comparison; and (iii) the legal context of the legal issues under examination in the case of a micro-comparative study. In establishing what the law is in each jurisdiction under study one should: (a) be concerned to describe the normal conceptual world of the lawyers; (b) take into consideration all the sources on which a lawyer in that legal system might base his or her opinion as to what the law is; and, (c) take into consideration the possible gap between the law on the books and law in action, as well as possible gaps in available knowledge about either the law on the books or the law in action. Important issues that need to be considered when carrying out a comparative study include: (1) the type of legal system (national, subnational, transnational) and the legal family or tradition to which it belongs (civil law, common law, religious, hybrid)[18]; (2) the field of law in which the issue being studied is located (e.g. constitutional law, criminal law, administrative law, property law, etc); (3) the type of sources needed (e.g., statutes, law codes, transnational or international treaties, case books or law reports, legal encyclopaedias, textbooks, monographs, journal articles etc) and the techniques used in data collection (e.g., literature searches, interviews, empirical surveys); (4) language and translation issues; and, (5) critical analysis of the information collected and presentation of the conclusions set out in a clearly comparative framework. Stating the relative weight accorded to historical, socio-economic, cultural, ideological and political factors and the possible influence of these factors on the development and function of the legal rules or institutions under consideration is particularly important. Provided that the information obtained on the legal systems under comparison is accurate, the approach adopted is ultimately to be assessed in the light of the purposes or goals of the comparatist. In this respect one may ask, for example: does the approach adopted facilitate a better understanding of one's own law? Does it help in the formulation of a well-grounded theory? Does it assist in the development of a law reform or legal unification or harmonization program?

As previously noted, an important aspect of the comparative law methodology is concerned with the issue of comparability of legal phenomena: the question of whether the legal institutions, rules or practices under consideration are open to comparison. Comparatists recognize that a comparison is meaningful when the objects being compared share certain common features, which can serve as a common denominator (*tertium comparationis*). Determining the requisite common features in the relevant objects occurs at the preliminary stage of the comparative inquiry. At this stage one examines the general structure, purposes and functions of the legal institutions or rules one intends to compare, without, however, embarking on a detailed analysis of the study's results. This analysis occurs in the main phase of

[17]For example, a comparatist interested in legal history or the sociology of law will usually adopt a historical or sociological approach to the legal systems, institutions or rules under examination.

[18]See relevant discussion in Chap. 6 below.

the comparative inquiry, when one considers and attempts to explain the similarities and differences between the objects being compared. Certain legal institutions or rules may appear comparable at the preliminary stage of the inquiry, but as the comparative process progresses important differences may emerge. For example, legal institutions, which were initially assumed to be comparable due to certain common structural characteristics, may subsequently prove to operate in entirely different ways. In other words, whether two or more legal institutions that *prima facie* appear to be comparable in fact share certain common characteristics (e.g. are intended to address the same problem) often cannot be declared with certainty before the actual comparison is executed.

Although resolving the problem of comparability does not presuppose the full application of the comparative method, ascertaining comparability is not always easy. The following two questions must be addressed: What are the criteria for ascertaining the existence of common elements or characteristics in the objects one seeks to compare? To what extent are considerations pertaining to the broader socio-economic, political and cultural environment relevant to defining these criteria? The following paragraphs elaborate the different theoretical approaches to the problem of comparability, which is one of the major theoretical problems of comparative law methodology.

5.2 The Normative-Dogmatic Approach to the Comparability Issue

In the nineteenth and early twentieth centuries comparatists tended to proceed from the assumption that the common ground rendering the comparison of two or more legal institutions possible emanates from their institutional affinity. They believed, in other words, that similar legal institutions, norms, concepts and principles reflect general legal ideas or patterns that reside in most, if not all, legal orders. In the case of normative-dogmatic comparison one proceeds from a consideration of legal terms, concepts and categories peculiar to one's own legal system. It is supposed that another comparable legal system uses the same terms, concepts and categories, and that behind a similar name there exists a common legal idea or pattern.

The comparative law of the German *Begriffsjurisprudenz* (conceptual jurisprudence)[19] preferred this kind of comparison of conceptual forms as it hoped to use it to prove the existence of general, universally valid legal systematics. Comparative law could reveal the common core or essence (*Wesen*) of basic juridical concepts, even if it was recognized that every legal order has a system of its own. The unitary and universalistic mentality underpinning the definition of comparative law adopted

[19] *Bergriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories and principles as a means of developing a highly systematic body of positive law. See, e.g., Puchta (1841), esp. 95–108; Windscheid (1891), pp. 59–60.

at the First International Congress of Comparative Law in 1900 reflects a similar approach.[20] However, the criticism directed against this school of thought has been annihilating. One of the most vigorous attacks upon the methods of the *Begriffsjurisprudenz* emanated from Rudolf Jhering, who insisted that legal theory must abandon the delusion that it is a system of legal mathematics, without any higher aim than a correct reckoning with conceptual schemes.[21] Furthermore, since the period of logical empiricism, a tendency prevailed to regard questions concerning the nature and essence of legal concepts as generally meaningless. The so-called Analytical School of law typically reduces legal problems to relationships between legal facts (*Rechtstatbestand*) and legal consequences (*Rechtsfolge*). Scholars who have adopted the analytical method and its conceptual nominalism (through logical empiricism) claimed that many traditional concepts were 'empty' and therefore concepts with an extensional reference should be used. In other words, one must consider the function, not the imaginary essence of the concepts. From this point of view, one might assert that the regulation of contracts, for example, can be reduced to single relationships between *legal facts* and *legal consequences*. The event where certain consequences did not ensue can be termed 'invalidity', but otherwise the concept has no content at all.[22]

Even if it is accepted on an abstract level that one can detect certain common patterns, the substantive content of a particular legal institution and the way it operates in practice, often differs considerably from one legal system to another. The further apart two legal systems are the more difficult it is to rely on the assumption of institutional affinity as a basis of the comparison, for the differences in the content and function of the legal institutions in these systems would tend to negate that assumption. The unsatisfactory nature of a purely normative-dogmatic approach to the issue of comparability was noted when scholars embarked on the comparative study of civil law and common law legal systems. Certain legal institutions and categories of civil law systems were unknown to common law systems. On the other hand, basic categories of common law systems, such as the distinction between common law and equity are not found in the legal systems of Continental Europe. These differences that affected basic legal concepts and categories, legal terminology, structures of law, interpretation of legal norms and

[20] As E. Lambert declared at that Congress: "Comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergences in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances". "Conception générale et definition de la science du droit comparé", in *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, (1905–1907), I, 26. Lambert drew a distinction between comparative law based on historical and ethnological research, concerned with the discovery and understanding of universal laws of social evolution and serving mainly scientific and theoretical purposes; and comparative law as a special branch of legal science seeking to identify common elements of legislation in different states with a view to laying the basis for the development of a 'common legislative law' (*droit commun legislatif*).

[21] See Jhering (1884).

[22] See, e.g., Aarnio (1979), p. 65 ff.

distinctive features of law enforcement were explained by reference to the specific historical circumstances under which the relevant legal systems developed. A further problem of the normative-dogmatic approach is that *prima facie* identical legal terms do not always have the same meaning in different legal systems.[23] On the other hand, certain legal institutions may be comparable even when the differences between them with respect to legal terminology are so great that, in terms of language, it is difficult to recognize any common elements.

The reaction to the formalism and extreme conceptualism of the German *Bergriffsjurisprudenz* led to the emergence of new trends in European legal thought. Examples of such trends include *Zweckjurisprudenz*[24] (focusing on the purposes that legal rules and institutions serve) and *Interessenjurisprudenz*[25] (focusing on societal interests as the chief subject-matter of law), which were precursors of legal realism[26] and the sociology of law.[27] These new approaches are also connected with the rise of functionalism in comparative law.

5.3 The Functional Method of Comparative Law

The shortcomings of the normative-dogmatic approach prompted comparatists to adopt the view that to ascertain the real similarities and differences between the substantive contents of legal systems, one must start not with the names of legal rules and institutions, but instead one should consider their functions, i.e. those real or potential conflict situations which the rules under examination are intended to regulate. The compared legal institutions must be comparable to each other functionally: they must be designed to deal with the same social problem. This common function furnishes the required *tertium comparationis* that renders comparison possible.[28]

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[23]For instance, 'equity', is a term that is used in both common law and civil law systems. In English law the technical meaning of this term refers to a body of law that developed separately from the judge-made common law. The boundary between equity and law was so clearly drawn that English lawyers tend to think of the relevant distinction as juristically inevitable. By contrast, in civil law countries such as France and Germany, equity is a clearly recognized element in the administration of justice. Judges in these countries use the concept whenever they do not wish to adopt a formal or narrow interpretation of a legal principle, or when they wish to adapt such a principle to changing social conditions. On the role of equity in the English common law tradition see Chap. 9 below.

[24]See Jhering (1877).

[25]Consider on this Heck (1914), p. 1.

[26]See Holmes (1881), Holmes (1897), p. 457.

[27]Pound (1911), p. 591; Pound (1912), p. 489.

[28]As O. Brand points out, "Functionalism is so centrally relevant to contemporary comparative law because of its orientation towards the practical. It is particularly concerned with how to compare the law's consequences across legal systems and therefore allows rules and concepts to be appreciated for what they do, rather than for what they say. Functionalists believe that the "function" of a rule, its social purpose, is the common denominator (*tertium comparationis*) that permits comparison."

Functional comparison does not proceed from a legal term or norm to a social fact but from a social fact to the legal regulation thereof. One does not compare abstract or general legal notions but, rather, how the legal systems under consideration deal with the same factual situations in real life. In other words, a prerequisite of functional legal comparison is the comparability of basic social conditions and problems. Such a similarity creates the possibility of concluding that the respective legal solutions found in different legal systems are comparable. According to Rheinstein, the principle of functionality requires comparative inquiries to "go beyond the taxonomic description or technical application of one or more systems of positive law. . . . every rule and institution has to justify its existence under two inquiries: First, what function does it serve in present society? Second, does it serve this function well or would another rule serve it better?"[29] And as Kamba points out, a key question for the comparatist is: "what legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?"[30]

The resolution of a particular social problem may be achieved through a combination of different legal means in different systems. For instance, the institution of trust or trust ownership in English law has no equivalent in Romano-Germanic legal systems where the functions it fulfils are realized with the assistance of direct representation of a person lacking dispositive legal capacity by their legal representative. As this shows, different legal means are used to attain the same legal and social goal, i.e. defending the interests of a person lacking dispositive legal capacity. The fact that one of the two analysed systems does not possess a direct equivalent of a legal institution found in the other does not mean that there is a gap in the law nor that the two systems are incomparable with respect to the solutions they have adopted for a particular social and legal problem. Thus, functional comparison focuses on the study of legal means and methods for the resolution of similar or identical socio-legal problems adopted by different legal systems. Such a

"Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies", (2007) 32 *Brooklyn Journal of International Law* 405, 409.

[29]Rheinstein (1938), pp. 617–618.

[30]Kamba (1974), p. 517. As Zweigert and Kötz explain, "The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function." *An Introduction to Comparative Law*, 2nd ed. (Oxford 1987), 31. The authors point out that "function is the start-point and basis of all comparative law. It is the *tertium comparationis*, so long the subject of futile discussion among earlier comparatists. For the comparative process this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. It means also that we must look to function in order to determine the proper ambit of the solution under comparison." (Idem at p. 42). And see Siems (2018), p. 31 ff; Samuel (2014), p. 65 ff; Michaels (2019), p. 345.

comparison serves both theoretical-scientific and applied-practical purposes, thus promoting a better understanding and assessment of legal institutions within one's own law.[31]

Functionalism rests on three interconnected premises. The first premise relates to the realist understanding of law as an instrument for guiding human behaviour and as a means of resolving conflicts and furthering social interests. This premise embodies the 'problem-solution' approach that functionalists advocate. Comparatists following this approach begin their comparisons by selecting a particular practical problem or social conflict. They then consider how different systems of law seek to resolve this problem. Finally, in a third stage, the similarities and differences between the solutions offered by the systems under consideration are identified, explained and assessed. The second premise of functionalism is that most of the problems that the law seeks to resolve are similar if not identical across diverse legal systems. The third basic premise of functionalism relates to the assumption that legal systems tend to resolve practical problems in the same way. The German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in 'unpolitical' areas of private law, such as commercial and property transactions and business dealings, the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (*praesumptio similitudinis*).[32] This presumption, he claims, can serve as a useful tool in the comparative study of different legal systems. At the end of a comparative study, if the comparatist concludes that the solutions offered by the examined systems are identical or compatible, this may be regarded as confirmation that he or she probably understood and compared them correctly. The discovery of substantial differences is a warning that an error may exist and thus the process should be repeated and the results carefully verified.[33] This 'presumption of similarity' is connected with the idea that it might be possible to develop, on the basis of comparative research, a system of general legal principles that could acquire international recognition. According to Zweigert:

> [The international unification of law] cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than

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[31]In this connection, it should be noted that, according to some scholars, the functional approach may be construed to eliminate the problem of comparability as the social needs that legal institutions and rules address are largely the same in most systems. See Ancel (1982), p. 5.

[32]See, e.g., Zweigert (1966), p. 5; Zweigert and Kötz (1987), p. 36. And see See Dannemann (2019), pp. 394–395.

[33]According to Zweigert and Kötz, "The comparatist can rest content if his researches . . . lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough." *An Introduction to Comparative Law*, 3nd ed., (Oxford 1998), 40.

> any of the existing ones. Preparatory studies in comparative law are absolutely essential here; without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which of the actual or proposed solutions is the best.[34]

It is important to note here that Zweigert, in both publications where he elaborates the idea of a 'presumption of similarity' refers only to the field of private law and within this field to the law of contract and the law of tort, but not to family law. Moreover, he recognizes that there are important differences between legal systems in the way they attain their solutions. It is the solutions to societal problems that are often the same.

Based on the above three premises, functionalists seek to explain the similarities and differences between legal norms found in diverse jurisdictions and how such norms are expressed in different or similar kinds of legal rules. They stress the importance of neutrality in the study of legal systems and legal institutions and the need to avoid approaching foreign laws through the mindset of one's own legal system. In other words, functionalists pay little attention to differences relating to the technical-juridical construction of rules, emphasizing that "the solutions [found] in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need."[35] In this respect, the functional approach constitutes a major departure from the methods of nineteenth and early twentieth century scholars, who tended to place the emphasis on the wording, structure and systematic classification of legal rules and institutions rather than on the social purposes they were intended to serve. It has been adopted by comparatists in Europe, the United States and elsewhere, and continues to play a key part in comparative law research today.[36] There is a universalist trend inherent to functionalism, as this approach is taken to rest on the assumption that "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."[37]

However, for all its merits functionalism is not without problems. These problems pertain to the basic assumptions on which the functional method is based, i.e. the presence of a legal need that is common to the legal systems under consideration; and the existence of a similarity in the factual circumstances of the compared laws. According to the functional approach, a meaningful comparison is not possible unless the relevant problem is defined in similar practical terms by the compared legal systems. In other words, one cannot deal with a problem that has a different

[34] Zweigert and Kötz (1987), p. 23.

[35] Zweigert and Kötz (1998), p. 44. And see Reitz (1998), pp. 621–622.

[36] The more recent trend to combine comparative law and economics may be taken to constitute a narrower version of functionalism focusing not on social functions in general but on a particular function, namely the efficiency of a legal rule or institution in economic terms. See Mattei (1997), Mattei (1994), p. 3.

[37] Zweigert and Kötz (1987), p. 31.

social significance in one of the systems under examination; in such a case there is no issue of legal rules or principles of similar function. However, because of the multiplicity of legal functions that may exist on different levels and may differ between cultures, 'common need' or 'function' and 'similarity' with respect to factual circumstances may be difficult to ascertain, even within one's familiar socio-economic environment.[38] The diverse functions of the law on different levels—social, political, economic, religious, spiritual, symbolic—may be difficult to detect, describe and evaluate in terms of importance and thus functionality ultimately depends on the viewpoint embraced.[39] As McDougal remarks, "the demand for inquiring into function is. . .but the beginning of insight. Further questions are: 'functional' for whom, against whom, with respect to what values, determined by what decision-makers, under what conditions, how, with what effects".[40] As this suggests, it would be requisite for the functional method to have a broad scope so as to take proper account of the relativity in the socio-economic and cultural circumstances under which legal institutions operate. What is needed, in other words, is a method that focuses on the function of law as this function is conditioned by the socio-economic and cultural environment. Legal rules and institutions should be examined in light of their broader implications, with respect to not only the legal but also the social, economic and political system. As Ainsworth remarks, "[because a] legal order simultaneously encompasses systems of political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives and ideological values", we must scrutinize not only rules but also legal cultures, traditions, ideals, ideologies, identities and entire legal discourses.[41] In other words, an interdisciplinary and comprehensive approach is a prerequisite for avoiding false assumptions on seemingly 'identical' societal problems and ill-founded, de-contextualized evaluations of legal solutions.[42]

[38]According to commentators, "the functional approach runs the risk of simplifying complex reality by assuming that similarity of problems produces similarity of results". Frankenberg (1985), p. 436.

[39]Focusing on the issue of economic efficiency as the sole basis for comparing laws, as the strict law and economics approach suggests, represents a reductionist understanding of law and its role in society.

[40]McDougal (1980), p. 219. Consider also Gerber (2001), p. 204; Markesinis (2003), p. 39.

[41]Ainsworth (1996), p. 28.

[42]It should be noted here that traditional functionalists have also called for an interdisciplinary approach, albeit in somewhat different terms. According to Pierre Lepaulle, "[I]t must be clear that a comparison restricted to one legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces and hence the similarity may be due to the purest coincidence – no more significant than the double meaning of a pun". "The Function of Comparative Law", (1921–1922) 35 *Harvard Law Review*, 838 at 853. Similarly, Rabel, one of the founders of functionalism, points out that "The material of reflection about legal problems must be the law of the entire globe, past and present, the relation of the law to the land, the climate, and race, with historical fates of peoples, - war, revolution, state-building,

This means that the use of the functional method demands from the comparatist an extremely broad knowledge not only of contemporary law, but also of sociology, anthropology and history, among other things, i.e. a level of knowledge that is very difficult, if not impossible, for a single scholar to attain.[43] Because of this problem, functional legal comparison is usually conducted by international teams of experts. Specific socio-legal problems are assigned to national rapporteurs in accordance with a preliminary scheme designed with the aim of taking comparison into account. The representative of each national system then submits a report explaining how the law of each system resolves the specific problem being considered. This collective approach to functional comparison has considerable advantages, although it often involves significant costs and requires great organizational efforts and time.

5.4 Combining the Functional and Normative-Dogmatic Perspectives

As already noted, the starting-point of comparative law is usually 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? The existence of a common social problem is not a sufficient starting-point for comparative law. For a meaningful legal comparison to be undertaken, there must also be some form that is sufficiently similar. As Watson notes, some common features of legal culture are essential; a relationship is required to render comparative law possible.[44] This relationship can be actual and historical or also 'inner'—an undeniable similarity between the peoples whose legal systems are compared. Historically, problems, juridical forms and their systematic organization are older than the norms of present law. General doctrines are extremely relevant as a framework for comparative legal studies. This is partly due to the presence of common problems but partly also due to historical tradition, e.g. the fact that Roman law has been an important common basis of many contemporary legal systems. Thus, the conceptual

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subjugation -, with religious and moral conceptions; ambitions and creative power of individuals; need of goods production and consumption; interests of ranks, parties, classes. Intellectual currents of all kinds are at work... Everything is conditioned on everything else in social, economic and legal design". *Rabel* (1925), p. 5. See also Rothacker (1957), p. 31; Siems (2018), p. 44. For a critical assessment of functionalism see also Brand (2007), p. 405; Graziadei (2003), p. 100.

[43] As J. C. Reitz remarks, "good comparatists should be sensitive to the ever-present limitations on information available about foreign legal systems and should qualify their conclusions if they are unable to have access to sufficient information or if they have reason to suspect that they are missing important information. If the gaps are too large, the study should not be undertaken at all because its conclusions about foreign law will be too uncertain to be useful." "How to Do Comparative Law", (1998) 46 *American Journal of Comparative Law* 617, 631.

[44] Watson (1974).

system of Roman law is an apt *tertium comparationis*, a common denominator of the legally organized relationships of life. These relationships are organized by forms that are derived from Roman law and are based on concepts such as *culpa*, *contractus*, *bona fides* and such like. These forms constitute a kind of *pre-knowledge* for most Western legal thinking.

A system of forms is meaningful when it corresponds to a related system of content. A legal system cannot but be both formal and substantial. But it is by no means obvious that the legal concepts and the juristic systematics of forms are a sufficient means to organize social states of affairs as far as comparative law is concerned. A *functional coherence* between social states of affairs must be established. Can this be expressed by an abstract scheme? In legal science, attempts have been made to reduce social relations to single right-duty relations, which are the objects of legal regulation. There are formal systems of legal relations. Consider, for example, the system proposed by Wesley Hohfeld, whereby all legal relations between humans can be expressed with the help of 'fundamental legal conceptions.'[45] The basic relations are: right—duty; privilege—no right; power—liability; immunity—disability. With the help of such schemes, similarities and differences in legal regularities can be articulated in a particularly graphic manner. Such an approach could be used in comparative law to deal, for example, with the question concerning the legal positions of the buyer and the seller in the case of faulty goods. Has the buyer the right to have the goods repaired or is their legal position only a privilege? Has he or she the power to change their legal position by annulling the contract?

Although such legal relations may be abstract relations, they are also connected with social reality. A buyer is not only a buyer; he or she has other social roles to play, and these roles might determine that he or she must play the role of the buyer in a certain situation. The contractual roles express the relations of exchange of certain goods. But actual contractual relations are, to a considerable extent, not determined by the uniform will of the parties concerned but by their social roles. In short, legal roles and relations express other, often more basic, social positions. But this does not mean that analyses of legal relations have no value. Even if schemes such as the fundamental legal conceptions of Hohfeld are purely formal, they provide useful starting-points. Abstract legal relations are first described. Then one proceeds to ask whether they can be explained in terms of more basic social relations. Legal relations and the models of behaviour they express are based upon an experimental shaping of social relations. But this shaping is not purely empirical and cognitive. There are reactions, also partly evaluative, when certain states of affairs are chosen on axiological grounds as consciously followed goals. But this process involves a set of juristic forms, which are not incidental or particular to the relevant case: they stem from the history of legal doctrines and ideas. Thus, we may assert that whether we proceed from forms or from contents, the choices of subjects are not purely

[45] See Hohfeld (1917), p. 710.

empirical; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematic treatment.

To understand social function, one must comprehend social structures. It is important that legal comparatists keep this in mind. For example, if one says, "in country A Lawmaker Z introduced the law L1 and in the country B Lawmaker X enacted the law L2', it is obvious that even if the lawmakers were the human causes of the relevant legal enactments we cannot build a reasonable comparison of L1 and L2 solely upon the personalities of Lawmakers Z and X. An understanding of the social situation is needed. We must grasp the conditions in the respective countries, i.e. their social structures that set the limits upon the legislative activities of lawmakers.

The structuralist view of society is related to the Marxist theory of the state and law: it refers to the socio-economic basis of law; law and state are phenomena of the so-called *superstructure*. The basis consists of 'real' relations of production and exchange. Law is conditioned by the state, which in turn, is conditioned by class relations and cultural factors. But one cannot speak of *the* Marxist theory of law. Even though dialectical materialism is a common element among Marxists, their opinions differ considerably when the precise interrelationship of law and economics is contemplated. Law is *not determined* by the economic basis. Law is *relatively independent*: it not only expresses social relations but also influences them. Law also expresses certain historical traditions pertaining to the different ways of looking at legal issues. Law may be considered as a *form of social power*. But the role of law is not uniform in different societies: law can have a wider or narrower scope; it can cover a relatively larger or smaller part of intentional human behaviour. Legal regulation in society has both an explicit and a latent non-intentional function—this is the thesis of the German functionalist sociologists of law, such as Niklas Luhmann.[46] Law is not only a form but also a social structure whose functions may vary. Legal forms and their social context are interconnected. We can declare that comparative law proceeds from the following two assumptions: (a) law is not only a manifestation of will but is also socially constructed—one cannot compare 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 factors law expresses. There is an *intentional* element in law; its 'facts' are

[46] N. Luhmann's social theory is a systemic 'supertheory' of the social. This theory is universal in that it is a theory of everything, of the world, as seen and reconstructed from the standpoint of sociology, including a theory of itself. It is systemic because it uses the guiding difference (*Leitdifferenz*) between the system and the environment as its main conceptual tool to analyze the production and reproduction of the social. Analyzing society as a hypercomplex conglomerate of social subsystems, Luhmann insists that modern societies are so complex that his own theory of social complexity can offer only one possible formulation of the social among others. See Luhmann (1974, 1982, 1995, 2004).

not 'brute facts' but *institutional* facts, which should be interpreted in their social context.[47]

Intentional human action can be interpreted with the assistance of an intentional scheme involving: (a) goals, i.e. states of affairs which have certain properties justifying their perception as valuable; and (b) epistemic conditions, i.e. knowledge concerning, among other things, social structures, possible means and means-goals relations. A decision to act (or not to act) may be construed as deriving from the combination of the above factors. It is important to realize that a value-element is present in all intentional decision-making, including lawmaking and the application of law. A value-element is also present in concepts used for imparting regulatory information. Evaluative concepts such as, for example, good faith and equity, are important, because the rapid development of society often renders it impossible for the legislator to foresee all potential situations. 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 between facts and concepts, and this should not be ignored.

It is submitted that most legal concepts are evaluative concepts, even if their value-laden nature is often only latent, concealed or not even contemplated. One may refer to a normative use of legal language. Such a use occurs every time when regulatory information is presented or applied in legal decision-making. One might perhaps assert that there is an element of decision-making in every step of an interpretatory operation. There are two basic components in such an operation: observation and evaluation. This suggests that relevant concepts also have two inherent aspects, a descriptive and a prescriptive one. Such an approach has far-reaching implications for the methodology of comparative law. Consider, for

[47]According to Searle, there are some entities in the world that seem to exist wholly independently of human institutions, and he designates these 'brute facts.' Their existence appears in no way dependent on our will, nor do they result from our practices and contrivances. Other entities, by contrast, do not seem to exist in this way. For example, consider a goal in a football match. If someone asks me what that is, I cannot point to anything in the material world that I can specify as a goal. I cannot point to a ball crossing the line and say, 'that is what I mean by a goal'. And yet, I can intelligibly articulate the existence of a thing such as a goal. According to Searle, these facts may be called institutional facts: "[They] are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behaviour constitute Mr Smith's marrying Miss Jones. Similarly, it is only given the institution of baseball that certain movements by certain men constitute the Dodgers beating the Giants 3 to 2 innings. Even at a simpler level, it is only given the institution of money that I now have a 5-dollar bill in my hand. Take away the institution and all I have is a piece of paper with various green and grey markings." Searle (1969), p. 51. See also Anscombe (1957–1958), p. 69. Legal entities appear to exist and behave in a similar way to our goal in a football match. For example, every time I board a bus a contract is formed between myself and the bus company, but I cannot point to it in the material world. I cannot point to myself getting on the bus and buying the ticket, and say 'that is the contract'. And yet I can, and legal practitioners do all the time, intelligibly allude to a contract. To declare that a contract exists presupposes the adoption of a particular view of a particular relation between two people, namely, that which is set within the frame of reference of certain organised groups of people, such as the legal profession, judges and law enforcement agents.

example, a comparative analysis of attempts at reforming the law governing family relations. Such an analysis presupposes that the relationship between the institution of family and social ideologies is clarified. Between the present historical situation of society and current law there is an intermediate factor that enables us to understand this relationship. This may be termed 'the world-picture'. A world-picture corresponds, at a certain moment, to the basic structure of society. Legislation corresponds to the world-picture. The legislation is, one might say, a manifestation of the world-picture reflecting the way certain groups in society conceive the prevailing state of affairs and the manner in which matters should be arranged.

A world-picture is a set of beliefs held by certain social groups. It is an interpretation of nature, humankind and society. It is set forth by legal norms as the dominant ideology, whose function is also to explain and legitimate them. A world-picture contains opinions or beliefs on the status of matters at a certain moment and how these should exist now and in the future. The use of a particular world-picture for the purpose of legitimating legal norms presupposes a social group or class believing in such a world-picture and having sufficient social power to further its inherent goals. An analysis of social and state power is therefore needed when one seeks to understand and explain legal institutions. One should ask: which social group possesses the power to impose its own world-picture—its knowledge, beliefs and desires regarding society—as the basis for the creation and application of legal norms? After addressing this question, one can proceed to an analysis of those factors that led to the normative modelling of society through law in a certain way.

There are two types of elements in a world-picture: factual-theoretical and normative-ideological. These elements are intertwined in a very complicated manner, but they can be treated separately at an abstract level. The factual-theoretical element can be divided into two parts: actual and possible states of affairs. For instance, the factual-theoretical element of the notion of family consists of a set of propositions on the definition of the family, its social position and functions. These beliefs are to a considerable extent based on everyday experience, which complements systematic theoretical knowledge and also supplies its interpretative basis. The normative-ideological aspect of the notion of family comprises a set of opinions concerning the question of how matters in society should exist. Every notion of the family contains viewpoints relating to social goals. Some states of affairs have not yet been realized, but they are deemed desirable, just, fair or equitable. The normative-ideological element furnishes a criterion that enables one to claim that the present state of affairs falls short of the desired one and, at the same time, articulates the means considered necessary for rectifying the situation. It is submitted that one should endeavour to devise a model of comparative analysis that would embrace both factual-theoretical and normative-ideological elements. Such a model would be an improvement over the traditional method of comparative law, in which the evaluative dimension of law-making is often neglected and, consequently, the (undeniable) role of traditional, historical systematics in the conceptual organization of regulatory information tends to be over-emphasized.

We may say, in conclusion, that in the quest for comparability, a mid-way approach—one that views the normative-dogmatic and functional methods not as

contradictory but rather as complementary—appears more appropriate. Legal solutions relating to a particular social problem presuppose an analysis of specific legal norms and institutions. At the same time, considerable attention needs to be paid to the purposes that legal norms and institutions serve, i.e. their social role. The normative-dogmatic and functional comparison methods may thus be combined, although, depending on the goals of the particular study, either of these may be accorded priority. The common elements constituting the requisite *tertium comparationis* may appear at different levels pertaining to the language, structure, functions, aims and outcomes of legal rules and institutions. Indeed, they may be present on several levels simultaneously. Depending on the nature, scope and goals of the comparative inquiry, several criteria of comparability may be used, either together or alternatively.[48] Knowledge of the goals the compared legal rules are intended to achieve is particularly important for understanding the detected differences and similarities. Such knowledge is also needed when one attempts to evaluate the legal solutions provided by the legal systems under consideration.

5.5 Comparing Legal Institutions of Countries with Different Socio-Economic and Political Systems

As previously noted, in a comparative study a variety of normative-dogmatic and functional criteria of comparability may be used, either together or alternatively, depending on the nature, scope and purposes of the relevant inquiry. When certain conditions are met there is no serious risk of error if the legal systems under consideration belong to the same broader legal family or to different legal families underpinned by the same political and economic ideology. An interesting situation is posed when one seeks to compare legal institutions and rules operating in countries with different political and economic systems or at different levels of socio-economic development. In other words, the question is whether for two or more legal institutions to be considered comparable it is requisite that they belong to comparable legal orders. The question concerning the comparability of legal orders attracted much attention among scholars after the emergence of the socialist legal systems in Eastern Europe and other parts of the world. Various opinions have been expressed concerning the comparability between Western law, or the law of countries with a free market economy, and socialist law, or the law of countries with a planned economy. After the demise of most communist regimes, this question concerning the comparability between Western law and socialist law lost much of

[48] Suppose, for example, that one wishes to compare the text of a German statutory provision on marriage with that of a French statute on the registration of real property. If considered from the viewpoint of their substantive contents, these statutes have nothing in common and therefore are not open to comparison. If, on the other hand, one is interested in comparing how the text of the relevant statutes is structured, i.e., how it is divided into sections and subsections, a comparison appears possible.

its immediate relevancy. However, a similar question may arise with respect to the comparability between Western law and the law of societies that are culturally markedly different from the West.

Scholars have argued that legal comparison may be meaningful only if the systems being considered share similar socio-economic, political and cultural foundations.[49] According to scholars from former socialist countries, because the function of law in a capitalist state, with its class conflicts, is different from that in a socialist state in transition to communism where there are no classes, any comparison between socialist and Western law is impossible or meaningless. Socialist law and the law in capitalist states were declared to fulfil different functions, or serve different purposes (or class interests), and hence they lacked a *tertium comparationis*, i.e. a common basis for enabling the comparison between them.[50] However, long before the decline of the communist regimes in Eastern Europe this view was abandoned, and socialist comparatists came to concur with their Western colleagues in accepting that legal rules and institutions of countries with different types of socio-economic and political regimes are open to comparison. It was recognized, in other words, that the existence of a difference in the ideological orientation of two (or more) legal systems does not necessarily preclude the possibility of a host of inner similarities, as required for a meaningful comparison.

As Bogdan has pointed out, a distinction must be drawn between the general objectives of legal institutions that are based on fundamental extra-juridical values and their immediate objectives on a juridical level. When the latter coincide, a meaningful comparison of the systems under consideration is feasible. Bogdan warns particularly against the serious mistake of confusing the political-ideological aims of a legal rule, i.e. to contribute to social change in a particular direction, with the rule's juridical function, i.e. the particular aspect of socio-economic life that the rule is designed to regulate. For him the crucial question, as far as the issue of comparability is concerned, is whether the same situations of life arise and are subjected to legal regulation in both capitalist and socialist countries.[51] A similar approach to the matter was adopted by Zweigert and Kötz, according to whom the comparability of different legal orders depends on the similarity of legal needs. Only when legal needs are seen as fundamentally different, will Western-capitalist and socialist legal systems be impossible to compare.[52]

Thus, as no socialist country had eradicated the use of money as a means of exchange for goods and services, the distribution to citizens of goods and services was made through a form of a market system regulated by legal rules (concerning, e.g., sales, leases and loans) that were largely similar in terms of function to the

[49] For an overview of the various views that have been advanced see Constantinesco (1974), pp. 105–119; Constantinesco (1973), pp. 6–13.

[50] See, e.g., Szabó (1964), pp. 114–115; Tchkhikvadze and Zivs (1971), p. 596; Zivs (1971), p. 177; Hazard (1965), pp. 278–302.

[51] Bogdan (1978), pp. 2, 93, 95; Bogdan (1994), p. 61 ff.

[52] Zweigert and Kötz (1987), p. 37 ff.

corresponding rules operating in capitalist countries. A citizen in the former East Germany, who purchased goods in a state-owned department store was engaged in the same activity as a citizen of West Germany, who purchased goods in a privately-owned store. Of course, in theory, the former individual, by means of his citizenship, could be regarded as a part-owner of the state-owned store. Moreover, in contrast to privately owned stores in capitalist countries, the operation of state-owned stores in socialist countries was supposed to be guided not by the goal of profit but by the goal of serving consumer needs. However, these differences were so remote from the actual purchase transaction that they did not significantly affect the practical legal issues that could arise in connection with the purchase. As these issues were largely the same in both countries, the legal rules by which they were regulated could be meaningfully compared. The same can be said with respect to the majority of rules governing relationships in other fields of law. For instance, as David has observed, no differences existed between socialist and capitalist countries with respect to the institution of family and its associated issues.[53] The rules governing marriage, divorce and relations between parents and children performed largely the same functions in both socialist and Western countries and thus were open to comparison. There are, however, legal rules governing situations that arise only in societies that have reached a certain level of development or have adopted a particular type of political and economic system. Antitrust laws, for example, are limited to countries with a market-oriented economy, just as detailed planning regulations are specific to countries with a centrally planned economy. Such rules often lack comparable counterparts outside the socio-economic and political regimes in which they operate.

As previously noted, the question whether the rules or institutions of two or more legal systems share certain common characteristics, e.g., regulate the same social relationship or address the same social conflict, should be considered during the preliminary, investigatory stage of the comparative study (when the *tertium comparationis* is determined). Once the legal rules or institutions of the different systems have been analysed, it is important to place them in their ideological, socio-economic and broader cultural framework. This would facilitate the determination of their relationship with their background and the proper assessment of the extent to which the solutions adopted may have been influenced by this background.[54] If this approach to the comparison at the micro-comparative level is followed, the issue of commensurability at the political-ideological or cultural level, important though it may be, should not present insurmountable difficulties.[55]

[53]David (1971), p. 155.

[54]In this respect, the division of legal systems into transnational families of law may be a useful starting-point. From these legal families a comparatist may select one or more legal systems for comparison, according to the topic, scope and objectives of his or her research. See Kokkini-Iatridou et al. (1988), p. 87.

[55]Constantinesco grounds his proposed solution to the methodological problems relating to inter-systems comparability at the micro-comparative level in his so-called ‘theory of determinant elements’. According to him, the comparatist must establish whether he is dealing with legal systems from countries subscribing to different socio-political or socio-economic ideologies and

5.6 Concluding Remarks

Comparative law has to consider many more elements than merely law, but its object is ultimately law. The methodological problems of comparative law cannot be addressed solely at the level of *language*—these problems are not exclusively semiotic.[56] A successful translation of legal terms, important though it may be, is hardly sufficient.[57] Nor does the existence of certain similar social relationships constitute a sufficient condition for comparison. Although for a meaningful legal comparison to be carried out there must exist sufficient similarity with respect to social function, a form of *conceptual commensurability* is also required.[58] The role of legal concepts is multifaceted. They are used as vehicles of regulatory information guiding human action and thus have an important normative function. Furthermore, they steer the use of legal argument when legal norms are being created and applied. When the selection of a certain concept is considered, this entails the evaluation of certain sets of arguments. Hence legal concepts stand for arguments—a function that is connected with a historical tradition in a particular legal culture. It is also correct to assert that concepts and their systematic arrangement express systems of values.[59] Elucidating these matters is one of the chief goals of comparative law. Attaining this goal presupposes that the methods applied have an adequate theoretical grounding; otherwise, comparative law will remain at the level of mere description or be ensnared in the trammels of speculation.

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thus whether the legal orders under consideration contain differing 'determinant elements.' Once this is determined, the inevitable impact of the determinant elements on the compared legal rules or institutions must be evaluated. It is precisely the recognition of these determinant elements and their central role, as well as the methodological rules which result from their presence, that render comparison possible, for it is by means of these elements that the fundamental differences between legal orders are considered. In Constantinesco's view, major political, economic and ideological differences do not pose an obstacle to legal comparison if the significance of the determinant elements is contemplated. The risk of jumping to erroneous conclusions based on external/formal similarities is thereby eliminated or, at any rate, minimized. See Constantinesco (1973), pp. 14–16; L. J. Constantinesco (1971), pp. 262–269. Consider also Oderkerk (2001), p. 293.

[56]On the problem of legal translation see, e.g., Hoeflich (2002), p. 753; L. Rayar, "Translating Legal Texts: A Methodology", Conference Paper, Euroforum, (April 1993).

[57]Thus, as it has been pointed out by scholars, the most evident translations of Roman legal terms accepted in different legal cultures may be misleading. See Kahn-Freund (1966), p. 52.

[58]Consider on this Pearce (1987), p. 194.

[59]See Ewald (1998), pp. 704–705; Ewald (1994–1995), pp. 1973–1974 (noting that it is important to compare law from an internal point of view so that we can understand how lawyers think in their own legal system). Consider also Demleitner (1998), p. 652.

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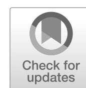
Chapter 6
Legal Traditions, Legal Cultures and Families of Law



6.1 Introduction

Law can be studied at two interconnected levels. One level of study is that in which lawyers and other legal practitioners are mainly involved: the content of substantive law and the processes through which legal rules are created and enforced. At the other level, the study of law considers the nature of legal norms, the relationship between law and society, and fundamental concepts, such as 'right', 'duty', 'justice' and the 'common good'. Straddling these two levels of study invites consideration of both the content and process of law in society. It is concerned with the effects of legal rules and institutions as well as their ability to fulfil the purposes and goals that may have been recognized at the more fundamental, jurisprudential level.

As noted in Chap. 1, jurisprudence is the general study of law as a type of social practice that societies adopt and maintain. Law is a complex practice to explain 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 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. Jurisprudence works at the level of describing, explaining and justifying law and 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 jurisprudence can be 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 jurisprudence but are not necessarily incompatible with each other. The principal aim of analytical jurisprudential

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inquiries is 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).[1] 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.[2] 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 norms cannot be properly understood unless they are examined in the light of social facts—including the intentions, interests and evaluations of social agents.

As previously observed, a jurisprudential perspective is an integral part of comparative law as a scholarly discipline. 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? Legal comparatists today advocate broader approaches to the study of legal systems—approaches that extend beyond the traditional 'law as rules' approach, which is concerned mainly with the description and ordering of statutory enactments and court decisions while ignoring all contexts that are not of a strictly legal nature. They recognize that law and the understanding of law involves much more than the description and analysis of statutory enactments and judicial decisions. Therefore, elucidating the relationship between legal systems, i.e. identifying and accounting for their shared elements and distinct differences, presupposes an examination of the factors that influence the structure, development and substantive content of legal norms. These interrelated factors pertain to historical circumstances, ideology, linguistic and philosophical tradition, religion, politics, economic structure and level of economic development, among other things. For a meaningful legal comparison to be carried out, laws and legal systems must be placed in a broad historical and socio-cultural context and, in this respect, concepts such as 'legal tradition', 'legal culture' and 'legal family' play a key part.

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[1] 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 H. L.A. 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.

[2] 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.

6.2 The Concept of Legal Tradition

A legal tradition is not simply a body of rules governing social life; rather, it is an expression of "deeply rooted, historically conditioned attitudes about the nature of law ... the role of law in ... society and the polity, the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective".[3] There are national legal traditions, each with its characteristic attitudes to law that according to their more general features may be classified into broader, transnational traditions or families, such as civil law, common law and Islamic law.

The theme of legal tradition invites consideration of an essential aspect of law, namely its traditionality. Law is traditional not simply in the sense that it comprises inherited forms and rituals. Whether one is examining a European legal system rooted in Romano-Germanic law, or a system that has its origins in English common law, or the law of a country dominated by religion, analysis of the law presupposes an understanding of how the past has authority for the present. One might say that law embodies three elements that are central to its identity and functioning: *origins in the past*, *present authority* and *inter-generational transmission*.[4] The first element points to the fact that legal traditions cannot be created. It is only with the benefit of hindsight that one may be able to contemplate that a tradition has its origins in some event or emerged at a particular time and place. Similar to other complex social phenomena, a legal tradition embraces and sustains a vast body of attitudes, assumptions, practices and materials that have been accumulated over a very long period of time.[5] Of course, law is not in its entirety the product of past times and intergenerational transmission. Legislative bodies create a large number of new legal rules each year and much of the law that is applied by the courts is statutory law of relatively recent origin. Yet, even this newly created law is an extension or modification of the preceding body of law that has been built up over many years. Furthermore, when judges and jurists are construing a recently introduced statute, they read it with the help of the past by drawing on an interpretative tradition sometimes going back centuries.[6]

The second characteristic of a legal tradition is that it has present authority in the eyes of those individuals who participate in it. In law, the past is not simply relied on in order to understand the present. It is institutionalized. Nowhere is this more evident than in relation to legal reasoning: the process of justifying arguments for or against a particular legal position or result by reference to established interpretations of legal materials, especially statutory enactments and court decisions. Similar to religious traditions, in which authority rests on inherited sacred texts as interpreted

[3]Merryman (1985), p. 2.

[4]See on this Krygier (1986), pp. 240–251.

[5]See Krygier, ibid at 241.

[6]Consider on this Krygier (1988), p. 20.

by certain designated individuals, legal traditions ascribe authority to particular texts and have both long-established rules of interpretation and an authoritative community of interpretation.[7] The role of the past in the legal reasoning process is a complex one. Notwithstanding the emphasis laid on the requirement of continuity as a basis for justifying decisions in the present, law is in a perpetual state of evolution and transformation. Law responds to and is shaped by developments in the society of which it is an integral part. As society progresses the legal system must keep pace. Often change in the law is subtle with judges modifying or extending the relevant rules to adapt them to current needs while declaring that their decision stands in historic continuity with the past. Sometimes change occurs more abruptly. One might say that in the domain of law the past is a source of ongoing authority and guidance, but it is construed through the eyes of the present. History also involves a process of construing past events through the eyes of the present.[8] Yet, law differs from history in that it is concerned not with historical precision but with the meaning attached to the past by later generations. In law, what matters most is not what the law was in the past, but what it has been taken to be by authoritative interpreters, who might reinterpret the past to conform to the needs of the present. What has been said so far suggests that legal traditions are dynamic rather than static, for the continuities between past and present do not rule out progress and change. As Krygier has remarked, legal traditions are characterized by "a dialectical interplay between inherited layers which pervade and mould the present, and the constant renewals and reshaping of these inheritances, in which authorized interpreters and guardians of the tradition and lay participants indulge, and must indulge."[9]

The third element of a legal tradition is that it is transmitted through generations. It is a distinctive feature of a tradition that there is a strong pressure to conformity with certain values and standards of conduct. Acceptance in the higher echelons of the legal profession depends on adherence to the tradition's cultural norms, linguistic patterns, modes of reasoning, rituals and codes of conduct. In this way, the tradition is both maintained and transmitted to successive generations of acolytes. Legal traditions evolve in pursuance of efficiency, order and societal consensus and, as the values and circumstances of society change, a tradition's norms will tend to adapt accordingly. However, it is intrinsic to the nature of a tradition that change is piecemeal: traditions evolve and progress occurs continually over generations, with each generation building on the heritage of its predecessors.[10] If fundamental values and standards are jettisoned and discontinuity with the past prevails, there will come a point at which the tradition itself withers away. If such a dramatic event occurs, it may be a very long time before a new legal tradition takes shape and becomes part of society's fabric. One may ask: why is there such a stress within the legal order on the authority of the past to determine the present? And why is a

[7]For a comparative analysis of law and religion see Berman (1974).

[8]See Carr (1964), pp. 29-30.

[9]Krygier (1991), p. 68.

[10]See Berman (1983), p. 5.

tradition maintained and defended jealously, so that younger generations of jurists feel a pressure to conform to it? The preservation of the tradition is essential for the legitimacy of the legal and political order. Legal rules gain legitimacy from their location within a body of rules which represent the cumulative achievement of many generations. It is the recognition that the law as a whole represents a multi-generational achievement that gives the law much of its authority. Even if citizens disapprove individual legal rules, or perceive injustice in particular cases, the traditionality of law is a factor giving the law a sufficient level of acceptance to operate as arbiter in conflicting claims. The shared acceptance of the legal tradition provides a focal point for unity in the face of the very conflicts which the law is relied on to resolve.

All long-standing legal traditions have a core of norms and principles which are deemed to be foundational. They form a basic structure of rights, duties, powers and prohibitions considered essential for social order. In the course of time, these basic rules may develop, adapt and become more sophisticated, but the evolving law builds upon that basic structure. These foundational norms and principles are held to originate in community values and practices. They are the product of a process that transcends generations and, in the case of transnational traditions, also national boundaries. The transcendent authority of law, from which individual legal institutions gain legitimacy, arises in part from a sense that law is essential to the life of a community and that the current law reflects the collective wisdom and experience of past generations. Of course, not all legal rules can claim to be the product of the accumulated wisdom of several generations. Indeed, the wisdom of certain rules may be highly questionable. However, as already noted, new laws do not entirely replace existing ones; rather, they modify the existing body of law and must fit within it. No one generation can figure out for itself, as if starting with a clean sheet of paper, the balances that need to be struck between competing rights or interests; or the reasons for which and the extent to which individuals should owe obligations to one another. Although the balances that have been struck between competing rights often have to be assessed in light of society's changing norms, values and attitudes, the relevant process involves adaptation of the solutions and compromises devised by past generations and only rarely their wholesale abandonment.

A key question for any political and legal order is where ultimate authority should reside. Historically, this question has been answered in different ways by different societies. Some societies have ascribed ultimate authority to the will of God, as revealed in a holy book or other sacred sources. In other societies, ultimate authority rests with a monarch or a democratically elected parliament. Judges are said to be servants of the ultimate authority, exercising a delegated function within the legal system.[11] In so far as society recognizes the cohesive authority of a shared tradition, political stability is guaranteed. Stability, of course, is not a good thing in itself.

[11] In England the answer to the question of where authority should be located dates back to the constitutional strife of the seventeenth century between the King and the Parliament. The supremacy of Parliament, under the formal authority of the monarch, was recognized by the end of the seventeenth century, and that constitutional arrangement was inherited in a number of countries around the world, such as Australia, New Zealand and Canada.

There is little good in the stability of a tyrannical regime. Yet it is the nature of oppressive regimes, characterized by the exercise of arbitrary power, injustice and self-interested rule, that they can rarely claim to be the legitimate heirs of a society's legal tradition, as their power to rule and enact laws is not the product of an evolved societal consensus. Of course, even governments whose authority is founded on long-standing traditions may sometimes become oppressive due to the moral decay of the ruling classes or the neglect of those entrusted with the preservation of the tradition. The existence of a legal tradition is not in itself a sufficient safeguard against corruption. The values that are handed down, such as the commitment to substantive equality before the law, must be embraced and reaffirmed by each successive generation of lawyers and judicial personnel. Nevertheless, even in societies that have experienced extensive moral decline, or in which the notions of justice and fairness are distorted, the legal tradition can act as a brake on arbitrary power. It is thus unsurprising that judges steeped in the values of a legal tradition have sometimes resisted rulers seeking to exercise arbitrary power, even at the cost of their positions.

Since legal traditions have their origins in the past, they are likely to be influenced, for good or for ill, by the values and cultural norms of past generations. Traditions that have developed in male-dominated societies would reflect male perspectives, consciously or otherwise. Likewise, in countries with legal traditions that have been shaped by the needs and values of the wealthier and more educated social classes, the law would tend to be inaccessible to the population at large. Although traditions may to some extent be flawed by the shortcomings of previous generations, they contain within them the capacity to change. For many centuries, countries belonging to the Western legal tradition have condoned or tolerated slavery. At the same time, it has been a constant theme of Western legal thought that in at least certain ways all people should be considered equal before the law. The eventual abolition of slavery in the United States, Britain and other Western nations thus brought the law into line with a basic principle of the Western legal tradition. This principle of equality before the law also furnished a basis on which claims to equal treatment can be made when there is discrimination by race, gender, religion or otherwise. The appeal to equality is compelling because it represents an appeal to a fundamental principle underpinning the Western legal tradition. In many countries today, the challenge is to promote the sense that the legal tradition belongs to all parts of the community. This involves the adaptation of the law to the complex needs of a diverse society. It also involves recognizing those instances where the application of the law may have a discriminatory impact on certain categories of people, such as women, children and members of minority groups.

It is through a process of continual re-examination and re-appraisal that the legal tradition is adapted to the needs and values of a changing society. However, there are good reasons not to despise traditions in the name of progress. Like other aspects of a society's culture, its legal tradition represents a heritage that is valuable because it is an integral part of a society's history, culture and present character. Certain features of a legal tradition may be outdated or obsolete, but the value of traditions is not merely instrumental. Traditions connect the present with the past and thus help to

integrate the present culture with its roots or origins. By maintaining respect for the accumulated wisdom of the past, it becomes more difficult for future generations to jettison certain values that are regarded as fundamental. A key issue is how to effect change while maintaining continuities within the legal tradition. Not every pressure group in society can be accommodated; not everyone's values and life objectives can be equally respected. In dealing with the tension between tradition and change it is essential to identify and hold onto those core values that lie at the heart of the tradition. These values support moral, political and procedural principles that together give content to a society's fundamental ideas about justice, civil order and the rule of law.

In today's globalized world legal traditions do not exist in isolation from one another but contribute to one another through the continuous exchange of information, ideas and models. The more intense and pervasive forms of communication today have engendered more permeable the boundaries of legal traditions than at any time in the past. Furthermore, while the legal traditions of the world are inevitably open to external influence, they should also be capable of accommodating internal diversity. Indeed, it is through reconciliation of considerable internal diversity that the major legal traditions have succeeded in expanding their influence around the world. The reconciliation of diversity and contradiction within the framework of each legal tradition is one of the most important tasks that traditions face, and all major traditions have developed doctrines for dealing with inner differences and conflicts.[12]

6.3 Law as Culture

The term 'legal tradition' is sometimes used interchangeably with the term 'legal culture', although the two notions do not entirely overlap.[13] 'Legal culture' is a multi-dimensional term, which is employed in sociological and anthropological studies of law. It is closely connected with the broader concept of culture, defined as "the set of distinctive spiritual, material, intellectual and emotional features of

[12]For example, the Islamic tradition recognizes the doctrine of *ikhtilaf*, or diversity of doctrine ('the tree of many branches'). In the common law the terms Anglo-American law, Anglo-Canadian law, Anglo-Indian law and such are used to bridge national variations, and to remind lawyers and scholars working in the relevant systems that they participate in a larger enterprise. In the Civil law the same purpose is served by the notion of the Romano-Germanic legal tradition. Similarly, the Asian legal tradition is underpinned by the philosophical doctrine of the interconnection and interdependence of all things—a doctrine fundamental to Buddhism and implicit in most Confucian thinking. See Glenn (2001), p. 142.

[13]According to J. H. Merryman, one can use the term 'legal culture' when referring to a specific legal system, and 'legal tradition' when referring to a historically related group of legal systems (e.g. the civil law tradition). "Comparative Law Scholarship", (1998) 21 *Hastings International and Comparative Law Review* 771, 776. As previously noted, the term 'legal tradition' can also refer to a particular system of law (e.g. the Italian legal tradition).

society or a social group." As such "it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[14] According to the influential anthropologist Edward B. Tylor, culture is "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[15] Clifford Geertz, another important anthropologist, takes a symbolic view of culture. He states that "man is an animal suspended in webs of significance he himself has spun." He takes culture to be "those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."[16] In Geertz's framework, culture provides unity and regularity to a society, allowing people to frame their thoughts and experiences in intelligible ways and to communicate with one another.[17] Manfred Steger's definition of culture brings some of the above-mentioned perspectives together. He asserts that the "cultural" refers to "the symbolic construction, articulation, and dissemination of meaning." He then goes on to explain that "given that language, music, and images constitute the major forms of symbolic expression, they assume special significance in the sphere of culture."[18]

Although culture involves production, including the creation of things like music and art, it also involves constraint, in the sense that it establishes a set of limits within which social behaviour must be contained or a set of models to which individuals must conform. Malinowski's definition of culture should be mentioned in this connection. According to this author, culture is "an instrumental reality, an apparatus for the satisfaction of fundamental needs, that is, organic survival, environmental adaptation, and continuity in the biological sense."[19] Furthermore, Malinowski describes the normative function as an inherent characteristic of all cultures. He points out that the absence of institutionalized legal norms in early or primitive societies should not lead one to conclude that in such societies "types of debate and quarrel, mutual recrimination and readjustment by those in authority" do not correspond to the judicial process in more highly developed cultures, for "even in primitive communities norms can be classified into rules of law, into custom, into ethics and into manners."[20] Transgressing cultural norms may evoke disciplinary responses from society, the most extreme of which might include imprisonment and execution. However, social cues, such as glares, ridicule, or looks of pity, are a far

[14]UNESCO Universal Declaration on Cultural Diversity 2002.

[15]*Primitive Culture* I (London 1871), 5–6.

[16]Geertz (1973), p. 5.

[17]As Geertz points out "The concept of culture I espouse . . . is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning." Ibid. And see Geertz (1983).

[18]Steger (2003), p. 69.

[19]Malinowski (1945), p. 44.

[20]See Malinowski, ibid at 44–45.

more common way of encouraging adherence to cultural norms. We might conclude that culture is a system of symbolic meaning with features distinctive to a society or a social group, that forms the basic, common model for the beliefs, values and opinions held by its members. Each society, based on the historical experience of the people it embraces, chooses a set of meanings especially significant and fundamental for it and systematizes them, thus producing its culture. This symbolic system forms a basic framework for cognition and evaluation for the society's members, and is preserved and transmitted through the processes of socialization. Members of society internalize this framework and then gradually develop their own values, attitudes, beliefs and opinions based on it. In the sphere of law, culture manifests itself in the concept of law, and more generally in the notion of social order prevalent in a society.[21]

Law and legal systems are cultural products, like language, art and family arrangements. In the words of a commentator, "they form a structure of meaning that guides and organizes individuals and groups in everyday interactions and conflict situations. This structure is passed on through socially transmitted norms of conduct and rules of decisions that influence the construction of intentional systems, including cognitive processes and individual dispositions. The latter manifest themselves as attitudes, values, beliefs, and expectations."[22] Viewing law as culture implies that law is more than simply a body of rules or institutions; it is also a social practice within a legal community. It is this social practice that shapes the actual meaning of the rules and institutions, their relative weight, and the way they are implemented and operate in society. But law is not an isolated social practice; it is an aspect of the broader culture to which it belongs. Understanding law presupposes knowledge of the social practice of the legal community and this, in turn, implies familiarity with the general culture of the society in which the legal community is a part.[23] The relationship between law and culture is characterized by continual interaction and interdependence.[24] One might say that law is an element of the culture of a society that both impacts upon culture and is permeated by it.[25]

Several definitions of legal culture are found in the relevant literature.[26] Blankenburg and Bruinsma, for example, define legal culture in terms of the interplay of all four levels of legal phenomena: law in the books, comprising both substantive and procedural law; the institutional infrastructure (judicial system and

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[21]See Jaeger and Selznick (1964), p. 653.

[22]Bierbrauer (1994), p. 243.

[23]See van Hoecke and Warrington (1998), p. 498.

[24]See on this Mayer (1903), p. 24; Fezer (1986), p. 22.

[25]As J. H. Merryman observes, "Law is, among other things, a cultural expression; ideas about law are a deeply rooted, historically conditioned component of the culture. Such ideas powerfully limit and direct thinking about what law is and about the proper composition and operation of the legal system. Legal culture can be thought of as the inner logic of the legal system." "Comparative Law Scholarship", (1998) 21 *Hastings International and Comparative Law Review* 771, 776. See also Visegrády (2001), pp. 204–205; Ehrmann (1976), p. 6 ff.

[26]See Gibson and Caldeira (1996), p. 55 ff.

legal profession); patterns of legally relevant behaviour (e.g. legal transactions); and legal consciousness.[27] John Bell defines legal culture as "a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts."[28] According to Lawrence Friedman, one of the first scholars to advocate the use of the term 'legal culture', legal culture consists of the "attitudes, values and opinions held in society relating to legal system or legal processes."[29] Elsewhere Friedman refers to legal culture as the "ideas, values, expectations and attitudes towards law and legal institutions which some public or some part of the public holds."[30] He notes, further, that legal culture may be seen as embodying two aspects: an 'external' (lay) and an 'internal' (professional).[31] External legal culture embraces the opinions, judgments, conceptions and beliefs of the general population on the legal system and its actual rules and institutions. What he refers to as 'claims consciousness' pertains to the eagerness or reluctance of the general population to involve themselves in litigation. Internal legal culture, on the other hand, encompasses the ideology, principles, values, knowledge of legal terminology and interpretations of those members of society who perform specialized legal tasks, i.e. advocates, judges, legal scholars etc. Legal specialists perform a two-fold function: they are influenced by and reproduce the legal culture to which they belong and, at the same time, may give rise to new attitudes or values about law, thus creating legal culture. Legal culture, like societal culture in general, is a result of historical evolution. The current state of a legal culture is always between tradition and innovation. The study of legal culture should embrace not only formal legal rules and institutions, but also informal norms, insofar as the latter are observed by the general population or the legal professionals, or both.

Friedman connects external legal culture to the legal system by maintaining that legal culture converts the interests of influential social actors into demands, or it makes possible this conversion. Demands exert pressure on the legal system and instigate the creation of new legal norms. To put it otherwise, the legal culture acts like a filter, which transforms interests into demands or makes this transformation possible. However, Friedman asserts that external legal culture can effect change on the legal system only if such change is compatible with the requirements of internal legal culture.[32] In describing the relationship between general social culture and the legal system, one might say that when social culture penetrates the legal system and influences its functions, it becomes legal culture. Atiyah and Summers refer to a "vision of law as a set of inarticulate and perhaps even unconscious beliefs held by the general public at large and, to some extent, also by politicians, judges and legal

[27]Blankenburg and Bruinsma (1991), pp. 8–9.

[28]Bell (1995a), p. 70.

[29]Friedman (1977), p. 103. See also, Friedman (1994), p. 117.

[30]"The Concept of Legal Culture: A Reply", in Nelken (ed.), *Comparing Legal Cultures* (Brookfield, Vt., 1997), 34.

[31]See Friedman (1977), p. 76.

[32]Friedman (1975), pp. 193–222.

practitioners, as to the nature and function of law – how and by whom it should be made, interpreted and enforced."[33] This way of looking at law appears to largely coincide with Friedman's description of legal culture, but it is more inclusive since both external and internal legal culture are embraced by the term 'vision of law'.

Diverse legal cultures could coexist within the same society. The term 'legal pluralism' is used to describe this situation.[34] Friedman defines legal pluralism as "the existence of distinct legal systems or cultures within a single political community." He then goes on to distinguish between *horizontal* legal pluralism, when subcultures or subsystems have equal status and legitimacy (as, e.g., in a federal state), and *vertical* legal pluralism, when subcultures or subsystems are arranged in a hierarchical order (as, e.g. in colonial or imported legal systems).[35] In the latter case, each socio-legal entity is engaged in an internal struggle to maintain and reshape its legal culture under an integrating national legal order.[36] If the existing socio-legal entities fail to assert themselves or retreat gradually until they vanish, then *legal acculturation* sets in.[37] If, on the other hand, the socio-legal entities succeed in adapting themselves to the new legal environment, they may coexist with the dominant legal order under the disguise of informal law or custom. They may even, under certain circumstances, prevail upon imported law, which might fall into disuse, or they may form a new legal culture together with the imported legal system.

The notion of legal culture has been subjected to the criticism that it lacks specificity and is therefore unreliable as a tool of comparative legal research.[38] In response to this criticism, Friedman maintains that general concepts, such as legal culture, legal system, legal doctrine, public opinion, standard of living etc. are widely used, serving as general categories under which more specific concepts are subsumed. According to him, legal culture is an umbrella term that covers a range of observable and measurable (although not always measured) phenomena. Of course, people's ideas or values about the nature and functions of law may vary, but there are detectable patterns in the distribution of such ideas or values. Friedman remarks that "legal culture is a generic term for states of mind and ideas held by some public; these states of mind are affected by events, situations and the like in society as a

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[33] Atiyah and Summers (1987), p. 411.

[34] For a closer look at legal pluralism consider: Hooker (1975), Griffiths (1986), p. 1.

[35] Friedman (1975), pp. 196–197.

[36] Consider on this issue Chiba (1991), Beiheft 12, pp. 283–306.

[37] See on this matter Manai (1993), p. 3. According to this author, acculturation is a dynamic and global process, which has two complementary aspects: the heterogeneousness of the cultures that come into contact with one another, and the prevalence of one of them over the others. Consider also Alliot (1968), p. 1181.

[38] Consider, e.g., Cotterrell (1997), pp. 13–32. Cotterrell asserts that the notion of legal culture is useless in comparative legal sociology and therefore could be substituted by the notion of 'legal ideology'.

whole, and they lead in turn to actions that have an impact to the legal system itself."[39]

As previously noted, Friedman defines external legal culture as the opinions, appreciations, conceptions and beliefs of the general population about the positive law rules of the actual legal system. This definition is very broad in scope embracing all positive law rules within a legal system. However, depending on the nature and scope of the study at hand, the notion of legal culture can be applied to a particular legal rule, institution or other aspect of the legal system under consideration. According to Friedman, internal legal culture embraces the ideas, conceptions and beliefs of legal specialists about the rules of positive law within a legal system. It is true that legal professionals, because of their specialised knowledge of the law and their everyday involvement with legal issues, acquire a different attitude towards the law than lay people. However, as legal experts live within and are part of the general population, their attitude towards law is to some extent influenced by common perceptions about law. In other words, there is an interaction between the internal and external aspects of legal culture. This interaction should be taken into account when one considers the meaning and function of a particular rule or institution of the legal system. Indeed, the notion of legal culture is most useful when one compares specific legal concepts, rules or institutions found in two or more legal systems.

6.4 Grouping Legal Systems into Families of Law

Comparative law scholarship has an extensive tradition of categorizing systems of law into broader legal families of kinship and descent.[40] The classification of legal systems into families is primarily a pedagogical instrument, which is designed to facilitate the comparative study of laws by providing scholars with a general overview of the bewildering diversity of the world's legal systems. The starting-point of such classification is the observation that while national legal systems differ considerably with respect to the contents of specific rules and forms of procedure, their differences appear to diminish when examined from the perspective of their broader societal culture; historical origins and development; legal ideology; mental attitudes and modes of legal thinking; legal terminology; and the hierarchy and interpretation of legal sources.[41] The division of legal systems into families fosters the comparative study of law as it allows one to examine such systems from the viewpoint of their general characteristics, style or orientation. Apart from its practical importance, the division of legal systems into broader families has great value to legal theory, as it requires a more spherical or comprehensive knowledge of law as a social phenomenon. Not only is comparative law a method of legal research but it

[39] Friedman (1997), p. 35.

[40] See Dannemann (2019), p. 393.

[41] See Winterton (1975), p. 69.

can also be regarded as an independent branch of legal science partly because it addresses broad theoretical issues surrounding the categorization of the world's legal systems. The problem of classifying legal systems into families has been the subject of discussion and debate among scholars since early times. Although contemporary classifications have been revised in light of developments in Russia and other formerly communist nations, the traditional conceptual framework of legal families remains relevant for describing legal reality in the world today.

Although some scholars sought to base the classification of legal systems on a single criterion (e.g. historical origins, political and economic ideology), most comparatists today recognize that a useful classification should involve several criteria.[42] According to Constantinesco, several 'determinant factors' should be used together when allocating legal systems to groups or families. Among these factors he includes the concept and role of law; the predominant ideology; socio-economic and political realities and their relation to legal norms; the concept and role of the state; the fundamental rights of the citizen; the sources of law and their hierarchy; attitudes to legal interpretation; the status and role of judges; and, finally, legal concepts and basic categories of law.[43] One should note that even when a single, broad criterion is proposed, such as a system's general 'style', this criterion would usually require the consideration of many interrelated factors. Depending on the nature and purposes of the comparative inquiry, the relevant criteria may also include geography, language and other cultural characteristics determining the people's general attitude towards law.

As previously noted, as early as the seventeenth century the German philosopher Leibniz (1646–1716) recognized the need of describing what he referred to as 'the theatre of the legal world' (*theatrum legale mundi*).[44]

In 1880, Ernest Glasson, drawing on historical sources and on the basis of common characteristics of their laws, classified legal systems into three main

[42]A classification drawing on a single criterion, such as political and economic ideology, may be meaningful but is not particularly useful as it places within the same group legal systems that are markedly different in many respects. Thus, a classification relying on political and economic ideology as the decisive criterion would place in the same broader family both the Continental European civil law and the common law systems, despite the structural and other differences between the two.

[43]Constantinesco (1971), pp. 262–265. Constantinesco suggests, moreover, that several legal families can together form a broader family (*Rechtskreis*). The latter constitutes an expression of one of the cultural civilizations (*Kulturkreis*) in which human societies may be divided. Consider "Die Kulturkreise als Grundlage der Rechtskreise", (1981) *Zeitschrift für Rechtsvergleichung*, 161–178; "Über den Stil der 'Stiltheorie' in der Rechtsvergleichung", (1979) 78 *Zeitschrift für vergleichende Rechtswissenschaft*, 154–172.

[44]In 1531 Saint German spoke of the difference between Roman and English laws noting that what was perceived as natural law (*ius naturale*) in the former, recurred as reason in the latter. See Christopher Saint German, *Dialogus de fundamentis legum Anglie et de conscientia* (The Dialogue in English between a Doctor of Divinity and a Student in the laws of England) (London1528). In 1602 William Fulbeck described a legal world built upon three types of law: Anglo-Saxon, European Continental and Canon. See Fulbeck (1601–1602).

categories: (i) those that were strongly influenced by Roman law, such as the Italian, Spanish, Portuguese, Romanian and Greek legal systems; (ii) those that were largely immune from Roman law influence and had their origins in customary law, such as the English, Scandinavian and Russian systems; and (iii) those that combined Roman and Germanic (or Barbarian) influences, such as the French, German and Swiss legal systems.[45] The principal criterion for Glasson's classification was a system's proximity to Roman law. Interestingly, the author treats the English, Russian and Scandinavian legal systems, each of which would have belonged to a separate legal family according to contemporary schemes, as belonging to the same group. Furthermore, the French and German systems are assigned to the same category, separate from that of the Spanish, Portuguese and Italian systems that are today considered to be part of the French branch of the civil law family.[46]

In 1884, the Japanese jurist Hozumi, taking as his starting-point the recognition of the importance of the classification of legal systems as a methodological tool in comparative law, divided legal systems into five broad families: (i) Indian, (ii) Chinese, (iii) Islamic, (iv) Anglo-Saxon, and (v) Roman.[47]

At the 1900 International Congress on Comparative Law in Paris the taxonomy of the world's legal systems attracted a great deal of attention and came to be regarded as a key element of the emerging science of comparative law. At that Congress, Gabriel Tarde, a professor of Modern Philosophy at the College of France, emphasized the importance of legal family classifications as one of the principal goals of comparative law. As he pointed out, "under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural – that is, rational – classification of juridical types, of branches and families of law."[48] Tarde's approach to the taxonomy of legal systems drew heavily on comparative linguistics and biology. It may be regarded as an early articulation of an approach that would come to dominate twentieth-century comparative law thinking. Whilst earlier classifications were meant simply to facilitate the description of different countries' legal systems, the formulation of a proper taxonomy now became the primary goal of comparative law scholarship.

While Tarde himself did not put forward a clearly defined criterion for the classification of legal systems, Adhémar Esmein, a professor of law at the University of Paris, addressed this issue in his own contribution to the Paris Congress. Relying on language and ethnicity as his principal classification criteria, he proposed a division of Western legal systems into five main groups: (i) the Latin group,

[45]Glasson (1879), p. cxli + 273. And see Pargendler (2012), pp. 1047–1049.

[46]According to Constantinesco, Glasson was probably the first scholar to seek the relationship between the European legal systems in their common historical origins and development instead of their racial relationships. *Rechtsvergleichung* III *Die rechtsvergleichende Wissenschaft* (Köln 1983), 96–97.

[47]Y. Noda, "Le développement du droit comparé depuis 1868 et la situation actuelle des études comparatives du droit au Japon", in *Livre du Centenaire de la Société de législation compare. Un siècle droit comparé en France (1869–1969)*, (1969), vol 2, 423.

[48]Tarde (1905), pp. 439–40. And see Pargendler (2012), pp. 1049–1050.

embracing the legal systems of France, Belgium, Italy, Spain, Portugal, Romania, and Central and South American countries; (ii) the Germanic group, comprising the legal systems of Germany, Austria, Hungary and Scandinavian countries; (iii) the Anglo-Saxon group, encompassing the legal systems of England, the United States of America and the British colonies and dominions; (iv) the Slavic group; and (v) the Muslim group.[49] Although Esmein's scheme resembles in some important respects some widely used later classifications, it came under heavy criticism and was soon forgotten.

In the early 1910s, French comparatist Georges Sauser-Hall proposed a new, ethnological taxonomy of legal systems using race as his principal classification criterion. On this basis he identified four broad legal families: (i) Aryan/Indo-European, including Hindu, Celtic, Greco–Latin, Germanic, Anglo-Saxon and Slavic legal systems; (ii) Semitic, embracing Jewish and Arabic-Muslim systems; (iii) Mongoloid, comprising Chinese, Indo-Chinese and Japanese systems; and (iv) Barbarian customary, encompassing African, Melanesian, Indonesian, Australian, Polynesian, American and Hyperborean native systems.[50] Taking the apparently immutable criterion of race as the basis of his classification, Sauser-Hall was critical of early comparatists' universalist vision which, according to him, ignored profound differences across peoples. Many later comparatists criticized Sauser-Hall's theory as failing to establish any causal relationship between race and law[51] and thus his approach was not pursued by other scholars.

In the interwar period, Henry Lévy-Ullmann was the first scholar to propose a classification of legal systems according to their sources of law. On this basis, he divided the world's systems into three broad groups: (i) Continental, based on written sources of law; (ii) English-speaking, based on customary law and developing through legal practice; and (iii) Muslim, having a religious basis and characterized by immobility.[52] This was the first clear articulation by a leading comparatist of the basic civil law—common law dichotomy that prevailed in comparative law in later years.

In the same period, John Henry Wigmore, drawing on an extensive historico-comparative study, proposed a comprehensive taxonomy of legal systems embracing the enormous variety of past and contemporary systems: Mesopotamian; Egyptian; Hebrew; Chinese; Hindu; Greek; Roman; Japanese; Muslim; Celtic; Slavic; German; marine; Papal; Romanesque; and Anglican.[53]

Reference should also be made here to the 'juristic-historical' classification theory proposed by the Argentinian jurist Enrique Martinez-Paz. Drawing on

[49]Esmein (1905), p. 445 ff. And see Pargendler (2012), pp. 1050–1052.

[50]Georges Sauser-Hall, *Fonction et méthode du droit comparé*, Leçon inaugurale faite à l'Université de Neuchâtel le 23 octobre 1912, (Genève 1913), 113 ff. See also Pargendler (2012), p. 1052.

[51]See, e.g., Constantinesco (1983), p. 93; David (1950), pp. 155–157.

[52]Lévy-Ullmann (1923). And see Pargendler (2012), pp. 1052–1053.

[53]Wigmore (1928).

Glasson's earlier theory, this author took as his starting-point the assumption that initially all legal systems possessed a high degree of originality. He then proceeded to consider how far the development of each system had been influenced by other systems, such as Roman law and Canon law, as well as by more recent 'democratic ideas'. On this basis, he identified four broad groups (*genera*) of legal systems: (i) the Barbaric-customary group; (ii) the Barbaric-Roman group; (iii) the Barbaric-Roman-Canonical group; and (iv) the Roman-Canonical-democratic group. This classification is based on 'generic' criteria pertaining to barbaric, Roman, feudal, Canonical and democratic juristic elements.[54]

The first in a series of classifications proposed during the half-century following World War II was that of Pierre Arminjon, Boris Nolde and Martin Wolff. These authors sought to lay the theoretical-methodological foundations of comparative law as a science rather than to merely describe the contemporary legal world. In this respect, they argued that "the task of comparative law as an autonomous science should have as its starting point the classification of the large number of the world's legal systems."[55] According to their theory of classification, there exist in the world certain 'model' or 'parent tree' systems whose legal rules and institutional structures were transplanted (often through military conquest or colonization) or adopted (by virtue of their perceived quality and prestige) in many countries around the world.[56] The authors assert that the crucial criterion for the classification of legal systems is the substantive content of laws; and this requires attention to originality, derivation and common elements, rather than to external factors, such as race or geography. From this point of view, seven legal families are identified: (i) French, (ii) German, (iii) Scandinavian, (iv) English, (v) Russian, (vi) Islamic, and (vii) Hindu.[57] According to critics, the above approach suffers from some serious flaws. For example, Malmström argued that the legal systems of European origin have several common features which justify their classification into a Western (European-American) group, embracing, in addition to the Romanist and Germanic systems, the common law, Nordic and Latin-American systems. According to this author, the socialist legal systems, the non-communist Asian systems and the African systems fall into a distinct group.[58] Zweigert and Kötz recognized that Arminjon, Nolde and Wolff's scheme was the most convincing to date (especially in its rejection of external factors), but criticized the authors for not clearly articulating the common qualities upon which the relationship between systems is based.[59] Moreover, the general distinction between civil law and common systems has not been included in this scheme.

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[54]Martinez-Paz (1934), pp. 149–160.

[55]Arminjon et al. (1950), p. 42.

[56]Ibid., at 47 ff.

[57]Ibid., at 42–53. The authors point out, however, that their proposed classification pertains primarily to private law.

[58]See in general Malmström (1969), pp. 145–146.

[59]Zweigert and Kötz (1984), p. 59. See also Zweigert and Kötz (1987), p. 65.

René David has offered another approach to the classification of legal systems into families. According to his theory, originally proposed in 1950, the decisive criterion for such classification is ideology or philosophical worldview, which he considered as a product of religion, philosophy, and political, social and economic structures. Ideology is complemented by legal technique, which David regarded as a secondary criterion pertaining to the way in which philosophical theories and conceptions of justice are realized in positive law.[60] On this basis, David proposed the division of the world's legal systems into five groups or families: (i) Western law, grounded on Christian religious doctrine, liberal political philosophy and capitalist economic theory; (ii) Socialist law, based on Marxist-Leninist political and economic theory and ideology; (iii) Islamic law, founded on the teachings of the Qur'an and the Muslim religious tradition; (iv) Hindu law, based on the religious, philosophical and social system of Hinduism; and (v) Chinese law, underpinned by the politico-religious and moral philosophy of Confucianism.[61] Moreover, David proposed a division of the systems of the Western family into two sub-groups: the French and the English. However, the distinction between Continental European and common law traditions is conspicuously absent from this scheme. It is important to note that, in his treatise, David draws attention to the "inevitably arbitrary" nature of legal taxonomies, illustrating his claim by citing earlier comparatists' attempts to construct adequate classifications.[62]

Particularly interesting is the classification of legal systems that was proposed by Northrop in 1959. This author, drawing on cultural and historical knowledge, proposed the division of the world's legal systems into three broad groups: (i) intuitive mediational, including Confucian, Buddhist, Taoist, non-Aryan Hindu; (ii) those developed according to natural history, such as classic Chinese and ancient Indian/Aryan; and (iii) abstract contractual.[63] In the Far Eastern systems, described as intuitive mediational,

> [t]he procedure ... is to push legal codes into the background, preferably dispensing with them altogether, and to bring the disputants into a warm give-and-take relationship, usually by way of a mediator, so that previously made demands can be modified gracefully, and a unique solution taking all the exceptional circumstances of the case into account is spontaneously accepted by both disputants. Codes there may be, but they are to be used only as a last resort, and even then recourse to them brings shame upon the disputants. ... Not only is there no resort to a legal rule; there is also no judge. Even the mediator refuses to give a decision. Instead, the dispute is properly settled when the disputants, using the mediator

[60]David (1950), pp. 8 and 214–226.

[61]A similar approach to the classification of legal systems was adopted by Sola Cañizares, who identified the following legal families: (i) Western (Christian but not authoritative); (ii) Soviet (atheist and collectivist); (iii) religious (derived from religious principles and including canonical, Hindu and Muslim laws); and (iv) Chinese (grounded on a quasi-religious philosophy in which the law is ethically coloured). See de Sola Cañizares (1954), p. 330.

[62]David (1950), p. 223. However, the author expresses his dissatisfaction with what he describes as "the traditional opposition, affirmed by all authors, between the Roman law system and the common law system." Id. 225.

[63]Northrop (1959), p. 184.

> merely as an emissary, come to mutual agreement in the light of all the existential circumstances, past, present, and future. . . . Not the abstract universals of a legal code, but the existential particularity of the concrete problematic situation . . . is the criterion of the just and the good.[64]

By contrast, in systems developed in accordance with natural history realistic universals are applied. As the author observes, in such systems

> codes . . . are expressed in the syntactical grammar of the language of common-sense objects and relations . . . the codes describe the biologically conceived patriarchal or matriarchal familial and tribal kinship norms of the inductively and sensuously given status quo.[65]

Finally, in systems of law grounded upon an abstract contractual ideal, there is some

> technical terminology . . . permitting the construction of legal and social entities and relations . . .while... [the] identification of the ethical and the socially legal with abstractly and imaginatively constructed . . . human norms and relations . . . makes possible ethical and legal reform. . . . Because [in such systems] all men are equal, they are instances of the same universals, their existential particularity is ethically irrelevant. Thereby . . . a contractually constructed norm cannot be regarded as ethical unless if it holds for any one individual it also holds for any other.[66]

Another approach to the classification of legal systems, also based on a historico-cultural perspective, was proposed by Adolf Schnitzer in 1961. According to this scholar, five great blocks of civilization may be discerned: (i) primitive peoples; (ii) ancient cultured peoples (Egypt, Mesopotamia, Ancient Greece, Rome); (iii) European-American (including Romanist, Germanic, Slavic and Anglo-American); (iv) religious (Jewish, Christian, Islamic); and (v) Afro-Asian (Asian, African). Within these blocks, each and every ‘great cultural circle’ [*große Kulturkreise*] could generate a corresponding ‘circle of law’ [*Rechtskreis*].[67]

About the same time, Konrad Zweigert published his well-known theory of classification, which had a great deal in common with that formulated by Arminjon, Nolde and Wolff in the 1950s. Zweigert’s proposed criterion for the grouping of legal systems into families is ‘style’ (*Rechtsstil*), a multi-faceted or multi-dimensional criterion shaped by the interaction of the following factors: (a) the historical background and development of a system; (b) its predominant and characteristic mode of legal thinking; (c) its distinctive legal institutions; (d) the hierarchy and interpretation of its legal sources; and (e) the ideological background of the system. On this basis he divided the legal systems of the world into eight groups or families: (i) Romanistic, (ii) Germanic, (iii) Nordic (Scandinavian), (iv) Anglo-

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[64]Ibid., at pp. 184–185. As the author remarks on p. 186, “behind this intuitive, mediational type of law in Asia there is a Confucian, Buddhist and pre-Aryan Hindu epistemology which affirms that full, direct and exact empirical knowledge of any individual, relation or event in nature reveals it to be unique”.

[65]Ibid., at p. 186.

[66]Ibid., at pp. 188–189. And see Varga (2012), pp. 57–58.

[67]Schnitzer (1961), p. 133 ff.

American, (v) socialist, (vi) Far Eastern, (vii) Islamic, and (viii) Hindu.[68] According to Zweigert, any taxonomy depends largely on the particular period of which one is speaking and that, therefore, the classification of the world's legal systems into families is susceptible to change as a result of legislative reform or other events.

At a time when the Cold War was at its height, Gorla argued that the distinction between capitalist and socialist law overshadowed that between civil law and common law. According to this author, the difference that existed between Continental and Anglo-Saxon legal systems was merely formal, whilst the difference between these and socialist systems was one of substance.[69]

In the early 1960s, David, without abandoning his original criteria, modified his earlier classification of legal systems in response to criticisms levelled at aspects of his theory, especially by German scholars objecting to his view that the German system should be included in the French sub-group. He reclassified the legal systems of the world into four broad families: (i) the Romano-Germanic (commonly referred to as the civil law family); (ii) the Anglo-American or common law; (iii) the socialist; and (iv) the family of legal systems based on religious and traditional grounds. Within the last group he included Islamic law, Hindu law and the indigenous legal systems of Eastern Asia and Africa.[70] As previously noted, David's taxonomy is based on two mutually supplementing classification criteria, namely legal technique (including vocabulary, concepts, hierarchy of the sources of law, and juridical methods) and philosophical, political or economic principles desired to be implemented. He points out that "[t]he two criteria are to be used subsequently and not in isolation."[71] In this respect, one is invited to consider whether a lawyer educated in a particular legal system should be able to work without great difficulty within another legal system. If the answer is affirmative, one should conclude that the two systems probably belong to the same broader family. According to David, legal technique is subordinate to the ideological criterion. Despite their similarities with respect to legal technique, two or more systems cannot be regarded as belonging to the same family if they are based on markedly different ideologies. Thus, while David recognizes the existence of considerable differences between civil law and common law systems, he argues that these differences exist at what is essentially a technical, not an ideological, level. He asserts that both systems reach essentially similar legal results by means of different technical methods.[72]

[68] Zweigert (1961), p. 45 ff; see also Zweigert and Kötz (1987), pp. 68–75. Consider also Zweigert and Kötz (1971), pp. 69 and 74.

[69] As the author points out, "the difference between continental (or Romanist) law and common law is certainly rather formal, i.e., drawn by a criterion that distinguishes and approaches forms (structures, techniques and concepts), rather than substance." Gorla (1963), p. 9.

[70] David (1964). And see David and Brierley (1985), p. 33 ff.

[71] David (1964), p. 16.

[72] As he notes in his earlier treatise, "the opposition between continental and common law cannot be scientifically placed at the same level as that between French and Chinese law; it permits no more than to establish a division, albeit fundamental, within a legal system whose unity is recognized and affirmed: the Western legal system. It is only by an error of perspective that Anglo-American law,

Reference should also be made here to the theory of classification put forward by Ake Malmström in 1969. Drawing largely on a historical perspective, this author distinguished between: (i) Western legal systems, including Continental European, Latin American, Nordic and Anglo-Saxon; (ii) Socialist (or Communist) systems, including Soviet, people's democracies and Chinese; (iii) Asian (non-Communist); and (iv) African.[73] This was the most enlarged scheme since David's early attempt in 1950, and the first to clearly recognize the legal systems of Latin America as belonging to the Western legal family.

In the early 1990s, following the decline of socialism in Europe, the Czech comparatist Viktor Knapp argued that three legal families exist: (i) the Continental European or Civil law family; (ii) the Anglo-American or Common law family; and (iii) the Islamic family. According to him, the Eastern European legal systems belong to the Continental European group.[74]

Michael Bogdan argued that Socialist law did not entirely disappear but regarded Chinese law as a distinct system. According to his proposed scheme, one should distinguish between English, American, French, German, Socialist, Chinese and Islamic legal systems.[75]

Van Hoecke and Warrington proposed a classification of legal families into two very broad groups, namely Western and non-Western (Asian, Islamic and African).[76] This, rather simplistic, approach is of little use as it places in the same category immensely diverse systems that have very little in common beyond merely being 'non-Western'.[77]

A far more sophisticated scheme was proposed by Patrick Glenn who, by drawing on the concept of tradition, sought to distinguish between different philosophical and historical patterns of thought, starting with what he refers to as *chthonic*, i.e. ancient, primitive, organic (*chthōn* = earth) model of order. Thus, according to this author, a distinction should be made between Chthonic, Talmudic, Civil Law, Islamic, Common Law, Hindu and Asian systems.[78]

The Italian comparatist Ugo Mattei observes that the traditional classifications of legal families are primarily Eurocentric and tend to neglect other legal systems. He proceeds to propose three patterns, which are decisive for a new classification of legal systems: law in the Western sense, politics and philosophical and religious tradition. On this basis, he proposes a tripartite taxonomy of legal families. The first legal family, associated with the Western legal tradition, is characterized by the

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and with even greater reason German law, was until now considered as constituting separate categories enjoying perfect autonomy in relation to French law." *Traité élémentaire de droit civil comparé* (Paris 1950), 225.

[73]Malmström (1969), pp. 127–149. See also Varga (2012), p. 63.

[74]Knapp (1991), p. 58.

[75]Bogdan (1994), 245 pp.

[76]van Hoecke and Warrington (1998), p. 495.

[77]See Varga (2012), pp. 66–67.

[78]Patrick Glenn (2000). Consider also Patrick Glenn (2019), p. 423.

prevalence of *professional law* and is based on the separation of legal and political decision-making and the secularisation of law; the second is marked by the dominance of *political law* (law of development), a product of the interaction among law, public policy and administration, and politics—this is described as 'unstable' and incudes former Socialist, Southern European, unestablished African and South American systems; and the third is characterized by the preponderance of *traditional law* and includes Islamic, Indian, Hindu and other Asian and Confucian systems.[79] The pattern that holds the dominant role within a legal system determines the legal family to which that system belongs. It should be noted that, according to Mattei, all three patterns may exist in any legal system, but only one is predominant. Thus, he talks of the Chinese system as belonging to the family characterized by the dominance of traditional law, but developing toward the political, whilst the Japanese system, which is also influenced by traditional law, is developing towards the professional.[80] Furthermore, Mattei points out that legal systems are not internally homogenous and therefore "[t]he same system may belong to the rule of traditional law if we consider family law, while belonging to the rule of professional law as far as commercial law is concerned, and to the rule of political law when we look at its criminal justice system."[81] This author's approach to the classification of legal systems, useful though it may be for educational purposes, remains very schematic. In fact, it is not substantially different from some of the traditional classifications of legal systems mentioned earlier, even though legal families are renamed. For instance, it subsumes under the same category the Chinese and Japanese legal systems, since both have been influenced by Confucianism, although they have followed different paths as far as political development is concerned.[82]

It is submitted that the classifications of legal systems into families proposed by comparative law scholars cannot be regarded as strict or exhaustive.[83] Further, one cannot discern a single answer to the question as to which criterion (or criteria) ought to be used for grouping legal systems into families. As the classification of legal systems is primarily a tool designed to facilitate the comparative study of laws, much depends on the nature, scope and purpose of each particular study. For instance, if the comparative study aims to explore the influence of religious factors on law, one would focus on religion as the basic criterion for classification and thus may distinguish between Islamic, Hindu and Jewish law, on the one hand, and the law of the Western secular societies on the other. If the aim of the study is to examine indigenous or native legal systems, it is useful to contrast the legal systems

[79] See Mattei (1997), p. 5.

[80] Ibid., at p. 40.

[81] Ibid., at p. 16.

[82] Varga (2012), pp. 67–68.

[83] As Malmström notes, "it is impossible to establish a uniform system of classification which is ideal from every point of view and implies a clear distinction between families or groups." "The System of Legal Systems: Notes on a Problem of Classification in Comparative Law", (1969) 13 *Scandinavian Studies in Law*, 127 at 138.

composed of customary or unwritten law with those that rely on written law. One must keep in mind, in other words, that the grouping of legal systems into families of law is not an end in itself. It is connected with a particular purpose or purposes and a classification that is suitable for one purpose may not be helpful in another connection.[84]

It should be mentioned, further, that the borderlines between the various sub-groups or sub-families identified by some scholars are ill-defined or vague, and thus it is often difficult to identify with certainty which sub-group a legal system belongs to. Special difficulties are presented by the so-called 'mixed' or 'hybrid' legal systems, that is systems whose development has been influenced by two or more legal families.[85] This category embodies, for example, the legal systems of Québec (French and English influence)[86]; Louisiana (French and American influence)[87]; and South Africa (Dutch and American influence).[88] Moreover, the legal systems of many countries in Asia and Africa constitute a mixture of traditional local law, religious elements and the law imported from European countries during the colonial period or in more recent times.[89] Interesting classification problems arise also in connection with legal systems in a process of transition, such as those of Eastern European countries in the period following the demise of socialism. These considerations suggest that the members of any legal family are themselves subject to evolution, a fact that is not always contemplated by the various approaches to the notion of legal family offered by scholars. The methods of classification proposed do not lead to unanimous results and consigning a legal system to a particular legal family can lead to serious misconceptions. The classification of East Asian legal systems may be referred to in this connection.

David, Zweigert and Kötz list the People's Republic of China, Japan, Korea and Indo-China as members of the 'Far Eastern legal Family'.[90] They argue that the old Chinese doctrines of Confucius (551-479 BC),[91] which emphasise social, group or

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[84]Consider on this matter Bogdan (1994), p. 85; Schlesinger (1970), p. 252.

[85]A 'mixed' or 'hybrid' legal system is the result of an encounter of legal systems of diverse socio-legal cultures. For a detailed discussion of mixed legal systems see Du Plessis (2019), p. 474. And see Palmer (2012), p. 3; McKnight (1977), p. 177; Baxter (1983), p. 84; Örücü (1996), p. 344.

[86]See Zweigert and Kötz (1987), pp. 121–122. Consider also Lemieux (1989), p. 16.

[87]Zweigert and Kötz, ibid., at 119–121. And see Osakwe (1986), p. 29.

[88]Zweigert and Kötz, ibid., at 240–244. Consider also Zimmermann and Visser (1996), p. 1.

[89]Consider Reyntjens (1991), pp. 41–50.

[90]The term 'Far Eastern' is said to be problematic since it implies a Eurocentric perspective. A purely geographic notion, such as 'East Asian' would be more neutral and therefore preferable.

[91]Confucianism is a complex system of moral, social, political, philosophical, and quasi-religious thought that has had tremendous influence on the culture and history of East Asia. The basic teachings of Confucianism stress the importance of education for moral development of the individual so that the state can be governed by moral virtue rather than by coercive laws. Relationships are central to Confucianism, as particular duties arise from one's situation in relation to others. Social harmony, the ultimate goal of Confucianism, results from every individual knowing his or her place in the social order and playing his or her part well.

community harmony rather than individual interests, have been very influential in all these societies, with the consequence that individuals tend to avoid litigation in favour of compromise and conciliation. Their classification of the East Asian legal systems into the same legal family is thus based on what they regard as a common culture. One might argue, however, that it is simplistic to emphasize culture at the expense of political and economic factors as the principal classification criterion. Consider Japanese law, for instance. The Japanese legal system has been variously classified as part of the 'Far Eastern' legal family, described as a 'civil law' system based on German law, and treated as a 'unique hybrid of different legal systems'. These different approaches to the classification of the Japanese legal system suggest that the classification process is more arbitrary, subjective and open to manipulation than traditional comparatists are prepared to recognize. One should keep in mind, moreover, that as the proposed classifications concern national systems in their entirety, they do not always coincide with classifications referring to specific branches of law, or classifications attempted in the framework of micro-comparative legal studies. For example, if one ventures a classification from the viewpoint of constitutional law, one may distinguish between federal systems, such as the United States, Germany, Australia and Switzerland, and unitary systems, such as France, Japan, Egypt and New Zealand. Furthermore, one may place the American, Italian and German systems into the same group on the basis that all these systems recognize the judicial review of the constitutionality of legislative enactments. As the above examples indicate, with respect to a particular branch of public or private law, a system may be allocated to one group or 'family' in a narrow sense and allocated to another with respect to a different branch.

6.5 Western Law

Distinguishing and comparing legal systems and families of law presupposes locating such systems and families within the general framework of their societal cultures. At a global level, we may identify four broad cultures or cultural traditions: Western, Asian, African and Islamic. Some countries, such as Russia, incorporate two or more of these cultures, or have a distinct position in one of them, such as India within the Asian culture; but all countries may be classified under one or more of these broad cultural families. As most commentators recognize, Western culture has exercised, and continues to exercise, a significant influence on other cultures through past colonialism and its substantial position in today's globalized world. The Western idea of law, in particular, has played a key role in the formation and development of legal systems around the world. But how can Western law be defined?

From a purely juristic point of view there exists a system or family of civil law and a system or family of common law, but no system of Western law. When considering the concepts used in law, forms of procedure, approaches to legal interpretation and modes of legal thinking, one cannot identify the existence of a 'Western law' at that level. The term 'Western law' becomes meaningful when

attention is focused on sociological, cultural, philosophical and ideological considerations. If law is viewed as a facet of a particular kind of civilization, as a condition for a particular form of social organization based on a particular conception of justice, then the phrase 'Western law' expresses the fundamental unity that exists between the civil law and the common law systems. The legal scholar who attaches emphasis to juristic concepts and techniques for interpreting and applying legal rules perceives only the differences between civil law and common law systems. On the other hand, the observer who views law from the perspective of a political scientist, a philosopher or a historian of culture, will discern the connecting links between these systems: both civil law and common law systems are underpinned by individualism, rationalism and the liberal conception of social order; in both systems the ideal is a society governed by the 'rule of law'; finally, both systems attach primary importance to the autonomy of law, i.e. the understanding of law as relatively distinct from morals, politics and religion. These features are so familiar that it is tempting to see them as universal. This is not true, however. If such ideas are becoming universal this is so only because of the pervasive influence of Western values and concepts throughout the world. In turn, the Western legal tradition has been affected, to a certain extent, by the values of other legal orders.[92]

Individualism refers to the belief in the primacy of the autonomy and total liberty of the individual member of society. This contrasts with collectivism or the idea of the individual's submission to their community. Individualism has its roots in Ancient Greek philosophy, which stressed the idea that the individual has worth—that he is capable and rational, and that his achievements in this world are significant. Christian religious doctrine, characterized by the belief in a personified omnipotent God who created man in his own image, also reinforced this belief in the value of the individual. During the later medieval age (eleventh–fourteenth centuries) the Western legal tradition acquired some essential characteristics: the secularization of law based on the clear distinction between ecclesiastical and secular power; the establishment of separate central authorities for these powers; and the subsequent recognition of the autonomy of law. The recognition of law's autonomy meant that law became the principal means of resolving disputes between individuals, and this added further support to the notion of individualism in Western legal thought. The prevalence of individualism in Western culture is also connected with the

[92]The characteristics of the Western legal tradition reflect its historical origins. More specifically, the Western idea of law developed from a synthesis of Greek, Roman and Judaeo-Christian thought. Roman law furnished the basis for the civil law systems of Continental Europe and other parts of the world, and for much of the canon law of the church. However, Roman law was inextricably intertwined with Greek and Christian influences, for it was studied within the context of a worldview that was derived from ancient Greek, especially Aristotelian, philosophy as reinterpreted by Christian theology. The Christian theology of revelation was married with the Roman and Greek ideas to form the intellectual foundations of Western law. On the characteristics of Western law see Berman (1983), Sawer (1975), p. 45 ff.

recognition of the idea of human rights—a development that occurred in the seventeenth and eighteenth centuries, the Age of the Enlightenment.[93]

Rationalism refers to the belief in the infinite possibilities available to the human mind to understand, structure and master reality in an objective or scientific manner. Rationalism is contrasted with irrationalism or the belief in the primacy of emotion and metaphysical elements in perceiving reality. In this respect, legal systems based on religion, such as Islamic and Hindu law, are construed as opposed to rationalism. The secularization of law reinforced rationalism, another defining characteristic of Western culture. Wieacker remarks that the process towards rationalization was precipitated by the intellectual constructions of the Medieval jurists—the Glossators and the Commentators.[94] The doctrines adopted by these jurists precipitated the systematization and rationalization of law established on the perception of law as a distinct body or '*corpus*' composed of rules and concepts. In the ensuing centuries the rapid advances in positive sciences, technology and industry strengthened the belief in the value and abilities of the human mind and warranted the predominance of rationalism in Western culture. Concerned with the organization of social life, law is perceived as pertaining to the rationalization of social relationships. As by definition all organization is rational, law, as an organizing scheme, must be rational. This rationalist view of law is reflected in the image of law as a system of logic, a geometry, a coherent whole where everything can be reduced to concepts, principles

[93]The notion of right, as developed in this period, was barely perceived in Roman law and formed an element of little significance in that system. Furthermore, for the medieval mind, natural law (with which the idea of rights was in later times linked) was concerned mainly with good conduct, i.e. with duties and obligations, not rights. It is unsurprising that systems that recognized slavery and serfdom could have no place for what in later times came to be regarded as fundamental human rights. The Enlightenment brought with it a new understanding of human nature based on the notions of human autonomy, rationality and freedom. This period is marked by the emergence of new political philosophies and saw the collapse of feudalism and the rise of the nation states in Europe. It was with the rise of the modern concept of the nation state that discussion began as to the nature of the relationship between the citizen and the state, and concerning the question as to what rights an individual had, or should have, against the state, especially against a state that acted tyrannically towards its citizens (absolutism prompted men to claim rights precisely because it denied them). Two major sets of ideas furnished the intellectual foundations of this period of social and political change: social contract theories and utilitarianism. The essence of the social contract theories is the idea that legitimate government is the result of the voluntary agreement among free and rational individuals. An important point about the social contract theories is that they express the idea that the state rests for its legitimacy upon the consent of its subjects. Laws can legitimately be used to ensure compliance if they have been properly approved by citizens who are party to the social contract. This idea lies at the heart of contemporary Western political thought. Utilitarianism is primarily a normative, ethical theory that lays down an objective standard for the evaluation and guidance of human conduct. That standard is derived from the assumption that the overriding aim of morality and justice is the maximization of human welfare or happiness. From this point of view, the rightness or wrongness of decisions, actions, institutions and policies is assessed by reference to their tendency to promote the welfare and safeguard the rights of those individuals affected by them.

[94]"Grundlagen der Rechtskultur", in Jörgensen et al. (eds), *Tradition and Progress in Modern Legal Cultures* (Stuttgart 1985), 176 at 182. According to Wieacker, Western legal culture is characterized by three elements: personalism, legalism and intellectualism (idem, at 185).

and juridical categories—an image that has dominated European legal thinking for centuries.[95] Law, as a rational enterprise, is construed to operate at two different levels: first, the norms governing behaviour and, second, the processes and institutional arrangements for the creation, modification, abolition and application of these norms.[96]

Law in Western thought is an autonomous domain, i.e. it is conceptually separate from custom, morality, religion and politics.[97] Thus, a distinction is drawn between legal institutions and other kinds of institutions, and between legal norms and other kinds of norms. Moral precepts and legal rules may overlap to some extent but are not synonymous with one another. Laws may stem from the customs of a community but are distinct from customs in as much as not all customs are law, and not all laws derive from custom. Laws may have a religious origin, but the basis of their authority and binding force is not religious obligation, but civic responsibility. Similarly, laws may mirror the will of a government, but the will of the government does not in itself constitute law—indeed, the laws of the land may at times act as an obstacle to the

[95] See van Hoecke and Warrington (1998), pp. 503–505.

[96] According to Max Weber, modern law is rational, whereas primitive and traditional laws were irrational or less rational. A rational legal system is universalistic; an irrational is particularistic. Furthermore, a rational system places special emphasis on contract, not on status. Weber holds that Western law is unique in that it is also reliant on the logical analysis of meaning of abstract legal concepts and rules. He observes that the modern law of the West has become increasingly institutionalized through the bureaucratization of the state. He draws attention to the fact that the recognition of law as a rational science is based on certain fundamental postulates, such as that the law is a 'gapless' system of norms and principles and that every judicial decision involves the application of an abstract legal proposition to a particular factual situation. Consider: Weber (1954). And see: van den Berg and Meadwell (2004).

[97] It should be noted here that the view that law is autonomous is not universally accepted in Western thought. It is rejected by radical scholars who see the apparent autonomy and objectivity of law as concealing the real significance of law in enforcing and perpetuating oppression. For instance, the idea of autonomy is called into question by Marxist theorists who see law as reflecting the underlying economic relations in society, in which power resides in the ownership of the means of production. According to Karl Marx, every society, whatever its stage of development, rests on an economic foundation. He terms this 'mode of production' of commodities, which embodies two elements: (i) the physical or technological arrangement of economic activity, and (ii) the social relations of production or, in other words, the attachments that people form with one another when engaged in economic activity. For Marx, the principal determinant variable is the mode of production. This economic determinism is reflected in Marxist theory of law, which rests on three interconnected assumptions: (i) law is a product of economic forces; (ii) law is a tool used by a ruling class to secure and perpetuate its power over the lower classes; and (iii) in the communist society of the future, law as an instrument of social control with wither away and eventually disappear. The notion that law is a reflection of economic forces is connected with the doctrine of dialectical materialism, according to which the political, social and cultural order is determined by the prevailing system of production and forms a 'superstructure' on top of this economic basis. For Marx, law is part of this superstructure; it is nothing more than a function of the economy but without any independent existence. As Marx declares "Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class." Marx and Engels (1955, originally published in 1848), p. 47. For a closer look at Marxist legal theory see Collins (1996).

will of a government. It should be noted, however, that law is not autonomous in the sense that it is free from the influences of custom, morality, religion, politics, economics and those socio-cultural factors which shape or influence the beliefs and attitudes of legislators and judges. The content of law is moulded by the social forces that provide the framework of law's operation. However, the values that these social forces embody are not merely translated in Western societies into law; they have to be reconstructed within law and to be embraced as law, converted into legal norms of rights and obligations, and of lawful and unlawful acts.[98] The relevant rights and interests are protected through legal procedures and remedies, and the law assumes a life of its own as it imparts content to those rights through its processes of legal reasoning and the creation of legal precedents. Law's autonomy in Western societies is reflected in the fact that law has its own distinctive institutions, profession and professional literature, university discipline, technical language and peculiar etiquette.[99]

As the Western mind tends to take law's autonomy for granted, it sometimes finds it difficult to conceive of a civilization that does not organize itself in the same manner. Yet, one may point to societies in which a different approach to law has prevailed. For example, a contrast may be drawn between the Western notion of law and the conception of law in the traditional Maori culture of New Zealand. Prior to European contact, the Maori had a well-developed system of customary law and practice that ensured the stability of their communities. However, in contrast with the Western view of law, Maori customary law (*tikanga*) required neither a strict set of formal rules nor a distinctive hierarchy of judges or a legal profession to uphold it.[100]

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[98]Some legal theorists, drawing on N. Luhmann's work, view law as an 'autopoietic', self-referential system that is, in certain ways, closed off from other systems. Consider, e.g., Luhmann (1995), Teubner (1993), Teubner (1998), p. 11; King (1993), p. 218; Priban and Nelken (2001).

[99]Roberto Unger draws a distinction between three types of law: (a) customary or interactional; (b) bureaucratic or regulatory; and (c) autonomous. Customary law is "simply any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied." Bureaucratic or regulatory law "consists of explicit rules established and enforced by an identifiable government." Such law is "limited to situations in which the division between state and society has been established and some standards of conduct have assumed the form of explicit prescriptions, prohibitions, or permissions, addressed to more or less general categories of persons and acts." Unger calls the third type of law 'the legal order' or 'legal system', which he considers to be both autonomous and general, as well as public and positive. The three different forms of law represent different stages of legal evolution: regulatory law is preceded by customary law, and the autonomous legal order is preceded by regulatory law. The development of an autonomous legal order brings about an extension of the instrumental rules to everybody. He observed, however, that this situation requires a further legitimization of the norms and principles of law, and consensus must be generated by social contract and by agreement upon the requirements of substantive justice. See Unger (1976), p. 49 ff.

[100]*Tikanga* has been defined in more than one way. According to Judge Durie, it embraces the "values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct." Durie (1996), p. 449. Chief Judge Williams describes *tikanga* as "the Maori way of doing things – from the very mundane to the most sacred or important

Such law was inextricably woven into the cultural and ethical fabric of Maori life and thus not autonomous.[101] It was constructed over centuries of practice and was informed by core values and principles that governed Maori political, social and spiritual life. Islamic law offers an example of a system in which law and religion are inextricably linked. Total and unqualified submission to the will of Allah or God is the basic tenet of Islam. Islamic law defines the will of Allah in terms of a comprehensive or all-inclusive code of conduct covering all aspects of human life. Known as 'Sharia', (the 'path' or 'way'), this law constitutes a divinely ordained path of life and conduct, which guides the Muslim toward the fulfillment of his religious conviction in this life and reward from his Creator in the world to come. Where legal norms are derived directly from sacred texts and owe their authority to the will of God, law ceases to have an authority that is independent from that of religion.[102] As law in some societies may be only a facet of religion, so in some societies it may be nothing more than an expression of political power. Where rulers have exercised unconstrained power, no distinction could be made between political power and the law. On the other hand, when people bind their rulers by constitutions or other legal constraints, the law asserts its independence from political power; it subjugates political power to its authority (hence we speak of a society governed by the 'rule of law').[103]

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fields of human endeavor." J. Williams, "He Aha Te Tikanga Māori", paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki 11–13 August 2000, 2. The word *tikanga* originates from the words *tika* and *nga*. *Tika* can be defined as correct, right, just or fair. *Nga* is the plural for the English word 'the'. Therefore, *tikanga* may be defined as 'way(s) of doing and thinking held to be just and correct'. *Tikanga* was believed to have had its origins in the spiritual realms of the *Atua* (the gods) and was handed down from *tupuna* (ancestors) to the present. *Tikanga* was pragmatic, open-ended, flexible and adaptable to fit new circumstances or the needs of the community at a particular time or situation. The ability of *tikanga* to change over time and place explains its variations among different tribal groups (*iwi*). However, flexibility could not be so great as to allow a practice to be advanced as *tikanga* where it conflicted with core values handed down from the ancestors. This allowed for common *tikanga* not only within individual groupings but also at a broader regional level.

[101] As a commentator has remarked, "the Maori lived not under the law but with it." Jackson (1988), pp. 97–98.

[102] As M. van Hoecke and M. Warrington observe, "In Islamic legal culture there is no division between law, morals and religion. All law is based on and deduced from the Koran, despite legal doctrine in practice being generally considered a source of law, and sometimes even against the literal wording of the Koran. In this legal culture moral principles have more weight than rational, systematic legal constructions." "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", (1998) 47 *International and Comparative Law Quarterly* 495, 507. For a closer look at the principles and development of Islamic law see Chap. 10 below.

[103] Generally, the phrase 'rule of law' refers to a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. According to the English jurist Albert Venn Dicey, the rule of law requires total subjection of all classes to the law of the land. It requires, further, that no one should be punished except for a proven breach of law. In this respect, the rule of law is not consistent with arbitrary or even wide discretionary power on the part of the government. See Dicey (1915, first published in 1885). The American legal scholar Lon Fuller stresses that law is the enterprise of subjecting human

Law in Western culture is not only autonomous; it tends to be disconnected in people's consciousness from the legislators, deriving authority and respect from a deep sense within the community that the law ought to be upheld not merely for fear of punishment but from a feeling of positive obligation. Interpretations of law as an instrument for giving effect to the wishes of those in power, or in terms of law's function in maintaining order in society, offer an incomplete description of law, for they pay little attention to the fact that in Western societies law is not only generally obeyed, but also believed in. People have a deep commitment to such values as equal treatment before the law, certainty and predictability in the application of legal rules, and the principle that governments are themselves subject to law. Individuals perceive their legal rights and the obligations of others towards them as standards to be observed in their private transactions with one another—standards objectively indicating what is right or socially acceptable. In other words, in popular conscience law exemplifies what is considered morally as well as legally acceptable behaviour, and the appeal to law is an appeal to voluntary compliance out of respect for the rightness of the law's commands.[104] Respect for and fidelity to law and adherence to procedural justice in the application of legal rules represent fundamental moral values in Western societies.[105] This respect for law is concurrent with its perception

behaviour to the governance of rules. He identifies eight requirements of the rule of law: (1) laws must be general, laying down specific rules prohibiting or permitting conduct of certain kinds; (2) laws must be promulgated or publicly accessible; (3) laws should be prospective, prescribing how individuals ought to behave in the future, rather than prohibiting conduct that occurred in the past; (4) laws should be written with reasonable clarity to avoid unfair enforcement; (5) laws must avoid contradictions—a law cannot prohibit what another law permits; (6) laws must not command the impossible; (7) laws must remain constant through time to allow the formalization of rules (however, law also must allow for timely revision when the underlying social circumstances have changed); and, (8) official action should be consistent with the enacted rules. Only when lawmakers abide by the eight requirements of generality, publicity, non-retroactivity, clarity, non-contradiction, non-impossibility, constancy and congruity, their activities can count as law-making. See Fuller (1969), p. 106. Although, standing alone, Fuller's eight elements may seem clear and understandable, they are often difficult to implement in practice because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choices. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Furthermore, instead of only applying prospectively, some laws are meant to apply retroactively, because they were passed with the specific intent of correcting an existing situation. Fuller recognized these conflicts and suggested that societies should be prepared to balance the different rule of law objectives.

[104]In the words of H. Berman, "Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it but also to their faith in a truth, a justice, that transcends social utility." *The Interaction of Law and Religion* (London 1974), 29.

[105]It should be pointed out, however, that, in some ways, respect for law is a fragile quality. The experience of a number of Western countries in recent years shows that a strong adherence to the fundamental precepts of the Western legal tradition can co-exist with the breakdown of law and order in some parts of the community. This breakdown is often connected with adverse socio-economic conditions. However, on its own, this is an inadequate explanation. Many countries are poor, yet the levels of violent crime are much lower than in some Western countries. When people

as a primary means of social ordering. Law pervades every aspect of modern society: it regulates business relationships and interpersonal transactions; it governs political life through constitutional norms and the behaviour of public officials through complex systems of administrative law; it furnishes the framework for family relations.[106] Moreover, law is seen as a primary means of social change. Political parties campaign for control of the legislative body as well as the executive, and law provides an important means of giving effect to the policy objectives of the government.

The centrality and pervasiveness of law in Western society is not universal. There are other means of social ordering which have special power in other societies. Law plays a less pronounced role in societies that can appeal to other bases for shaping social behaviour, such as custom or religious belief. Thus, the appeal to Islamic values or Islamic religious ideology is a call to behave in certain ways from reasons other than adherence to legal rules. The centrality of law in Western societies is also contrasted with the way law is perceived in traditional Asian societies. Commentators have observed that these societies perceive law as playing a less pronounced role, in the sense that it is simply another vehicle (not the principal means) for maintaining peace and order. Instead of relying on law as the main method of resolving disputes, the favoured way of dealing with conflict in these societies is by means of customary social norms. As previously noted, this attitude reflects the influence of the ethical and philosophical system of Confucianism.[107] Confucianism holds that the appropriate basis for the resolution of a dispute is conciliation and compromise in accordance with ethical principles based on both human sentiment and reason. The resolution of the dispute is thought to restore harmony so that no one would experience being the winner or the loser. This presupposes that the resolution of a conflict is voluntarily accepted and is not forced upon the parties from the outside. Traditionally, the Chinese recognized enacted or positive law (termed '*fa*') as the rules laid down by an earthly ruler. However, it was thought to be much better

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become alienated from a society and perceive themselves as destined to be destitute within a nation where levels of wealth are high, respect for the rule of law will often give way to destructive forces. This means that respect for law cannot be taken for granted. It is always dependent, in the final analysis, on the people's sense of belonging to a society. Where law is viewed only as an instrument of repression, it ceases to be effective as law at all.

[106] According to A. Bozeman, "law has consistently been trusted in the West as the main carrier of shared values, the most effective agent of social control, and the only reliable principle capable of moderating and reducing the reign of passion, arbitrariness and caprice in human life." *The Future of Law in a Multicultural World* (Princeton 1971), 38.

[107] According to M. van Hoecke and M. Warrington, "[the] Asian legal culture, when interpreted from an (overtly) Western point of view, can to a certain extent be represented as irrational, because of the important role of morals, or religion and of the Confucianist conception of the natural order of things. Oriental people likewise may well consider Western people too rational: so caught up in their own minds and in their rational concepts that they have lost all contact with the universe which surrounds them, lost the consciousness of their place in this universe." "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", (1998) 47 *International and Comparative Law Quarterly*, 495, 505–506.

for the preservation of harmony and order that social relations should be governed by the customs, ethics, ceremonies and taboos of the community (referred to as '*li*'). Positive law is considered to be useful only to control people who refuse to accept social norms and people who do not understand the Chinese way of life (i.e. outsiders). As Chinese people tended to associate law and judicial proceedings with disgraceful events, such as prosecution for crime and punishment, they found it difficult to understand the Western notion of legal justice.[108] A similar pattern may be seen in traditional Japan, where a series of traditional social norms (referred to as '*giri*')[109] was more important in maintaining social relationships than the law.[110] In

[108]It is important to note here that the continued survival of the traditional Chinese attitude to law cannot be simply explained by saying that the Chinese people have not been exposed to any other system. Approximately 250 years after Confucius, China was in fact dominated by the so-called legalist school, with its preference for comprehensive regulation by laws and a detailed state control over their implementation. However, these ideas had official support for only a short period of time and faded away with the change of dynasty in the latter half of the third century BC. It should be observed, further, that the traditional system became insufficient when China commenced its modernization after the fall of the last Emperor in 1911. The new Kuomintang government introduced a number of major law codes based on the Continental (Romano-Germanic) European model, including a civil code. This development played an important role in stimulating commercial activities in the coastal cities, but did not reach the people as a whole, especially those living in the countryside. Moreover, officials were reluctant to enforce legal rules that in their eyes contradicted traditional principles. In recent times, especially since the death of Mao Zedong, there has been a growth of legislation in the People's Republic of China. Although this legislation has provided a clearer framework against which citizens can measure their conduct and organize their affairs, many of the new laws are drafted in very broad terms and reflect the reluctance of the Chinese to determine the appropriate course of action by strict legal rules. In the everyday life of the population, mediation and conciliation continue to play a significant role as a means of dealing with private disputes. Furthermore, the state and party leadership of China appears not to have become quite accustomed to using legal instruments as the main means of control over society. It is still common that political directives are preferred in certain sensitive areas. In general, one might say that, although steps have been taken towards the development of a more sophisticated legal framework, the Chinese continue to have a unique way of perceiving law. For a closer look at Chinese law see K-K Wang and Mo (1999), Chen (2016).

[109]*Giri* is a Japanese value roughly corresponding to 'duty', 'obligation', or even 'burden of obligation' in English, but one with a far more pervasive influence on the Japanese world view and culture than its English equivalent. Today, social critics decry the diminishing influence of *giri* on *shinjinrui*, the new generations of Japan, who pursue an individualistic path in life that seems quite foreign to traditionalists.

[110]The Chinese civilization exercised a very strong influence on Japanese culture and Chinese ideas influenced the overall Japanese conception of law. In the 5th century AD Chinese writing was introduced to Japan and the sixth century saw the importation of Buddhism. But it was Chinese Confucianism as adapted to the Japanese psyche and way of life that had the single greatest impact on early Japanese culture. The 'Seventeen Article Constitution' of Prince Shotoku (c. 604 AD) proclaimed a social order embodying the ideals of Han Confucianism and ever since the relations between Japanese rulers, their officials and their subjects have borne the stamp of Confucian thought. It is thus unsurprising that the most generally favoured method of dispute settlement in Japan throughout its history revolved around those informal processes within the social group, often described as 'conciliation'. In such cases determination takes place according to the circumstances of each individual case, seen in the light of the shifting norms of internal group custom and of the

the latter half of the nineteenth century, Japan adopted a legal system modelled substantially on the legal codes of Continental Europe.[111] As previously noted, comparatists have adopted the view that with the introduction of these models Japanese law passed from the Chinese to the European civil law family. Although since that time Western legal models have exerted a strong influence on the evolution of Japanese law, Japan's own culture continues to impact upon the received law producing a unique synthesis.[112]

6.6 Concluding Remarks

Concepts such as legal tradition and legal culture are flexible tools that can be applied to all areas of legal research. In the field of comparative law, the study of legal culture seems necessary when it comes to defining the object of comparison, especially in cases where strict comparison of legal texts appears inadequate. In the age of globalization, when the traditional classifications of legal systems into families of law have lost much of their earlier appeal, the notion of legal culture has grown in importance.[113] In general, the notion of legal family is relied upon when formal laws and legal institutions are compared. However, this notion cannot adequately explain the attitudes, perceptions and forms of behaviour associated with

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relative strengths of the parties in bringing social pressures to bear. The idea of rigid, external, universal rules independent of time, place, personalities and circumstances is incompatible with such processes.

[111]Perhaps the most interesting feature of the new Japanese legal system was its adoption of one of the most characteristic concepts of modern Western law, namely the concept of rights (as contrasted to that of obligations). Here we have a distinct and clear case of the exertion of a direct Western influence on Japanese culture, for the notion of right was foreign to the jurisprudence that Japan borrowed from China and on which the early Japanese law codes were based. Indeed, not only in its laws but also in its customs the social system of Japan was permeated by the idea of duties to the exclusion of that of rights. So foreign was the concept of the rights of the individual subject that in Japanese legal language there was no term that closely corresponded to the word 'right' as expressing something that is due to a person—nor indeed did everyday speech include such a word in its vocabulary. Thus, it was necessary to coin a new term, and this was the term '*kenri*', made up of '*ken*', meaning 'power' or 'influence', and '*ri*', meaning 'interest'. See Kawashima (1967), pp. 268. On the rise of the modern Japanese legal system see Oda (1999), p. 21 ff.

[112]Thus, very much in line with traditional Japanese philosophy, legal conflict is generally avoided and compromise and reconciliation are still considered more important than the vindication of legal rights in the resolution of interpersonal disputes. On the character of Japanese law see, e.g., Kawashima (1979), p. 127; Aoki (2001), p. 130. And see Kitamura (2003), p. 729.

[113]The study of legal culture shows that divergence even within the same legal family is considerable. See, e.g., Blankenburg (1994), p. 789. On the notion of global culture consider Robertson (1992). Consider also Ancel (1981), p. 355. And see Varga (2007), p. 95.

law as a socio-cultural phenomenon.[114] The study of legal culture can more surely reveal fundamental similarities and differences among legal systems, including systems that belong to the same legal family.

As noted in Chap. 5, contemporary comparatists have embraced the view that the basic methodological principle of comparative law is functionality, according to which only legal rules and institutions that fulfil the same function can fruitfully be compared. Zweigert and *Kötz* remark that the legal system of every society has to solve essentially the same problems. The means by which these problems are addressed in each legal system may be quite different, but the results are often very similar.[115] This approach to the matter seems to overlook the decisive role that legal culture can play with respect to the results arrived at. Two legal rules that supposedly fulfil the same function in two different cultural settings may very well lead to diverse results, due to the fact that in each cultural setting the relevant rules are understood and applied differently. This observation has prompted some comparatists to argue that comparison among legal families should be substituted by a thorough study of different legal cultures.[116] The study of legal culture, it is noted, would be particularly fruitful in relation to the study of those branches of law, such as family law and criminal law, that are more closely connected to or influenced by social, political and especially cultural factors. As Otto Kahn-Freund has pointed out, "the use of the comparative method requires a knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is performed by a legalistic spirit which ignores this context of the law."[117] Zweigert and Kötz recognize that as far as the comparison of legal systems and not just legal rules is concerned, it is of great importance for the comparatist to grasp the 'style' of the legal systems under consideration. As previously noted, according to these authors, the following factors are crucial for determining the style of a legal system: "(1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) its distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology."[118] In this connection, one may ask: wouldn't the style of a legal system be dependent on cultural factors as well? At the very least, the historical background, the predominant and characteristic mode of legal thinking and the system's ideological background are all related to the cultural

[114] As Lawrence Friedman remarks, the traditional classifications of legal systems may be useful in many ways, but without a knowledge and understanding of legal culture their structures and substance are merely 'lifeless artefacts'. *Law and Society* (Englewood Cliffs, N.J., 1977), 76.

[115] Zweigert and Kötz (1987), p. 31.

[116] Consider, e.g. van Hoecke and Warrington (1998), p. 495.

[117] Kahn-Freund (1974), p. 27.

[118] Zweigert and Kötz (1987), pp. 68–69.

context. The relevance of concepts such as legal tradition and mentalité is also drawn attention to by some authors.[119]

As the above discussion suggests, for a legal comparison to be meaningful one should go further than a mere juxtaposition of formal laws. Additional elements should be examined, such as what is meant by the language of a legal text, how people perceive the function of a particular legal rule or institution and how they use it in practice. In order to compare, one should try to feel the pulse of the outside world, the ideas, beliefs and habits of the general population relating to law or, in Friedman's words, the external legal culture.[120] This makes it necessary for a legal comparatist to transcend the boundaries of what he or she has been trained to understand as law, of his or her own legal culture.[121] However, surpassing one's own legal culture in order to gain an insight into another culture is not an easy task; it is like trying to get out of one's own self, since our culture defines to a great extent who we are. Nevertheless, this intellectual and psychological effort is necessary in any kind of comparative study, insofar as the principal objective of such study is to learn from the 'other'.

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[119]See, e.g., Krygier (1986), p. 237; Bell (1995b), pp. 19–31; Legrand (1996–1997), pp. 316–318. And see the discussion of the notion of legal tradition above.

[120]As V. Grosswald Curran remarks, such "cultural immersion requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in which the legal system operates. It requires an explanation of various cultural mentalities." "Cultural Immersion, Difference and Categories in U.S. Comparative Law", (1998) 46 *American Journal of Comparative Law* 43, 51. See also Grosswald Curran (1998), pp. 659, 661.

[121]K. Zweigert and H. Kötz describe this need to eradicate all preconditions of one's own legal system when carrying out a comparative study as the negative aspect of functionality. *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 31–32.

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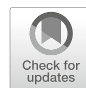
Chapter 7
Comparative Law, Legal Transplants and Legal Change



7.1 Introduction

Systems of law[1] are concerned with relations between agents (human, legal, unincorporated and otherwise) at a variety of levels. At an international level, public international law governs relations between sovereign states and sets the limits for the exercise of state power in the light of generally recognized norms. At an international or transnational level also operate human rights law, international criminal law, refugee law, international environmental law, transnational arbitration and other systems. Functioning at a territorial state level are the legal systems of nation-states and sub-national (e.g. the legal systems of the individual states within federal states) or sub-state jurisdictions (e.g. the bye-laws of counties or municipalities and the laws of ethnic communities within states which enjoy a degree of autonomy). It is important to note that very few legal orders or systems of rules are complete, self-contained or impervious. Co-existing legal orders interact in complex ways: they may compete or conflict; sustain or reinforce each other; and often they influence each other through interaction, imposition, imitation and transplantation. Nowadays, national legal systems have become interconnected through the operation of international and transnational regimes in a variety of ways. They are subject to, and modified by, international conventions and treaties, trade regulations and various inter-state agreements. Some countries harmonize their laws, coordinate their fiscal policies, and agree to recognize each other's judgments or cooperate in antitrust enforcement. 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

[1]The term 'legal system' is used to highlight the fact that law is comprised of many interconnected elements, which should be examined in the light of their functional interdependence. Related to the term 'legal system' is the term 'legal order' (*Rechtsordnung, ordre juridique*). When the latter term is used emphasis is placed on the creative role of the human agency in the formation and development of law.

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comparative law information and thereby urged new objectives for the comparative law community. The comparative method, which was in the past 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. Associated with this development is the growing interest in the issue of transferability or transplantability of legal norms and institutions across different systems, especially in so far as current legal integration and harmonization processes require reasonably transferable models. Following a discussion of factors accounting for the divergence and convergence of legal systems, this chapter critically examines the issue of transferability of laws with special attention being paid to the theory of legal transplants propounded by Professor Alan Watson, one of the most influential contemporary comparatists and legal historians.

7.2 Divergence and Convergence of Legal Systems

Contemporary legal systems differ in many respects: the substantive content of legal rules; the operation and hierarchy of the sources of law; the norms of statutory interpretation; legal terminology; and style of judicial reasoning.[2] For example, as regards the sources of law and the law-making process, comparatists often draw attention to certain differences between civil law and common law systems: in the former, legislation constitutes the principal source of law, while the chief sources of law in the latter include both case law—a body of principles derived from court decisions governed by the doctrine of precedent (*stare decisis*)—and statute law, i.e. the law contained in legislative enactments. These differences are related to differences in the modes of legal thinking prevailing in the civil and common law systems. While civil law practitioners tend to think in terms of enacted rules that may apply to a particular case, their common law counterparts are inclined to contemplate the parties and their particular legal relationship, seeking pragmatic answers to the issues before the court. When a common law lawyer queries the nature of a case he or she thinks of the facts, with a view to identifying the material circumstances of the case and showing that these fall within the scope of one rule rather than another. By contrast, when a civil law lawyer considers a case he or she generally refers to the legal issues defined in a general way with reference to enacted rules. Legal reasoning in civil law has a top-down structure, moving from the general to the more specific. Employing this kind of reasoning, the civil law lawyer may present a legal argument as if there is only one right answer to any legal problem. In this respect, any disagreement over the application of the law to the facts is blamed on the presence of faulty logic. This explains why civil law judges do not offer dissenting opinions. Every judgment, even in cases decided on appeal, is the judgment of the court as a

[2] See Rodière (1979), p. 4 ff; Agostini (1988), p. 10 ff.

whole. Under the deductive approach of the civil law, the value of case law is limited as court decisions are viewed as particular illustrations of, or specific exceptions to, the law as embodied in a general norm or principle. In this respect, the material of law may be construed to form an independent, closed system where, at least in theory, all sorts of questions could or should be answered by interpreting existing legal norms. The law in civil law is regarded as 'found' rather than 'made' in each individual case through the application of deductive reasoning or, if necessary, reasoning *per analogiam* or *a contrario*.[3] By contrast, in common law systems no formulation of a rule, by a judge or anyone else, is regarded as final. Therefore, a later judge can broaden or narrow the terms in which a legal norm is expressed. In other words, in common law what is authoritative is what is decided. Law, in this system, is seen as open-ended in the sense that new extensions to existing rules can be revealed at any time by the courts. It is by identifying and distinguishing past cases that the common law lawyer 'discovers' the applicable legal rule in the case at hand. To the common law lawyer, the deductive approach of the civil law lawyer seems to reverse the natural form of legal reasoning.[4]

Systems of law may differ, moreover, with respect to the ideological background and aims of legal institutions. Legal institutions designated by the same name may function in different ways in the context of national systems operating under different ideologies.[5] For example, in both common law and civil law countries, contract is in principle regarded as an expression of the autonomy of the will, even though a person's freedom to contract may be limited by social, commercial and legally acceptable norms. By contrast, in the former socialist countries contract served an entirely different purpose. Contracts involving state property had to be concluded within the limits stipulated by the law and had to serve the tasks prescribed by the state economic plan. Agreements at variance with the current plan were considered void as a matter of private law.[6]

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[3]However, it should be noted that, notwithstanding their common origins and general characteristics, civil law systems differ from each other in many respects. It is only when the civil law lawyer inspects the common law and other legal systems that they acquire awareness of the affinity between the members of the civil law family. For an overview of the origins and main features of the civil law tradition see Chap. 8 below.

[4]As C. D. Gonthier remarks, the civil law is distinguished from the common law by "a difference in intellectual approach, in the quest and ordering of [legal] knowledge. Each approach reflects one of the modes of functioning of the human intellect, that is, on the one hand, the empirical mode based on specific instances from which one may eventually draw rules and even identify principles and, on the other, the theoretical approach based on established principles from which concrete consequences and applications are drawn." "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings", (1993) 21 *Canadian Business Law Journal*, 323.

[5]The ideology of a legal system is explained by K. Zweigert and H. Kötz as pertaining to "political or economic doctrines or religious belief'. *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 73.

[6]David (1988), p. 337 ff.

Notwithstanding the important differences between legal systems, the comparative study of laws also brings to light significant similarities among systems relating to the letter and spirit of legal rules and institutions, as well as the process by which these rules and institutions are created and developed. For example, even though, in contrast to common law systems, case law is not generally regarded as a formal source of law in civil law systems, it plays an increasingly important role in the latter systems' development. Thus, in France key concepts and principles of administrative law developed out of decisions arising from proceedings before the Council of the State (*Conseil d'Etat*) and administrative courts. Consequently, the judicial practice of the *Conseil d'Etat* and of administrative courts is considered a principal source of administrative law in that country. Similarly, in Germany the law governing activities such as strikes and lockouts developed from the decisions of the Federal Labour Court (*Bundesarbeitsgericht*). Furthermore, the usual contrast between the adversarial approach of the common law and the inquisitorial approach of the civil law should not be exaggerated.[7] Langbein, commenting on German and American procedures, remarks that "[A]part from fact-gathering. . .the lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure. There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent, they interpret statutes, and they formulate views of the law that further the interests of their clients". According to this author, the chief difference between civil law and American litigators is that the former may be described as 'law adversaries' while the latter as 'law-and-fact adversaries.' The civil law is distinguished from the common law with respect to legal procedure in that the civil law places greater responsibility upon the judge for the investigation of the facts, whilst the common law leaves the parties to gather and produce the factual material on which adjudication depends.[8] In a nutshell, the civil law model of legal procedure is construed to display a preference for 'centripetal' decision-making, determinative rules and a rigid ordering of authority. It also attaches greater importance to written testimony in the form of official documents and reports.[9]

Furthermore, comparatists warn against the serious mistake of confusing the political-ideological aims of a legal rule with the rule's juridical function. Even

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[7]The adversarial system of legal procedure is a system where the facts emerge through a formal context between the parties, while the judge acts as an impartial umpire. In the inquisitorial system, on the other hand, the truth is revealed by an inquiry into the facts conducted by the judge. In this system it is the judge who takes the initiative in conducting the case, leading the investigations, interrogating witnesses and assessing the evidence.

[8]Langbein (1985), pp. 823–824.

[9]According to M. Damaska, the relatively greater emphasis on certainty in the Civil law model of legal procedure is traced to the influence of the rationalist Natural Law School, and in particular "the rationalist desire to impose a relatively simple order on the rich complexities of life". "Structures of Authority and Comparative Criminal Procedure", (1975) 84 *Yale Law Journal*, 480.

though with respect to the former two legal systems may be fundamentally different, with respect to the latter the systems may be similar or compatible.[10] For example, as no socialist country had eradicated the use of money as a means of exchange for goods and services, the distribution to citizens of goods and services was made through a form of a market system regulated by legal rules (concerning, e.g., sales, leases and loans) that were largely similar in terms of function to the corresponding rules operating in capitalist countries. A citizen in the former East Germany, who purchased goods in a state-owned department store was engaged in the same activity as a citizen of West Germany, who purchased goods in a privately-owned store. Of course, in theory, the former individual, by means of his citizenship, could be regarded as a part-owner of the state-owned store. Moreover, in contrast to privately owned stores in capitalist countries, the operation of state-owned stores in socialist countries was supposed to be guided not by the goal of profit but by the goal of serving broader social needs. However, these differences were so remote from the actual purchase transaction that they did not significantly affect the practical legal issues that could arise in connection with the purchase. As these issues were largely the same in both countries, the legal rules by which they were regulated shared many common features. The same can be said with respect to many rules governing relationships in other fields of private law.

Contemporary legal systems share a host of common problems derived, among other things, from revolutionary changes in communication, transport and technology, the liberalization of immigration policies and the deregulation of national and international financial networks. This makes necessary the introduction of uniform or at least not incompatible legal solutions within national systems. The problems facing many countries include the control of restrictive business practices; the protection of public health and consumer protection; the conservation of the environment; and the application of new technologies and their impact on the labour market. Although there is considerable variety in the tools and methods adopted by different national systems to address these problems, the solutions are often identical or similar. In other words, the fact that national systems often employ different mechanisms in response to a social need or in addressing a legal problem does not preclude their convergence as long as the solutions adopted are compatible. Indeed, to some extent contemporary law-making and law-reform in many countries is characterized by a sort of eclecticism. This takes the form of using comparative law to investigate legal approaches and solutions to socio-economic problems, even if the countries whose laws are studied do not belong to the same broader legal family as that of the country concerned. The exchange of ideas and models among legal systems, precipitated by increased communication, mobility and cooperation, is gaining momentum and contributes to the move towards the convergence of laws. According to Schlesinger, the phenomenon of convergence between legal systems occurs when, starting from different stated rules, the systems evolve meeting

[10] See, e.g., Bogdan (1978), pp. 2, 93, 95; Bogdan (1994), p. 61 ff; Zweigert and Kötz (1987), p. 37 ff.

somewhere at a middle ground.[11] Legal converge can occur at a substantive, institutional or procedural level or, sometimes, on all these levels.[12]

7.2.1 *Factors Accounting for the Divergence and Convergence of Legal Systems*

Elucidating the relationship between legal systems, i.e. identifying and accounting for their common elements and differences, presupposes an examination of the factors that influence the development, structure and substantive contents of the relevant systems. It is the similarities and differences between these factors that engender many of the similarities and differences observed in the domain of law. The factors relevant to explaining the differentiation between national systems of law include: physical and geographical conditions; economic structure and level of economic development; political ideology; religion and other cultural factors; and historical circumstances. It is impossible to draw a complete list of all the factors at work, as many factors may be unknown or entirely incidental. Moreover, the various factors are not independent of each other but are interrelated or interdependent. Law may be construed as the product of a synthesis both of *exogenous* factors, such as economic structure, culture and political system, and *endogenous* elements, such as the operation of the legislative bodies and the nature of judicial decision-making. The effects of such factors are not the same everywhere but can considerably vary from case to case.[13]

The content of national laws is on occasion directly determined by physical conditions, such as geography, climate and the availability or lack of natural resources. Obviously, the rules regulating night work in the Arctic regions would be different from the relevant rules in countries located within the equatorial zone. Similarly, the legal regulation of water supply cannot be the same in the desert areas of North Africa and in Scandinavia. In areas where the level of seismic activity is high, the risk of earthquakes affects the content of the legal rules relating to construction standards. Climatic conditions are considered when formulating rules

[11] Schlesinger (1995), p. 477.

[12] See Sacco (1991), p. 1.

[13] As early as the mid-eighteenth century, the era of the Enlightenment, the French philosopher Montesquieu observed that the laws of a nation were necessarily formed relative to the physical features of a country: to a hot, mild or cold climate; to the quality, situation and scale of formation of the terrain; and to the life-style of the inhabitants as determined by these conditions. He also argued that laws were related with several other factors, such as the degree of liberty that physical conditions made possible; the population's religious beliefs and cultural attitudes; relative wealth; density of the population; modes of commerce; and customs and manners. What Montesquieu refers to as *l'ésprit des lois*, the underlying spirit that shapes any set of laws, is the result of the combined influences of all these factors. See Charles de Secondat Montesquieu, *De l'Esprit des lois* (1748), book I, chapter 3.

on the control of food supply and distribution. The discovery of new energy sources, such as oil or natural gas, necessitates the introduction of legal rules to regulate their exploitation.[14] Physical conditions play a direct role in the formulation of specific legal rules, i.e. rules that are introduced to meet needs generated by the conditions themselves, but they also impact upon the character of the legal system indirectly, e.g. by influencing the mentality and temperament of the population,[15] or by affecting a country's economy and, through it, its legal development to the extent that the law is influenced by economic circumstances.

An interrelationship also exists between economic and legal development. Often the content of specific legal rules is determined by and directly reflects certain economic patterns. The economic structure establishes the limits of decision-making with respect to both the system and details of the law. One can say that the economy underpins and sets the limits to the law but, on the other hand, law also provides the framework for economic activity. Countries with different economic systems (free market economy, centrally planned economy), or at different stages of economic development, have different legal rules in the economic domain. For example, the introduction of legal rules against restrictive business practices (antitrust legislation) becomes necessary only in the context of a free market economy and presupposes a certain level of concentration of economic power. Moreover, as far as the economic structure impacts upon other aspects of social life, such as criminality and family life, it also plays an indirect part in the areas of criminal law and the law governing family relations. Notwithstanding its importance, the economic system should be regarded as one of several interrelated factors affecting the character and development of the law.

The study of cultural history shows the important role that religions have played in the development of legal systems. The influence of religion on law is manifest not only in early societies, in which religious, moral and legal norms often overlapped, but also in modern ones. For example, in countries of the Muslim world religious norms have directly acquired the status of legal norms or been indirectly incorporated into the legal system. Likewise, in Western countries religious beliefs and attitudes have impacted on the development of the law, especially in the fields of family and criminal law. Moreover, as Zweigert and Kötz have pointed out, religious beliefs may have a distinctive effect on the style of a legal system as well as people's attitudes towards it.[16] For example, the influence of Confucian ethics in Asian countries is a factor that explains the people's general aversion to laws and judicial proceedings, and the emphasis placed on compromise and conciliation as a means of resolving private disputes. It is important to note, however, that one should examine the effects of religious factors on a particular legal culture in light of the historical processes that shaped the epoch during which that culture emerged, while always

[14]See Grossfeld 1990), p. 75 ff; Rodière (1979), p. 8.

[15]See Wahl (1973), pp. 261–276.

[16]Zweigert and Kötz (1987), p. 73.

remaining aware of the connections between these factors and both socio-economic and political influences.[17]

To gain a thorough understanding of a country's legal system and its development one must also examine its political system. Both the contemporary political system and the social situation set certain ideological limits on legal regulation. The legislation reflects the way powerful groups in society conceive the prevailing state of affairs and the manner in which matters should be arranged. In this respect one should ask: which social groups possess the power to impose their own world picture or ideology—their knowledge, beliefs and desires regarding society—as the basis for legal norms and their application? From this point of view one may explain differences between the legal systems of democratic and non-democratic states, especially in the fields of constitutional, criminal and administrative law.[18] Moreover, the close connection between a country's political system and its economic structure dictates a general explanatory background of economic activity as a framework for concrete observations.[19] Although a particular type of ideology normally underpins an economic and political system, ideological differences can be detected even between countries with the same or similar political and economic systems. For example, differences between the prevailing views in two countries about the position of women in society are reflected not only in family law, but also in other branches of law such as labour law and the law of succession. Such ideological differences may be explained by reference to cultural, religious and historical factors.

As previously noted, law can only be properly understood when it is placed in a broad historical context. The defining features of a legal system are the product of historical processes, especially those that shaped the epoch during which the system was formed. Thus, historical factors can explain a country's constitutional structure (e.g., whether it is a republic or a constitutional monarchy), the hierarchy of sources of law, the organization of its court system or the enactment of certain laws.[20] For

[17]As previously noted, Friedman defines legal culture as the body of ideas, values, expectations and attitudes towards law and legal institutions which some public (or some part of the public) holds. "The Concept of Legal Culture: A Reply", in D. Nelken (ed.), *Comparing Legal Cultures* (Brookfield, Vt., 1997), 33–40. And see Chap. 6 above.

[18]See on this Friedmann (1972), pp. 22–23.

[19]Political decision-making may be described as the uniting link between economic conditions and legal norms.

[20]In so far as law is a product of the authoritative power of the state, it is unsurprising that, under certain historical conditions, legislative enactments were strongly influenced by the personal preferences or priorities of a person or persons in a position of great authority. For example, the content of certain family law rules in France at the time of the introduction of the French Civil Code (early nineteenth century) was largely determined by considerations pertaining to Napoleon Bonaparte's own family situation. In general, however, a legislator's choice may very rarely be regarded as being entirely arbitrary. In most cases the legislator would adopt one of several possible solutions to a problem generated by a conflict of interests—the solution which appears to him or her the most reasonable in the circumstances—even though in the eyes of another legislator a different solution may have been preferable.

instance, consider the phenomenon of codification of law—a distinctive feature of civil law systems. Codification denotes an authoritative statement of the whole law in a coherent and systematic way. The tradition of codification is a product of the rationalist tendencies that prevailed in European political philosophy during the eighteenth and nineteenth centuries. Its roots, however, can be traced to the great codification of Roman law by the Emperor Justinian in the sixth century AD. One can trace to Justinian the idea that the code overrides all legal sources, offering a fresh start to the law. As previously noted, a great deal of the differences between civil law and common law systems are, in one way or another, connected with the contrast between the procedural and the theoretical origin of legal norms, concepts and principles. Therefore, it is not surprising that legal scholars and academics in civil law countries enjoy more prestige than judges, for the duty of the civil law judge is to apply the written law whose meaning is discovered largely from the work of academic scholars.[21] In the civil law, the legal scholar seems to be the senior while the judge is the junior partner in the legal process. The authority of academic writers in civil law countries has an historical explanation. When the texts of Justinian's legislation were rediscovered in the eleventh century, they appeared so complicated and difficult to understand that it was left to academic scholars (the glossators and the commentators) to decipher and explain them. As a result, the works of academic commentators acquired as much authority as the texts themselves. Judges also came to greatly rely on legal scholars for information and guidance concerning the interpretation and application of the law. By the end of the sixteenth century it had become a common practice for judges in Germany and other Continental European countries to refer the record of a difficult case to a university law faculty and to adopt the faculty's collective opinion on questions of law. This practice, which prevailed until the nineteenth century, resulted in the accumulation of an extensive body of legal doctrine. When systematized in reports and treatises the scholarly opinions rendered in actual cases were regarded as a kind of case law and an authoritative source of legal interpretations.[22] Reference should also be made, in this connection, to the importance of elucidating the historical relationship between legal orders and the issue of transferability of legal institutions and norms. The legal systems of countries such as New Zealand, Australia, Canada, India, and Singapore, share many common characteristics by reason of their historical inheritance from British colonialism, notwithstanding the fact that the legal rules and institutions received have often been modified or replaced to meet local conditions and needs.

There is an incessant competition between the factors of differentiation and uniformity of legal systems. The outcome is determined by the relative weight ascribed to the various factors in different socio-cultural and legal contexts.

[21]As J. Merryman remarks, if the common law is the law of the judges, the civil law is the law of the law professors. *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, CA, 1969), 59–60.

[22]See Dawson (1968), p. 231.

7.3 Legal Transplants and Reception of Laws

A great deal of the similarities that exist among legal systems belonging to the same broader legal family or transnational tradition are the result of 'legal borrowing' or 'legal transplanting'. As previously noted, 'legal transplanting' involves a legal system incorporating a legal rule, institution or doctrine adopted from another legal system. It may also pertain to the reception of an entire legal system, which may occur in a centralist way. To understand the reception of foreign law phenomenon one must examine the historical reasons behind the introduction of foreign law in a particular case, e.g. whether it is the result of conquest, colonial expansion or the political influence of the state whose law is adopted. Territorial expansion through military conquest did not always entail the imposition of the conquering peoples' laws on the subjugated populations. For example, in the lands under Roman, Germanic and Islamic rule subject populations continued to be governed by their own systems of law under the so-called 'principle of the personality of law'. In some cases, a direct imposition did in fact occur, as happened, for instance, with the introduction of Spanish law in South America. In other cases, the law of the conquering nation was introduced in part or in an indirect fashion. For example, during the British and French colonial expansion there was a tendency to introduce into the colonies elements of the legal systems of the colonial powers or to develop systems of law adapted to local circumstances but largely reflecting the character of the metropolitan systems. Furthermore, one should recognize that the process of legal transplanting might be interrupted, or precipitated, by revolutionary change. A revolution may be defined as an historical event that may change the identity of a socio-political system by altering the ideological foundations of its legitimacy and, consequently, its orientation. A revolutionary legitimacy change is the most radical change that a socio-political system may undergo.[23] The transformation of a country's legal system prompted by such a change may entail the system of law moving further away from or closer to other systems, so far as ideological differences and similarities with respect to different countries' socio-political and economic structures are expressed in law.[24]

[23]Legitimacy is the quality of a socio-political system that explains its authority at a particular place and time over a particular community. A system's legitimacy may be founded on social consensus (democracies), or on a variety of other elements, such as transcendental command (e.g. theocratic states) or, even, arbitrary oppression. In turn, orientation may vary from old-fashioned, open-ended laissez-faire orientations to communism and many other distinct combinations. Efficiency is a quality that refers to the overall performance of a system. A system develops and remains the same to the extent that the foundation of its legitimacy and the direction of its orientation remain stable. Non-revolutionary changes are under legitimacy control. In such a case, since the foundation of legitimacy is not affected, a change in the direction of orientation must satisfy the criteria of the established legitimacy foundation. Revolutionary change may be the result of a catastrophic collapse with respect to the authority or efficiency of a system.

[24]On the role of revolution as a factor explaining the divergence or convergence of legal systems see Rodière (1979), p. 21.

As commentators have observed, the perceived quality and prestige of the donor system plays a central part in a legal reception process. Consider, for instance, the reception of Roman law in Europe and its admirable longevity as a system under different socio-economic conditions. Roman law, as preserved by the compilers of Justinian's codification in the sixth century AD, was one of the strongest formative forces in the development of Western legal culture. It was adopted and applied in most of Continental Europe during the Middle Ages and the Renaissance (in wide areas of Germany and other European regions it remained an immediate source of law until the end of the nineteenth century).[25] Roman law was received in Catholic, Calvinist and Lutheran countries; it operated in countries where agriculture dominated economic life and it also applied in mercantile centres and later in countries undergoing an industrialization process. This system of law, first adopted in Europe, was directly or indirectly (through a European law code) transplanted in South America, Quebec, Louisiana and many countries in Asia and Africa. But why was Roman law adopted? The medieval reception of Roman law was partly due to the lack of centralized governments and developed formal legal systems that could compete with the comprehensive inheritance of Rome; and partly due to the fact that the lands formerly governed by the Romans were accustomed to this style of thought, and accorded it wisdom and authority. A third feature, deriving almost completely from the model of the Roman *Corpus Iuris Civilis*, was the desire of the emerging nation-states to codify their laws and the aspirations of later jurists to conform their studies to this model. The important point here is that Roman law was not adopted merely because it was admired, nor because its norms were particularly suitable for the social conditions in the early European nation-states. In fact, many norms of Roman law were entirely antiquated. Foremost, it was the perceived superiority of Roman law *as a system* that led to the adoption of its norms, even if this adoption was supported by a learned tradition that endured for centuries.[26] Thus, as an important common denominator of Western legal experience, the conceptual system of Roman law may be said to be an apt *tertium comparationis*—a common basis of the legally organized relationships of life.[27]

Nowadays, foreign rules or doctrines are usually 'borrowed' in the context of legal practice itself, because they fill a gap or meet a particular need in the importing country. As already noted, one of the chief objectives of comparative law has traditionally been the systematic study of foreign laws with the view to deriving models that would assist the formulation and implementation of the legislative policies of states. In drafting or revising statutes and law codes, national legislators

[25]On the Reception of Roman law in Europe see Chap. 8 below.

[26]Seen as constituting an expression of natural reason, Roman law was received in Europe not by virtue of any theory concerning its continued validity as part of the positive law, but in consequence of its own inherent worth. In other words, its validity was accepted not *ratione auctoritatis*, but *auctoritate rationis*.

[27]Legal relationships are to a large extent organized by forms derived from Roman law (such as *contractus* and *bona fides*). One might say that these forms constitute a kind of *pre-knowledge* for Western legal systems.

often rely on large-scale legislative comparisons that they themselves undertake or mandate. A legislator's readiness to adopt a foreign legal rule is often associated with considerations of economic efficiency. According to Mattei, the reception of foreign legal rules is usually the end result of a competition where each legal system provides different rules for the resolution of a specific problem.[28] In a market of a legal culture, where rule suppliers are concerned with satisfying demand, ultimately the most efficient rule will be the winner.[29] Moreover, the study of foreign laws can also be valuable when courts and other authorities interpret and apply the legal rules of their own legal system. In so far as a judge, in filling a gap in the law, is expected to decide in the way in which the legislator would have decided, then the question is: how does a modern legislator reach their decisions? As previously noted, a legislator often reaches their decisions by taking into consideration information about foreign systems provided by comparatists. It is thus unsurprising that judges often seek to justify their decisions by pointing to the fact that a similar approach has been adopted in other jurisdictions. This is especially true when a judge interprets and applies rules that have been borrowed from other legal systems, as well as the rules introduced as a result of international unification or harmonization of law. As the above discussion suggests, a study of legal borrowing must also address the roles that the legal profession, legal science and legal education play in the reception process; the form of the imported law (whether it is a written, customary or judge-made); and whether (or to what extent) the importing and exporting countries are compatible with respect to culture, socio-political structure and level of economic development.

Legal transplants can be introduced by all branches of government: legislatures, courts or administrative bodies. As observed in Chap. 2, legislation involves a significant potential for legal transplantation due to the extensive power of the legislature to introduce legal reforms. Probably the most dramatic examples of legal transplantation through legislation concern transitional periods in a nation's history. In such periods, political-legal systems undergo drastic transformation and the most effective tool for change is legislation. For example, large scale legal transplantation through legislation was part of the process of opening up to the West, which transformed the legal system of Japan in the second half of the nineteenth century.[30] In a similar way, large scale legal transplantation through legislation was part of the new beginnings of legal systems, such as the systems of

[28]See Mattei (1994), p. 3 ff; Mattei and Pulitini (1991), p. 207 ff. According to Mattei, from the viewpoint of a particular legal system, 'efficient' is whatever makes the legal system work better by lowering transaction costs. Mattei's approach, which represents an example of the more recent trend to combine comparative law and economics, may be taken to constitute a narrower version of functionalism focusing not on social functions in general but on a particular function, namely the efficiency of a legal rule or institution in economic terms.

[29]But, as Mattei recognizes, the existence of differences between legal systems does not necessarily imply inefficiency. Different legal systems may adopt alternative solutions for the same legal problem, which may be regarded as neutral as far as the issue of efficiency is concerned.

[30]See Seizelet (1992), pp. 67–72; Minear (1970) and Röhl (2005).

countries liberated from colonialism[31] and, in later times, from communist rule.[32] As previously noted, a nation in the process of enacting a new constitution is particularly susceptible to external influences and this may be due to its desire to abandon norms associated with overthrown political regimes or a disappointing constitutional past.[33] In today's globalized world, legal transplantation through legislative action is part of everyday reality in most countries. However, the tendency to borrow foreign legal concepts and institutions varies according to the socio-cultural and political context, as well as the subject-matter of the legislation at hand. In particular, areas where a legal system is faced with challenges on which no prior relevant experience is available are usually more susceptible to borrowing from foreign legal systems. Technological innovations that make it necessary for legislators to search for models include, for example, artificial intelligence and new reproduction technologies.[34] Furthermore, searching for inspiration from foreign legal systems is often associated with economic competition between countries. For instance, tax legislation and special laws facilitating investment are of immediate concern for today's competing economies.[35] Another type of legislative enactment with outside origins (as distinguished from legislation inspired by laws enacted by another state) is legislation introduced in the wake of the conclusion of an international treaty mandating or encouraging the adoption of conforming laws by the contracting

[31]For example, the law codes enacted in Latin American countries following their liberation from Spain in the nineteenth century were based on European legal models, such as the French and German civil codes. For a closer look see Mirow (2000), p. 83; Mirow (2001), p. 291. For a general view consider Mirow (2004). Similarly, in the 1960s countries liberated from colonial rule adopted legal systems based on Western models, especially those of the former colonial powers. However, what was portrayed as a Western contribution to the successful development of former colonies has been criticized as inadequate to meet these countries' needs, largely due to the socio-cultural differences between the donor and recipient countries. Consider on this issue Gardner (1980). And see Berkowitz et al. (2003), p. 163.

[32]In the years following the demise of the communist regimes in Eastern Europe, former communist states in the process of transition to democracy and a market economy introduced major legal reforms in the fields of both public (especially constitutional) and private law. Consider, e.g., Ajani (1995), p. 93. In China too, major legislative reforms were enacted with a view to developing appropriate tools for the country's growing economy, with considerable input from foreign experts. See Seidman and Seidman (1996), p. 1.

[33]For example, after the World War II, both Germany and Japan adopted new constitutions that were drafted with the assistance and under the guidance of the victorious powers, especially the United States. Consider on this, e.g., Hamano (1999), p. 415.

[34]A relatively new example in this context is the tendency to consider legal arrangements in other states concerning the acceptance of same-sex marriage and registered partnerships.

[35]The adoption of Western models in the domain of commercial law by East European countries should also be understood as being motivated by economic factors and the desire to increase competitiveness. A negative effect of this phenomenon is the so-called 'race to the bottom' with respect to welfare legislation and the laws protecting workers' rights. Consider on this issue Avi-Yonah (2000), p. 1573; Charny (2000), p. 281.

parties.[36] Finally, some acts of legislation are motivated by the desire to facilitate the worldwide or regional harmonization of law and to overcome the diversity of national laws and the conflicts this gives rise to in certain areas (such as intellectual property rights or internet law).

As noted in Chap. 2, judges also use the technique of recourse to foreign legal systems, especially when facing difficult cases. However, as in most cases judges are expected to apply existing rules (and not to create new ones), the use of foreign legal material is restricted to the interpretation of current laws in the wake of legal uncertainty produced by conflicting rulings. To put it otherwise, judges cannot engage in legal transplantation that entails institutional reform or has no basis in existing norms that are considered binding within the system. Constitutional norms concerned with the protection of individual or collective rights are especially open to judicial interpretation by reference to international and foreign legal standards, due to their vague wording and the expectation of compliance with international human rights conventions.[37] Furthermore, when courts are confronted with novel problems, i.e. problems falling outside the scope of both current legislation and judicial precedent, they often tend to rely on foreign law materials. In general, courts find it easier to utilise precedents from legal systems belonging to the same legal family as their own.[38] A potential problem with the judicial transplantation of legal norms is that it presupposes broad judicial discretion concerning the decision when to borrow and from where.

The practice of transplantation by the executive is an important, although often neglected, aspect of comparative law today. Although administrators are not regarded as law-makers, they are engaged in the creation of new legal norms in at least two ways: through legislation originating in the initiatives of the executive and when they borrow new administrative models from other countries. As is well known, significant legislative reforms are often proposed and drafted by the professional staff of the executive, who would use foreign law materials when they believe that such material may prove useful. Indirect transplantation may occur also when government agencies import new methods of governance, such as outsourcing and privatization, and administrative innovations from foreign countries. Although such initiatives are in theory only administrative decisions not involving a normative content, they are often accompanied by a growing incentive to import also the legal mechanisms developed in the donor country to deal with the relevant administrative model. A problem with transplantation through administrative initiative is that it appears to contradict democratic values, in so far as administrative decisions often lack transparency and are generally not subject to public scrutiny.

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[36]Another form of activity on an international plane that influence domestic legislation is that pertaining to the creation of model laws by organs of the United Nations or other international organizations. In this connection, reference should be made to the activities of the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT), mentioned in Chap. 2 above.

[37]Consider on this matter Neuman (2004), p. 82.

[38]See relevant discussion in Chap. 2 above.

As the above discussion suggests, the practice of legal transplantation is more common and complex than is usually perceived. It is utilized not only by lawmakers and judges but also by members of the executive and administrators. Therefore, studies which consider the use of foreign law by focusing mainly on legislation and juridical literature may lead to an incomplete picture of how legal change occurs.[39]

Examining the destinies of legal transplants in diverse socio-cultural, economic and political contexts is important for determining the desirability and applicability of such transplants for legislative and judicial practice. It may be true that socio-cultural and other differences between the exporting and importing countries do not necessarily preclude the successful transplantation of legal rules and institutions. Legal rules can be taken out of context and used as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occasionally ascribed a different, local meaning, when it is 'indigenized' on account of the host culture's inherent integrative capacity. It is not surprising that, very often, Western legal concepts, institutions and rules imported by non-Western countries are understood in a way that is different from that in the donor countries. The absence of substantial differences in the wording of a legal rule between a donor and a host country does not imply that legal reality, or everyday legal practice, in the two countries should be presumed to be identical or similar. The legal reality in the host country may be very different with respect to the way people (including judges and legal practitioners) read, construe and justify the relevant law and the court decisions based on it. Moreover, the role of statutory law in the recipient country may be weaker than in the exporting country and custom may be a predominant factor. Thus, in practice, socio-cultural norms might effectively prevent people from initiating a legal claim or even using a court decision supporting such a claim. As this suggests, it is not good sense to use the perspective and framework of one's own legal culture when examining a legal rule or institution borrowed by a legal system operating within the context of another culture.[40] Such an approach carries the risk of implying the existence of many more similarities than actually exist.[41]

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[39]See on this Siems (2007), p. 133.

[40]According to O. Kahn-Freund, there are 'degrees of transferability'. All legal rules may to some extent be disconnected from their socio-political setting, and this makes legal transplants across socio-political boundaries theoretically possible. However, since laws get disconnected to varying degrees, some are more likely to survive the journey than others. The author notes, moreover, that socio-political institutional factors determine the degree of coupling between law and society. These factors pertain to the ideological role of law, the distribution of state power and pressure from non-sate interest groups. Transplanted laws should be compatible with the dominant political-legal ideology in host countries; they should accord with host countries' legal frameworks and political power structures; and should attract sufficient support from special interest groups, such as market support organisations (e.g. banks, trade unions and political parties) in host countries. "On Uses and Misuses of Comparative Law", (1974) 37 (1) *Modern Law Review*, 1, 12–14. Consider also Stein (1977–1978), p. 198.

[41]As A. Watson has remarked, "except where the systems are closely related, the differences in legal values may be so extreme as to render virtually meaningless the discovery that systems have the same or a different rule". *Legal Transplants*, 2nd ed., (Athens, Georgia, 1993), 5. For example,

7.4 Legal Transplants and Legal Change: Watson's Theory Revisited

Since the publication of the first edition of his seminal book, *Legal Transplants: An Approach to Comparative Law* in 1974, Professor Alan Watson has produced many significant works on the relationship between law and society, and the factors accounting for legal change.[42] In these works he iterates his belief that changes in a legal system are due to legal transplanting: the transfer of legal rules and institutions from one legal system to another. According to Watson, the nomadic character or rules proves that the idea of a close relationship between law and society is a fallacy.[43] Law is largely autonomous and develops by transplantation, not because some rule was the inevitable consequence of the social structure, but because those who control law-making were aware of the foreign rule and recognized the apparent benefits that could derive from it.[44] Watson does not contemplate that rules are borrowed without alteration or modification; rather, he indicates that voluntary transplants would nearly always—always in the case of a major transplant—involve a change in the law largely unconnected with particular factors operating within society.[45] Neither does Watson expect that a rule, once transplanted, will operate in exactly the same way it did in the country of its origin. Against this background, Watson argues that comparative law, construed as a distinct intellectual discipline, should be concerned with the study of the historical relationships between legal orders and the destinies of legal transplants in different countries.[46] On this basis one

consider the difficulties surrounding the interpretation of the concept of individual freedom, as found in international treaties on human rights. Individual freedom has a rather different meaning in China and other Asian countries, as compared to the Western view, not just because of a political ideology currently or formerly imposed by the rulers of those countries, but because of a more basic, culturally embedded ideology that originates from a very different, collectivist world view. And see Ewald (1995), p. 489. For a closer look at the issue of legal transplants see Siems (2018), p. 231 ff; Graziadei (2019), p. 442; Graziadei (2009), p. 723; Örücü (2002), p. 205; Gillespie (2001), p. 286.

[42]See, e.g., Watson (1996), p. 335; Watson (1978), p. 313; Watson (1976), p. 79; Watson (1977, 1984, 1985, 1991b, 2001). And see Sacco (1991), p. 343.

[43]*Legal Transplants*, supra note 41, 108.

[44]"Comparative Law and Legal Change", (1978) 37 (2) *Cambridge Law Journal*, 313, 313–315 and 32.

[45]Watson has identified a number of factors that determine which rules will be borrowed, including: (a) accessibility (this pertains to the question of whether the rule is in writing, in a form that is easily found and understood, and readily available); (b) habit (once a system is used as a quarry, it will be borrowed from again, and the more it is borrowed from, the more the right thing to do is to borrow from that system, even when the rule that is taken is not necessarily appropriate; (c) chance (e.g., a particular written source may be present in a particular library at a particular time, or lawyers from one country may train in, and become familiar with the law of another country); and (d) the authority and the prestige of the legal system from which rules are borrowed.

[46]*Legal Transplants*, supra note 41, 6.

may identify the factors explaining the change or immutability of law.[47] Watson asserts that comparative law (which he distinguishes from the study of foreign law) can enable those engaged in law reform to better understand their historical role and tasks. It can provide them with a clearer perspective as to whether and to what extent it is reasonable to borrow from other systems and which systems to select; and whether it is possible to accept foreign legal rules and institutions with or without modifications.[48]

The concept of *transplant bias* is an essential element of Watson's theory that legal change primarily occurs through the appropriation or imitation of norms. It refers to a system's receptivity to a particular foreign law as a matter distinct from acceptance based on a thorough assessment of all possible alternatives.[49] This receptivity varies from system to system and its extent depends on factors such as the linguistic tradition shared with a potential donor system; the general prestige of the possible donor system; and the educational background and experience of the legal professionals in the recipient system. The adoption of an entire foreign legal code is probably the clearest manifestation of transplant bias. According to Watson, juristic doctrine is particularly susceptible to foreign influence.[50] Precedent, on the other hand, seems to be least affected by transplant bias—when judges borrow from foreign legal systems, the value of the foreign rule for the judge's own system is often carefully considered and evaluated. Transplant bias involves an authoritative argument that takes, for example, the form: norm N is a Roman law norm—Roman law is superior—therefore, norm N should be accepted. Behind the *minor* premise of this inference there is no general appraisal of all norms of Roman law, but rather an opinion based upon the *systematical coherence* of the relevant norm. The assertion, 'Roman law is superior', is neither deductive (i.e. based upon an axiom concerning the superiority of Roman law) nor inductive (where one should present reasons for

[47]*Legal Transplants*, ibid., at 21. To illustrate his point, Watson mentions a set of rules concerned with matrimonial property, which travelled "from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, [and] from California to other states in the western United States." (Ibid., at 108) He adds, that if one considers a range of legal systems over a long term "the picture that emerge[s] is of continual massive borrowing . . . of rules." (Ibid., at 107) On this basis he concludes that the moving of a rule or a system of law from one country to another has now been shown to be the most fertile source of legal development, since "most changes in most systems are the result of borrowing." (Ibid., at 94). According to R. Sacco "Borrowing and imitation is . . . of central importance to understanding the course of legal change" . . . "the birth of a rule or institution is a rarer phenomenon than its imitation." "Legal Formants: A Dynamic Approach to Comparative Law" II, (1991) 39 *American Journal of Comparative Law*, 343, at 394 and 397.

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

[49]Transplant bias may be used to denote, for example, a system's readiness to accept a Roman law norm *because* the norm is derived from Roman law.

[50]This is evidenced by the fact that the reception of Roman law in Continental Europe first occurred in the field of legal science.

considering the particular norm N good); rather it is quasi-inductive and systematical.

As a factor of legal change, transplant bias interacts with a number of other factors: source of law; pressure force; opposition force; law-shaping lawyers; discretion factor; generality factor; inertia; and felt needs.[51] Consideration of these factors is crucial to understanding the phenomenon of legal change.

According to Watson, the development of a legal system is influenced by the nature of the predominant *source of law*, whether this is custom, statute, judicial precedent or juristic doctrine. In general, precedent-based law develops more slowly than statutory law because precedent-based law "must always wait upon events, and, at that, on litigated events." There is no way of precisely defining the *ratio decidendi* of a particular case, for "only when there is a line of cases does it become possible to discover the principle underlying even the first case."[52] While law based on precedent is slow to change, statutory law, which is more systematic and broader in scope, can be utilized to introduce drastic and swift reforms.

The term *pressure force* refers to an organized group of persons who believe that they would derive a benefit from a change in the law. Watson says that the power wielded by a group to effect legal change varies in accordance with the social and economic position of its members and its capacity to act on a particular source of law. In general, development by legislation is more strongly affected by pressure forces than development by judicial precedent.[53] Examples of interest group influence on lawmaking abound: laws concerned with the use of alcohol or drugs and sexual behaviour, food and drug legislation, antitrust laws and the like are all well-known instances of interest group activity. Furthermore, alterations in existing statutes often result from the influence of those groups who see some advantage in the proposed changes.

Opposition force is the converse of pressure force and refers to an organized group of persons who believe that harm will result from a proposed change in the law. Change may be resisted by groups who fear a loss of power, prestige or wealth, should a new proposal gain acceptance. There are many different kinds of vested interests for whom the status quo is profitable or preferable. For example, in some countries, divorce lawyers constitute a vested interest and for a long time have

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[51] Although these factors pertain primarily to the Western legal tradition, Watson believes that they are valid also outside this sphere. Consider "Comparative Law and Legal Change", (1978) 37 (2) *Cambridge Law Journal*, 313–336.

[52] Watson (1978), p. 323.

[53] Watson stresses the independence of judges in precedent-based systems. As judges are not elected and their role is not seen as primarily political, they are less likely to be subject to direct pressure by organized groups. He adds that juristic doctrine, as a source of law, is also largely immune from pressure forces, except where a pressure force has great power and authority. In my opinion, Watson over-emphasizes the immunity of judges and jurists from external pressure. Usually there is a system of permanent pressure forces in society, and most lawyers belong to that system. It is important to consider whether or to what extent judges and jurists are susceptible to political arguments, and the degree of participation in politics they are permitted in different systems.

resisted efforts to reform divorce laws. Students attending public or state universities have a vested interest in a tax-supported higher education system. Residents in a community often organize to oppose zoning changes, interstate highways, the construction of waste disposal facilities, or the building of prisons.[54] In fact, almost any change through law will adversely affect some groups in society, and to the degree that those groups consciously recognize the danger, they will oppose the change. According to Watson, for an opposition force to exist it is required that the group that would be adversely affected by the change is adequately organized.[55]

Law-shaping lawyers are the legal elite that shape the legal system and whose knowledge, imagination, training and experience strongly influence the end product of any change in the law. Legal professionals mould the law in diverse ways: as members of parliamentary or governmental committees they are directly involved in the drafting of legislation; as judges they determine the shape and form of judicial precedents; and as jurists they contribute to the development of juristic doctrine and its recognition as a source of law. Watson observes that lawyers are well-placed to act as pressure or opposition forces.[56] Their knowledge of how the legal system actually works means that they are fully aware of how the current law or its change affects their well-being.[57]

The *discretion factor* refers to the implicit or explicit discretion that exists either to enforce or not enforce the law, or to press or not press one's legal rights. The discretion factor is concerned with "the extent to which the rules permit variations, or can be evaded. . .or need not or will not be invoked."[58] Watson observes that some degree of discretion is an inevitable element in any developed legal system. This discretion may be possessed by individual parties, judges and members of the executive or actually be built into the legal rules themselves. By providing choice

[54]Occasionally, widespread resistance to change may be channelled through a social movement or political action groups or lobbyists.

[55]Watson remarks that although the persons who will be adversely affected by a proposed change in the law may be more numerous than those who will benefit, the change will most likely be executed if the anticipated gains of each member within the latter group is extensive, whereas the perceived harm to each member of the former group is small. The absence of an organized opposition force in such a case explains why legislation that is overall harmful and generally considered unpopular is occasionally passed without much resistance.

[56]For example, the majority of British judges and lawyers insist on wearing the arcane court attire consisting of ceremonial robes and wigs that became fashionable and then mandatory during the reign of King Charles II in the late seventeenth century, although there has been a move led by the Lord Chancellor, head of the country's judiciary, to wear business attire for every day and use the knee breeches, silk stockings and buckled shoes only on special occasions.

[57]Watson observes that although, as a factor of legal change, law-shaping lawyers may be deemed superfluous (as their functions are adequately covered by the notions of source of law and transplant bias), their role deserves special attention. In his more recent work, Watson places greater emphasis on the role of legal culture in shaping law's internal development. He points out that legal change comes about through the culture of the legal elite, and it is above all determined by that culture. See Watson (2001), p. 264. On the notion of legal culture see Chap. 6 above.

[58]Watson (1978), p. 330.

the discretion factor tends to mitigate some undesirable requirements or consequences of legal norms, thus prompting an easier acceptance of these norms.[59]

The *generality factor* denotes the extent to which legal rules regulate more than one group of people, or more than one transaction or factual situation. Watson points out that the greater the generality of law, the more difficult it is to find a rule that precisely fits the situation of each group, or transaction or factual situation being regulated. He adds that the greater the generality of a proposed change in the law, the greater the difficulty of securing agreement on the appropriate rule or rules, and hence the greater the difficulty of bringing about legal change. The generality factor interacts to a considerable extent with the pressure or opposition forces. If the scope of the proposed change in the law is too narrow, the pressure force supporting it may have little influence. If, on the other hand, the scope of the proposed change is too broad, it is likely to produce an opposition force as such a change is unlikely to satisfy all the groups concerned. A connection also exists between the generality factor and the sources of law: to carry out a legislative change a degree of generality is required.

Inertia is defined by Watson as the absence of a sustained interest of society and its ruling elite to endeavour to bring about the most 'satisfactory' rule. For legal change to occur, an impulse must exist (directed through a *pressure force* operating on a *source of law*) that is sufficiently strong to overcome the inertia.

Finally, *felt needs* are the purposes known to, and considered appropriate by, a pressure force operating on a source of law. Watson recognizes that elucidating the nature of felt needs is not always easy. He declares that this requires an examination of words, deeds and effects: what the pressure force says is needed; how its constituent elements act both before and after the legal change is implemented; and how the change actually impacts on the interests of the pressure force concerned. There are needs that may be general, well-recognized and enduring in time. But unless these needs are supported by an active pressure force they are not 'felt needs' as understood by Watson, even though consideration of these 'other needs' is important for anyone interested in understanding the relationship between law and society.

The experience of the legal historian underlies Watson's scepticism towards the view that law is directly derived from social conditions. According to him, history shows that legal change in European private law has occurred mainly by

[59]However, Watson does not fail to note that an abuse of discretion will entail an adverse reaction. It is true that discretion creates choice, but the use of choice depends on certain other factors. It might be the case, for example, that a controversial parliamentary bill is passed as law after the most questionable paragraphs have been recast in such a way as to enable the judiciary or the executive to exercise discretion (e.g. open wording, general clauses or flexible criteria are used). However, this transfers the problem to another level of decision-making. At that level of micro decision-making, the principle pertaining to the equal treatment of the subjects of law plays a more important part than at the level of law-making, where the criteria of formal justice are introduced. From a comparative point of view, it should be stressed that a mere statement of discretion is rarely sufficient, as discretion is exercised according to some criteria and not at random.

transplantation of legal rules and is not necessarily due to the impact of social structures. He sees legal change as an essentially 'internal' process,[60] in the sense that sociological influences on legal development are considered generally unimportant. The evidence to support this position is derived from history, which Watson claims to show: (i) that the transplanting of legal rules between systems is socially easy even when there are significant material and cultural differences between the donor and recipient societies; (ii) that no area of private law is very resistant to change through foreign influence—contrary to the sociologically oriented argument that culturally rooted law is more difficult to change than merely instrumental law[61]; and, (iii) that the recipient legal systems require no knowledge of the context of origin and development of the laws received by transplantation from another system.[62] Social, economic, and political factors affect the shape of the generated law only to the extent they are present in the consciousness of lawmakers, i.e. the group of lawyers and jurists who control the mechanisms of legal change. The lawmakers' awareness of these factors may be heightened by pressure from other parts of society, but even then, the lawmakers' response will be conditioned by the legal tradition: by their learning, expertise and knowledge of law, domestic and foreign. Societal pressure may engender a change in the law, but the resulting legal rule will usually be adopted from a system known to the lawmaker and often modified without always a full consideration of the local conditions. Watson stresses that law is, to a large extent, a phenomenon operating at the level of ideology; it is an autonomous discipline largely resistant to influences beyond the law itself. From this point of view, he argues that the law itself provides the impetus for change.[63] At the same time, he recognizes that there is a necessary relationship between law and society, notwithstanding that a considerable disharmony tends to exist between the best rule that the society envisages for itself and the rule that it actually has. The task of legal theory with comparative law as the starting-point is to shed light on this relationship and, in particular, to elucidate the inconsistencies between the law

[60]He speaks of an 'internal legal logic' or of 'the internal logic of the legal tradition' governing legal development. See Watson (1985), pp. 21–22.

[61]See on this Levy (1950), p. 233.

[62]Watson (1976), pp. 80–81.

[63]From the viewpoint of the autopoiesis theory, G. Teubner criticizes Watson for placing too much emphasis on the lawyers' professional practices as such. Teubner argues that these practices are not, in themselves, the motor of legal change but rather the necessary outcome of law's character as a distinctive discourse concerned chiefly with producing decisions that define what is legal. Because what is legal is law's essential focus as an independent discourse, law cannot be governed by social developments of the kind sociologists are concerned with. It may react to these developments but it always does so in its own normative terms. Thus, what Watson sees as the autonomous law development by legal elites, proponents of autopoiesis theory regard as the working out of law's independent evolution as a highly specialized and functionally distinctive communication system. For a closer look see in general Luhmann (1995), Teubner (1993) and Priban and Nelken (2001). On the implications of the autopoiesis theory for comparative law see Teubner (1998), p. 11.

actually in force and the ideal law, i.e. the law that would correspond to the demands of society or its dominant strata.[64]

Watson's work on the concepts of legal transplants and legal change calls into question the notion that law is a local phenomenon functionally connected with the living conditions of a particular society. His statement that "legal rules are not peculiarly devised for the particular society in which they now operate"[65] is descriptive rather than normative in nature. It implies that the reception of foreign legal norms and institutions often occurs without the benefit of full familiarity with whatever is adopted in the receiving country. And even when the borrowed rule remains unaltered, its impact in the new socio-cultural setting may be entirely different.[66] For Watson, the source of the original legal norm or institution does not control the final result of the process of transplantation or borrowing. It is the recipient and not the donor system that has the last word on the mode of application of the imported law. However, as critics have pointed out, Watson's position involves a paradox: if the recipient system controls the outcome of the process initiated by the transplanting, how can one say that foreign models are actually at work in the new local context?[67] According to Legrand, 'legal transplants' cannot happen, for a legal system or rule cannot exist apart from its given meaning, and such meaning can be found only in the particular socio-cultural context in which the rule or system operates. As it crosses borders, the original rule undergoes a change that affects it *qua* rule. Thus, any approach attributing change in the law to the displacement of rules across borders is ill-founded, for it fails to treat rules as actively constituted through the life of interpretive communities. Furthermore, such an approach to the matter fails to make apparent the fact that rules are the product of divergent and conflicting interests in society, that is, it eliminates the dimension of power from the equation. Legrand concludes that the shifting complexity of development in the law cannot be adequately explained through a rigid framework such as that furnished by Watson's legal transplants thesis.[68]

In my view, the objections of those critics emphasizing cultural diversity do not militate against the general validity of Watson's theory. It may be true that each legal culture is the product of a unique combination of socio-cultural and historical

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[64] According to Watson, "It should be obvious that law exists and flourishes at the level of idea, and is part of culture. As culture it operates in at least three spheres of differing size, one within another. . . .The spheres are: the population at large, lawyers and lawmakers. By 'lawmakers' I mean the members of that elite group who in a particular society have their hands on the levers of legal change, whether as legislators, judges, or jurists. . . . For a rule to become law it must be institutionalized. It must go through the stages required for achieving the status of law. . . .Because lawyers and lawmakers are involved in all those processes a rule cannot become law without being subject to legal culture'. "Legal Chance: Sources of Law and Legal Culture", (1983) 131 *University of Pennsylvania Law Review*, 1121, 1152–1153.

[65] *Legal Transplants*, supra note 41, 96.

[66] Id., 116.

[67] See Legrand (1997), pp. 116–120.

[68] Ibid., at 120. Consider also Nelken (2003), p. 437.

factors. Nevertheless, it is equally true that collective cultural identities are formed through interaction with others and no culture can claim to be entirely self-contained or original.[69] There is a degree of uniformity with respect to the emergence of certain needs as societies progress through similar stages of development and a natural tendency exists towards imitation, which may be precipitated by a desire to accelerate progress or pursue common social and political objectives.[70] As del Vecchio notes, "the basic unity of human spirit makes possible the effective communication between peoples. Law is not only a national phenomenon; it is, first and foremost, a human phenomenon. A people can accept and adopt as its own a law created by another people because, in the nature of both peoples, there exist common demands and needs which [often] find expression in law".[71] As previously noted, the German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in 'unpolitical' areas of private law, such as commercial and property transactions and business dealings, the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (*praesumptio similitudinis*).[72] This presumption, he claims, can serve as a useful tool in the comparative study of different legal systems. Despite the sheer diversity of cultural traditions in the world today, the problems dogging the regional harmonization of law (e.g., at a European level) and the difficulties surrounding the prospect of convergence of the common and civil law systems, 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. It is submitted that if it is true that legal rules emanate as a response to social needs (according to the socio-functional view of law), the

[69]See on this Levi-Strauss (2001), p. 103 ff.

[70]On the so-called 'law of imitation' and its role in the evolution of social institutions see Tarde (1890). And see Allen (1964), p. 101 ff.

[71]del Vecchio (1960), p. 497. As Albert Hermann Post, one of the founders of the School of Comparative Anthropology (*Rechtsethnologie*), has remarked "there are general forms of organization lying in human nature as such, which are not linked to specific peoples. . . .[F]rom the forms of the ethical and legal conscience of mankind manifested in the customs of all peoples of the world, I seek to find out what is good and just. . . .I take the legal customs of all peoples of the earth as the manifestations of the living legal conscience of mankind as a starting-point of my legal research and then ask, on this basis, what the law is". *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte: Leitgedanken für den Aufbau einer allgemeinen Rechtswissenschaft auf sociologischer Basis* (Oldenburg 1884), XI. According to Post, ["C]omparative-ethnological research seeks to acquire knowledge of the causes of the facts of the life of peoples by assembling identical or similar phenomena, wherever they appear on earth and by drawing conclusions about identical or similar causes". *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (Oldenburg 1880), citations at 12–13. Other important works of this school include Albert Hermann Post's *Einleitung in das Studium der ethnologischen Jurisprudenz* (1886) and Henry Maine's *Ancient Law* (1861). For further details see Chap. 4 above.

[72]Zweigert (1966), p 5 ff; Zweigert and Kötz (1987), p. 36.

emergence of a global society will almost inevitably lead to a greater degree of convergence among legal systems.[73]

Watson's theory of legal transplants has been subjected to strong criticism by scholars who insist on functional-sociological explanations of law.[74] However, much of this criticism fails to detect the intellectual roots of Watson's theory and misses the opportunity to evaluate it in the light of its proper background. As already noted, Watson remarks that, as a matter of fact, societies often tolerate much law that has no correspondence with what is 'needed' or regarded as efficient. The thesis that law may be dysfunctional in relation to society lies in the idea of 'survivals'—a key concept of nineteenth and early twentieth century evolutionary anthropology. In his 1871 work *Primitive Culture*, Edward Tylor (often called 'the father of British anthropology'), formulated a comprehensive theory to bridge the gap between the present and the remote past.[75] This was the theory of 'survivals': elements of culture or society that evolution has left behind—irrational, obsolete practices and beliefs that continue past their period of usefulness. Tylor's influential treatment of survivals inspired Oliver Wendell Holmes's analysis of the permanence of legal norms and institutions after the demise of the beliefs, necessities or customs that generated them.[76] From a functional viewpoint, however, survivals cannot be adequately understood simply by reference to that mental disposition called 'conservativism'. Conservatism is itself in need of explaining and that explanation has to be functional.[77] Watson's notion of 'inertia' may be useful to consider in this connection. As previously noted, inertia is defined as the general absence of a sustained interest of society and its ruling elite to struggle for the most socially satisfactory rule. For law to be changed there must exist a sufficiently strong impulse directed through a *pressure force* operating on a *source of law*. This impulse must be strong enough to overcome the inertia. But how can inertia be explained? Watson notes that there is a *normal desire for stability* and society, particularly the dominant elite, have a generalized interest in maintaining the status quo. This reflects an abstract interest in stability, which is linked to the fact that many legal norms have no direct impact on the lives of most citizens. Furthermore, the mystique surrounding law as well as practical considerations may obstruct legal change. For instance, the case may be that anticipated long-term benefits are not sufficient to justify a reform if the costs are not outweighed by the short-term benefits. Legal inertia has, I think, two aspects.

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[73]See King (1997), p. 119; Ferrari (1990), p. 63; Markesinis (1994), Zimmerman (1995), p. 1. For a critical perspective on this issue see Legrand (1996), pp. 52–61. As previously noted, some scholars have raised the question of whether or not 'natural convergence' is simply an euphemism for what they refer to as 'Western legal imperialism'. See von Mehren (1971), p. 624; Knieper (1996), p. 64.

[74]See, e.g., Abel (1982), p. 785; Legrand (2001), p. 55; Wise (1990), p. 1; Murdock (1971), pp. 256. On the view that law is the result of the social needs of a given society see in general Friedmann (1972), Damaska (1986) and Friedman (1973).

[75]Tylor (2010, first published in 1871).

[76]See Oliver Wendell Holmes, *The Common Law*, ed. by S. M. Novick, (New York 1991, first published in 1881), 5 and 35.

[77]Consider on this Barnard (2000), p. 158 ff.

First, it renders a 'static' justification of law sufficient: law is justified by past behaviour and behaviour by norms. This kind of inertia is inherent in all legal decision-making that strives to maintain regularity and predictability in the practice of law. Besides this aspect of inertia, inertia also relates to the structure and function of law in society. There are two kinds of structural matters for consideration: (a) law is to a certain extent *resistant* to certain social change, and society to certain legal change; and (b) there is a 'relative resistance' to change pertaining to the *time-lag* between different functionally interdependent changes.

We may now proceed to comment on Watson's attempt to explain why the legal rules are quite often borrowed rather than generated by a given society. As previously noted, for Watson much in the law depends upon its 'internal logic'—a logic that is very much that of an elite distancing itself from the rest of society. In the creation of their product, lawyers enjoy a great deal of freedom and legal transplants occur thanks to that freedom. According to Watson, in most areas of law, especially in the domain of private law, it is not the holders of political power (those who prescribe which persons or bodies create the law and how the validity of the law is assessed) who determine what the relevant rules are or should be.[78] The study of the activity of the jurisconsults in ancient Rome, the law professors in Continental Europe and the English judges clearly demonstrates the importance of legal elites as the real shapers of the law. In Watson's scheme, the discourses of legal elites are largely self-referential: the members of a professional group, such as lawyers, regard the law as belonging to their (distinct) professional culture. Within this group, authority is derived primarily from reputation. And reputation, in turn, depends on argumentative skill and inventiveness according to the rules of legal reasoning governing legal debates—rules that have implicitly been established by the participants themselves. This is why lawyers claim to be solving legal problems by applying a legal logic peculiar to their own profession. Thus, although lawyers may be involved directly or indirectly in political decisions, their intellectual outlook does not necessarily depend on their political orientation. Many critics failed to grasp the functional character of Watson's explanation as to why lawyers devote so much energy playing self-referential games. His point is that lawyers' activities that apparently do not satisfy any practical need establish and confirm their identity as an elite. The outcome of lawyers' discussions may be arbitrary or may reflect specific power pressures or demands. But even when the result of the process is arbitrary, it can still be explained functionally.

[78]"Law is power. Law is politics. Law is politics in the sense that persons who have the political power determine which persons or bodies create the law, how the validity of the law is assessed, and how the legal order is to operate. But one cannot simply deduce from that, as is frequently assumed, that it is the holders of political power who determine what the rules are and what the sources of law are to be". Watson (1991a), p. 97.

7.5 Concluding Remarks

As previously noted, 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 legal orders. How can these similarities or differences be explained? The existence of a common social problem is not a sufficient starting-point for comparative law. For a meaningful legal comparison to be undertaken some common features of culture are essential. The element of relativity must be considered when comparative law is used in the search for similarities between different legal systems or relied on to enhance the understanding of one's own legal system or employed in the process of harmonizing legal rules or systems. This relativity is imposed by the special relationship of the law to its socio-cultural, political and economic environment. To the extent that socio-cultural diversity is a reality, law is bound to be defined in diversified terms. However, the view that legal transplants are impossible is too extreme and betrays an exaggeration of cultural diversity. To deny the possibility of legal transplants contradicts the teachings of history and is at odds with legal integration processes currently taking place in Europe and other parts of the world.

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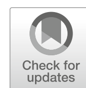
Chapter 8
Roman Law, Medieval Legal Science and the Rise of the Civil Law Tradition



8.1 Introduction

The civil law tradition is the oldest and most prevalent legal tradition in the world today, embracing the legal systems of Continental Europe, Latin America and those of many African and Asian countries. Despite the considerable differences in the substantive laws of civil law countries, a fundamental unity exists between them. The most obvious element of unity is the fact that the civil law systems are all derived from the same sources and their legal institutions are classified in accordance with a commonly accepted scheme existing prior to their own development, which they adopted and adapted at some stage in their history. The civil law tradition was the product of the interaction among three principal forces: Roman law, as transmitted through the sixth century codification of Emperor Justinian; Germanic customary law; and the canon law of the Church, which in many respects derived from Roman law, but nevertheless constituted a distinct system. Particularly important in this process was the work of the medieval jurists who systematically studied, interpreted and adapted Roman law to the conditions and needs of their own era. From the fifteenth century onwards, the relationship between the received Roman law, Germanic customary law and canon law was affected in varying degrees by the rise of the nation-state and the increasing consolidation of centralized political administrations. The present chapter traces the common history of European civil law from its beginning in the High Middle Ages to the emergence of national codifications in the eighteenth and nineteenth centuries. A significant part of the work is devoted to the discussion of the historical factors that facilitated the preservation, resurgence and subsequent reception of Roman law as the basis of the 'common law' (*ius commune*) of Continental Europe.

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8.2 The Heritage of Roman Law

Roman law is both in point of time and range of influence the first catalyst in the evolution of the civil law tradition. The history of ancient Roman law spans a period of more than eleven centuries. Initially the law of a small rural community, then that of a powerful city-state, Roman law became in the course of time the law of a multinational empire that embraced a large part of the civilized world. During its long history, Roman law progressed through a remarkable process of evolution. It advanced through different stages of development and underwent important transformations in substance and form as it adapted to the changes in society, especially those derived from Rome's expansion in the ancient world. During this long process the interaction between custom, enacted law and case law led to the formation of a highly sophisticated system gradually developed from layers of different elements. But the great bulk of Roman law, especially Roman private law, derived from jurisprudence rather than legislation. This unenacted law was not a confusing mass of shifting customs, but a steady tradition developed and transmitted by specialists who were initially members of the Roman priestly class and then secular jurists. In the final stages of this process when law-making was increasingly centralized, jurisprudence together with statutory law was compiled and codified. The codification of the law both completed the development of Roman law and evolved as the main means whereby Roman law was subsequently transmitted to the modern world.

Roman legal history is divided into periods by reference to the modes of law-making and the character and orientation of the legal institutions that prevailed in different epochs. The following phases are distinguished: (i) the archaic period, from the formation of the city-state of Rome to the middle of the third century BC; (ii) the pre-classical period, from the middle of the third century BC to the early first century AD; (iii) the classical period, from the early first century AD to the middle of the third century AD; and (iv) the post-classical period, from the middle of the third century AD to the sixth century AD. The archaic period covers the Monarchy and the early Republic; the pre-classical period largely coincides with the later part of the Republic; the classical period covers most of the first part of the imperial era, known as the Principate; and the post-classical period embraces the final years of the Principate and the Late Empire or Dominate, including the age of Justinian (AD 527–565).[1]

The earliest source of Roman law was unwritten customary law, comprising norms (referred to as *mores maiorum*: the ways of our forefathers) that had grown from long-standing usages of the community, as well as from cases that had evolved from disputes brought before the clan patriarchs or the king for resolution. Resembling the law of other primitive societies, the Roman law of the archaic period was marked by the dominance of religious and formalistic attitudes. Notwithstanding the religious significance of early legal norms, the Romans themselves believed that

[1]Some modern Romanist scholars consider Justinian's age to constitute a distinct phase in the history of Roman law in its own right.

from as early as the time of the kings a distinction began to be made between the functions of religious law (*fas*) and those of secular law (*ius*)—the body of man-made norms governing human relations. A momentous event of this period was the codification of the customary norms that governed the life of the Roman citizens by the Law of the Twelve Tables, enacted around 450 BC. This law embodied the first written record of the rules and procedures for the attainment of justice and it entailed a new source of law, in addition to the unwritten customary law. In the years following the enactment of the Law of the Twelve Tables, legal development was based largely on the interpretation of its text, a task carried out by the priests (pontiffs) and, in later times, by secular jurists. Moreover, later in this period the office of praetor was introduced (367 BC)—a new magistracy entrusted with the administration of private law.

The Romans called their own law *ius civile*: the legal order of the Roman citizenry (*cives Romani*). Like other peoples in antiquity, the Romans observed the principle of personality of law, according to which the law of a state applied only to its citizens.[2] Thus the Roman *ius civile* was the law that applied exclusively to Roman citizens. However, Roman law underwent an important expansion in the course of time. With the gradual enlargement of the Roman state and the increasing complexity of legal life, Roman jurisprudence adopted the idea of *ius gentium*: a body of legal institutions and principles common to all people subject to Roman rule regardless of their citizenship (*civitas*). By the introduction of the *ius gentium* within the body of Roman law, the scope of the law was considerably enlarged. Nevertheless, technically the position remained that some legal institutions were open only to Roman citizens. Such institutions were classified as belonging to the *ius civile*, while other institutions were regarded as belonging to the *ius gentium* in the sense that they were applicable to citizens and non-citizens alike.

A turning point in the history of Roman law was the emergence, in the later republican age (third century BC-late first century BC), of the first secular jurists (*iurisconsulti* or *iurisprudentes*). The main focus of their activities was presenting legal advice on difficult points of law to judicial magistrates, judges and parties at law, and the drafting of legal documents. Towards the end of this period the first systematic treatises on civil law emerged—a development reflecting the influence of Greek philosophy and science on Roman legal thinking. The legal history of the republican period is marked also by the development of the *ius honorarium*, or magisterial law, as a distinct source of law. Early Roman law was rigid, narrow in scope and resistant to change. As a result of the changes generated by Rome's expansion, the Romans faced the problem of how to adjust their law to address the challenges created by the new social and economic conditions. In response to this problem the law-dispensing magistrates, and especially the praetors, were granted the power to mould the law in its application. Although the magistrates had no legislative authority, they extensively used their right to regulate legal process and

[2]According to jurist Gaius, "the rules enacted by a given state for its own members are peculiar to itself and are called civil law." (G. 1. 1.)

thus in fact created a new body of law that was progressive, flexible and subject to continual change and development.

Roman law reached its full maturity in the early imperial epoch (late first century BC-late third century AD), often referred to as the 'classical' period of Roman law, and this emanated mainly from the creative work of the jurists and their influence on the formulation and application of the law. From the early years of this period the emperors customarily granted leading jurists the right to present opinions on questions of law (*ius respondendi*) and deliver them by the emperor's authority. In the later half of the second century it was recognized that when there was accord between the opinions of the jurists who had been granted this right, these opinions operated as authoritative sources of law. Besides dealing with questions pertaining to the practical application of the law, the jurists were also engaged in teaching law and writing legal treatises. The main fabric of Roman law, as we know it today, was established upon the writings of the leading jurists from this period. During the same period, the resolutions of the Roman senate and the decrees of the emperors came to be regarded as authoritative sources of law. On the other hand, the role of the magisterial law (*ius honorarium*) gradually declined as praetorian initiatives became increasingly rare. The final codification of the praetorian edict in AD 130 terminated the development of the *ius honorarium* as a distinct source of law. After the enactment of the *constitutio Antoniniana* (AD 212), an imperial enactment that extended Roman citizenship to all the inhabitants of the Empire, the old distinction between *ius civile* and *ius gentium* in effect vanished: every free man within the Empire was now a citizen, subject to the same Roman law.

In the later imperial age (late third century AD-sixth century AD) the only effective source of law was imperial legislation, largely concerned with matters of public law and economic policy. Moreover, as jurisprudence had ceased to be a living source of law, earlier juristic works were regarded as a body of finally settled doctrine. During this period, as the body of imperial legislation grew, there emerged the need for the codification of the law. In addition, direction was required for the use of the classical juridical literature—a vast body of legal materials spanning hundreds of years of legal development. The process of codification commenced with the publication of two private collections of imperial law, which appeared at the end of the third century AD: the *Codex Gregorianus* (AD 291) and the *Codex Hermogenianus* (AD 295). These were followed by the *Codex Theodosianus*, an official codification of imperial laws published in AD 438. In the fifth century, Roman legal scholarship experienced a period of revival centred around the law schools of the Empire.[3] The study of the classical authorities at the law schools engendered a new type of jurisprudence concerned not so much with developing new legal ideas but with understanding and expounding the classical materials in

[3]The first law school was probably founded in Rome in the late second century and a second such school was later established in Beirut during the third century. As the administrative needs of the Empire grew (especially after Diocletian's reorganisation of the administration), new law schools were established in places such as Alexandria, Caesaria, Athens and Constantinople in the East; and Carthage and Augustodunum in the West.

light of the needs and conditions of the times. Despite its lack of originality, post-classical legal science succeeded in resurrecting genuine familiarity with the entire classical inheritance and facilitating its adaptation to the conditions of the times.

The process of codification culminated in the middle of the sixth century AD with the great codification of Roman law, both juristic law and imperial enactments, by Emperor Justinian. Through the codification of the law Justinian sought to produce, on the basis of the legal inheritance of the past, a complete and authoritative statement of the law of his own day to replace all former statements of law in both juridical literature and legislation. In this way he hoped to create a uniform law throughout the empire and, at the same time, to preserve the best of classical jurisprudence, displacing the diffuse mass of legal materials that had caused so much confusion in the past. The commissions of jurists and state officials appointed by Justinian to execute the codification sought to achieve the following goals: (a) the collection and editing, with a view to their current applicability, of all imperial laws promulgated up to that time; (b) the gathering and harmonization of the Roman jurists' opinions; and (c) the creation of a standard textbook that would clearly and systematically introduce the first principles of the law to students.

In February 528, Justinian assigned to a commission composed of high officials and jurists the task of consolidating into a single code all the valid imperial enactments. The work was published under the name *Codex Iustinianus* and acquired the force of law in April 529. However, the mass of new legislation issued by Justinian after 529 soon rendered the Code obsolete and in 534 it was superseded by a revised edition.

After the publication of the first Code, Justinian attended to the goal of systematizing the law derived from the works of the classical jurists. Like the compilers of the Code, the members of the commission appointed to perform this work were granted wide discretionary powers. They determined which juristic writings to include or omit as superfluous, imperfect or obsolete; they could shorten the relevant texts, eliminate contradictions, and correct and update matters taking into consideration current legal practice and changes in the law introduced by imperial legislation. The compilation was to assume the form of an anthology of the writings of the classical jurists with exact references. Although the material relied upon spanned hundreds of years of legal development, the compilation was devised as a correct statement of the law at the time of its publication and the only authority in the future for jurisprudential works (and the embodied imperial laws). The work was published under the name *Digesta* or *Pandectae* and came into force in December 533. From that date, only juristic writings contained within it were regarded as legally binding; references to the original works were now deemed superfluous and the publication of critical commentaries on the Digest was prohibited.

As an authoritative statement of the law, the Digest was intended for use not only by legal practitioners and state officials, but also by those engaged in the study of law. However, even before it was published, it was obvious that the work was far too long and complex for students to use, especially for those in their first year of their studies. An introductory textbook was required that would allow students to grasp the basic principles of the law before progressing to the more detailed and complex

aspects of legal practice. This idea inspired Justinian to order, in 533, the preparation of a new official legal textbook for use in the empire's law schools. The work was published under the name *Institutiones* or *Elementa* and came into force as an imperial statute, together with the Digest, on 30 December 533.

After the publication of the second edition of the Code, Justinian's legislative activity continued unabated as political and social developments necessitated changes in the law unforeseen by earlier legislation. Although most of these new laws, or 'Novels' (*Novellae constitutiones*), addressed matters of administrative and ecclesiastical law, Justinian also introduced important innovations in certain areas of private law, such as family law and the law of intestate succession. These were intended to be officially collected and published as part of a new edition of the Code, but this never happened. Knowledge of them derives mainly from three later compilations based upon a few private and unofficial collections produced during and after Justinian's reign: the *Epitome novellarum Iuliani*, the *Authenticum* and the *Collectio Graeca*.

The Code, the Digest, the Institutes and the Novels constitute the bulk of Justinian's legislative work. All four compilations together are known as *Corpus Iuris Civilis*.[4]

The influence of Justinian's codification has been tremendous. In the Byzantine East, it prevailed as a basic document for the further evolution of the law until the fall of the empire in the fifteenth century.[5] In Western Europe, it remained forgotten for a long period but was rediscovered in the eleventh century. Initially treated as the object of academic study, it later experienced a far-reaching reception—a reintegration as valid law that led to its becoming the common foundation on which the civil law systems of Continental Europe were built.

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[4]The term '*Corpus Iuris Civilis*' did not originate in Justinian's time; it was introduced in the late sixteenth century by Dionysius Godofredus, author of the first scholarly edition of Justinian's work, in contradistinction to the codification of the canon law (referred to as *Corpus Iuris Canonici*).

[5]The social conditions and intellectual climate of the Byzantine world required the simplification and popularization of the intricate legal heritage of Justinian's law books. This inspired the development of a whole new genre of legal literature that included several important legislative works and was designed to adapt the Roman law of Justinian to the prevailing conditions. The most important of these works encompassed: the *Ecloga Legum*, a collection of extracts from Justinian's law codes produced by Emperor Leo III the Isaurian and published in 740 AD; the *Eisagoge* or *Epanagoge*, a formulation of law from a historical and practical perspective devised as an introduction to a new law code under Emperor Basil I (867–886 AD); the *Basilica* (*basilica nomima*), an extensive compilation of legal materials from Greek translations of Justinian's *Corpus* in sixty books that was enacted at the beginning of the tenth century by Emperor Leo VI the Wise; the *Epitome Legum* composed in 913, a legal abridgment based on the legislation of Justinian and various post-Justinianic works; the *Synopsis Basilicorum Maior*, a collection of excerpts from the above-mentioned Basilica that was published in the late tenth century; and the *Hexabiblos*, a comprehensive legal manual in six books compiled around 1345 by Constantine Harmenopoulos (a judge in Thessalonica). Some of these works, such as the *Hexabiblos*, were habitually used throughout the Ottoman period and played an important part in the preservation of the Roman legal tradition in countries formerly within the orbit of the Byzantine civilization.

8.3 The Revival of Roman Law in Western Europe

In the years following the demise of the Roman Empire in the West (476 AD), the once universal system of Roman law was replaced by a plurality of legal systems. The Germanic tribes, which settled in Italy and the western provinces, lived according to their own laws and customs, whilst the Roman portion of the population and the clergy were still governed by Roman law. 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*, the *Edictum Theodorici* and the *Lex Romana Burgundionum*.[6] In parts of Italy under Byzantine control the Roman law of Justinian continued to apply until the middle of the eleventh century, when the last of the Byzantine possessions in Southern Italy were lost to the Normans. Elsewhere in Italy, Gaul and Spain, Roman law was preserved, even though in a vulgarized form, through the application of the principle of the personality of the laws. It also existed through the medium of the Church whose law was imbued with the principles and detailed rules of Roman law. Moreover, Roman law, either directly or through canon law, exercised an influence on the various codes of Germanic law that emerged in the West during the early Middle Ages, although this influence varied greatly from region to region and from time to time.[7]

[6]In AD 506, the King of the Visigoths Alaric II promulgated the *Lex Romana Visigothorum*—hence, it is also known as the Breviary of Alaric (*Breviarium Alarici*). It contains extracts from the Gregorian, Hermogenian and Theodosian Codes; a number of post-Theodosian constitutions; an abbreviated version of Gaius' Institutes (*Epitome Gai*); sections of the *Sententiae* by Paulus; and a short *responsum* of Papinianus as a conclusion. Some of the texts are accompanied by interpretations (in the form of paraphrases or explanatory notes) aimed at facilitating their understanding and application. The *Lex Romana Visigothorum* remained in force in Spain until the seventh century; in Southern France, its application prevailed (even though no longer as an official code) until the twelfth century.

The *Lex Romana Burgundionum* was composed during the reign of King Gundobad of the Burgundians and was promulgated by his son Sigismund in AD 517 for use by the Roman inhabitants of his kingdom. It is based on the Gregorian, Hermogenian and Theodosian Codes; a shortened version of the Institutes of Gaius; and the *Sententiae* of Paulus. Unlike the Visigothic Code mentioned above, it does not contain any extracts from the original Roman sources. Instead, the materials are incorporated into a set of newly formulated rules that are systematically arranged and distributed over forty-seven titles.

In the late fifth century, King Theodoric II (AD 453–466), ruler of the Visigothic kingdom of Southern France, enacted the *Edictum Theodorici* that was applicable to both Romans and Visigoths. It has 154 titles and contains materials distilled from the *Sententiae* of Paulus; the Gregorian, Hermogenian and Theodosian Codes; and post-Theodosian legislation.

[7]The most important Germanic codes embrace the *Codex Euricinianus*, enacted about 480 by Euric the Visigothic king and drafted with the help of Roman jurists; the Salic Code (*Pactus legis Salicae* or *Lex Salica*) 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

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 national origin tended to break down and the system of personality of the laws was gradually superseded by the conception of law as entwined with a particular territory or locality. As a result, Roman law as a distinct system of law applicable within a certain section of the population fell into abeyance in most of Western Europe. A considerable degree of integration of the Roman and Germanic elements first occurred in the Visigothic territory in Spain. In this region, the *Lex Romana Visigothorum* of Alaric ceased to possess any force and a new code was introduced in 654 under King Recceswinth: the *Lex Visigothorum* (also known as *Forum Iudicum* or *Liber Iudiciorum*: Book of Judicial Actions).[8] In the course of the ninth century the shift from the principle of personality to that of territoriality was further precipitated by the growth of feudalism. The predominant feature of feudalism was an estate or territory dominated by a great lord (duke, count, baron or marquis) who was the vassal of an emperor or king. Since the domain of a great lord constituted a quasi-independent unit in economic and political terms, the area that was controlled by a particular lord was decisive as to the form of law that should prevail. However, the intermixture of races meant that the laws recognized in a territorial unit could no longer be those of a particular race. Instead, all persons living within a given territory were governed by a common body of customary norms that varied in regions and periods. In this way, the diversity of laws no longer persisted as an intermixture of personal laws but as a variety of local customs. In all the territories, however, the bulk of the customary law that applied was a combination of elements of Roman law and Germanic customary law.

By the end of the tenth century, vulgarised versions of Roman law were so intermingled with Germanic customary law that historians tend to describe the laws of this period as either 'Romanised customary laws' or as 'Germanised Roman laws.' Moreover, Roman law exercised a strong influence on the legislation (capitularies) of the Frankish emperors, as well as on the development of the law of the Roman Catholic Church. Thus, Roman law throughout Western Europe sustained its existence and served both as a strand of continuity and as a latent universalising factor. Yet, in comparison with classical Roman law the overall picture of early medieval law is one of progressive deterioration. The study of law, as part of a rudimentary education controlled largely by the clergy, was based simply on abstracts and ill-arranged extracts from older works. As the surviving literature from this period exhibits, legal thinking was characterised by a complete lack of originality.

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the Salic and Ripuarian Codes. Other law codes that exhibited a Roman influence include the Lombard Edict (643), the Alammanic Code (*c*. 720), the Bavarian Code (*c*. 750), the Frisian Code (*c*. 750) and the Saxon Code (*c*. 800).

[8]The *Lex Visigothorum* follows the structure of the Theodosian Code. It is based on early legislation (especially on a revised edition of Euric's Code issued by King Leovigild) and laws issued by the current monarch (King Recceswinth). Alaric's code continued to be used in southern France, especially in the territory of the Burgundians, and in some countries north of the Alps.

From the eleventh century, improved political and economic conditions created a more favourable environment for cultural development in Western Europe. At the same time, a renewed interest in law was prompted by the growth of trade, commerce and industry, and the increasing secularism and worldliness of urban business life.

The legal revival began in Northern Italy. Among the earliest centres of legal learning was the law school of Pavia established in the early tenth century. Roman law and the customary and feudal law of the Lombard kingdom were taught and developed at this school. As the capital of the Italian Kingdom and the seat of a supreme court with a corps of judges and lawyers, Pavia was the centre of vigorous legal activity. Although legal growth was fostered largely by practical needs, it encouraged the systematic study and interpretation of legal sources and improved standards of legal culture. Indeed, studies were not based solely on practical interests, but were carried out according to the processes of formal logic that were then being developed by the first scholastics. The study of Lombard law was based primarily on the *Liber Papiensis*, a work composed in the early years of the eleventh century.[9] Other important works of the same period were the *Lombarda* or *Lex Langobarda* and the *Expositio ad Librum Papiensem*, an extensive collection of legal commentaries that embodied materials drawn from both Lombard and Roman sources. The chief source for the study of Roman law was the *Lex Romana Visigothorum*.

By the end of the eleventh century the *antiqui*, the jurists dedicated to the study of ancient Germanic sources, had been superseded by the *moderni*, who were interested primarily in the synthesis of Roman law and Lombard customary law. While the *antiqui* regarded Roman law as a system subordinate and supplementary to Lombard law, the *moderni* sought to rely on Roman law as a basis for the improvement and development of native law. But the Lombard capital of Pavia was not the only Italian city where law was studied and legal works produced. At Ravenna, the former centre of the Byzantine Exarchate in Italy, there existed in the eleventh century a school of law where Justinian's texts were known and studied. Moreover, Southern Italy remained for a considerable period of time under Byzantine rule and thus Roman legal learning was preserved in this area through the influence of Byzantine law.

[9]The Lombards, like other Germanic peoples, had originally no written law. The first compilation of Lombard law was the *Edictum* of King Rothari, published in 643. This work is considered to be the most complete statement of the customary law of any of the Germanic peoples in the West. The entire body of Lombard law, consisting of the Edict of Rothari and the additions introduced by his successors, is known as *Edictum regum Langobardorum*. Even after the annexation of the Lombard kingdom by the Frankish Empire during the reign of Charlemagne, Lombard law continued to be applied in Northern Italy, where it coexisted with Roman law and the customary laws of other Germanic peoples. To deal with the inevitable inconvenience that the presence of diverse legal systems entailed, the Frankish kings of Italy promulgated a large number of laws referred to as *capitula* or *capitularia*. A private collection of these laws, known as *Capitulare Italicum*, was permanently joined to the Lombard Edict in the early eleventh century. This *corpus* of Lombard-Frankish law, referred to in early sources as *Liber Legis Langobardorum*, is commonly known today as *Liber Papiensis*.

Towards the end of the eleventh century, Roman law studies experienced a remarkable resurgence. It is difficult to assign a single reason for this development, although some writers place central importance on the discovery of a manuscript in Pisa during the late eleventh century. The material contained the full text of Justinian's Digest that had remained largely unknown throughout the early Middle Ages (when the Florentines captured Pisa in 1406 the manuscript was transferred to Florence and hence designated *Littera Florentina* or *Codex Florentinus*). A second manuscript seems to have been unearthed around the same time but has since been lost. This is referred to as *Codex Secundus* and is believed to have furnished the basis for the copies of the Digest produced at Bologna. The rediscovery of the Digest occurred at a time when there was a great need for a legal system that could meet the requirements of the rapidly changing social and commercial life. The Roman law of Justinian had essential attributes that offered hope for a unified law that could in time replace the multitude of local customs: it possessed an authority as a legacy of the ancient *imperium Romanum* and existed in a book form written in Latin, the *lingua franca* of Western Europe. As compared with the prevailing customary law, the works of Justinian comprised a developed and highly sophisticated legal system whose rational character and conceptually powerful structure made it adaptable to almost any situation or problem irrespective of time or place.

The revival of interest in Roman law was also fostered by the conflict between the Holy Roman Empire of the German Nation and the Papacy, which was from the outset a conflict of political theories for which the rival parties sought justification and support in the precepts of the law. The supporters of the Papacy argued that, as spiritual power was superior to secular power, the Pope was supreme ruler of all Christendom and temporal affairs were subject to the final control of the Church. Relying on the despotic principle of Roman law, opponents of the papal views argued that the power of the state was absolute and could override the opposition of any group within the state. Roman law was thus construed to uphold secular absolutism—a view utterly at variance with the papal claims to primacy. The Holy Roman emperors were receptive to this law because its doctrine of a universal law founded on a grand imperial despotism provided the best ideological means to support the theory that the emperor, as heir of the Roman emperors, stood at the pinnacle of the feudal system.[10]

8.3.1 The School of the Glossators

The principal centre of Roman law studies in Italy was the newly founded (*c.* 1084) University of Bologna, the first modern European university where law was a major

[10]Charlemagne had been the first to assert that he was in fact heir to the throne of the Western Roman emperors and this claim was again made by Otto when he became German emperor in 962.

subject.[11] By the close of the thirteenth century, a number of similar schools had been established at Mantua, Piacenza, Modena, Parma and other cities of Northern and Central Italy, as well as in Southern France. The law school of Bologna owed its fame to the grammarian Irnerius (*c.* 1055–1130), who around 1088 began lecturing on the Digest and other parts of Justinian's codification. This jurist came to be regarded as the founder of the school, although he does not appear to have been the first teacher at this institution (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). Irnerius's fame attracted students from all parts of Europe to study at the Bologna school that had around ten thousand students by the middle of the twelfth century.[12] The jurists of Bologna set themselves the task of presenting a clear and complete statement of Roman law through a painstaking study of Justinian's original texts (instead of the vulgarised versions of Roman law contained in the various Germanic compilations usually relied upon in the past). Their object was to re-establish Roman law as a science—a systematic body of principles and not simply a tool for practitioners. However, the ancient texts were unwieldy as they contained an immense body of often ill-arranged materials and dealt with a multitude of institutions and problems that were no longer known. Therefore, the first task to accomplish was the accurate reconstruction and explanation of the texts.[13]

The work of interpretation was closely connected with the Bolognese jurists' methods of teaching and performed by means of short notes (*glossae*) explaining difficult terms or phrases in a text and providing the necessary cross-references and reconciliations without which the text was unusable. These notes were written either in the space between the lines of the original text (*glossae interlineares*), or in the margin of the text (*glossae marginales*). The extended glosses of a single jurist formed a connected commentary on a particular legal topic and this continuous

[11]By the middle of the twelfth century about ten thousand law students from all over Europe were studying at Bologna. The students had the right to choose their own teachers and to negotiate with them matters such as the place and manner of instruction and the amount of tuition. The students and teachers organized themselves into guilds (*societates*) for purposes of internal discipline, mutual assistance and defence. The various *societates* formed a larger body termed *universitas scholarium*, within which students were grouped by nations.

[12]Irnerius's success is attributed to three principal factors: first, his excellent edition of the Digest, known as *Litera Bononiensis* or the *Vulgata*; second, the new approach to the study of Roman law, which viewed the *Corpus Iuris Civilis* as living law; third, the separation of the study of Roman law not only from the study of rhetoric, but also from the study of canon law and feudal law.

[13]The most important part of their work was the reconstruction of Justinian's Digest. According to tradition, the materials were divided into three parts: the *Digestum Vetus*, embracing the initial twenty-four books; the *Digestum Novum*, covering the last twelve books from books 39 to 50; and the *Digestum Infortiatum*, encompassing books 25 to 38. These three parts of the work were contained in three volumes. A fourth volume comprised the first nine books of Justinian's Code, and a fifth embodied the Institutes, the last three books of the Code and the Novels as found in the *Authenticum*. The fifth volume also incorporated several medieval texts, the *Libri Feudorum* (containing the basic institutions of feudal law), a number of constitutions of the emperors of the Holy Roman Empire and the peace treaty of Constance (1183). These five volumes became known as *Corpus Iuris Civilis*.

glossing of the texts entailed the emergence of entire collections or apparatuses of glosses that addressed individual parts or the whole of Justinian's codification. By employing the general pattern of scholastic reasoning, the Bolognese jurists (designated Glossators, *Glossatores*) sought to expose the conceptual and logical background of the various passages under consideration and to ascertain the consistency and validity of the principles underlying the legal material upon which they commented. They initiated the process by comparing different passages from various parts of Justinian's work dealing with the same or similar issues, explaining away the inconsistencies and harmonizing any apparent contradictory statements (this method was by no means new as it had been engaged by earlier medieval scholars and resembled the approach used by the jurists of the Constantinople and Beirut law schools during the later imperial era). These successive processes corresponded to the medieval progression in the curriculum of the *trivium* from grammar and rhetoric to logic or dialectic—the content of Justinian's works first had to be understood, and so explanatory notes were used; then the consistency of the texts had to be established through the application of the dialectical method. Logic was the most important element of medieval education. Based on works such as Aristotle's *Organon*, it became the dominant technique of medieval scholasticism.[14]

Apart from the *glosses*, several other types of juristic literature were developed, partly from the teaching of the *Corpus Iuris Civilis* at the law schools. Some deal with the issues in the order in which they are found in Justinian's legislation (*ordo legum*), such as the *commenta* or *lecturae*, reports written down by assistants or experienced students and sometimes revised by the teacher himself.[15] Another form of literature is the written record of a *quaestio disputata*, an exercise in which a teacher posed a question, either a theoretical one or one derived from legal practice, and his students offered opposing views. This was meant to teach students to analyse a legal problem and to argue their case in a logical and structured way. A further type of commentary, which did not originate in the classroom, was the *summa*. The *summae* are synopses or summaries of contents of particular parts or the whole of

[14]Scholasticism as a system of philosophy was based on the belief that reality exists in the world of abstract ideas, generally independent of the external sensual world. Its chief assumption was that truth is discoverable if pursued according to the norms of formal logic. From this point of view, the only path to wisdom was the avoidance of logical fallacies rather than observation of commonplace nature. The formal logic that was applied was largely based on the work *Sic et non* ('Yes and No') of the French philosopher Peter Abelard (1079–1142), composed around 1120. In this work Abelard applies the principles of logic, as laid down by Aristotle, to texts of the Church fathers. The relevant texts are grouped by reference to their similarity (*similia*), or contrariety (*contraria*) and reasoning *per analogiam* or *a contrario* is applied, while distinctions (*distinctiones*) are introduced explaining the differences between the texts. This so-called scholastic method, which could be applied to any authoritative text, whether in the field of theology, philosophy, medicine or law, prevailed throughout the Middle Ages and remained influential even after the end of this period.

[15]The *commentum* was rather condensed, whilst the *lectura* was a full report on the lecture that included all that was said and done in the lecture hall.

Justinian's work.[16] Unlike the above-mentioned *commenta* or *lecturae*, these are systematic works that do not follow the order of the issues in the original texts but establish their own order with respect to the fragments within the title they treat. Other forms of juristic literature included: works clarifying conceptual distinctions arising from the texts (*distinctiones*)—these comprised a series of divisions of a general concept into subcategories that were carefully defined and explained until all the implications of the concept were elucidated; collections of conflicting juristic interpretations (*dissensiones dominorum*—the term *domini* referred to medieval jurists); anthologies of opinions on various legal questions connected with actual cases (*consilia*); cases constructed to exemplify or illustrate difficult points of law (*casus*); collections of noteworthy points (*notabilia*) and statements of broad legal principles drawn from the texts (*brocarda* or *aphorismata*); and short monographs or treatises (*summulae* or *tractatus*) on specific legal topics, such as the law of actions and legal procedure.[17]

The interpretation and analysis of Justinian's legislative works was the exclusive preoccupation of the Bolognese jurists until the late thirteenth century. Among the successors of Irnerius, the most notable were Bulgarus,[18] Martinus Gosia,[19] Jacobus and Ugo (renowned as the 'four doctors of Bologna'), Azo, Rogerius, Placentinus, Vacarius, John Bassianus, Odofredus and Accursius. Azo became famous for his influential work on Justinian's Code, known as *Summa Codicis* or *Summa Aurea*.[20] In the late twelfth century, Rogerius founded a law school at 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 Oxford. In 1149 he composed his famous *Liber pauperum* that comprised a collection of texts from the Code and

[16]The *summae* were similar to the *indices* composed by the jurists of the law schools in the East during the late Roman imperial era.

[17]Of particular importance were works dealing with the law of procedure (*ordines iudiciarii*). Since the *Corpus Iuris Civilis* does not contain a comprehensive section on the law of procedure, these works sought to record and compile all the relevant material on legal procedure in general and on specific actions, and to provide guidance on how to initiate a claim in law. One of the best-known works of this kind is the *Speculum iudiciale* of Wilhelmus Durantis (*c.* 1270).

[18]Bulgarus advocated the view that Roman law should be interpreted according to the strict, literal meaning of the text. From the beginning of the thirteenth century, this approach seems to have prevailed. Among Bulgarus's followers were Vacarius, who went to teach in England, and Johannes Bassianus, the teacher of Azo.

[19]In contrast to Bulgarus, Gosia held that the Roman law texts should be interpreted liberally, that is, according to the demands of equity and the needs of social and commercial life. Bulgarus also recognized the role of equity, which for him pertained to the 'spirit' of the law or the intent of the legislator; Gosia, on the other hand, understood equity in the Aristotelian sense, that is as a corrective principle of the law in exceptional cases. Gosia's followers included Rogerius and Placentinus, who had been students of Bulgarus.

[20]The importance of Azo's *Summa Codicis* was reflected in the popular saying: '*Chi non ha Azo, non vada a palazzo*', which means that in some places a man could not be admitted as an advocate unless he possessed a copy of Azo's *Summa.*

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.[21]

The greatest of the late Glossators was the Florentine Franciscus Accursius, a pupil of Azo's, who dominated the law school of Bologna during the first half of the thirteenth century. Accursius produced the famous *Glossa Ordinaria* or *Magna Glossa*, an extensive collection or *apparatus* of glosses from earlier jurists covering the entire Justinianic codification and supplemented by his own annotations.[22] The *Glossa Ordinaria* both summarised and made obsolete the whole mass of glossatorial writings from the preceding generations of jurists. It represented the culmination of the Glossators' work and gained rapid acceptance in Italy and other parts of Europe as the standard commentary on Justinian's texts, providing guidance for those engaged in the teaching and practice of law.[23] The *Glossa Ordinaria* was regularly published with editions of the *Corpus Iuris Civilis*, so that they were received together throughout the Continent. With the publication of Accursius's Great Gloss, the contribution of the School of the Glossators to the revival of Roman law ceased but their methods were still applied in the teaching of law at Bologna and elsewhere for a long time.

The Glossators' approach to Roman law is characterised by its lack of historical perspective. Neither the fact that Justinian's codification had been compiled more than five hundred years before their own time, nor the fact that it comprised extracts of an even earlier date meant much to them. Instead, they perceived the *Corpus Iuris Civilis* as one body of authoritative texts and paid little attention to the fact that the law actually in force was very different from the system contained in Justinian's texts. This attitude was reinforced by the theory that the Holy Roman Empire was a successor to the ancient Roman Empire—a theory that the Glossators tended to support.[24] It was also associated with the fact that the Glossators' interest in law was chiefly academic and their learning was quite remote from practical affairs.[25] Being true medieval men, the Glossators regarded Justinian's texts in much the same way as theologians regarded the Bible or contemporary scholars viewed the works of Aristotle. Just as Aristotle was treated as infallible and his statements as applicable to all circumstances, the texts of Justinian were regarded by the Glossators as sacred and as the repository of all wisdom. The Glossators have been subjected to the criticism that they neglected both the developing canon law and the statutory law enacted by local political bodies, especially in the Italian city-states. They were

[21] See de Zulueta (1927).

[22] The work comprised about 96,000 glosses.

[23] The importance of Accursius's gloss was manifested in the popular saying: '*Quod non adgnovit glossa, non adgnoscit curia*', which means that a rule unknown to the *Glossa Ordinaria* was also not recognized by a court.

[24] This is evidenced by the fact that the Glossators added to the *Codex* constitutions of the German Emperors Frederick Barbarossa and Frederick II.

[25] The general attitude of the Glossators was not affected by the fact that their teachings exercised an influence on the statutory law of Italian cities and entered the practice of law through their graduates who were appointed to the royal councils or served as judges in local courts.

entirely preoccupied with the study of Roman law, which for them represented a system of legislation more fully developed than either the nascent canon law or the contemporary statutory law. Nevertheless, the Glossators did succeed in resurrecting genuine familiarity with the whole of Justinian's codification and their work prepared the ground for the practical application of the legal doctrines it contained. Their new insight into the workings of Roman law led to the development of a true science of law that had a lasting influence on the legal thinking of succeeding centuries.[26]

8.3.2 The Commentators or Post-Glossators

By the close of the thirteenth century, the attention of the jurists had shifted from the purely dialectical analysis of Justinian's texts to problems arising from the application of the customary and statute law and the conflicts of law that emerged in the course of inter-city commerce. The enthusiasm for the study of the ancient texts that had enticed many students and scholars to Bologna in the twelfth century now waned, and the place of the Glossators was assumed by a new kind of jurists known as Post-glossators (*post-glossatores*) or Commentators (*commentatores*). The new school with chief centres at the universities of Pavia, Perugia, Padua and Pisa, reached its peak in the fourteenth century and remained influential until the sixteenth century.

The rise of the Commentators' school was not unrelated to the new cultural and political conditions that emerged in the later part of the thirteenth century. Of particular importance was the gradual erosion of the traditional dualism of a universal Church and a universal Empire as a result of the crises affecting both institutions[27]; and the growing strength of nation and city-states in Europe, which were able to develop their political structures with little interference from higher universal entities. During the same period, scholastic philosophy reached its pinnacle with the work of the catholic theologian Thomas Aquinas (1225–1274), who synthesized Aristotelian philosophy and Christian theology into a grand philosophical and theological system. The new dialectic that this philosophy forged was not restricted

[26]On the school of the Glossators see Robinson et al. (1994), p. 42 ff; Vinogradoff (1929), p. 32 ff; Clarence Smith (1975), Benson and Constable (1982), Tamm (1997), pp. 203–206; Stein (1999), p. 45 ff; Cortese (1992), Kunkel and Schermaier (2001), p. 230 ff; Lange (1997), Schlosser (2005), pp. 36–53. Consider also Mather (2002), p. 323.

[27]The last emperor of this period who was able to maintain a unitary view of the Empire was Frederick II of Swabia (1194–1250). His successors concentrated their efforts on consolidating their rule in Germany rather than on governing the Empire as a universal political entity. The crisis that affected the Church is evidenced by, among other things, the transfer of the papal seat to Avignon, where the Pope remained subject to the control of the French kings for about seventy years (1309–1377).

to theological-metaphysical speculation but permeated the study of both public and private law.

Unlike the Glossators, the Commentators were not concerned with the literal reading and exegesis of Justinian's texts in isolation but with constructing a complete legal system by adapting the Roman law of Justinian to contemporary needs and conditions. The positive law that applied in Italy at that time was a mixture of Roman law, Germanic customary law, canon law, and the statute law of the empire and the various self-governing Italian cities. The Commentators endeavoured to integrate these bodies of law into a coherent and unitary system. In executing this task, they abandoned the excessive literalism of the early Glossators and sought to illuminate the general principles of law by applying the methods of rational inquiry and speculative dialectics—thereby building an analytic framework or 'dogmatic construction' of law. Furthermore, in their roles as legal consultants and administrators, they contributed significantly to the development of case law, which also provided a fertile ground for the progressive refinement and testing of their concepts and analytical tools. Indeed, many of their theoretical propositions and dogmatic constructions evolved out of the pressures of actual cases. On the other hand, since the Commentators were mainly concerned with the development of contemporary law, they tended to pay scant attention to the primary sources of Roman law. Thus, the synthesis that occurred was between the non-Roman elements and the Roman law of Justinian as expounded by the Glossators. Systematic treatises and commentaries were written based on this body of law, especially in areas of the law where there was a need for the development of new principles for legal practice.[28]

Among the earliest Commentators was Cino of Pistoia (1270–1336), a student of the French masters Jacques de Revigny and Pierre de Belleperche, professors at the Orleans law school in the second half of the thirteenth century. Cino began his teaching career at Siena, having been for about 10 years active in practice, and moved to Perugia in 1326. There he composed his great commentary, the *Lectura super Codice*, which continued to be read and cited for more than a century.[29] At Perugia Cino was the master of Bartolus of Saxoferrato, the most influential of the Commentators and one of the great jurists of all time.

[28]The increased attention to the needs of legal practice is evidenced in the development of the *quaestio disputata*: from the middle of the thirteenth century onwards, jurists increasingly based their *quaestiones* on local statute law or even local custom, which were then analysed by means of the methods of the civil law.

[29]Cino's method consisted of several successive stages: (a) the literal rendition of a legislative text (*lectio literae*); (b) the subdivision of the text into its component provisions (*divisio legis*); a summary of the content of the text (*expositio*); examples of practical cases to which the text was relevant (*positio casuum*); significant observations derived from the law (*collectio notabilium*); possible counter arguments (*oppositiones*); and, finally, an exposition of the problems that might arise (*quaestiones*). By applying this method, Cino sought to subject a legislative enactment to a dialectical process and a systematic analysis that would bring to light the rationale of the relevant law, while being aware that the pursuit of logic could lead to arguments irrelevant to the actual application of the law.

Bartolus (1314–1357) obtained his doctorate at Bologna and lectured at Perugia and Pisa, where he also served as judge. He produced a monumental commentary on the entire *Corpus Iuris Civilis*, which, like Accursius's Great Gloss, was acknowledged as a work of authority and extensively used by legal practitioners and jurists throughout Western Europe. Bartolus also dictated legal opinions and composed a large number of monographs on diverse subjects. His reputation among his contemporaries was unsurpassed and his writings came to dominate the universities and the courts for centuries. In Italy, where the doctrine of *communis opinio doctorum* operated (whereby the solution supported by most juristic authorities should be upheld by the courts), the opinions of Bartolus were regarded to possess the same weight as the Law of Citations had accorded to the works of Papinian.[30]

Another influential jurist of this period was Baldus de Ubaldis (*c.* 1327–1400), a pupil of Bartolus. Baldus taught at Bologna, Perugia and Pavia and was also much involved in public life. Unlike Bartolus, he was a canonist and a feudalist as well as a civilian.[31] He was best known for his opinions (*consilia*) that proposed solutions for problems arising from actual cases, especially cases involving a conflict between Roman law and local laws and customs.[32]

The Commentators were remarkably flexible in their interpretation and application of the Roman texts regardless of the original context. They did not hesitate to apply a text to address a current issue, no matter how obsolete they might know its real meaning to be, if its use could be fruitful. However, when they derived arguments from materials that had little or no relation to current affairs, they were not recklessly distorting Roman law to fit their own needs but were consciously adopting its principles to develop new ideas. Their use of the Roman texts was partly due to a feeling that it was important to support a conclusion by reference to some authority, no matter how reasonable in itself the conclusion might have been.

The reconciliation of the scholarly Roman law and local law that was achieved though the Commentators' work produced what is referred to as 'statute theory', the notion that in the fields of legal practice local statutes were the primary source, while Roman and canon law were supplementary. However, in spite of the priority bestowed on statutory law, the Roman law-based civil law could prevail in various ways. First, a statute might expressly embody elements of Roman law, and to that

[30]In Portugal, his writings were declared to have the force of law in 1446. Moreover, lectures on his work were established at Padua in 1544 and at Ferrara in 1613. The extent of Bartolus's influence is expressed in the saying: '*nemo jurista nisi Bartolista*', which means one cannot be a jurist unless one is a follower of Bartolus.

[31]His work includes commentaries on the Decretals of Gregory IX and the *Libri Feudorum*. In this connection, it should be noted that in the time of Baldus there was a closer connection between civil law and canon law. It was customary for a student to engage in the study of both subjects and thus become doctor of both laws (*doctor utriusque iuris*).

[32]The *consilium*, the advice given by a law professor on a practical problem, evolved as the most important form of legal literature during this period, as judges were often obliged to obtain such advice before delivering their decision. In the *consilia* problems caused by interplay between diverse sources of law (local statutes, customs, etc) are tackled through the Roman law jurists' techniques of interpretation and argumentation.

extent Roman law shared in the statute's primary authority. Second, a statute might contain technical terms of concepts of Roman law, which would in almost all cases be construed in the civilian sense, especially since it was accepted that statutory enactments had to be interpreted in such a way as to involve the least possible departure from the civil law. Even when a statute required strict interpretation of its text, it could often be argued that it required declaratory interpretation in light of other available legal sources.

The Commentators succeeded both in adapting Roman law to the needs of their own time and in imbuing contemporary law with a scientific basis through the theoretical elaboration of Roman legal concepts and principles.[33] Of particular importance was their contribution to the development of criminal law, commercial law, the rules of legal procedure and the theory of conflict of laws. It was the Commentators who constructed on the basis of the Roman texts on criminal law a legal science and who created a general theory of criminal responsibility. It was they who developed commercial law in such areas as negotiable instruments or partnership; who articulated the concept and principles of international private law; who devised the detailed rules of Romano-canonical procedure on the basis of the Roman *cognitio* procedure; who formulated doctrines of legal personality for entities other than human beings; and who gave substance to the notion of the rights of a third party to a transaction and to the law of agency. The work of the Commentators played a major part in the creation of the *ius commune* and enabled the reception of Roman law throughout Western Europe in the fifteenth and sixteenth centuries.[34]

8.4 The Reception of Roman Law

The thousands of students from all over Europe who had studied at Bologna and other Italian universities conveyed to their own countries the new legal learning based on the revived Roman law. Throughout Western Europe (in France, Spain, the Netherlands, Germany and Poland), universities were established where scholars trained in the methods of the Glossators and the Commentators taught the civil law on the basis of Justinian's texts. Their students formed a new class of professional lawyers whose members came to occupy the most important positions in both the administrative and judicial branches of government. Before the twelfth century,

[33] In the words of the German jurist Paul Koschaker, "[the Commentators] drew from the treasures of Roman wisdom and legal technique that could be used at the time and made of it a basic part of the law of their time, thus preparing the unification of Italy in the field of private law; they in addition made of Roman law the substratum of a legal science, which was later to become European legal science." *Europa und das Römische Recht* (Munich and Berlin 1953), 93.

[34] On the school of the Commentators see Robinson et al. (1994), p. 59 ff; Stein (1999), pp. 71–74; Tamm (1997), pp. 206–208; Wieacker (1995), p. 55 ff; Kunkel and Schermaier (2001), p. 232 ff; Horn (1973), pp. 261–364; Wesenberg and Wesener (1985), pp. 28–39; Lange and Kriechbaum (2007).

justice was administered by untrained jurors and based on local legal sources. In contrast, justice was now administered by professional judges appointed by a sovereign who could apply Roman law if local sources (either customary or statutory) were deficient. Through the activities of university-trained judges and jurists, the Roman law expounded by the Glossators and the Commentators entered the legal life of Continental Europe. It formed the basis of a common body of law, a common legal language and a common legal science—a development known as the 'Reception' of Roman law.

Like the Latin language and the universal Church, the received Roman law served as an important universalising factor in the West at a time when there were no centralised states and no unified legal systems but a multitude of overlapping and often competing jurisdictions and sources of law (local customs and statutes, feudal, imperial and ecclesiastical law). However, the course of the reception was complex and characterised by a lack of uniformity. This derived from the fact that the way in which Roman law was received in different parts of Europe was affected to a great extent by local conditions, and the actual degree of Roman law infiltration varied from region to region. In areas of Southern Europe that had incorporated Roman law as part of the applicable customary law, the process of the reception may be described as a resurgence, refinement and enlargement of Roman law. This occurred, for example, in Italy where the influence of Roman law had remained strong and in Southern France where the customary law that applied was already heavily Romanised. In Northern Europe, on the other hand, very little of Roman law had survived and the process of the reception was prolonged with a much more sweeping impact in some regions at its closing stages. The common law (*ius commune*) of Europe that gradually emerged towards the close of the Middle Ages was the result of a fusion between the Roman law of Justinian (as elaborated by medieval scholars), the canon law of the Church and Germanic customary law. The dominant element in this mixture was Roman law, although Roman law itself experienced considerable change under the influence of local custom and the statutory and canon law.

The universal *ius commune* was juxtaposed with the *ius proprium*, the local laws of the diverse medieval city-states and other political communities. Local law sometimes assumed the form of statute or, especially in earlier times, grew out of custom.[35] But the universal and local laws were not necessarily antithetical; they

[35]The first compilations of city customary law appeared in the second half of the twelfth century in Venice and Bari. These collections were subsequently superseded by statutory enactments, i.e. legislation issued by a local legislative body. An enactment of this kind (*statutum*) was distinguished from a law of theoretical universal application (*lex*), which could be promulgated only by the emperor. In principle, a *statutum* was subordinate and could only supplement but not alter or derogate from a *lex*. In fact, however, local statutes that were irreconcilable with imperial laws often prevailed in the legal practice of the area or city in which they had been enacted. An important example of legislation issued by a monarch is the *Liber Constitutionum Regni Siciliae*, also known as *Liber Augustalis*, a legal code for the Kingdom of Sicily promulgated by Emperor Frederick II in 1231. This code remained the principal body of law in the Southern Kingdom until the eighteenth century. Royal legislation was also enacted in the County (later Duchy) of Savoy, the provinces of Sardinia, the Patriarchate of Aquileia and many other areas. In the domains of the

were complementary and each interacted with and influenced the other. Statutory enactments born out of the need to address situations not provided for by the *ius commune* were often formulated and interpreted according to the concepts developed by scholars of the *ius commune*. The scholars, in turn, with their concern for concrete problems of social and commercial life and the need to deal with the law as it actually existed, took the local law into consideration. In their role as judges, lawyers and officials, jurists trained in Roman law at Bologna and other law schools regarded local law as an exception to the *ius commune*, and therefore as something requiring restrictive interpretation. Furthermore, they tended to interpret local law based on concepts and terminology derived from Roman law, thereby bringing it into line or harmonizing it with the *ius commune*.[36]

8.4.1 The Reception of Roman law in France

In the period between the sixth and the ninth centuries, three bodies of law applied in France: under the system of the personality of the laws, the Germanic sections of the population were governed by their own laws and customs, whilst the Roman inhabitants of the country continued to live according to Roman law; at the same time, everyone in France (irrespective of ethnic origin) was bound by the laws promulgated by the Frankish monarchs. In the course of the ninth century, the personal system of laws began to disintegrate (as the fusion of the different races made its application virtually impossible) and yielded to a territorial system. The shift from the system of personality to that of territoriality coincided in time with the expansion and consolidation of the feudal institutions in France. Whilst the territory of every feudal lord was governed by its own customs, the customary law that applied in an area generally tended to derive from the predominant ethnic group. And since the Roman element was dominant in Southern France and the Germanic element prevailed in the North, the whole country was divided into two broad regions: the country of the written law (*Pays du Droit écrit*) in the South, where Roman law as embodied in various sources, such as the *Lex Romana Visigothorum*

Church, the most important legislative enactment was the *Constitutiones Sanctae Matris Ecclesiae*, also informally known as *Constitutiones Aegidianae*, issued in 1357 by Cardinal Gil of Albornoz, the legate to the papal state during Pope's residence in Avignon.

[36]Even in parts of Europe where Roman law was not received in a normative sense, the conceptual structure created by the Glossators and the Commentators was sometimes employed to give a Roman form to indigenous customary rules. Thus, although the *ius commune* was not adopted in Norway and Hungary, local legislation exhibited a certain Roman influence. For example, the Norwegian Code of 1274 of King Magnus VI, while intended to be a written statement of ancient Viking custom, reflects an influence of Roman-canonical law in its organization and many of its institutions. Similarly, in Hungary the spirit of Roman law exercised an influence on the structure of Hungarian law and the character and development of legal thought. In areas as far off as the Ukraine and Belarus, where there was no reception, doctrines and practices of Roman law were introduced through the influence of Byzantine law.

and later editions of the *Corpus iuris civilis*, prevailed; and the country of customary law (*Pays des Coutumes, droit coutumier*) in the North that featured the application of a variety of local customs with a Frankish-Germanic character. In both zones, the law in force also included elements derived from royal, feudal, and canonical sources.

In the South of France, the land of written law, the common law of the region was essentially Roman law (notwithstanding local differences). The Roman law of Justinian was rapidly received in Southern France and accepted as the living law of the land. This favourable reception was facilitated by the revival of Roman law in the late eleventh and twelfth centuries, and the spread of its study from Bologna to Montpellier and other parts of France. In the early twelfth century, a summary of Justinian's Code was produced in Southern France with the designation *Lo Codi* and based on the work of the Glossators. The study of Roman law received a fresh impetus with the establishment of new law schools at Toulouse and Orleans in the thirteenth century. In these schools and the many others that sprang up in the years that followed the civil law was taught on the basis of Justinian's texts.[37]

In the northern regions of France, the country of customary law, a multitude of Germanic customs were in force. Some of these customs applied over a wider area (*coutumes générales*), whilst others were confined to a particular town or locality (*coutumes locales*)—there were sixty general customs and three hundred special or local customs. In this part of France, Roman law was regarded as a supplementary system invoked when the customary law was silent or ambiguous. Moreover, in certain areas of the law (such as the law of contracts and the law of obligations) the Roman system had been adopted and perceived as superior to customary law as well as better suited for tackling many new problems that emerged from the expansion of economic activity.

The administration of justice fell in the province of regional judicial and legislative bodies referred to as Parliaments (*Parlements*). In the country of customary law, the case law of the Parliament in Paris acquired special significance. Advocates attached to this body fostered legal development by means of an intensive literary activity that pertained, largely, to the study of case law.[38]

From the beginning of the thirteenth century, the customs of many regions of Northern France began to be recorded. Several collections of customary law

[37]The *Ultramontani*, as the jurists at Toulouse, Orleans and Montpellier were referred to, employed essentially the same methods and composed the same types of legal work as their Italian colleagues at Bologna. The first professors of these universities were Frenchmen who had studied at Bologna, but later there were some who had received their training in France (such as Jacques de Revigny and Pierre de Belleperche, both of whom taught at Orleans). These later jurists were more interested in legal theory than the Italian Glossators, and adopted a more historical and more liberal approach to the study of the Roman legal sources. Moreover, they made a significant contribution to non-Roman areas of law, such as penal law and international private law.

[38]In the course of time, the works of the Parisian advocates formed the basis of an extensive body of jurisprudence that was built upon the comparative study of the diverse local customs—a study that also paid attention to the great tradition of Roman law in France.

appeared, written in the vernacular but modelled on Roman law compilations. Some of these works, such as the *Les Livres de Jostice et de Plet* (The Books of Justice and Pleading), composed around 1260, reflect a strong influence of Roman law. In other works, such as the *Coutumes de Beauvaisis* (the customs of the county of Clermont in Beauvaisis) written in the late thirteenth century, the impact of Roman law is much less noticeable. Moreover, some of these compilations were private whilst others were issued under the authority of various feudal lords (*chartes de coutumes*). In general, the purpose of these works was to compile and present in a clear form the rules of customary law that applied in one or more regions so that these rules could more easily be proved in the courts of law.

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. The consolidation of customary law through its official publication precluded the wholesale reception of Roman law in Northern France, although elements of Roman legal doctrine entered the fixed body of customary law by way of interpretation. Moreover, Roman law continued to apply in areas of private law on which customary law was silent. This interaction of Roman and customary sources infused the law that prevailed in Northern France with a distinctive character.

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. Legal unity was finally established in France with the introduction of the Napoleonic Code in 1804.

In the course of the one hundred and 50 years prior to the enactment of the French Civil Code, the academic study of Roman law reached a climax—a development associated with the writings of jurists such as Jean Domat (1625–1695) and Robert Joseph Pothier (1699–1772).

Domat was born in Clermont-Ferrand, where he served as judge until 1681. His best-known work is his *Les loix civiles dans leur ordre naturel*, published in three volumes between the years 1689 and 1694. After an examination of the entire recorded body of legal material (*droit écrit*) of his region (Auvergne), Domat concluded that it was permeated by an internal logic and rationality that pointed to the existence of certain universal or immutable legal principles (*loix immuables*). He noted that these natural principles are reflected best in the norms of private law; public law, on the other hand, is composed to a much larger extent of statutory laws of a changeable or arbitrary character (*loix arbitraries*). Domat asserted that the general principles of Roman law, as embodied in the codification of Justinian, met the criteria of the *loix immuables* and could be ascribed the status of a system. He

argued, further, that contemporary French language was capable of expressing this system in a clear and precise way.[39]

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,[40] was concerned with the customary law of his hometown. His next important work was a comprehensive treatise on Roman private law, titled *Pandectae justineaneae 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.[41] In his writings, Pothier sought to overcome the problems for legal practice caused by the fragmentation of the law in France by means of a systematic restatement of fundamental Roman law concepts and principles.[42] In this way he contributed a great deal to the process of unification of private law in France.[43]

8.4.2 The Reception of Roman law in Germany

During the early Middle Ages, the law that applied in Germany was customary law that tended to vary regionally as a result of the shift from the system of personality to that of territoriality of the laws. Some of the customs applied over an entire region, whilst others were confined to a single city, village community or manor. After the establishment of the Holy Roman Empire of the German Nation in the tenth century, imperial law (concerned almost exclusively with constitutional matters) contributed as an additional source of law. Although the German emperors regarded themselves

[39]Domat was the first major academic jurist who challenged the connection between Roman law and its original language, Latin. With respect to the order of the various branches of private law, Domat first treated the general rules of law, then persons, property, obligations and, finally inheritance law. For a closer look at Domat's work see Sarzotti (1995).

[40]A revised edition of this work was published in 1760.

[41]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 consomption* (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.

[42]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.

[43]The Code Civil 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.

as successors of the Roman emperors and imperial legislation was influenced by the idea of a universal empire, initially there was no attempt to render Roman law applicable to all German regions as a form of common law that could replace local customs. In the twelfth and thirteenth centuries, Germans who had studied at the law schools of Italy and France introduced some knowledge of Roman law into Germany. However, the effect of this activity on the applicable customary laws was limited as Roman law scholars were largely ignorant or contemptuous of the local laws, which they regarded as primitive in both form and substance and as unworthy of the serious attention of the learned.

In the thirteenth and fourteenth centuries, there appeared a number of compilations embodying the customary laws observed in certain regions of Germany. The most important of these works were the *Sachsenspiegel*, or the Mirror of the Saxons, composed around 1225 by Eike von Repgow and containing the territorial customary law observed in parts of Northern Germany[44]; the *Deutschenspiegel*, or Mirror of the Germans, published about 1260 in Southern Germany; and the *Schwabenspiegel*, or Mirror of the Swabians, a collection of the customs of Swabia published in the late thirteenth century.[45] These works aspired to provide a basis for developing a common customary law for Germany, but the centrifugal tendencies that prevailed were too strong to be overcome by these works. The formulation of a native common law for the entire German country based upon Germanic sources was impossible. This derived from the weakness of the imperial power that was exacerbated by the political splintering of the empire in the late thirteenth century, and the multitude and diversity of the local customs. A further obstacle to the attainment of legal unity was the fact that there was no organized professional class of lawyers interested in developing a common body of law. The administration of the law was in the hands of lay judges, the *schoffen*, who had the task of declaring the applicable law for a particular issue in court by reference to the customary law that applied in each district. However, the pronouncements of the *schoffen* were only concerned with particular cases and reflected the personal views of laymen who were not necessarily guided by generally established rules or principles—thus, they added to the uncertainty surrounding the application of customary law.

In the fifteenth century, the problems generated by the fragmented nature of the law in Germany became intolerable as commercial transactions proliferated between different territories. Local custom was no longer adequate to meet the needs of a rapidly changing society, and the weakness of the imperial government meant the unification of the customary law by legislative action alone was unthinkable. If a common body of law could not be developed based on Germanic sources, another system offered a readily available alternative, namely Roman law. The acceptance of Roman law in Germany was facilitated by the idea that the Holy Roman Empire of

[44]The *Sachsenspiegel*, a work of outstanding quality, achieved great prestige and authority throughout Germany. Modern commentators regard it as the beginning of Germanic legal literature.

[45]Both the Mirror of the Germans and the Mirror of the Swabians reflect some influence of Roman law.

the German Nation was a continuation of the ancient Roman Empire.[46] In this respect, Roman law was viewed not as a foreign system of law but as a system that continued to apply within the empire as its common law. This idea found support in the newly established German universities, where the teaching of law was based exclusively on Roman and canonical sources[47] whilst Germanic customary law was almost completely ignored. Like the jurists of other countries, German jurists regarded Roman law as superior to the native law and existing in force both as written law (*ius scriptum*) by virtue of the imperial tradition and as written reason (*ratio scripta*) due to its inherent value.

At a practical level, the reception of Roman law in Germany was facilitated by the establishment in 1495 of the Imperial Chamber Court (*Reichskammergericht*) by a legislative act of Emperor Maximilian I (1493–1519). This act focused on the centralisation of the German system of judicial administration and was part of Maximilian's broader political program designed to restore the power of the monarchy and to secure legal and political unity. The new imperial court, which heard appeals from regional and local courts, was directed to decide cases 'according to the imperial and common law and also according to just, equitable and reasonable ordinances and customs'. Since *doctores iuris* (jurists trained in Roman law) dominated the composition of the court, the term 'common law' was naturally interpreted as meaning Roman law. The significance of the 1495 legislation was that it formally acknowledged Roman law as positive law in Germany. Pursuant to this law, judges were required to apply Roman law only when a relevant custom or statutory provision could not be proved. In practice, the difficulty in proving an overriding German rule meant that Roman law became the basic law throughout Germany. The model of the Imperial Chamber Court was followed by the territorial courts of appeal established by local princes in Austria, Saxony, Bavaria, Brandenburg and other German states. At the same time, the courts where lay judges still presided increasingly relied on the advice of learned jurists (city advocates, state officials and university professors) for information and guidance concerning local as well as Roman law. In the course of time, the role of the lay judges diminished and the administration of justice was dominated by professional lawyers who had been trained in Roman and canon law at the universities. By the end of the sixteenth century, it had become common practice for judges to seek the advice of university professors on difficult questions of law arising from actual cases. The opinion rendered was regarded as binding on the court that had requested it. This practice (*Aktenversendung*) prevailed until the nineteenth century, entailing the accumulation of an extensive body of legal doctrine that applied throughout Germany.

[46]The Emperor of the Holy Roman Empire was at the same time king of Germany and of Italy.

[47]The methods of study and the legal materials used were substantially the same as in those employed in Italian universities.

By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[48] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence. The Roman law that was received embodied the Roman law of Justinian as interpreted and modified by the Glossators and the Commentators. This body of law was further modified by German jurists to fit the conditions of the times and thereby a Germanic element was introduced into what remained a basically Roman structure. In some parts of Germany (such as Saxony), Germanic customary law survived and certain institutions of Germanic origin were retained in the legislation of local princes and of cities. Legal practitioners and jurists from the sixteenth to the eighteenth century executed the process of moulding into one system the Roman and Germanic law, which led to the development of a new approach to the analysis and interpretation of the Justinianic Roman law—referred to as *Usus modernus Pandectarum* ('modern application of the Pandects/Digest').[49] This approach continued to be followed in Germany, subject to local variations, until the introduction of the German Civil Code in 1900.

8.4.3 *The Ius Commune in Italy, the Iberian Peninsula and the Netherlands*

By the close of the fifteenth century, the medieval world of the Italian city-states had evolved into the Kingdom of Naples in the south, the Papal States and Tuscany in central Italy, Piedmont, Lombardy under Milan, the Republic of Venice and a number of lesser states.[50] The Kingdom of Naples was a centralized state with a

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

[49] Although this approach externally appears to be a continuation of the Bartolist method, under the influence of Legal Humanism (see relevant discussion below) it gave rise to a different doctrine about the sources of law: whereas Roman law continued to be regarded as an important source of law, local law was no longer viewed as an aberration from Roman law but as a further development of Roman law through custom. Thus, the *Usus modernus Pandectarum* elevated the importance of local law, which now became the subject of systematic scientific study. As far as Roman law is concerned, the term *Usus modernus Pandectarum* implies that the jurists' purpose was to apply the Roman legal texts in contemporary legal practice. The representatives of this approach may to some extent have been influenced by the work of the Humanist jurists, but they tended to use the Roman texts ahistorically, as just another source of legal norms. However, there was no general agreement among jurists as to which texts actually applied. It should be noted that the methods of the *Usus modernus* movement were adopted by many French and Dutch jurists. Leading representatives of this movement include Samuel Stryk (1640–1710), a professor at Frankfurt a.d. Oder, Wittenberg and Halle; Georg Adam Struve (1619–1692); Ulric Huber (1636–1694); Cornelis van Bynkershoek (1673–1743); Arnoldus Vinnius (1588–1657); Gerard Noodt (1647–1725); and Johannes Voet (1647–1713). On the *Usus modernus Pandectarum* see Wieacker (1995), p. 159 ff; Tamm (1997), p. 225; Söllner (1977), pp. 501–516; Voppel (1996), Schlosser (2005), pp. 76–83.

[50] These included Siena, Ferrara and Mantua.

hierarchy of courts, more akin to France or Spain than the rest of Italy. The continued political fragmentation of Italy did not affect the application of civil law and the working of the courts, which maintained the traditional blending of the Roman law of the Glossators and Commentators, canonical procedure and general and particular custom. The great medieval treatises of Bartolus and Baldus, in particular, continued to enjoy high esteem. The legal literature that emerged in university towns, such as Bologna, Padua, Pavia and Naples, although frequently concerned with local needs, became part of the pan-European *ius commune*—a process facilitated by the invention of the printing press in the late fifteenth century.[51] Italian scholars of the late fifteenth and early sixteenth centuries, such as Giasone del Maino (1435–1519) and Filippo Decio (1454 – *c.* 1535), sought to combine the tradition of the *ius commune* with the ideals of the new humanist learning. After the integration of Italy into the Napoleonic state, the French Civil Code was introduced in the country (1806). Even though the *ius commune* continued to exist even after the restoration of the Italian states following the defeat of Napoleon (1815), a growing number of states began to draw up their own law codes (the so-called *codici preunitari*). The earliest among these, the codes of the Kingdom of Naples (1819) and the Duchy of Parma (1820), were modelled closely on the French Civil Code, while the later ones of Piedmont (1837) and Modena (1851) represent a peculiar blend of French style and traditional local elements. In Lombardy and Venice, which had been returned to the rule of the Austrian emperors, the Austrian Civil Code (ABGB) of 1811 was put into force.[52]

Any consideration of the development of law in Spain must take into account the fluid relationships between the different peoples that settled in the Iberian Peninsula and the changing fortunes of the diverse states that evolved in medieval times. As noted earlier, in the second half of the fifth century the Germanic tribe of the Visigoths was successful in establishing a permanent rule on the Peninsula.[53] In the period that followed, Roman personal law, as embodied in the *Lex Romana Visigothorum*, coexisted with the laws of the Visigoths (who never amounted to more that 5% of the total population). In the course of time, as the two ethnic groups merged, a territorial law, permeated in both substance and form by Roman law, prevailed. This law was embodied in the *corpus iuris* promulgated for all citizens by the Visigothic king Recceswinth in *c*. 654. The new law code, referred to as *Liber Iudiciorum* or *Lex Visigothorum*, remained the basis of law in Spain until the fifteenth century, governing the Christian population even during the long Muslim rule (from 711). During the period when Christian forces were pushing back those of Islam, a diversity of states of varying sizes and significance emerged in the territory

[51]As already noted, the local laws were not necessarily in conflict with the universal ones: many laws born out of the need to address situations not provided for by the *ius commune* were formulated and interpreted in accordance with concepts devised by jurists of *the ius commune*.

[52]The ABGB combined natural law ideas, especially in the fields of the law of persons and family law, with Roman law concepts and principles.

[53]The capital of the Visigothic kingdom was Toledo.

of present-day Spain: Castile (later reunited with León), including Galicia and the Basque region; Aragon; Catalonia; Navarre; and the Balearic Islands.

The legal development of Castile-León deserves special mention because of the important role this state played in the unification of Spain. In this realm the king exercised supreme jurisdiction as the natural lord of all his subjects. The growing influence of the court of *alcades de corte*, or of the royal household, composed of professional judges, diminished the importance of local customs of a largely Germanic origin, called *fueros* or *usus terrae*. In the course of the thirteen and fourteenth centuries men trained in Roman law at the universities (*letrados*) became influential and attained high office in the royal service. A large number of students from Spain attended Bologna, and this trend continued even after the first Spanish universities were established (in Palencia, Salamanca, Seville and Lerida) in the thirteenth century.[54] These institutions spread the knowledge of Roman law and the methods of the Glossators and the Commentators throughout the Iberian Peninsula. The most significant product of this growth of the study of Roman law was the famous *Libro de las leyes*, commonly called the *Las Siete Partidas* (The Seven Parts [of the Law]), compiled by order of King Alfonso X the Learned during the period 1256–1265. This work, drafted largely by jurists of the University of Salamanca, contains a large number of legal rules on marriage, contracts, inheritance and procedure, derived from a variety of Roman and canonical sources.[55] The enforcement of *Las Siete Partidas* as the common law of Spain was delayed due to the opposition of Spanish traditionalists, who remained loyal to their local customs. Only in 1348 was it promulgated as general law (by the *Ordenamiento de Alcalá*, a compilation of laws enacted by the courts of Alfonso XI in Alcalá de Henares), even though it remained subordinate to local custom. However, as local customs needed to be proved to a court as actually being observed, whilst there was always a presumption in favour of *Las Siete Partidas*, the later work gradually came to prevail as the official law of Spain. The accompanying reception of the learned law of the *ius commune* was so massive that the monarchs decreed that the courts, when faced with gaps in the law, should rely on the authority of the major Glossators and Commentators.[56] Although *Las Siete Partidas* was rearranged at various times as political conditions evolved, it remained the foundation of law in Spain until it was superseded by the *Codigo Civil* of 1889.

In neighbouring Portugal the law that applied was at first derived from the *Liber Iudiciorum* of the Visigoths, as extended in 1054 by King Alfonso V of León, and local customs. But, in the course of time, the *ius commune* was received in this

[54]So numerous were the students from Spain studying at Bologna that in 1346 a special college was set up for them there by the Spanish Cardinal Gil of Albornoz.

[55]These sources include the *Corpus Iuris* of Justinian, the *Decretum* of Gratian, the *Decretales* of Gregory IX, and the works of some of the most famous of the Glossators, especially Azo and Accursius on civil law, and Goffredo of Trani and Raymond of Peñafort on canon law.

[56]To avoid confusion, in 1427 John II, King of Castile and León, ordained that the courts should not follow, as authorities, the opinions of jurists later that Johannes Andreae (Giovanni d'Andrea) on canon law and Bartolus on Roman law. Later, by a law of 1499, Baldo was also included.

country too, with the principal centres of legal learning being the universities of Coimbra and Lisbon. It is thus unsurprising that the first comprehensive collection of Portuguese laws, the *Ordenações Afonsinas*, enacted by King Alfonso V in 1446, in large part consisted of Roman and canon law. This compilation was followed by the *Ordenações Manuelinas*, promulgated by King Manuel in 1521, and finally in 1603, during the reign of King Philip II, by the *Ordenações Filipilinas*, which remained in force until modern times not only in Portugal, but also in its colonies, such as Brazil. These enactments embodied the principle that Roman law and the works of the Glossators and the Commentators constituted the common law of the realm that was applicable whenever local legislation or customs were silent or ambiguous.

In the Netherlands, as in most areas of Western Europe, the revival in the study and application of Roman law in the High Middle Ages led to a major reception of Roman legal norms, concepts and principles, so that by the end of the sixteenth century Dutch law bore a heavily Romanised look. This development occurred at a time when the material prosperity of Holland had advanced considerably, owing largely to the growth of trade and commerce, and so a more sophisticated legal system was required to meet the new conditions. Instances of Roman legal influence were particularly evident in the fields of the law of property, contract and delict, as these were the areas where Roman law was considered to be far superior to the indigenous Dutch law. However, in spheres such as the law of persons and intestate succession, local customary laws largely resisted the Roman reception. Moreover, even in the areas of property and contract, Dutch jurists were cautious in their selection of Roman rules, and tended to reject archaic and formalistic concepts. The outcome of this process was thus a hybrid legal system, consisting of Roman and Dutch elements, which came to be known as Roman-Dutch law.[57] The principal centre of Roman legal studies in the Netherlands was the University of Leyden, established in 1575. In the period that followed more universities were founded at Franeker in Friesland (1585), Groningen (1614), Utrecht (1636) and Harderwijk in Gelderland (1648). Legal development in the seventeenth and eighteenth centuries was based largely on the work of the Dutch professors, especially those of Leyden, who, together with the judges of the High Courts of the provinces, created a highly advanced body of law derived from the synthesis of legal science and legal

[57]The term ‘Roman-Dutch law’ was introduced in the seventeenth century by the jurist Simon van Leeuwen, who used it as a title in his principal work, *Roomsch Hollandsch Recht* (1664).

practice.[58] In 1652 Roman-Dutch law was introduced to South Africa, with the result that the Roman and Dutch texts became authoritative sources of South African law.[59]

8.5 The Humanists and the School of Natural Law

The Renaissance and the Reformation brought about a broader appreciation of intellectual and cultural accomplishments and an emancipation of human reason from the fetters of traditional faith and dogma. This new outlook and new spirit fostered impatience with the narrow pedantry of the old schools of law. The established doctrine of *communis opinio doctorum*, in its extreme form, hampered the logical development of principles and resolved legal problems by marshalling the opinions of legal scholars on the point at issue and then counting heads. Thus, during this period, the law schools of Italy, which until then had been famous throughout Europe, came to be regarded as the homes of an outworn theory (referred to as *mos Italicus*). The influence of the Renaissance produced a new school of jurists, the Humanists, who brought to legal writing the spirit of the revival of letters.

As previously observed, the school of the Commentators entailed the shift of scholarly attention from the dialectical examination of Justinian's texts to the consideration of the adaptability of Roman law to the needs and conditions of medieval life. But as the Commentators were primarily interested in developing contemporary law, they tended to disregard the historical framework and the primary sources of Roman law. From the fifteenth century the growing interest in the cultural inheritance of classical antiquity, associated with the rise of humanistic scholarship, led to the development of a new approach to the study of Roman law. Scholarly

[58]The greatest product of the Leyden law faculty was Hugo Grotius, author of the famous work *De iure belli ac pacis* (1625). Grotius also published a work entitled an Introduction to the Jurisprudence of Holland (*Inleidinge tot de Hollandsche Rechtsgeleerdheid*, 1631), in which he treats the law of Holland as a unique amalgam of Germanic custom and Roman law. Reference should also be made here to Arnold Vinnius (1588–1657), a law professor at Leyden, who established Dutch legal science as a mixture of Roman, customary and natural law elements; Johannes Voet (1647–1714), another Leyden professor, author of the influential *Commentarius ad Pandectas*, published in two volumes in 1698 and 1704; and Ulrich Huber (1636–1694), a professor at the University of Franeker, whose works *De iure civitatis libri tres* (1672) and *Paelectiones iuris civilis* (1678–1690) are built up largely from Roman materials. The widespread influence of the Dutch masters throughout Europe is attested by the large numbers of foreign editions of their principal works in the seventeenth and eighteenth centuries.

[59]It should be noted here that unlike the Continental European legal systems, but like the English common law, Roman-Dutch law in South Africa has not been codified. It is thus unsurprising that law courts and commentators have to grapple, even today, with the historical sources of the *ius commune* and its Dutch variant. Special attention is given to seventeenth and eighteenth century Dutch authorities, such as Grotius, Voet and Vinnius, although other works from the entire body of learned literature from Bartolus to the German Pandectists, and even the sources of Roman law itself, are regularly consulted in areas like property, contract and succession.

attention now focused on the consideration of Roman law as a historical phenomenon, and special emphasis was placed on the techniques of history and philology for its proper understanding and interpretation. The methods used by the Commentators to study Justinian's texts prompted the formulation of theories, which, from the Humanists' perspective, were utterly unwarranted when the ancient texts were considered in their proper historical context; therefore, such theories were rejected in favour of interpretations based upon the true historical sense of the texts.[60] Thus, 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 (*mos Italicus*). A considerable part of the Humanists' work concerned the detection of the interpolations in the Justinianic codification, which was an important step towards uncovering the true character of classical Roman law. An important innovation was that, unlike the medieval jurists, the Humanists were able to read Greek texts, which enabled them to use Byzantine legal sources, such as the *Basilica*, to reconstruct the texts of Justinian.[61] The Humanists also endeavoured to achieve a more systematic treatment of the contents of Justinian's *Corpus*. The medieval *summae* and other works had introduced systematic treatment for one work at a time, but it was now attempted to present the entire *Corpus Iuris Civilis* as one systematic whole. The Institutes furnished an important model, since this was the only part of Justinian's codification that contained a real system.[62]

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[60]Lorenzo Valla, a fifteenth-century Italian Humanist, criticized the inelegant Latin of the Commentators, arguing that this was proof of their shortcomings as jurists. See Stein (1999), p. 75. Stein relates that the French Humanist Guillaume *Budé described the earlier jurists' glosses and commentaries as "a malignant cancer on the texts, which had to be cut away." Idem., at 76.*

[61]The Legal Humanists were responsible for the beginnings of what is known as *palingenesia*: the reconstruction of legal texts that have been altered by editors after they were first issued. With respect to the works of the classical Roman jurists, *palingenesia* profited from the fact that every fragment in the Digest is accompanied by an *inscriptio* containing the name of the original author and the title and part of the work from which the fragment was taken. This made it possible for scholars to separate all the fragments contained in the Digest, sort them by jurist and then, for each jurist, sort them by work and then by book (e.g., Ulpianus, *libro octavo decimo ad edictum*). This approach was begun by Jacobus Labittus, a sixteenth century Legal Humanist, in his *Index legum omnium quae in Pandectis continentur* [...], published in 1557. In this work Labittus listed: the texts of the Digest according to their authors, the works in which they appeared, and the books of those works from which they were excerpted; other Digest texts which cited that jurist; those jurists who were not themselves excerpted in the Digest but who were referred to by other jurists therein; and, finally, those texts in the Codex and Novels which mentioned specific jurists. However, he did not try to restore the original order in the works of individual Roman jurists—this was done in the nineteenth century by Lenel, author of the more extensive *Palingenesia iuris civilis*, I-II (1889). It should be noted here that, as the compilers of Justinian's *Corpus* retained only about 5 per cent of the available texts, a complete reconstruction of the original works was impossible. Nevertheless, with respect to those jurists whose works were extensively used, it is possible to gain a good impression of the scope and structure of a particular work.

[62]In this connection, reference should be made to the French Humanist Franciscus Connanus (Francois de Connan, 1508–1551), who in his *Commentaria iuris civilis libri decem* attempted to re-order legal material in a more rational way under the tripartite division of law into persons, things

The new school of thought was initiated in France by the Italian Andreas Alciatus (1492–1550), but its effects resonated all over Europe.[63] 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*. In general, however, the Humanist movement appears to have insignificantly influenced the practice of law as the courts in France and elsewhere remained faithful to the Bartolist tradition. This was largely due to the fact that most Humanists were concerned chiefly with the historical analysis of Roman law and paid little attention to problems relating to the practical application of the law or the need to adapt Roman law to contemporary conditions. At the same time, however, 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 *ius commune* and the emergence of national systems of law.[64]

In the seventeenth and eighteenth centuries, European legal thought moved in a new direction under the influence of the School of Natural law. The idea of natural law has its origins in ancient Greek philosophy, but was given a more concrete form by the Stoic philosophers of the Hellenistic and Roman eras. Under the influence of Stoicism, Roman jurists treated natural law as a body of law equally observed by all peoples, and therefore also called it *ius gentium* (law of nations in a theoretical sense). Furthermore, Stoic philosophy furnished the terminology on the basis of which the early Church Fathers were able to formulate the first conceptions of the Christian natural law philosophy and to impart them to the world of their time. The Church Father Aurelius Augustinus (AD 354–430) promoted the idea of a divine origin of law and founded a theory that contributed a great deal to the transition from

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and actions derived from the Institutes. Hugues Doneau (Donellus), a sixteenth century French Humanist, in his *Commentarii de iure civili libri viginti octo* (Frankfurt 1595–1597), departed from the traditional approach to law that gave priority to actions and procedure and regarded the rights of the individual as being of greater importance than the methods by which these rights could be defended. This new approach is clearly reflected in the structure of his work. Moreover, Donellus separated the law of obligations from the law of property, both originally considered to constitute aspects of the law of things. See Garnsey (2007), p. 202; Stein (1993), pp. 448–452.

[63]The centre of the Humanist School was the University of Bourges in France. Among the most important representatives of this school, which included not only jurists but also historians and philologists, were Jacques Cujas (Cuiacius, 1522–1590), Hugues Doneau (Donellus, 1527–1591), Guillaume Bude (Budaeus, 1467–1540), Ulrich Zasius (1461–1535), Antoine Favre (Faber, 1557–1624), Charles Annibal Fabrot (Fabrotus, 1580–1659) and Jacques Godefroy (Godofredus, 1587–1652). From the late seventeenth to the mid-eighteenth century Legal Humanism also flourished in the Netherlands, where it engendered a highly advanced approach to the study of Roman legal sources, referred to as the Dutch Elegant School. Among the leading representatives of this School are Gerard Noodt (1647–1725) and Henrik Brenkman (1681–1736).

[64]On the influence of the Humanist movement see Stein (1999), p. 75ff; Maffei (1956), Kelley (1970), Robinson et al. (1994), ch. 10; Gilmore (1963), Wieacker (1995), P. 120 ff; Kunkel and Schermaier (2001), pp. 237–238; Kisch (1955).

ancient philosophy to Christian jurisprudence. Augustinus held that the *lex naturalis moralis* is imprinted on the soul, heart, and mind of humankind. Nonetheless, he recognized that temporal or human positive laws are necessary in order that humankind might make manifest that which has been obscured through sinfulness and vice. The greatest figure in medieval theology is, without doubt, Thomas Aquinas (1225–1274). Aquinas's work is a blending of earlier traditions: the philosophical thought of Aristotle[65] and the theology of the early Church Fathers, especially that of Augustinus. In his most important work, the *Summa theologiae*, a manual for students of theology, Aquinas defines natural law as man's participation in God's eternal law (or God's purpose in creation), which can be discovered through reason. Human beings, like all other entities in the universe, are subjects upon which the eternal law moves. However, the crucial difference between human beings and the rest of the created order is *freedom of choice*. This means that people do not necessarily behave in accordance with the eternal law. Thus, two distinct sources of guidance are provided for our benefit: divine law and natural law. These operate by two different means namely, revelation, that is God choosing to make known His will in the Holy Scriptures, and reason respectively. But if we can all know natural law through reason—and we all have reason—how can we account for disputes over fundamental moral issues or differing understandings of right and wrong at different times? Aquinas explains this by the process through which particular natural law precepts are deduced from general principles. He links this process of deduction both with human inclination and with the nature of reason itself. Reasoning about morality is practical rather than speculative. The fact that the conclusions of practical reason are not equally known by everyone does not affect their truth. Furthermore, in the process of application of practical reason to more and more situations, inevitably exceptions to general principles will have to be made and so the result may be variations in the natural law over time and place. Thus, while the primary precepts of natural law (such as the promotion of good and avoidance of evil) are unchanging, the secondary precepts of natural law are variable in content. But if we have Natural Law discoverable by reason why do we need human law? Aquinas defines human law to be an ordinance of reason for the common good, made by him who has care of the community, and explains the need for such law as arising both from unequal knowledge of natural law and the fact that knowledge is not the same as conduct—people are free to disobey. Hence, human law can help train us to act in accordance with natural law.[66] Although Aquinas sees human law as deduced from natural law, he recognises that because this deduction depends on practical reason it can lead to more than one possible conclusion. Variations in human laws between societies and over history are partly explicable by variations in the secondary natural law precepts

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[65] Aquinas was able to draw on recently made translations of the works of Aristotle by Willem van Moerbeke (*c.* 1215- *c.* 1286), which had made available works that had not been in circulation until that time.

[66] Aquinas answers the question of why human laws are necessary by drawing on Cicero and suggesting that human laws must be necessary to ensure the fulfilment of the divine plan because of humankind's limited participation in both natural and eternal law.

from which they are deduced and partly because the process of deduction allows a measure of freedom and creativity.

The doctrines of Aquinas dominated the theological, philosophical and intellectual landscape of Western Europe until the sixteenth century, when the traditional ideas about man and his relationship with God and the world began to be challenged by Humanism, Protestantism and the discovery of the New World. From this period, the natural law discourse began to untie itself from its associations with scholastic theology, and to increasingly use the language of reason. Of particular importance in this development was the work of the Dutchman Hugo Grotius (1583–1645), also known as the founder of modern international law.[67] In his famous work *De iure belli ac pacis* (1625)[68] Grotius expounded the idea of a purely secular natural law freed from all ecclesiastical authority. He stated that even if we were so bold as to assume that there is no God, or that God is not interested in human affairs, there would still be valid natural law.[69] This freeing of natural law from its religious bonds made it possible for him to place the law outside the bitter opposition that the conflict in matters of religion had engendered since the time of Reformation and Counter-Reformation. What he really did was to return to the common and rational basis of all law, which the Humanist thinkers generally recognized through their rediscovery of the Stoics. It is on this basis that Grotius developed his theory of international law as a law binding all nations by reason. His starting-point in developing out of natural law a set of usable principles for the mutual relations of states (and, so far as applicable, individuals) was the notion that man is by nature sociable: "Among the traits characteristic of man is an impelling desire for society, that is, for the social life _ not of any and every sort, but peaceful, and organized according to the measure of his intelligence, and with those of his own kind."[70] "The maintenance of the social order ... which is consonant with human understanding, is the source of law properly so called. To this sphere of law belongs the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the reparation of a loss incurred through our fault, and the infliction of penalties on men according to their deserts."[71] As the above statement suggests, Grotius viewed the law of nature as essentially the injunction to maintain peace by way of showing

[67]The secularism of the natural law of this era accounts for its relative lack of popularity in Italy, where, especially in the seventeenth century, the cultural environment of the Counter-Reformation tended to stifle new ideas. It is thus unsurprising that the famous Italian scholar Alberico Gentili (1552–1608), regarded as one of the founders of the Natural Law School, came under suspicion for heresy and had to seek refuge in England, where he became regius professor of civil law at the University of Oxford.

[68]This work was partly inspired by a desire to devise rules that might lessen the horrors of war, although Grotius' sought to formulate a system of law for peacetime as well.

[69]*De iure belli ac pacis, Prolegomena* 11.

[70]*De iure belli ac pacis, Prolegomena*, 6.

[71]*De iure belli ac pacis, Prolegomena*, 8.

respect for the rights of other people.[72] He notes, asserting his own personal faith, that even though this law stems from man's inmost being, it is still deservedly attributed to God, whose will is that the relevant principles should reside within us.[73] And so, summarizing his view, though again without prejudice to the assumption that God might not exist, he writes that "natural law is the command of right reason, which points out, in respect of a particular act, depending on whether or not it conforms with that rational nature, either its moral turpitude, or its moral necessity; and consequently shows that such an act is either prohibited or commanded by God, the author of that nature."[74] Notwithstanding his repeated statement of his own Christian faith, his hypothesis was to be decisive in freeing the doctrine of natural law from the bonds of theology. It should be noted, further, that Grotius employed the comparative method to place his natural law doctrine 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.

The idea of a rational natural law was developed further by the German philosophers Samuel Pufendorf (1632–1694), Christian Thomasius (1655–1728) and Christian Wolff (1679–1754). For Pufendorf, natural law is purely the product of reason and, as such, has no connection with divine revelation. A fundamental principle is: "Let no one act towards another in such a way that the latter can justly complain that his equality of rights has been violated."[75] More concrete rules derived from reason and thus nature were: not to harm others, and, where harm is caused, to make reparation; to treat others as having equal rights by reason of the dignity of all human beings; to assist others as far as one is able to do so; and to carry out the obligations one has assumed.[76] Pufendorf was the first modern legal philosopher who elaborated a comprehensive system of natural law comprising all branches of law.[77] His work exercised an influence on the structure of later codifications of law,

[72]According to Grotius, one of the rights derived from the law of nature is the right of self-defence. *De iure belli ac pacis,* 2. 1. 3. Furthermore, a natural right to punish a wrongdoer must be assumed, for otherwise such a right could not be possessed by the state by cession from its subjects. *De iure belli ac pacis,* 2. 20. 1–2. The law of nature is also the source of validity of various forms of acquisition, and underpins rights emerging through promises and contractual agreements. *De iure belli ac pacis,* 2. 3. 4 ff and 2. 11. 4.

[73]*De iure belli ac pacis, Prolegomena*, 11–12.

[74]*De iure belli ac pacis,* 1. 1. 10. 1–2.

[75]*Elementa jurisprudentiae*, 2. 4. 4.

[76]*De officio hominis et civis*, 1. 3. 9. 6–9.

[77]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

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.

Like other natural law thinkers, Christian Thomasius draws attention to the shift from a *iurisprudentia divina*, a theological mode of legal study, to a doctrine of law whose foundation lies in reason and in nature. A central theme in Thomasius's natural law theory is justice (*iustum*): the forbidding of any transgression against the rights of others, in service of which the state is entitled to exercise the right of coercion. This is distinguished from the demands of honesty (*honestum*) and decency (*decorum*). In this way, Thomasius separated the domain of law from that of morality. 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.[78]

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 illuminated by the Humanists, 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 logical reasoning on the nature of man and society, rather than the expression of the legal development of the Roman state. The Roman doctrine of *ius gentium* and *ius naturale*, in particular, seemed to support their theories. 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

historical facts and personalities." *Grosse Rechtsdenker der deutschen Geistesgeschichte*, 2nd ed. (Tübingen 1944), 298.

[78]Other important representatives of the Natural Law School include Gottfried Wilhelm Leibniz (1646–1716) and Jean Domat (1625–1696).

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.[79]

8.6 The Codification Movement

In the seventeenth and eighteenth centuries, the rise of nationalism and the consolidation of royal power in Europe entailed an increased interest in the development of national law and this, in turn, precipitated the movement towards codification. The demand that law should be reduced to a code arose from two interrelated factors: the necessities to establish legal unity within the boundaries of a nation-state, and develop a rational, systematised and comprehensive legal system adapted to the conditions of the times. The School of Natural Law had a rationalist approach to institutional reform and emphasized comprehensive legal system-building and thus provided the ideological and methodological basis to launch the codification movement. The unification of national law through codification engendered the eventual displacement of the *ius commune* and thus Roman law ceased to exist as a direct source of law. But as the drafters of the codes greatly relied on the *ius commune*, elements of Roman law were incorporated in different ways and to varying degrees into the legal systems of Continental Europe.

The first national codes designed to achieve legal unity within one kingdom were compiled in Denmark (1683) and Sweden (1734). The process of codification continued in the late eighteenth and early nineteenth centuries with the introduction of codes in Bavaria (1756), Prussia (1794) and Austria (1811). The Natural law philosophy exercised a strong influence on both the contents and structure of these codes. But the most important codificatory event of this period was Napoleon's enactment in 1804 of the French Civil Code (*Code civil des francais*). The chief aim of Napoleon's Code was to unify the law of France by fusing Roman law, customary law, royal ordinances and some laws of the revolutionary period into one comprehensive system. In this respect it succeeded brilliantly. The importance of the Code is attributed to not only the fact that it fostered legal unity within France, but also the fact that it was adopted, imitated or adapted by many countries throughout the world. This was partly due to its clarity, simplicity and elegance, which made it a convenient article of exportation, and partly due to France's influence in the nineteenth century.

The French Civil Code was drafted by a commission of four eminent jurists: Tronchet, the President of the Court of Cassation and former defence counsel for King Louis XVI; Portalis, a lawyer and provincial administrator at Aix-en-Provence and a close supporter of Napoleon; Bigot de Préameneau, government commissioner

[79]On the rise and influence of the School of Natural law see D'Entreves (1970), Robinson et al. (1994), ch. 13; Wieacker (1995), ch. 15; Stein (1999), pp. 107–110; Tamm (1997), p. 231 ff; von Kaltenborn (1848), Thieme (1954), Welzel (1962).

for the *Tribunal de cassation* and former lawyer at the Parliament in Rennes; and Maleville, formerly a lawyer at the Parliament in Bordeaux and, later, judge at the Court of Cassation.[80] The three ideological pillars of the Code were private property, freedom of contract and the patriarchal family. The position adopted was that the primary role of the state was to protect private property, secure the enforcement of legally formed contracts and warrant the autonomy of the family. With respect to private property, the Code consolidated the rejection of feudalism and its institutions achieved by the French Revolution. Through private law devices, such as the imposition of limitations on the freedom of testation, the drafters of the Code sought to break up the estates of the once powerful landowners. The formal division of the Code into three parts—Persons, Property and the Different Ways of Acquiring Property—was identical to that adopted by the drafters of Justinian's Institutes. Each part or book is divided into titles, such as Enjoyment and Loss of Civil Rights, Marriage, Divorce, Domicile and Adoptions. These are subdivided into chapters and, in several instances, into sections. Book One covers matters such as marriage, divorce, the status of minors, guardianship and domicile; Book Two deals with property, usufruct and servitudes; and Book Three includes diverse matters such as wills and intestate succession, donations, contracts, torts, matrimonial property settlements, sale, lease, partnership, mortgages, special contracts and such like. Certain parts of the Code (such as that addressing the law of contracts) were to a great extent based on the Roman or written law of Southern France, while other parts (such as family law and the law of succession) reflect a stronger influence from the North French customary law of Germanic origin. The drafters of the Code recognized that a legislator could not foresee all the possible applications of a basic legal principle. Therefore, they opted for the flexibility of general rules rather than for detailed provisions. As Portalis commented, "we have avoided the dangerous ambition to regulate and foresee everything... The function of the law is to determine in broad outline the general maxims of justice, to establish principles rich in implications, and not to descend into the details of the questions that can arise in each subject."[81] From this point of view, he identified the main tasks of judges in a codified system of law as being to clarify the meaning of the legal rules in the various circumstances that are submitted to them; to elucidate any obscure facets of the law and to fill its gaps; and to adjust the law to the evolution of society and, to the best extent possible, utilize the existing texts to avoid any potential inadequacy of the law in the face of contemporary problems.

The new code, an expression of the power of the middle class, represented both a substantial and formal departure from the preceding system of law, which it was designed to replace. Even the many pre-revolutionary rules and institutions incorporated into the code were deemed effective only because of their re-enactment as part of the new legislation. However, despite the formal rupture with the *ius*

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[80]Portalis, who presented the drafting intentions in the *Discours préliminaire*, was in overall charge. On Portalis' contribution see Plesser (1997) and Long and Monier (1997).

[81]See von Mehren and Gordley (1977), p. 54.

commune, the code was of necessity built up of culturally familiar concepts, institutions and ways of thinking about law derived from the preceding system. Thus, much of the earlier legal tradition, with a new ideological basis, was carried over into the code.

In Germany the French Civil Code attracted a great deal of attention and, as Napoleon extended his rule over Europe, it was adopted in parts of the country. The rise of German nationalism during the wars of independence compelled many scholars to express the need for the introduction of one uniform code for Germany to unite the country under one modern system of law and precipitate the process of its political unification. In 1814, Thibaut, a professor of Roman law at Heidelberg University, declared this view in a pamphlet entitled 'On the Necessity for a General Civil Code for Germany'.[82] Thibaut, a representative of the Natural Law movement, claimed that the existing French, Prussian and Austrian Civil Codes could serve as useful models for the German draftsmen. Thibaut's proposals encountered strong opposition from the members of the Historical School,[83] headed by the influential jurist Friedrich Carl von Savigny (1779–1861).[84] Savigny's thesis, elaborated in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science',[85] asserted that law, like language, ethics and literature, was a product of the history and culture of a people, a manifestation of national consciousness (*Volksgeist*), and could not be derived from abstract principles of natural law by logical means alone. From this point of view, Savigny argued that the introduction of a German Code should be postponed until both the historical circumstances that moulded the law in Germany were fully understood and the needs of the present environment were properly assessed. In this respect, a perplexing question that Savigny had to answer was how could the idea that the law emanated from the

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[82]Thibaut (1814), pp. 1–32; and see: *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg 1814).

[83]The rise of the Historical School was one manifestation of the general reaction to the rationalism of the School of Natural Law and the political philosophy associated with the French Revolution and the regime of Napoleon. Savigny officially founded the School in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781–1854). They edited the programmatic journal of the School, the *Zeitschrift für geschichtliche Rechtswissenschaft*—the predecessor of the modern *Savigny-Zeitschrift*.

[84]Savigny was born in Frankfurt am Main and became professor in Marburg University in 1803. After a brief period in Landshut (predecessor of the University of Munich), he became one of the founders of the University of Berlin (1810), where he taught until 1842. Furthermore, he was named Counselor of the state (*Staatsrat*) in 1829 and held the position of legislative minister in the Prussian cabinet from 1842 to 1848. Notwithstanding his impressive professional career, Savigny's reputation is mainly derived from his academic achievements and the influence they had on nineteenth century German legal and political thought. The focus of his work was Roman law, as preserved in the codification of Justinian. From 1815 to 1831, he dedicated himself to an extensive and in-depth study of Roman law in the Middle Ages with the view to elucidating the process through which Roman law formed the basis of European legal culture. In his work special attention is given to the contribution of the glossators of the twelfth and thirteenth centuries to the reception of Roman law as the common law of Continental Europe.

[85]von Savigny (1814).

people be reconciled with the fact that the Roman law operating in Germany was an alien importation? Savigny responded in the following manner: at a certain stage in a nation's development, the creation of law by the people became an overly complex and technical process and further development necessitated the establishment of a professionally trained class of lawyers and jurists. In Germany, this stage was reached in the fifteenth century and the jurists who were responsible for the reception of Roman law during that period were true exponents of the German national spirit. Thus, Roman law, as organically received law, is part of German legal history and contemporary legal life; at the same time, it supplies the connecting link between German law and European legal culture in general.

The early proposals for codification were abandoned due to the influence of the Historical School and, perhaps more importantly, the lack of an effective central government. At the same time, scholarly attention shifted from the largely a-historical Natural Law approach to the historical examination of the two main sources of the law that applied in Germany, namely, Roman law and Germanic law, so as to develop a true science of law. A group of scholars focused on the study of Germanic law, whilst others, including Savigny himself, concentrated on the study of Roman law and explored beyond the *ius commune* into the *Corpus Iuris Civilis* and other ancient sources. The latter jurists set themselves the task of studying Roman law to expose its 'latent system', which could be adapted to the needs and conditions of their own society. In carrying out this task these jurists (the Pandectists), elevated the study of the *Corpus Iuris Civilis* and especially the Digest to its highest level. They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany.[86] However, eventually the Pandectists, convinced of the superiority and eternal validity of Roman law, adopted a largely a-historical and primarily doctrinaire approach to law. Their chief objective was to construct a legal system where all particular rules could be derived from and classified under a set of clearly formulated juridical categories and abstract propositions. Although this way of thinking received severe criticism from other scholars, especially those belonging to the Germanist branch of the Historical School, the Pandectists played an important part in the process towards the codification of the civil law in Germany; this began in 1874, 3 years after the political unification of the country under Bismarck. The German Civil Code (*Burgerliches Gesetzbuch* or BGB) was finally promulgated in 1896 and came into force in 1900. Like the French Code, the German Code has acquired a wide acceptance outside the frontiers of Germany.

The German Civil Code is marked by two outstanding characteristics: its highly systematic structure and its conceptualism. In both these respects, it owes a great deal to the work of the German Pandectists of the nineteenth century. The Code is divided into five books. The first book contains the general principles of the entire civil law, i.e. the principles that have general application to all legal relations except when special rules are provided. It includes provisions relating to persons (both

[86]Leading representatives of the Pandectists were Georg Puchta, Adolf Friedrich Rudorff, Ernst Immanuel Bekker, Alois Brinz, Heinrich Dernburg, Rudolf von Ihering and Bernhard Windscheid.

natural and legal); the nature and classification of things and juristic acts; acting capacity; offer and acceptance; agency and ratification; limitation and prescription; and private means of redressing wrongs and securing rights. The second book is devoted to the law of obligations (*Schuldrecht*), which is concerned with the legal relation between particular subjects of rights. The third book contains the law of property (*Sachenrecht*) that addresses the rights of persons over things by describing the content, acquisition, loss and protection of real rights. The fourth book covers family law (*Familienrecht*) and is divided into two parts: the first part regulates personal relationships in the family; the second regulates the property relationships of family members. Finally, the fifth book deals with the law of succession (*Erbrecht*) that regulates the succession to the rights and liabilities of a deceased person. As already noted, the influence of the Pandectists is reflected in the Code's systematic consistency, succinctness and conceptual clarity. However, the work is not designed to be intelligible to the layman; it is codified jurists' law for jurists, only to be read and understood by them. This did not pose a problem for judges and legal practitioners, who were familiar with the style and methods of the Pandectists through their university legal training.

Notwithstanding their important differences with respect to style and structure, the German and French Civil Codes have a great deal in common. Both codes drew heavily on common sources of law—the *ius commune* and their respective national laws. In these codes, the influence of the *ius commune* derived from Roman law is particularly evident in the field of the law of obligations, as well as in the way the materials are structured and systematized. On the other hand, native sources of law appear to have exercised a considerable influence in the areas of family law and the law of succession. Moreover, the two codes have a common ideological basis as both are grounded on nineteenth century liberalism and are permeated by the notions of individual autonomy, freedom of contract and private property. As many changes in society transpired during the period of a hundred years that separates the two codes, the German Civil Code is in some respects more advanced or up-to-date than the French one. For example, several important provisions of the German Code recognize that certain private rights are related to certain social obligations and that a subjective right can be misused or abused. In the field of family law, the authority of husbands and fathers is less absolute than in the French Code and the definition of family is not as broad as that adopted by the latter code. Moreover, women have more power in relation to their own property matters. Certain aspects of contract and tort law reflect the effects of the increasing complexity of commercial relationships as well as the advances of industrialization.

In the period following the enactment of the Civil Code, German scholars focused mainly on the task of rendering the Code applicable in practice. This entailed explaining its difficult text, and elucidating and developing its concepts and principles. During the same period, the reaction against the excessive formalism and conceptualism of the Pandectists grew stronger. After the First World War, German legal science began to discard the methods of the Pandectists. While preserving the Pandectists' genius in formulating general concepts, German jurists started to place more emphasis on the examination of detailed facts and the operation of legal

principles in concrete factual situations. This process was interrupted, however, by the rise of National Socialism in the post-WWII period and the decline of liberal democratic ideas in Germany. Nevertheless, these new ways to conceptualize the law—associated with legal realism and the sociology of law—entered legal thinking in America and other countries, and exercised a strong influence on the development of legal thought in the twentieth century.

8.7 The Civil Law Tradition

8.7.1 Geographic Distribution of the Civil Law

Legal scholars use the term ‘civil law systems’ to describe the legal systems of all those nations predominantly within the historical tradition derived from Roman law as transmitted to Continental Europe through the *Corpus Iuris Civilis* of Emperor Justinian. When we refer to the civil law systems as belonging to a single legal family, we are calling attention to the fact that, despite the considerable national differences among themselves, they are characterized by a fundamental unity. The most obvious element of unity is naturally provided by the fact that they are all derived from the same sources, and that they have classified their legal institutions in accordance with a commonly accepted scheme that existed prior to their own development and that, at some stage in their evolution, they took over and made their own. However, it should be noted that, notwithstanding their common elements, civil law systems differ from each other in many respects. It is only when the civil law lawyer inspects the common law and other legal families that they acquire full awareness of the affinity between the members of the civil law family. It is thus unsurprising that contemporary comparative law scholars identify sub-categories of legal systems within the civil law family, with the Romanistic-Latin or French and the Germanic systems forming two secondary groupings or sub-families.[87] The distinctive French and German legal codifications and juristic styles each exerted a far-reaching influence worldwide, and to some extent their influences overlapped. Indeed, one might argue that the ‘typical’ civil law systems today are not those of France and Germany, but rather those civil law systems that have undergone a combined influence of both. Nevertheless, in the post-codification period, French law and German legal science have constituted the two main tributaries to the civil law tradition.

The Romanistic-Latin or French group of countries and territorial units share a private law that follows the Napoleonic Civil Code of 1804. In the course of the Napoleonic conquests and the subsequent political and administrative reshaping of many European countries the French Civil Code was introduced into the western regions of Germany, the low countries, Italy, Spain and other parts of Europe. Then,

[87]Consider on this matter David and Brierley (1985), p. 35; Zweigert and Kötz (1987), pp. 68–75.

during the colonial age, France extended her legal influence far beyond Continental Europe to parts of the Middle East, Northern and sub-Saharan Africa, Indochina, Oceania, French Guiana and the French Caribbean islands. But the influence of French law both outlived and went beyond the Napoleonic conquests and French colonialism. To this day, the French Civil Code remains in effect, with revisions, in Belgium and Luxemburg. Moreover, the *Code Civil* had a major influence on the Netherlands Civil Code of 1838 (whose spirit has naturally influenced the new civil code of the Netherlands enacted in 1992); the law codes of the Italian federal states prior to 1860 and the first *Codice Civile* of 1865[88]; the Portuguese Civil Code of 1867 (replaced in 1967); the Spanish Civil Code of 1889; the Romanian Civil Code of 1864; and some of the Swiss cantonal codes.[89] Furthermore, when the Spanish and Portuguese empires in Latin America disintegrated in the nineteenth century, it was mainly to the French Civil Code that the legislatures of the newly independent nations of Central and South America looked for inspiration. This is unsurprising, as the language and concepts of the French code were already familiar because of their affinities with the legal institutions and practices that had been introduced by the Spanish and the Portuguese. Moreover, French culture and the French revolutionary heritage were greatly admired in Latin American countries and Napoleon's personality served as an example to many of the early statesmen of these countries.[90] The French legal tradition continues to exist in territories that were first colonized by France but later on taken over by Great Britain or another power with a common law legal system, such as the province of Québec in Canada and the state of Louisiana in the United States of America.[91] With respect to countries that once belonged to the

[88]See on this Ghisalberti (1979), p. 223.

[89]Even after the Congress of Vienna (1815), the French Civil Code remained in effect in German territories on the left bank of River Rhine and also in parts of the Prussian Rhine Province.

[90]The Mexican state of Oaxaca promulgated the first Latin American civil code in 1827, following the French *Code Civil*. Bolivia enacted a civil law code in 1830, also modelled on the French Code. This code remained in force until a new code, based on the Italian Civil Code of 1942, was introduced in 1975. The Chilean Civil Code of 1855 was strongly influenced by the French Civil Code, although its principal drafter, Andrés Bello, was also familiar with the work of the German Historical School. Bello's Código Civil was adopted by Ecuador (1860), Colombia (1873), Nicaragua (1867), Honduras (1880) and El Salvador (1859), and had an impact on the relevant Venezuelan (1862) and Uruguayan (1868) legislation. The Argentinean Civil Code of 1871 (adopted by Paraguay in 1876) and the Brazilian Civil Code of 1916 (completed by Clóvis Beviláqua in 1899) also reflect the concurrent influence of the Napoleonic Civil Code, French nineteenth century jurisprudence and the German Historical School. See in general Stoetzer (1966) and Guzmán Brito (2000).

[91]Although the local population in some of these territories was initially promised that they could retain their French-inspired law, Anglo-American law gradually gained greater importance, largely due to the isolation from legal developments in France, the introduction of numerous English-inspired legal amendments and the transition to English as the language of the courts and the everyday language of the population. This is particularly the case with respect to the US state of Louisiana, where the position of both the French language and French law has become significantly weakened. On the other hand, the legal system of the Canadian province of Québec, where French language continues to be used by the overwhelming majority of the population, has significant legal

French colonial empire,[92] the current influence of French law varies, depending on the hold of French culture in these countries and the impact of local customs and legal traditions, especially Islamic law.[93]

The Germanic legal family consists of countries that have adopted or are influenced by the German Civil Code of 1896 and the German Pandectist scholarship (*Pandektenwissenschaft*) that preceded it. Although the German Civil Code appeared on the scene relatively late in the codification era and its highly technical language and complicated structure rendered its direct transplantation difficult, it did play a significant part in the codification of civil law in a number of countries, such as Italy,[94] Greece,[95] Portugal[96] and Japan.[97] Either via Japan or directly, the German civil law influence also spread to Korea,[98] Thailand and partly also China.[99] Furthermore, the legal science that preceded and accompanied the German Code has had considerable influence on legal theory and doctrine in several countries in Central and Eastern Europe, particularly in Austria, Hungary, Switzerland, and the former Yugoslavia. The Austrian General Civil Code of 1811 (*Allgemeines Bürgerliches Gesetzbuch*, or ABGB), also influenced by Roman law, was the product of the Age of Enlightenment and bore the stamp of the School of Natural Law. The German legal influence, especially that of the Historical School, on the Code has been apparent in connection with different legal reforms during the early

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resources of its own, based on the French legal heritage, which have made it resistant to common-law influence.

[92]This group includes Morocco, Algeria and Tunisia in North Africa; Senegal, Togo, Ivory Coast, the Republic of Congo, Cameroon, Guinea, Gabon, Benin and Burkina Faso in West Africa; Mauritania, Mali, Niger, the Central African Republic and Chad in Central Africa; Madagascar and Djibouti in Eastern Africa; as well as the former Belgian colonies of Congo and Rwanda and Burundi. The language of legal education in such countries is French and many members of the local 'legal elites' have been trained in France.

[93]In combination with Islamic law, French-inspired civil law and jurisprudence remain influential in most North African countries as well as in many Middle Eastern countries.

[94]The BGB was drawn upon by the drafters of the Italian Civil Code of 1942.

[95]The Greek Civil Code of 1940, which came into effect in 1946, was shaped substantially according to the German model.

[96]The drafters of the Portuguese Civil Code of 1967 closely followed the system of the BGB, although individual provisions also reflect French and Italian legal influences.

[97]The Japanese Civil Code of 1898 drew heavily on the first draft of the German Civil Code, but also embodied elements from French and English law. On the codification of civil law in Japan see Ishikawa and Leetsch (1985), Marutschke (2009).

[98]The Korean Civil Code, enacted in 1960, was drafted by jurists who had studied at universities in Japan and Germany. See Cho (1980).

[99]German legal science and the various forerunners of the German Civil Code (e.g. the Dresden Draft and the Saxon Civil Code), as well as the BGB itself exerted a strong influence on Chinese jurists. This influence is reflected in the Civil Code of 1930, parts of which are still applicable in Taiwan.

part of the twentieth century.[100] German legal science had a strong impact in other territories of the Habsburg Empire, especially Hungary, where it led to three civil code drafts (1900, 1911–1915 and 1928). Although none of these drafts attained the status of law, they nevertheless played an important part in judicial practice.[101] The Swiss Civil Code (*Zivilgesetzbuch*) of 1907, drafted by the jurist Eugen Huber, drew upon German and, to a lesser extent, French sources, but was adapted to Swiss circumstances and incorporated significant contemporary reforms.[102]

Civil law survives in so-called 'mixed' or 'hybrid' legal systems, i.e. systems that historically represent a mixture of legal traditions from two or more families of law, such as the civil and common law systems of Quebec, Louisiana, South Africa (Dutch and English influence), Scotland,[103] Puerto Rico and the Philippines.[104] Civil law is also one of the diverse elements in the complex legal systems prevailing in many countries in Asia, such as China, Sri Lanka, Indonesia, Taiwan, Laos, Vietnam and Cambodia.

8.7.2 Defining Features of Civil Law Systems

One should point out at the outset that it is very difficult to list the defining characteristics of the civil law family of legal systems without resorting to generalizations that would require lengthy qualifications in order for them to be meaningful. In part, the problem is caused by the relatively high level of abstraction that the concept of legal family involves, as well as by the fact that its use as a classification

[100]Many of the ideas of the German Civil Code found their way into Austrian civil law via the so-called Third Partial Amendment, concerning largely the law of obligations, which came into effect in 1916.

[101]Even the first codifications of the civil law in the Soviet Union in the 1920s exhibit similarities to the German Civil Code. Both via Soviet Union and directly, German jurisprudence influenced the legal systems in formerly socialist countries in Central and Eastern Europe. German legal science had a particularly strong influence in the Baltic states of Lithuania, Latvia and Estonia, where a system of private law written by F. von Bunge, a professor at the University of Dorpat in Estonia, in the late nineteenth century was adopted by the independent states in 1918. In the period following WWII, the civil law influence in Central and Eastern Europe subsided when socialist countries adopted new civil codes. Although these codes embodied several traditional civil law features, the fundamentally different public law plus significant private law reforms caused most contemporary comparative law scholars to classify the relevant legal systems as part of a new, socialist, legal family. With the demise of the socialist regimes, however, Central and East European nations are once again showing strong affinities to the civil law family.

[102]In 1926, the Swiss Civil Code was adopted, almost word for word, as the Civil Code of the newly formed Republic of Turkey.

[103]The private law of Scotland still reflects a Roman law influence, although contract law, under the influence of the House of Lords jurisprudence, has borrowed much from English law. It should be noted that in Scotland, just like in South Africa, Roman-based civil law survived in uncodified form.

[104]Zweigert and Kötz (1987), p. 74. Civil law is also one of the many elements in the legal systems of Israel and Lebanon.

device does not pay sufficient attention to the changes that accompany the individual systems' evolution. According to Zweigert and Kötz,[105] the ultimate distinguishing feature of legal families is their 'style' (*Rechtsstil*), a multi-faceted notion shaped by the interaction of five factors: (a) history; (b) mode of legal thinking; (c) legal institutions; (d) sources of law; and e) ideology. All these factors are relevant, albeit to varying degrees, in identifying what sets the civil law apart from other legal families, and in particular the common law family.

The characteristic common features of civil law systems may be summarized as follows:

(i) In civil law systems written sources of law (legal codes, statutes, decrees and ordinances) have precedence over custom and judicial decisions. A defining feature of civil law jurisdictions is the codification of the law. Codification denotes an authoritative statement of the whole law in a coherent and systematic way. The tradition of codification is a product of the rationalist tendencies that prevailed in European philosophy during the eighteenth and nineteenth centuries. Its roots, however, can be traced to the great codification of Roman law by the Emperor Justinian in the sixth century AD. One can trace to Justinian the idea that the code overrides all legal sources, offering a fresh beginning to the law. In contemporary civil law systems, law codes are integrated documents consisting of comprehensive and systematically stated provisions complemented by subsequent legislation. They govern all major branches of the law, including civil law, civil procedure, criminal law, criminal procedure and general commercial law.[106] Even though in civil law systems judicial decisions are studied in order to uncover trends, especially in areas in which there is sparse legislation, court decisions have in principle no binding effect on lower courts. However, despite the absence of any formal doctrine of *stare decisis*, there is a strong tendency on the part of civil law judges to follow precedents, in particular those of the higher courts. In light of this one might say that in practice the difference between *stare decisis* (binding precedent) and what is referred to in France as *jurisprudence constante* (the persuasiveness of judicial trend) is constantly being narrowed down.

(ii) For largely historical reasons, private law—the law regulating relationships between individuals—has had a dominant role in the development of legal concepts and principles in civil law systems. This is manifested by the fact that the classification of civil law systems focuses on the law canvassed by the civil codes, namely private law. Other branches of law, such as public law, developed later, largely on the basis of concepts and principles replicated from the private law. Indeed, the very description of the systems within the

[105] *An Introduction to Comparative Law*, 2nd ed., (Oxford 1987), 68 ff.

[106] See Stein (1992), pp. 1594–1595. Consider also Glenn (1998), p. 765.

Romano-Germanic family as 'civil law systems' reflects the predominant role that private law has played in their development.

(iii) Another distinctive feature of modern civil law is the sharp distinction between private law and public law—the body of rules concerned with the relationship between public bodies, and the resolution of disputes between the government and private citizens. Although this distinction is also recognized in common law countries,[107] in civil law systems it has far greater practical implications since, derived from it, there are two different hierarchies of courts dealing with each of these categories of law.[108]

(iv) In civil law systems a clear distinction is drawn between substantive law and legal procedure. This distinction has its historical origins in the work of the humanist jurists of the sixteenth and seventeenth centuries, who tended to view the law as a system of subjective rights—rights derived from substantive law. In this respect, legal procedure was considered to be a supplementary mechanism for the enforcement of rights. Whenever substantive law recognizes a right, the law of procedure as an accessory to substantive law, must provide an appropriate remedy. This shift from law as rules to law as rights was partly due to the fact that in Latin and in all European languages the word for 'substantive law' and the word for right is the same: *ius, droit, diritto, Recht*.[109] Modern procedural codes in civil law jurisdictions stress the public nature of judicial proceedings and the fact that, in principle, control of the claims and means of evidence belongs to the parties. However, the latter principle is in practice limited by the extensive power of the judge to supervise and direct the proceedings, as well as by the role the public prosecutor can play in civil litigation.

[107]In common law the difference between private and public law is traditionally regarded as a matter pertaining to the type of remedies available when one of the parties to a dispute is a public body. In other words, the common law is seen as indivisible in the sense that it applies to both the government and the individual citizen, and the same courts deal with matters of both private and public law. The idea of a separate system of public law was developed in England in the latter half of the twentieth century and is associated with the development of the action for judicial review, which is the method for challenging the decisions of public bodies.

[108]It should be noted in this connection that in civil law systems the term 'civil law' is also used to denote the substantive body of private law in contradistinction to commercial law, which is not regulated by a civil code. Commercial law is treated as a distinct body of law that is usually contained in a separate code and administered by a separate court system. It governs, among other things, companies, partnerships, negotiable instruments, trademarks, patents and bankruptcy. In common law systems, on the other hand, no distinction is drawn between civil law and commercial law, the latter being defined in English law as that part of the civil (as opposed to criminal) law that is concerned with rights and duties arising from the supply of goods and services in the way of trade.

[109]In the common law system, on the other hand, legal development focused on remedies rather than rights, on forms of action rather than causes of action. As often said, it was with writs and not with rights that the older English law was concerned. The difference is mainly one of emphasis, but it has the important practical consequence that the agent who controls the grant of remedies also controls the development of the law, for by creating new forms of action or extending existing forms to deal with new facts that agent could in fact create new rights. And see Chap. 9 below.

(v) In civil law systems there is a relatively greater scope for an inquisitorial approach to judicial decision-making. This approach allows the judge to take an active role in the proceedings, steering the search for evidence, examining witnesses and inquiring into the facts of the case.[110] However, the usual contrast between the inquisitorial approach of the civil law and the adversarial approach of the common law should not be overstated.[111] A closer look at the trial process in civil law jurisdictions shows that the process is a blend of inquisitorial and adversarial elements. Although the civil law model of legal procedure places greater responsibility on the judge for the investigation of the facts, litigators advance partisan positions from first pleadings to final arguments, suggesting lines of factual inquiry, participating in the examination of witnesses, urging inferences from fact, discussing and distinguishing precedent, interpreting statutes and formulating views of the law that further the interests of their clients.[112] In general, the civil law model of legal procedure is construed to display a preference for 'centripetal' decision-making, determinative rules and a rigid ordering of authority. According to Damaska, the relatively greater emphasis on certainty in the civil law system can be traced to the influence of the rationalist School of Natural Law and, in particular, "the rationalist desire to impose a relatively simple order on the rich complexities of life".[113]

(vi) In civil law systems legal norms are characterized by a kind of optimal generality: they are not too general (as too general norms would complicate the application of law), but general enough for application in certain situations. As a consequence, legal reasoning in civil law countries is manly deductive. Deductive reasoning proceeds from a broad norm or principle expressed in general terms; this is followed by a consideration of the facts of the particular case and the application of the norm or principle to these facts with a view to arriving at a conclusion. Civil law legal reasoning has a top-down structure, moving from the general to the more specific. This kind of reasoning prompts the civil law lawyer to present a legal argument as if there is only one right answer to any legal problem, whilst any disagreement over the application of the law to the facts is blamed on the presence of faulty logic. This explains why civil law judges do not offer dissenting opinions. Every judgment, even in cases decided on appeal, is considered to be the judgment of the court as a whole. Under the deductive approach of the civil law, the value of case law is limited as court decisions are viewed as particular illustrations of, or exceptions to, the law as embodied in a general norm or principle. In this respect, the material of law may be construed to form an

[110]See Stein (1992), pp. 1598–1599.

[111]The adversarial system of legal procedure is a system in which the truth emerges through a formal contest between the parties, while the judge acts as an impartial umpire.

[112]Consider on this Langbein (1985), p. 823.

[113]Damaska (1975), p. 480.

independent, closed system where, at least in theory, all sorts of questions should be answered by interpreting existing legal norms. The law in civil law systems is regarded as 'found' rather than 'made' in each individual case through the application of deductive reasoning or, if necessary, reasoning *per analogiam* or *a contrario*.[114]

(vii) In civil law systems the study of law is still regarded as primarily an intellectual pursuit. Notwithstanding the increasing emphasis on the practical implications of the law in recent years, the law in these systems—especially German law and the systems it influenced—is generally approached as a science, a form of logic, a coherent assembly where everything can be reduced to principles, concepts and categories. In the domain of legislation, in particular, this approach to law has entailed the use of a technical and abstract language. It also led to a high level of precision in selecting the relevant terms and phrases whose meaning remains fixed throughout the text of the law. With respect to the study of law, this approach means that one cannot rely on the study of cases alone if one wishes to grasp the essence of the law. The study of cases is intended to only illustrate how the law operates in practice, but its essence will necessarily remain abstract. Moreover, the way in which cases are recorded and interpreted in civil law systems is influenced by the traditional primacy of statutory law as the chief source of law. As Gonthier remarks, the civil law is distinguished from the common law by "a difference in intellectual approach, in the quest and ordering of [legal] knowledge. Each approach reflects one of the modes of functioning of the human intellect, that is, on the one hand, the empirical mode based on specific instances from which one may eventually draw rules and even identify principles and, on the other, the theoretical approach based on established principles from which concrete consequences and applications are drawn".[115]

(viii) The contrast between the civil law and the common law systems is traditionally presented as that between the essentially doctrinal law of the legal scholars and case or judge-made law. A great deal of the differences between the two systems are, in one way or another, connected with this contrast between the theoretical and procedural origin of legal norms. Therefore, it is unsurprising that legal scholars and academics in civil law countries enjoy more prestige than judges. As the principal task of the civil law judge is to

[114]By contrast, in common law what is authoritative is what is decided. Law, in this system, is seen as open-ended in the sense that new extensions to existing rules can be revealed at any time by the courts. The common law lawyer adopts as his or her starting-point the examination of facts with a view to identifying the precise legal issue raised by the case and the legal rules that should be applied. He or she does not view law as a set of given rules that can be applied with inexorable logic. When a common law lawyer queries the nature of a case he or she contemplates facts with a view to identifying the material circumstances of the case and showing that these fall within the scope of one rule rather than another. By contrast, when a civil law lawyer explores the nature of a case, he or she refers to the legal issues defined in a general and abstract way. See Stein (1992), pp. 1596–1597.

[115]Gonthier (1993), p. 323.

apply the law as expounded by academic writers, the legal scholar is the senior while the judge is the junior partner in the legal process.[116] The authority of academic writers in civil law countries has an historical explanation. When the texts of Justinian's legislation were rediscovered in the High Middle Ages, they appeared so complicated and difficult to understand that it was left to academic scholars (the glossators and the commentators) to decipher and explain them. As a result, the works of academic commentators acquired as much authority as the texts themselves. Moreover, judges came to rely on legal scholars for information and guidance concerning the interpretation and application of the law. By the end of the sixteenth century it was a common practice for judges in Germany and other Continental European countries to refer the record of a difficult case to a university law faculty and to adopt the faculty's collective opinion on questions of law. This practice, which prevailed until the nineteenth century, resulted in the accumulation of an extensive body of legal doctrine. When systematized in reports and treatises the scholarly opinions rendered in actual cases were regarded as a kind of case law and an authoritative source of legal interpretations.[117] In contemporary civil law systems, where court decisions play an increasingly important role in shaping the law, an ever-vigilant academic community observes, reviews and critiques the courts to ensure that any shaping or re-shaping of the law remains a controlled activity. Moreover, in these systems academic opinion often influences the courts in developing new concepts or in adopting new approaches to legal problems. Furthermore, academic scholars continue the tradition of writing textbooks and treatises in their area of expertise. Their works provide the basic source of legal knowledge that is imparted, in an authoritative way, from the scholars to their students and to those entering the legal profession. As the civil law emphasizes the transmission of legal knowledge and as there is so much knowledge to be transmitted, legal instruction in the universities takes the form of general overviews of or introductions to the various fields of the law. In civil law systems the principal source of legal knowledge has always been the textbook, rather than the casebook.[118]

[116]As P. G. Stein remarks, "Traditionally the civil-law judge is a fungible person, one of a group of anonymous, almost colorless, individuals who hide their personality behind the collegiate responsibility of their court. Their duty is to apply the written law, and the meaning of that law is to be discovered from the writings of its academic exponents." "Roman Law, Common Law, and Civil Law", (1992) 66 *Tulane Law Review*, 1591, 1597.

[117]See Dawson (1968), p. 231.

[118]As J. H. Merryman remarks, if the Common law is the law of the judges, the Civil law is the of the law professors. *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, Calif., 1969), 59–60. On the differences between the civil law and common law models of legal education see Merryman (1975), p. 859.

8.8 Concluding Remarks

In this chapter we have traced the long and intricate process that culminated in the codification of the civil law in Europe. The codes constitute a new point of departure in the development of the civil law. In the years following the publication of the codes, the dynamics of legal change have worked primarily through special legislation and judicial interpretation, as well as through code revision, constitutional law and the harmonization of law at a European or regional level. Legislatures in civil law countries responded to changes in society and the economy by excising large areas of the law from the domain of the civil codes. They also created entirely new areas of law that fall outside the scope of the codes, such as employment law, insurance law, competition law, and landlord and tenant law. Furthermore, legislatures endeavoured to update the civil codes by modifying their texts. Both the French and German codes have been amended several times since their introduction. In general, code revision has been more extensive in the area of family law than in any other areas. Many family law reforms were precipitated by constitutional provisions introduced after the Second World War and by international conventions promoting new ideas of equality and liberty that were at variance with the patriarchal family law of the civil codes. In other areas of the law, legislatures have often encountered difficulty in forging the necessary changes within the structure of the civil codes. To deal with this problem, legislatures have resorted to the introduction of special statutes outside the codes—statutes that could more easily be amended as socio-economic conditions change.

While legislatures created and developed bodies of law outside the sphere of the civil codes, the courts have introduced new rules through the interpretation of the code provisions. This judicial adaptation of the codes to new social and economic conditions has produced a new body of law, which is based on the expansion through interpretation of the existing legislative texts. In some civil law countries, such as France, this process has been facilitated by the structural characteristics of the civil code—its gaps, ambiguities and incompleteness. The drafters of the French Civil Code never imagined or anticipated the litigation-producing aspects of modern life such as industrial and traffic accidents, telecommunications, the photographic reproduction of images and mass circulation of publications. Thus, it is no surprise that in essence the modern French law of torts is almost entirely judge-made. Regarding the later codes, such as the German Code, the judicial adaptation of the civil law to changing social and economic conditions was facilitated by the inclusion in the codes of 'general clauses'—provisions that deliberately leave a large measure of discretion to judges. Although traditional civil law theory denies that judges make law or that judicial decisions can be a source of law, contemporary civil law systems are more openly recognizing the unavoidable dependence of legislation on the judges and administrators who interpret and apply it.

Although the oldest legal tradition in the Western world, civil law continues to evolve. In the course of its development it has spawned different sub-traditions and has exported its ideology and legal ideas throughout the world. Furthermore, it has

influenced the law of the European Community in structure, style of reasoning and ethos and continues to play an important part in the process of harmonisation of law in Europe. Few would deny that the civil law is gradually converging with the common law, at least to the extent of its growing reliance on case law. As the exchange of ideas among civil law, common law and other legal systems gains momentum, some of the differences separating these systems tend to wither away. Nevertheless, significant differences remain. At its heart, civil law remains very much a unique tradition in its own right by virtue of, among other things, its predominant forms of legal reasoning and argumentation, ideas concerning the divisions of law and the organization of justice, reliance on elaborations of statutory and codified precepts, and approaches to legal scholarship and education. The changes in the legal universe that have been taking place in the last few decades, associated with the ongoing tendencies of globalization and regional integration, make it difficult for us to predict how the civil law tradition will evolve or how it will be described by future observers. However, we can be reasonably certain that this oldest and most influential of the Western legal traditions has entered a new phase of development and that it will continue to adapt itself to the challenges of an ever-changing world.

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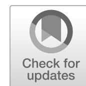
Chapter 9
The Development and Function of Equity in the English Common Law Tradition



9.1 Introduction

The English common law tradition, which encompasses several distinct sub-traditions, is one of the two major legal traditions of the contemporary world. Like the civil law tradition, it too has had a remarkable influence around the world, having been adopted by a large number of countries, including countries that are socially and culturally very different from England. Indeed, the reception of English law in diverse socio-cultural settings is a testimony to its genius and its adaptability, especially where this reception was not imposed but voluntarily embraced. Initially, the reception of English common law was the result of British colonization and the political dominance of the British empire from the eighteenth through the early twentieth century. It was a principle of English law that, in a settled colony, the colonists would bring with them and follow the laws of their home country. Countries such as Australia, Canada (except for Quebec) and New Zealand, which were once part of the British colonial empire, inherited the English common law system and continue to apply its legal philosophy and principles in their current legal systems. Other countries sharing, to a greater or lesser extent, the heritage of the common law include the United States, Ireland, India, Pakistan, Bangladesh, Malaysia, Singapore, Hong Kong, South Africa, Nigeria and Kenya. Much of the law in these countries has its basis in old precedents, stemming from the time when they were part of the British empire, although their legal systems grew apart since these countries became independent. Remarkably, in many of these countries, this uniquely English set of legal sources, institutions and norms co-existed with indigenous cultural, religious and legal traditions, and what may be described as 'hybrid' systems often emerged.

The development of the common law in England has occurred gradually over a long period of time. This law may be regarded as the law which developed from a central justice system, and which was common to the whole country. This is contrasted with the local or provincial laws which were unique to a particular area

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or region. The latter existed before the emergence of the common law and, in some instances, continued to apply alongside it. The common law was administered largely by the monarch and his or her representative courts. This law is typically identified with case-based law, a body of legal principles developed through the decisions of judges. The common law, as it evolved in this sense, is distinguished from statute law, which is the law contained in legislative enactments. In other words, whereas statute law is derived from acts of Parliament, the common law is 'judge-made'—it is derived from the courts applying legal principles developed in past cases involving similar factual situations. This system of judge-made law is dependent on a hierarchical court structure, where decisions of higher courts are binding on lower courts according to the doctrine of precedent (*stare decisis*).[1] The term 'common law' is used in this context to denote case law and the use of judicial precedents. In more recent times in England and other common law countries statute law has become not just an authoritative source of law, but the principal source of law, especially where no cases can be found governing the issue at hand, or even where decided cases do exist. In general, case-based common law is today regarded as subordinate to statute law. Furthermore, common law, understood as the body of law created by the royal courts, or common law courts, and developed as case law in England from about the twelfth century, is distinguished from the body of rules and principles of equity, as established by decisions of the courts of equity, which began to be developed from around the fourteenth century.

As the above discussion suggests, the term 'common law' can be understood in more than one way. First, with respect to its origin, common law means the universal system of law that developed in England from about the twelfth century onwards. Secondly, the same term refers to the family of legal systems derived from English law. When we say that a legal system belongs to the common law family, we usually refer to the system as a whole, including case law, legislative enactments and principles originally established by the courts of equity. Within these legal systems, the term 'common law' denotes that part of the law developed by the courts, as

[1]The doctrine of precedent can be interpreted in two ways. According to the first interpretation, the decision of a judge is evidence of the law already in existence before the judge gave his or her decision. If the relevant rule already existed, it is clear that the same rule should be applied in future cases. According to the second interpretation, the judge, in issuing his or her decision, creates a new rule that did not yet exist but would exist and be binding in future cases from the moment the decision is issued. In earlier centuries, the view that judicial decisions were merely evidence of pre-existing law was the fashionable one. As the eighteenth-century English jurist William Blackstone stated, "the decisions of courts of justice are the evidence of what is common law." *Commentaries on the Laws of England,* 16th ed., (London 1825, first published in 1765) Vol. 1, 71. In the course of the nineteenth and twentieth centuries, however, the second interpretation, namely that courts' decisions create law rather than merely state it, became prevalent. This second interpretation is confirmed in the doctrine of *stare decisis* (Latin for "stand by your decisions"). The custom to decide cases by analogy to previous cases and the application of the doctrine of *stare decisis* together suggest that common law has developed on the basis of precedents and case law. Common law legal reasoning is therefore a form of case-based reasoning, looking for similarities and differences between new cases and old cases that have already been decided.

contrasted with statute law or the law enacted by Parliament. The same term denotes that part of the law which was created by the courts, as opposed to the body of rules and principles of equity.

The first part of this chapter offers a general overview of the historical origins of English common law tradition and identifies some of the principal factors that contributed to its development. The second part considers in more detail the growth of equity, assesses its relationship with the common law and comments on its role in contemporary law.

9.2 Tracing the Historical Origins of the English Common Law: An Overview

At the end of the eleventh century there was little to distinguish the law in England from that of Germany or northern France. Although England had been a Roman province for more than three hundred years, after the invasion of the Angles and Saxons Roman law was superseded by Anglo-Saxon law—a species of Germanic folk-law. The law codes of Ethelbert of Kent (*c.* 600),[2] Ina (*c.* 700)[3] and Alfred (*c.* 890)[4] were of largely the same character as the Continental *leges barbarorum*, although, unlike the latter, they were written in Anglo-Saxon and not in Latin. In general, the substance of the law in England, like elsewhere in northern Europe, consisted mainly of unwritten customary law[5] that was supplemented or superseded in some particulars by canon law. The country was divided into shires (later referred to as counties), which were subdivided into hundreds and vills (small townships). There was a court for each shire and each hundred (these courts were known as communal courts), as well as seignorial courts held by local lords for their free tenants. The latter were 'private enterprise' courts running at a profit taken from court fees, and providing justice that was backed by the lord's military force. The shire court was held periodically and was presided over by the sheriff, who acted as a representative of the king. The hundred courts had jurisdiction only over a particular locality and dealt with minor matters, as compared to those that fell within the jurisdiction of the shire courts.

The immediate effect of the Norman Conquest of England in the second half of the eleventh century (1066) was to intensify the trend towards particularism by

[2]This code, as preserved, contains ninety brief sections dealing with punishments for various wrongs.

[3]This code consisted of 76 sections in the form of 'dooms' or penal judgments.

[4]This compilation, known as 'The Laws of King Alfred', contained about 125 sections in all. It draws on earlier Saxon laws as well as on various biblical sources.

[5]Customary law comes into being if particular norms and standards for behavior are traditionally used in a society and are experienced as binding. Customary rules are confirmed if they are actually used in legal decision making.

increasing the number of franchise and manorial courts, and through the reintroduction of the old principle of personality of law in favour of the Norman element of the population. However, the strong interest of the Norman kings in administration and their efforts at centralization gradually led to the creation in England alone in the West of a strong central government that was capable of imposing a uniform legal system on the whole country. At first, the Norman kings used the existing courts, but soon they began to send their own judges around the country to hear cases locally. This practice enabled them to control the country more efficiently. Moreover, it allowed them to enter into competition with the local courts for the fees paid by litigants. To attract litigants from the local courts, the royal courts began to introduce new and better methods of trial, which proved so successful that eventually all law courts came under royal control. An important benefit of having a dispute adjudged by a royal court was that such court's judgment was more likely to be properly enforced than when a case was decided by a local court.[6]

King Henry II (r. 1154–1189), with a view to strengthening royal power, divided England into regional circuits or *eyres* and began regularly to send judges around the country to hear and decide cases.[7] The judges assigned to the circuits (*justiciae errantes*) investigated crimes, negligence and misconduct of officials and private disputes and enforced feudal and other rights of the king. The king sought to gain the trust of his subjects not only by imposing laws on them, but by resolving disputes in accordance with local customs fairly administered by the circuit judges, who performed their duties, which included the supervision of local administration and the collection of taxes, in connection with certain commissions. There were three types of commission: *gaol delivery*, *Oyer and Terminer* and *assize*. The commission of gaol delivery empowered the judges to try all persons found in gaols.[8] Under the commission of Oyer and Terminer (literally 'to hear and determine' a case), the judges were authorized to try all criminal cases of treason, felony or misdemeanour committed in the county. The commission of assize empowered the judges to try civil cases. As a general rule, civil cases were tried at Westminster but, as a matter of convenience to the parties, trial was allowed to be held in a local court.[9] The early

[6]The Norman kings, especially Henry II, sought to expand the scope of royal jurisdiction not only at the expense of local and feudal authorities but also at the expense of the ecclesiastical courts.

[7]The word *eyre* is French and derived from Latin *iter*: journey. *Eyres* appear to have existed during the reign of Henry I (1100–1135), but Henry II systematized this practice. In 1166 Henry II appointed earl Geoffrey de Mandeville and Sir Richard de Lucy to tour the country in order to enforce royal law. In 1176 the itinerant judges, who numbered between 20 and 30 at a time, were organized into six circuits.

[8]It should be noted that at this time imprisonment was not regarded as a form of punishment.

[9]A case would formally set down for hearing at Westminster 'unless before' (*nisi prius*) it came up for trial at Westminster, it had been heard locally. In 1160 Henry II introduced the 'petty assizes', comprising a panel of neighbours who ascertained facts with respect to disputes concerning property and other issues. The word 'assize' originally denoted a session of a council or court; then it came to signify an enactment made at such a meeting. An assize established trial by inquisition whereupon it became customary to refer to the inquisition of 12 men as an assize. By a series of enactments or 'assizes' King Henry II made trial by inquisition available in a diversity of

judges were clerics but in the course of time, as the legal profession developed, the commissions were issued to lawyers. At first, the circuit judges decided cases by applying local customs, which they discovered with the help of a jury. However, the judges could refuse to apply customs which they considered to be unreasonable and would discuss the merits of the various customs in existence at Westminster, approving certain customs and condemning others. When a local custom was recognized as being valid by a court, it became a general rule of the law. Through this process, the judges eliminated customs deemed inappropriate or outdated and gradually brought about the unification of customs, thus creating a new body of law common to all in application, the common law.[10]

As the common law began to take shape and the judges were beginning to travel the circuits, there came into existence the courts of the common law. The early Norman kings ruled with the help of an assembly of nobles and leading clergy called the *curia regis* (King's Council).[11] The *curia regis* was a legislative, administrative and judicial body, the supreme central court that transacted all the business of the central government. It was from this body that the common law courts emerged in the thirteenth century to carry out certain duties. The first common law court to break away from the *curia regis* was the Court of Exchequer, which was principally concerned with taxation disputes.[12] The second court, the Court of the Common Pleas, was established at Westminster to carry out the same duties as the judges on

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cases. The Assize of Clarendon (1166) provided, among other things, that sworn inquests, comprising a large number of jurors (12 from each hundred and four from each vill), should present to the circuit judges, upon their arrival in a locality, all persons suspected of murder, theft, arson, counterfeiting or of receiving persons who committed such offences. The jurors were subject to fine if they concealed an offence or made a false presentment. The task of the jurors was not to try suspected offenders but to 'present' or 'accuse' before circuit judges those individuals suspected of crimes. It should be noted here that juries had been known in England since Anglo-Saxon times, when they were used to settle disputes at a local level. A jury was a body of sworn persons summoned to give a formal answer to a question submitted to them concerning a matter of fact, a right or a person in their neighbourhood. Such a formal answer also amounted to a verdict, i.e. a decision on the facts as well as the law. The task of giving a verdict was known as *recognoscere* and *recognitio*. Henry II systematized the relevant procedure and expanded the use of recognitions. Thus, whereas previously the juries had met locally, by command of a local official such as a sheriff, henceforth juries were always summoned before royal judges. Furthermore, whereas the *recognitio* procedure was initially used only to protect royal and other privileged interests, it was now made available to individual plaintiffs who could use it in a number of specified civil actions.

[10]Today, it is common to distinguish judge-made case law from customary law as a source of law. However, this distinction has not always been clearly made. The customary character of customary law consists partly in the fact that judges and other adjudicators follow the custom of applying these rules. Customary rules can come into being, or are confirmed, if they are actually used in legal decision making.

[11]The Norman *curia regis* was similar in constitution and function to the Anglo-Saxon *witan*—the council of the Anglo-Saxon kings.

[12]The Exchequer was the Treasury Department of the Monarchy. In the course of tax collecting many disputes would arise over feudal dues owed to the Crown, and it was from decisions given in connection with these disputes that the jurisdiction of the Exchequer gradually emerged.

circuit.[13] This court was essentially the court for pleas between subject and subject. Whenever one subject sought a remedy for a wrong committed by another subject, and not involving a fine to the king, action lay only in the Court of the Common Pleas. The third court, the Court of King's Bench, the last of the three courts to break away from the *curia regis*, followed the king in his travels around the country.[14] It was the only one of the three to have criminal jurisdiction and, in the course of time, it became the most important.[15] The bulk of English law as it developed during this period was not the product of legislation but of the work of the royal courts using their decisions as precedent.[16] In contrast to what happened in Continental Europe, where the unification of customs was realized largely through codification, in England the unification of customs was realized through the work of the courts.[17]

The royal courts, described above, developed a rigid system of rules and principles, not only in relation to legal procedure but also with respect to the actions through which claims could be brought. An action at common law commenced by the issue of a document known as *writ*.[18] This was obtained from the chancery office, which was headed by the Chancellor, the king's chief advisor and principal administrative officer. The writ was a formal document containing an allegation of a wrong and directing the sheriff to summon a jury to hear the dispute. It was, in other words, a kind of permission form entitling the common law judges to hear and determine a matter.[19] Writs were at first issued only in special cases to meet

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[13] King Henry II appointed five members of his *curia regis* to hear disputes between the king's subjects. This measure was probably intended to relieve the *curia regis* from some of the burden of the judicial work, especially where a case did not affect the king directly.

[14] The separation of these three courts from the King's Council had important consequences. The creation of a stationary royal court, operating independently of the king's personal presence, marks the beginnings of the separation between the judiciary and other organs of governance. By the thirteenth century the typical justices were no longer the king's private counsellors and advisers but professional judges employed to administer the law. Yet, medieval judges were considered to be special representatives of the king, whose interests they served. During this era no clear distinction was drawn between the king, the living individual ruler, and the Crown, the impersonal institution of the monarchy.

[15] Just as the new royal courts had competed with the local and feudal courts for business in earlier times, so the above-mentioned common law courts competed among themselves because the judges and other officials serving on these courts depended for their incomes on the fees paid by litigants.

[16] Reference should be made here to the introduction of law reporting (probably in the thirteenth century). This was a significant development which enabled the opinions and decisions of the courts to be recorded for continued reference. Law reporting made possible the consistent development of the law by means of the doctrine of precedent. Through this doctrine legal rules and principles developed from cases and were applied to situations with similar facts.

[17] It should be noted here that in addition to the central courts, there continued to be the local administration of justice within the different communities.

[18] See in general, Maitland (1976, first published in 1936).

[19] The word 'writ' simply denotes a writing and refers to a brief succinct order. The writ, originally an administrative device created by the Anglo-Saxon rulers of England, became under the Norman kings the chief instrument both of administration and legal development. It was King Henry II who 'judicialized' the writs and transformed the royal writ to an order addressed to the sheriff to

exceptional circumstances. Something took place that led the king, through the Chancellor, to give a command in writing to a royal official or to some lord who held a franchise court, and this command in writing was the writ. Each writ acquired a name and, once formulated, a writ became a precedent. Until the mid-thirteenth century the Chancellor was free to issue writs as needed and there was no restriction on their wording. However, this practice had come to an end by the fourteenth century, as it was considered that too many grounds for claim had been developed.[20] From that time the Chancellor could issue writs only when the facts of the case were similar to those of a previous case for which a writ had been issued. All litigation commenced with a writ which outlined the nature of the plaintiff's claim in the prescribed form. The plaintiff's success or failure depended on his ability to meet the established formal requirements. The existence of a legal remedy depended upon the existence of a writ.[21]

There were different writs for different claims: e.g., the writ of right to recover land; the writ of debt, to recover money owing; and the writ of trespass, to complain of a breach of peace. The clerks of the chancery office kept precedents of the writs issued and unless a complainant could bring his complaint within one of the forms of writ recorded in the *Register of Writs* he could have no remedy. Since an action could not be brought without a writ, it became established that the only kinds of harm for which one could seek redress in law were those that could be described within the narrow and unyielding language of some recognized writ.[22] If a plaintiff was successful in his action, he was usually awarded damages, in other words, the defendant had to pay him a sum of money fixed by the court. There was a limited right of appeal if an error occurred. The common law evolved largely through argument by lawyers and judges about the nature and scope of the writs, the

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command a defendant to do right in some specified way, or else to appear before the king's judges to explain why he should not. Accordingly, writs became the principal means of initiating legal proceedings.

[20]At the time of Glanvill (late twelfth century) there were about 40 writs, whereas during the reign of Edward I (1272–1307) there were more than 400. By the Provisions of Oxford (1258), the Chancery clerks were prohibited in future from sealing unprecedented writs without the permission of the king's council.

[21]Prior to the introduction of the legal procedure based on writs under King Henry II, legal proceedings in secular courts were entirely oral. The law dispensed was unwritten custom and the doctrine of precedent was unknown. Moreover, judges did not present reasoned judgments and the plea rolls very rarely recorded principles of jurisprudence. Most cases concluded with a jury verdict in which matters of fact and law were intermingled or by combat.

[22]A simple illustration of the difficulty caused by this highly technical system can be seen from the following example of writs available for wrongs against chattels: (a) A damages B's book: *writ of trespass to goods*; (b) A borrows B's book for two weeks but then informs B that he will not return the book until six months later: *writ of detinue*; (c) A borrows B's book and then sells it to another person: *writ of trover*. In each of these cases a wrong was done to B's property. In (a) B's enjoyment of his property was unjustifiably interfered with; in (b) B was deprived of possession of his property; and in (c) B's right of ownership was denied. Each writ had its own rules of procedure (e.g., time limits, rules of evidence, hearing requirements, etc.).

circumstances in which a writ should be issued and the remedies it should entail.[23] Indeed, the development of the common law was co-extensive with the expansion of the writ system. As in all rudimentary systems of law, procedural institutions, such as those associated with the writ system, preceded substantive law. Thus, each new writ eventually led to the emergence of a substantive law rule. Lawyers came to refer to the compartmentalization of law and practice associated with specific writs as 'forms of action'. Such forms of action served to formalize, categorize, classify and finally ossify the diverse actions in accordance with available remedies. To put it otherwise, a *cause* of action recognized by the law implies the existence of a *form* of action set out in a specific writ covering the facts of a plaintiff's case. In general, the system of writs as a method of pleading was restrictive and the relevant rules, as derived from reported cases, were strictly applied without exception. The effect was that the common law resulted in much injustice.[24] As we will see later, it was in response to the common law's shortcomings that the system of equity was developed.

We might say, at this point, that three strands of influence can be traced in the early development of English law. The foremost place must be attributed to the function of the *curia regis*, the king's court that transacted all the business of the central government. There is nothing in the contemporary history of Continental European law that can be compared with the creative activity of this court in the fashioning of the writ system.[25] Second in importance is the Roman and canon law that came to England in the twelfth century. Thirdly, there is the customary law that survived the Norman Conquest and continued to be applied by local courts. These latter two sources were those that formed the substance of the private law in much of Continental Europe. The fact that above all others helps to explain why the common law as it evolved in England represents a distinct system from the civil law is the relatively slight influence that these sources had on the content of English law. The history of English law has been marked not by the reception of a foreign system of law and its fusion with native customs, but instead by the growth of a body of rules fashioned by the king's justices and developed by their successors in which neither Roman law nor the customary law was a decisive influence. The development of common law rules occurred largely through the creation of exceptions to existing

[23]By the early fourteenth century the judges were appointed from among the senior advocates who argued cases before the royal courts. These advocates, called by different names at different times (serjeants-at-law, barristers), formed together with the judges an elite group of learned lawyers. The development of English law has been conditioned to a considerable extent by the political, economic and intellectual environment of this group.

[24]As a commentator has remarked, "it was better said the judges to suffer a mischief in an individual case than the inconvenience which would follow from admitting exceptions to general rules." Baker (1979), p. 70.

[25]The writ system was formally abolished around the middle of the nineteenth century (by the Common Law Procedure Act). However, the common law, as cast in the form of the writs, remains present through case law. The writ system and its formalism may have disappeared, but much of its content and spirit still exists.

rules, which themselves became fixed and rigid. The rigidity of the legal process, the need to conform to the framework that had been developed and the centralized court system, all helped to mould the diversity of local customs and practices into a common law, i.e. a law that was followed by the entire country.

It should be noted here, however, that for a century and a half after the Norman Conquest it was by no means obvious that England was destined to develop a distinct legal system. The effects of the revival of Roman law studies in Italy in the eleventh century were also felt in England. Indeed, it is not unlikely that Lanfrancus, a teacher of law at Pavia and subsequently Archbishop of Canterbury, contributed with his knowledge of Roman law to the administrative and legislative reorganization of the country. The first known teacher of Roman law in England was the Glossator Vacarius, who arrived in the country in the middle of the twelfth century. Vacarius taught at Oxford, where he composed for the instruction of his pupils his famous *Liber pauperum*, a nine-volume compendium of Roman law based on the Code and the Digest of Justinian.[26] Vacarius' success raised the fear that Roman law would be received as the law of the land and provoked a sharp reaction from the monarch, who was disturbed by the implication in Roman law of imperial sovereignty. The barons, too, opposed the prospect of Roman law reception since in their eyes Roman law provided a foundation for royal absolutism. Thus, King Stephen prohibited Vacarius from teaching at Oxford and in 1234 Henry III forbade the teaching of Roman law in London. Two years later the barons, gathered in Merton, rejected a proposal by bishops to adopt the Roman law principle according to which children born before the marriage of their parents should be counted as legitimate, on the grounds that they did not wish to alter the laws of England (*Nolumus leges Angliae mutare*). The position that was finally adopted corresponded to the practice of the courts and encouraged the autonomous development of English law. Nevertheless, Roman law concepts continued to exert some influence on English legal doctrine. This influence is clearly reflected in the two most important legal treatises of this era, namely Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae* (Treatise on the laws and customs of the Kingdom of England) written between c. 1187 and 1189 in Latin, and Bracton's treatise of the same title, written between 1220 and 1240.

Glanvill's work is divided into fourteen books and records the law laid down by the king's court—the common law which, according to Glanvill, was only one of the sources of law in England.[27] In this, he outlined the remedies available in the king's court and the manner in which these remedies could be invoked. The treatise is for the most part concerned with legal procedure, especially with respect to land issues, and reflects an enduring feature of the common law, namely its dependence on the

[26]See de Zulueta (1927).

[27]Ranulf de Glanvil (Glanvill or Glanville) served as sheriff of Lancashire and of Yorkshire, as ambassador and as justice in eyre. In 1180 he became Justiciar (Chief Minister of the Crown) at the court of Henry II.

writ system.[28] Glanvill's work reveals that the author had some knowledge of Roman and canon law. The preface and introductory chapters are based on the preface and introductory chapters of Justinian's Institutes and some attempt, not always successful, is made to assimilate Roman legal concepts to English common law. More importantly, the work "shows that Roman law has supplied a method of reasoning upon matters legal, and a power to create a technical language and technical forms, which will enable precise yet general rules to be evolved from a mass of vague customs and particular cases."[29]

Bracton's treatise, also called *Tractatus de legibus et consuetudinibus Angliae*, written in the reign of Henry III (1216–1272),[30] was also clearly influenced by Roman law, which came to him through the Glossator Azo. The work is written in Latin and is divided into two parts: the *Liber Primus*, which appears to correspond to Justinian's Institutes; and the *Liber Secundus*, which is largely a treatise on some of the writs that formed the basis of the English common law.[31] Bracton's treaty includes a large number of extracts from the Digest and Code of Justinian, as well as extracts from Azo's two *Summae* and the works of other Continental jurists. In general, the scope of his work was similar to that of the French works on customary law, which were being published at the same period. Just as the French writers filled out the customary law with importations from Roman law, so Bracton supplemented the meagre and inadequate rules of the common law in fields such as the law of personal property and the law of contract by borrowings from Roman sources. Furthermore, Bracton used Roman concepts and distinctions to describe, classify and explain the writs and actions through which the royal courts administered justice.[32] His work is a testament to how far the common law of England had progressed: new writs and forms of action had been introduced, and the common law had gone far towards displacing local customs.[33]

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[28]In the time of Glanvill, writs were not fixed in number and the king possessed unlimited power to issue new writs.

[29]Holdsworth (1938), p. 15.

[30]Bracton was one of the king's justices of the King's Bench and of the Assizes. Like many other royal judges of that time, he was an ecclesiastic and at the time of his death in 1268 he was Chancellor of the Exeter Cathedral. He was a student of Justice Raleigh, who was responsible for creating several writs.

[31]As the basis of his work, Bracton compiled a *Note Book* in which he collected two thousand cases from the plea rolls of the first 24 years of Henry III's reign. However, the treatise appears to be unfinished—it ends abruptly during the discussion of the writ of right.

[32]As S. E. Thorne observes, "[Bracton] was a trained jurist with the principles and distinctions of Roman jurisprudence firmly in mind, using them throughout his work, wherever they could be used, to rationalize and reduce to order the results reached in English courts." See *Bracton on the Laws and Customs of England* (Cambridge, Mass., 1968), 33.

[33]The main body of Bracton's work is divided into tracts dealing with the principal civil and criminal actions that came before the king's courts. It is interesting to note that Bracton agreed with Glanvill when he claimed that a king who wished to rule well needed two things: arms and laws. He declared that, although the king was supreme in his realm, his power was derived from law, which should govern all, king and subject alike. Notwithstanding such claims, Bracton recognized the

The two centuries following Bracton's death saw a sharp decline in the influence of Roman law in England. Though it continued to be studied at the Universities of Oxford and Cambridge, it had little effect on the common law itself. Undoubtedly, the causes were manifold and, in part, political. But one of the principal factors was the fact that English judges and lawyers received their professional training at the Inns of Court and not at the universities. The Inns of Court were self-governing societies, products of the medieval spirit of corporate organization that had manifested itself in the trade guilds.[34] The education of lawyers was essentially practical. A student who aspired to a career in law acquired an elementary training in law at an inn of Chancery followed by admission to one of the inns of court as a member. There he would spend about seven years as an 'inner barrister', taking part in moots, attending lectures ('readings') and performing various practical exercises under the supervision of his seniors. Upon completion of his training, the former 'inner barrister' might expect to be invited to the bar as an 'utter' or 'outer barrister'.[35] Unlike their Continental European counterparts, who studied law at universities, English lawyers learnt their law in the everyday world of practical affairs. Whilst the universities taught civil and canon law but generally declined to include municipal law in their academic curricula, perhaps because it was not expressed in Latin, common lawyers *relinquished* the study of civil and canon law.[36] It was not until 1828 that the newly established University of London established the first Chair of English Law.

The common law exhibited two characteristics in this period: in the first place, it tended to become more fixed and rigid in substance; and, secondly, the rules governing legal procedure became more complex and technical. The legal works of this period consist almost exclusively in commentaries on the writ system, and the legal education imparted in the Inns of Court was concerned primarily with giving to

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Roman law concepts of *necessitas* and *utilitas publica*, which provided rulers with justification to override the law in order to promote or safeguard the public interest.

[34]Much about their origins is unclear, but they probably began as hostels (*hospicia*: inns). By the end of the fourteenth century four principal Inns of Court had emerged: the Inner Temple, the Middle Temple, Gray's Inn and Lincoln's Inn.

[35]The term 'barrister' was not used before the middle of the fifteenth century. It derives from the 'bar' or forum on which sat the senior students called upon to argue at the mock courts or moots. Students who did not wish to become barristers, 'practitioners under the bar', could become 'pleaders', and later 'equity draftsmen' and 'conveyancers'.

[36]Once legal training was provided in the Inns of Court, the use of treatises such as those of Glanvill and Bracton declined. The works now in demand were of a practical nature. Such works were written in French—the language used by common lawyers. In addition to these works, which were mainly guides to legal procedure, 'plea rolls' were compiled of actual cases decided by the common law courts. Furthermore, Year Books were compiled by individual lawyers, consisting of short reports of significant arguments and rulings in cases noted by those who were present. By about 1400 personal compilations gave way to uniform practical collections of court pleadings and in the first half of the sixteenth century the first 'private law reports' made their appearance, in which the practice of citation is firmly established. The most famous of these reports are those of Sir Edward Coke (1552–1634), who is considered to be the greatest jurist of his time.

students an accurate knowledge of the procedural law in whose interstices substantive law was still firmly embedded. Such Roman law as was introduced came not through the courts of common law, but through the ecclesiastical and admiralty courts, and through the Court of Chancery, which owed its origin to the growing rigidity displayed by the common law. At the same time, the growth of the forms of action around which the law of tort and contract later crystallized meant that the fields of law that on the Continent succumbed most readily to the influence of Roman law were secured to the common law.

The sixteenth century was probably the most crucial period in the history of the common law. In the early part of that century the common law came under increasing attack. Many influential voices were raised against it, and there were calls for a wholesale reception of Roman law such as was taking place at the same time in Germany and other parts of Continental Europe.[37] But the common law stood its ground. Four key factors contributed to its survival. First was the character of the Tudor monarchs, who preferred to refashion the medieval institutions of the country and adapt them to the altered conditions of the age rather than to root them out altogether.[38] Second was the fact that new courts, especially the Court of Chancery[39] and the Court of Star Chamber,[40] addressed many of the deficiencies of the common law.[41] Thirdly, the continuity of the common law was secured by Coke's restatement and modernization of its principles in the early seventeenth century.[42] And, finally,

[37]F. W. Maitland has brilliantly related the story of the sixteenth century pressure of Roman law in England in his *English Law and the Renaissance* (Cambridge 1901, reprinted Union N.J. 2000).

[38]This may be explained by the fact that the principles of the common law constituted at the same time principles of the constitution, and to abolish them entirely would have amounted to a revolution rather than a resettlement.

[39]See Sect. 9.3 below.

[40]The Court of Star Chamber evolved from the king's Council. In 1487, during the reign of Henry VII, this court was established as a judicial body separate from the Council. The court, as structured under Henry VII, had a mandate to hear petitions of redress. Although initially the court only heard cases on appeal, Henry VIII's Chancellor Thomas Wolsey and, later, Thomas Cranmer encouraged suitors to appeal to it straight away, and not wait until the case had been heard in the common law courts. In the Court of Star Chamber (as in the Court of Chancery) all questions were decided by the court itself, and the granting or withholding of relief was in the discretion of the court and not regulated by rigid rules of law. The Court of Star Chamber was abolished in 1641, but its better rules were taken over by the King's Bench and became a permanent part of the law of England.

[41]As F. W. Maitland noted, "were we to say that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth." *The Collected Papers of F.W. Maitland* (Cambridge 1911), 496.

[42]Coke's famous law reports began to appear in 1600 and comprise 13 volumes. In these the author emphasizes the role of judicial activity in constantly developing and refining the law, declaring its principles and applying them to the matter in hand. Although Coke's reports fall short of what would now be regarded as accurate reporting, nor do they reveal anything other than a vague notion of precedent, they serve the author's purpose, namely the defence of the common law, admirably well. Coke asserts that the law the judges declare and apply is unwritten and immemorial, embodying the wisdom of generations—a result not of philosophical reflection but of the accumulations and refinements of experience. What emerges when a judge declares the law is the distilled

there was the vital role played by the Inns of Court, and by what Maitland has described as 'the toughness of a taught tradition'.[43]

Since the time of Edward Coke (1552–1634) the common law has never been under serious threat in England. However, the absence of a formal reception did not result in a total absence of impact of Roman law on English law. For instance, Roman law was of some assistance to Lord Mansfield (1705–1793) in the development of English commercial law, and judges have occasionally relied on it, whether in equity or at law, when an analogy was in point. Moreover, elements of Roman legal terminology were incorporated in English law. Nevertheless, although Roman legal concepts and doctrines have been woven into the fabric of English law, neither the corpus nor the structure of the latter can be said to be Roman.[44]

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knowledge of several generations of men, each decision being based on the experience of those before and tested by the experience of those after. Coke regarded the common law as an expression of right reasoning in the service of natural human interests. It followed from this that the common law was fundamental and, as such, it must prevail over any statutory enactment that did not conform with its precepts.

[43] In contrast to English law, the law of Scotland was affected by the Roman law-based *ius commune* to a significant degree. By the close of the Middle Ages, Scotland had a customary law similar to that of England, although considerably less developed. However, unlike its English counterpart, Scottish law remained open to external influences. The most obvious such influence was that of the Church, and it was through the infusion of canon law that Roman law first influenced Scottish law and procedure. Furthermore, knowledge of Roman law was brought to Scotland by students attending continental universities from as early as the thirteenth century. In 1532 a permanent court of professional judges, the Court of Session, was established, which used a version of the Continental Romano-canonical procedure. As far as possible, the court relied on native Scots law, but in cases that could not be addressed on that basis, judges had recourse to the Romanist *ius commune*. By the close of the sixteenth century, Roman law had infiltrated many aspects of Scottish law and had become one of the dominant characteristics of the Scottish legal system. However, from the beginning of the eighteenth century, especially after the Act of Union in 1707, by which Scotland and England were consolidated into one kingdom, English law began to exercise a strong influence on the law of Scotland, although the close contacts between Scots law and Continental European law continued to exist. It is thus unsurprising that comparative law scholars regard Scots law as an example of a 'mixed' or 'hybrid' system. See Evans-Jones (1999), p. 605; MacQueen (1999), p. 19; Rodger (1996), p. 1.

[44] As H. E. Holdsworth has remarked: "We have received Roman law; but we have received it in small homoeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or poison. When received it has never been continuously developed on Roman lines. It has been naturalized and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up by the development of old and the creation of new rules to meet the needs of a changing civilization and an expanding empire." *A History of English Law*, 7th ed. (London 1956–1966), Vol. IV, p. 293. According to Roscoe Pound, "History has played a decisive part in the development of systems of law more than once. A taught tradition is a decisive element in a system. Two distinct long traditions, the one going back to the Roman jurisconsults of the classical era, the other to the teaching of the law of the King's Courts by medieval English lawyers, have kept their identity since the Middle Ages. They have put their mark upon the significant features of the respective systems and have set the two systems off as independent however much either may have borrowed from the other at one time or another. Whatever the Continental law borrows it Romanizes. . .Whatever the Anglo-American law borrows it Anglicizes. . .From the Middle Ages the Continental lawyer and the

9.3 The Rise and Development of Equity

Legal systems often begin with general rules formulated to deal with the majority of society's disputes most of the time. In England in the period following the Norman Conquest, the body of rules known as the common law developed to serve this function. As previously noted, these rules were non-statutory, of a general nature and common to the whole country. By the end of the thirteenth century, the central authority had established itself in England—a development in which the centralization of the legal system and the common law courts that grew out of the king's council (*curia regis*) played a significant part. In the course of time, the common law courts assumed a distinct institutional existence. However, with this institutional autonomy there emerged also an institutional sclerosis, reflected in the reluctance of the courts to deal with matters that were not or could not be processed in accordance with a recognized form of action. Thus, it was often not possible for a wronged person to obtain help from the courts because no suitable writ was available, or because the remedy offered by the common law was inadequate. Such a refusal to address substantive wrongdoings because they did not fall within the prescribed parameters of procedural and form constraints led to injustice and, at the same time, gave rise to the need to remedy the perceived weakness of the common law system. In England the development of equity responded to this need. The equity system was erected to address the gap "whenever the common law might seem to fall short of [the] ideal in either the rights it conceded or the remedies it gave."[45]

Equity, in a general sense, is understood to mean fairness or justice and, as such, it is regarded as having a central place in law in so far as the principal attribute of good law is that it is just. In a narrow sense, the term 'equity', as used in legal philosophy, is contrasted with strict law (*ius strictum*). Once a legal rule has been settled, it is the task of the judge to apply it, but not to question it, for justice demands certainty in the application of the law. However, no system of law can provide rules capable of achieving justice in all circumstances, because all the possible variations of circumstances can never be foreseen. The essence of a legal rule is that it should be of general application, i.e. binding in all cases within its scope. But as a society grows and becomes more complex, cases inevitably arise which the general rules of the system are unable to address. One method of dealing with this problem is to enact new legislation. However, changes in law are not always readily achievable by legislation, especially when a legal system is at an early stage of its development. In such circumstances, resort to equity, as distinguished from strict law, becomes necessary. As Sidney Smith explains:

> A legal principle, in whatever period, aims at establishing a generalisation for an indefinite variety of cases. Uniformity and universality must characterise it and these are essential qualities in it. [The Greek philosopher] Aristotle, in calling attention to the fact, stated that

English lawyer have had a different bringing up." "Philosophy of Law and Comparative Law", (1951) 100 (1) *University of Pennsylvania Law Review*, 1, 1–2.

[45] Kitto (2002), at v.

> legal rules are necessarily general while the circumstances of every case are particular, and it is beyond the power of human insight to lay down in advance a rule which will fit all future variations and complications of practice. He concluded that law must be supplemented by equity, there must be a power of adaptation and flexible treatment sometimes resulting in decisions which will even be at variance with formally recognised law and yet will turn out to be intrinsically just.[46]

Aristotle described equity (*epieikeia*) as not different from justice, but as a better form of justice and as "a correction of the law where [the law] is defective due to its universality."[47] An equitable decision is considered just because it is what the lawgiver would have decided under the particular circumstances of the case, if he or she had been present. The conception of equity (*aequitas*), in contrast with strict law (*ius strictum*), occupied an important place in the history of Roman law[48] and there are several similarities in the English and Roman approaches to equity. Interpreting legal rules in a liberal and humane spirit, modifying the strict and formal law in the interests of justice, supplementing and expanding the scope of existing rules, preventing the abuse of legal rights and remedies are all fundamental requirements of equity that must have a place in every system of law. In England, when the common law was only beginning to take shape, the law was itself capable of modification to meet the needs of justice and, therefore, there was no need to resort to equity as an independent source. Furthermore, even after many rules of the law had become settled, early common law judges at times administered a general equity concurrently with the law by mitigating the strict legal rules in particular cases. However, as the legal system grew in complexity, the difficulty which was experienced in the common law courts in relation to the use of writs and the forms of action led to increasing dissatisfaction with the system.

Four main shortcomings of the common law system can be seen as the principal stimuli for the rise of equity.[49] First, as previously observed, a plaintiff could only sue at common law if his or her complaint was covered by an existing writ or form of action. However, as the writs that were available addressed only a relatively narrow range of situations, a wronged person was often unable to obtain help from the common law courts because no suitable writ existed and therefore no action could be brought. Even if the plaintiff's case fell within this range, the absence of a discretionary power on the court's part meant that in some cases justice could not be achieved. Secondly, the general and inflexible nature of the common law meant that

[46] Smith (1933), p. 310.

[47] Aristotle, *Nic. Ethics*, Bk. 5, chap. 14.

[48] Cicero's definition of the *ius civile* as "the equity constituted for those who belong to the same state so that each may secure his own" (*Top*. 2. 9.), and the renowned aphorism of the jurist Celsius "*ius est ars boni et aequi*": "the *ius* is the art of the good and just" (Digest 1. 1. 1. pr.), are obviously inspired by the concept of equity as an abstract ideal of justice and as a touchstone of the norms of positive law.

[49] Perell (1990), p. 4.

it could be employed to obtain unconscionable or unjust results.[50] Thirdly, to many medieval people the common law courts seemed easily influenced by the powerful or wealthy. And, fourthly, plaintiffs were often deprived of a remedy on account of a defendant defying the court or intimidating the jury, an injustice to which the common law had no response. Faced with one or more such difficulties, a wronged person's only option was to petition the monarch, who was regarded as 'the fountain of justice', to exercise his extraordinary judicial powers and provide him with a remedy. Such petitions would state that on account of a deficiency of the type above-mentioned the petitioner was unable to obtain a remedy at law. The petition would then appeal to the king for a remedy on the grounds of 'conscience' or 'for the love of God and by way of charity'. Some petitioners specified the desired remedy, such as, for example, the discharge of a mortgage, the enforcement of a trust, or the restraint of a stranger proposing to interfere with an executor's possessory rights.

At first, the majority of petitions were heard by the King himself.[51] In the course of time, the king began to refer these requests for help to the Lord Chancellor, his chief secretary and a leading member of the royal council. The early Chancellors were usually senior ecclesiastics and, although they were not professional lawyers, their prominent position in the royal court must have given most of them some acquaintance with the rules of English law. The Chancellor's department, the chancery, was closely connected with the administration of the law, and it was from this office that the writs were issued. In the course of the fourteenth century it became customary for petitioners to go directly to the Chancellor and, in time, the Chancellor came to be considered as conducting a court. In the Statute of 1340[52] a Court of Chancery was mentioned alongside other courts of the time and, in a petition presented in or about 1400, the Chancellor is acknowledged as holding a court.[53] By Tudor times, the Chancellor's court was a firmly established institution and an integral part of the English legal system.[54] From that time onwards the large majority of chancellors were lawyers. The Chancellor did not act like a common law judge, but instead developed his own type of law called equity. It should be noted here that in earlier times, when Chancellors were ecclesiastics, the notion of equity

[50]According to some commentators, people deliberately employed the common law to achieve unconscionable outcomes. This may not in fact have been the case, however. It seems more likely that unconscionable outcomes were simply the unfortunate result of the strict application of the common law.

[51]Certain classes of petitions were however referred to the king's most important official, the Chancellor. One such class involved cases where the alleged wrongdoer was the King himself such as, for example, where the king had possession of land that had been seized as an escheat (the term escheat refers to the reversion of property to the king or the state in the absence of legal claimants) but in fact the late tenant of the land had left an heir. The common law failed to provide the heir with a means of recovering the land. To recover it, the heir had to petition for it, and such petition was addressed to the Chancellor.

[52]14 Ed III St 1 c 5.

[53]See Meagher et al. (1984), p. 4.

[54]It should be noted that until the nineteenth century the chancellor was the sole judge in the Court of Chancery.

meant fairness or justice in a broad sense; in later times, when Chancellors were lawyers, equity acquired a more technical meaning and came to refer to the body of rules and principles created by the Chancery court. However, the fundamental distinction between equity and the common law remained unaffected by this development. In the course of time, a number of Chancery courts were set up so that for several centuries two systems of law existed side by side in England: the common law, which was administered by the common law courts, and equity, which was administered by the Chancery courts.

It is important to stress at this point that the Chancellor had jurisdiction both in equity and the common law. However, with respect to the latter his jurisdiction was limited to: (a) certain types of writ; (b) cases which directly concerned the king; and (c) personal actions brought by or against offices of the Court of Chancery. The Chancellor's equitable jurisdiction was considerably greater. It involved, among other things: (a) the recognition of uses and trusts; (b) the enforcement of contracts on grounds not recognised by the common law; (c) relief for unfairness resulting from the strict enforcement of legal rights; and (d) the granting of remedies non-existent or existent but unavailable at common law. Proceedings in the Chancery court were considerably different from trials in common law courts. Common law proceedings were initiated by the issuing of a writ and the issues of fact were tried by a jury, without any evidence being heard by the parties themselves. If the verdict of the jury was for the plaintiff, the judgment usually awarded him damages. In the Court of Chancery, on the other hand, proceedings were not initiated by a writ, but by a petition to the Chancellor. The Chancellor then issued a *writ of subpoena*, which was a command to the defendant to appear before him to answer the allegations made. When the defendant and the plaintiff appeared before the Chancellor, the latter questioned them closely and at length in order to arrive at the truth.[55] If the Chancellor felt that one party was acting against his conscience, he would order him to put matters right by doing or abstain from doing something. If the party refused, he was confined in the Chancellor's prison until such time as he decided to clear his conscience and abide by the Chancellor's order.

The basic tenet on which the Chancellor conducted his court was 'conscience'. Relief was therefore given on the basis of the Chancellor's individual perception of justice and how the parties' consciences should be bound by it.[56] However, the notion that the Chancellor's task was to correct the rigidity of the common law, guided only by a moral ideal, was obviously incompatible with the development of settled rules. The absence of any controls on the exercise of this discretion in

[55]From the time of King Henry VI (1421–1471) written answers were allowed, and in the sixteenth and seventeenth centuries a regular course of procedure based on written pleadings was adopted.

[56]As stated by Lord Ellesmere in 1615: "The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every act and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs, and oppressions of what nature soever they be, and to soften and mollify the extremity of the law." *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485, at 486.

administering justice led equity to be described as ‘a roguish thing’. In the words of John Selden,

> Equity is a roguish thing; for law we have a measure, know what to trust to. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. [It is] as if they should make the standard for the measure we call a foot a Chancellor’s foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. [It is] the same in the Chancellor’s conscience.[57]

However, although the Chancellor had without doubt a very wide degree of discretion, it would be incorrect to suppose that there were no limits to his powers. Especially from the sixteenth century onwards, the sphere of the Chancellor’s discretion became steadily less extensive and the arbitrary and discretionary nature of equity was mitigated by adherence to precedent and principle. This process is referred to as ‘the systemisation of equity’.

9.3.1 The Relationship Between Common Law and Equity

Records show that in the thirteenth century many of the remedies awarded by the courts of equity were remedies that were being awarded by other courts too, including those of the common law. Moreover, it appears that it was not uncommon for the Chancellor to sit with or seek the advice of common law judges.[58] However, this cooperation between the courts of common law and equity was not destined to last. In the course of the fourteenth century, the courts of common law adopted a strictly normative approach to the resolution of legal disputes (*rigor juris*), discarding notions of conscience and equitable discretion.[59] With this change in direction, the separation between equity and the common law became marked and conflict inevitably arose. This conflict developed because with respect to certain matters common law and equity had different ideas as to how the problem should be resolved. An arrangement known as the *use* offers an example of how a dispute could arise between common law and equity. In some parts of England, the rule prevailed that when a tenant died the land passed to his eldest son, but the son in turn had to give some money or a farm animal to the landlord. However, if the tenant gave away his rights over the land, nothing had to be given to the landlord. Therefore, some tenants, before they died, gave away their rights over their land to a friend who promised to permit the son to use the land after the tenant died, so that the son would get the benefit of the land without having to surrender anything to the landlord. This arrangement was referred to as a *use*. The common law courts refused to recognize

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[57]Pollock (1927), p. 43.

[58]See Meagher et al. (1984), pp. 5–6; Roebuck (1988), p. 73.

[59]By the time of the Tudors and Stuarts, the Chancellor’s power to give common law remedies had been removed.

the existence of uses and thus, from the viewpoint of the common law, the friend had rights over the land in question, whilst the son had nothing. However, the Chancery courts adopted a different approach to the matter: they recognized the common law rights of the friend, but stated that such rights had to be exercised in accordance with his conscience. This meant that if the friend refused to let the son benefit from the land, the Chancery court would confine him to prison until he decided to clear his conscience by allowing the son his rights. Furthermore, if the son was successful in an action in a common law court, this would be of no benefit to him, as a Chancery court would imprison him if he sought to take advantage of it. Therefore, the friend had to fulfil his promise to the deceased father. In these circumstances, it was said that the friend had a 'legal interest', whilst the son had an 'equitable interest'.

At the close of the sixteenth century the conflict between common law and equity came to a head in connection with the Chancellor's practice of issuing injunctions, an equitable remedy awarded to prevent successful but dishonest plaintiffs at law from enforcing unconscionable judgments given in their favour in common law courts. Chief Justice Edward Coke of the common law courts attempted to assert the supremacy of the common law by holding that imprisonment for disobedience to a common injunction was unlawful.[60] In reply Lord Ellesmere, Chancellor at the time, declared in the *Earl of Oxford's Case*[61] that injunctions interfered with the common law in no way at all. Rather, their effect was *in personam*, directing the individual concerned that on equitable grounds the action at law should not proceed or the judgment at law should not be enforced. A personal dispute sprang up between Coke and the Chancellor, who finally appealed to the King, James I. The latter, acting on the advice of Bacon and others experts in the law, decided that where equity and the common law were in conflict, equity was to prevail. As a result of this decision, the supremacy of the Court of Chancery was established and the importance of equity increased.

Whilst the role of equity remained unchallenged, its application became increasingly regulated through a system of rules and principles based on precedent and gradually developed by a series of Chancellors, all of whom were lawyers as opposed to the ecclesiastics of the earlier era. This so-called 'systemisation of equity' is reflected in, among other things, the classification of trusts, the development of the modern rule against perpetuities, the formulation of the doctrine of specific restitution and the creation of the doctrine of the equity of redemption. In 1673 Lord Nottingham declared that "the conscience of the Chancellor is not his natural and private conscience but a civil and official one."[62] By the nineteenth century, the period of systemisation was complete. As Lord Eldon, the last of the great Chancellors involved in the systemisation process, pointed out in 1818:

[60] *Heath v Rydley* (1614) Cro. Jac. 335; *Bromage v Genning* (1617) 1 Rolle 368; *Throckmorton v Finch* (1598) Third Institute 124, 125.

[61] (1615) 1 Ch Rep 1; 21 ER 485.

[62] Quoted in Smith (1933), p. 315.

> The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.[63]

In his *Commentaries on the Laws of England*, written in the middle of the eighteenth century, Blackstone remarked:

> The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs ... the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.[64]

The relationship between common law and equity was now one between distinct but not opposing systems of rules, even though differences between the two systems, most notably procedural, remained in place. The following statement by Maitland can provide a useful starting-point in understanding this relationship as perceived in the nineteenth century:

> We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, [for] at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short Act saying "Equity is hereby abolished", we might have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contracts would have been enforced. On the other hand, had the legislature said, "Common Law is hereby abolished", this decree, if obeyed, would have meant anarchy. At every point equity presupposed the existence of common law.[65]

As this statement suggests, the relationship was such that equity acted as a supplement to the common law—"[A] sort of appendix added on to our code, or a sort of gloss written round our code",[66] as opposed to a competing or opposing system of law. According to Megarry and Wade, "equity, although it followed the inevitable course towards fixity and dogma, remained in general a more modern and flexible system than the common law. Originally it provided the means, needed in every legal system of adapting general rules to particular cases, and this character was never entirely lost."[67]

In the previous paragraphs, we have seen that the English common law was built as a complete and independent system of law. Equity, on the other hand, developed

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[63] *Gee v Pritchard* (1818) 2 Swan 402, 414.

[64] Blackstone (1978), p. 429 ff.

[65] Brunyate (1936), pp. 18–19.

[66] Ibid., at 18.

[67] Megarry and Wade (1984), pp. 111–112.

as a means to remedy the shortcomings of the common law and so it presupposed the existence of the latter system. As has been noted, in its earliest days, equity was understood to refer to fundamental requirements of justice and fairness. However, by the nineteenth century it had become a rigid set of rules standing side by side with the rules of the common law, but administered by a different set of courts.

9.3.2 The Judicature Acts of 1873 and 1875 and the Administrative Fusion of Law and Equity

The nineteenth century was the century of law reform in England. There were many unsatisfactory features in the administration of justice system at this time. The jurisdiction of the various courts overlapped; the procedure used in the common law courts was out of date; and the Courts of Chancery were overburdened with cases and very slow in carrying out their work. In the 1850s the Parliament endeavoured to ease the position by legislation, but the relevant measures achieved limited success.

One of the main difficulties arising out of the division between the common law and equity was equity's lack of jurisdiction to resolve disputes about legal rights, titles and interests. This lack meant equitable relief could not be obtained until or unless: (a) a legal right was admitted; (b) a legal right was already established by a judgment at law previously obtained; or (c) the case had been sent to the common law courts to be tried by a jury.[68] Another difficulty arose from the fact that equity had no power to award damages in the sense in which they were awarded at common law. It could award monetary compensation on a restitutionary basis for the infringement of an equitable right. However, a plaintiff could not get an award of damages where he or she failed to establish title to an equitable remedy sought. This also meant that it was unclear whether the Court of Chancery could award damages in aid of a purely legal right.[69] It should also be noted here that the common law did not have the interlocutory remedies available in equity. Accordingly, to get an order for discovery, interrogatories or any other interlocutory steps in a suit that had been commenced at law, a litigant had to go to the courts of equity. Furthermore, the common law courts had no powers to award specific performance, declarations or common injunctions. The Common Law Procedure Act of 1854 gave the common law courts the power to grant injunctions in addition to damages for breaches of

[68]This difficulty was remedied by legislation: The Chancery Regulation Act 1862 (25 & 26 Vict., c. 42), also known as Rolt's Act. Consequently, in an action for specific performance a court of equity could decide whether there was a contract or not. In an action to restrain a trespasser it could determine who had title to the land. Furthermore, in an action for an injunction to prevent an infringement of copyright, the courts of equity could decide whether or not copyright existed.

[69]The Chancery Amendment Act, also known as Lord Cairn's Act of 1858 (21 & 22 Vict., c 27) granted the courts of equity the power to award damages in lieu of or in addition to an injunction or an order for specific performance.

contractual obligations or torts. But it did not give the common law courts power to grant injunctions against infringements of equitable rights. Hence there was still no remedy for the common law's refusal to recognize equitable interests.

In addition to the above-mentioned difficulties, there was a real danger of litigants commencing their action in the wrong court. For example, if a contract contained a mistake, that mistake may have been able to be remedied through a process of legal construction and so a plaintiff could safely sue for damages. On the other hand, it may have been necessary to resort to equity in the first instance for rectification and law in the second instance for damages. Similarly, where a public body failed to perform a statutory duty, it was often unclear whether to request a writ of mandamus at law[70] or an injunction in equity. Moreover, parties often had to go to the common law to determine liability and then to equity for any equitable defences. This was the case for the breach of a contract for the sale of land for which equity provided the remedy of specific performance.[71] This was also the case where the breach was of a stipulation as to the time at which the contract had to be performed. The common law required strict adherence to such stipulations. Equity, on the other hand, alleviated such stipulations as to time unless time had been made the essence of the contract.

The difficulties surrounding the division between law and equity eventually led to recommendations for reform of the English court system. Following a series of minor legislative reforms (regarding, for the most part, matters of procedure) in the mid-nineteenth century,[72] major changes were recommended by the UK Judicature Commission in 1869. This body proposed the establishment of a single Supreme Court in which the jurisdictions exercised by the superior courts of law, equity, probate, admiralty and divorce would be vested. The recommendation was based on the changes that had occurred in the State of New York twenty years before. There, in 1848, the separate systems of law and equity had been combined into one system of procedure and one system of courts. No substantive changes to the law were made.

The recommendation of the Judicature Commission led to the enactment of the Supreme Court of Judicature Acts of 1873–1875. This legislation reorganized the existing court structures completely and, in the process, formally brought together the common law courts and the Chancery courts. In the place of the old courts, a Supreme Court of Judicature, comprising the High Court of Justice and Court of Appeal, was authorized to administer both the common law and equity jurisdictions. In the Supreme Court of Judicature, the three original royal courts became three divisions of the new High Court of Justice; the Court of Chancery, which administered equity, became the fourth division of the High Court; and a fifth division, dealing with matters that fell outside the ambit of the common law or equity, namely

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[70]This is a prerogative order from a higher court instructing a lower tribunal or other public body to perform a specified public duty relating to their responsibilities, e.g. to deal with a particular dispute.

[71]But it was not the case for contracts for the sale of goods, for equity did not provide the remedy of specific performance in respect of such contracts.

[72]The Common Law Procedure Acts 1852–1852 and the Chancery Amendment Act 1858.

Probate, Divorce and Admiralty, completed the new arrangement. By Order in Council in 1880, the three royal courts were merged to form the Queen's Bench Division, thus leaving the three divisions of the High Court, i.e. Queen's Bench, Chancery and Probate, Divorce and Admiralty.

The Judicature Acts placed on a statutory foundation the old rule that where there is a conflict between the rules of equity and the rules of the common law in relation to the same matter, the rules of equity shall prevail. At the same time this legislation gave power to all the courts to administer the rules of common law and equity and to grant the remedies they provided, as the case before them demanded. This meant that litigants who needed help from the common law and equity could henceforth obtain both kinds of help in one and the same court. This arrangement led many people to believe that the two systems had merged. As commentators have remarked, however, the enactment of the Judicature Acts did not entail the elimination of the distinction between equity and the common law, or between equitable and legal rights, interests and titles.[73] The fusion of law and equity achieved by the passing of the Judicature Acts may be described as procedural, as no substantive merger between the two bodies of rules was effected.[74] Nevertheless, subsequent developments in the law have been such that, according to some commentators, there has been a gradual coalescence of the two streams over time and on matters of common concern. As Sir Anthony Mason has observed, "by providing for the administration of the two systems of law by one system of courts and by prescribing the paramountcy of equity, the Judicature Act freed equity from its position on the coat-tails of the common law and positioned it for advances beyond its old frontiers."[75] The first point to be made in this regard is that the abolition of the distinction between law and equity and legal and equitable rights, interests and titles need not be absolute. Lord Selborne, in the course of introducing the Judicature Act to Parliament, appears to have recognized this, when he described the distinction between law and equity as "real and natural" only "within certain limits."[76] The above statements appear to lend support to the school of thought which believes that, increasingly, common law and equity are fusing and mingling their remedies and procedures. It has been argued, for example, that common law remedies, in the form of damages, may be awarded for

[73]See, e.g., Meagher et al. (1984), p. 45 ("there was nothing in the Judicature Act which attempted to codify law and equity as one subject matter or which severed the roots of the conceptual distinctions between law and equity"); Baker (1977), p. 531.

[74]As has been pointed out, "The two streams of jurisdiction [that is, law and equity], though they run in the same channel, run side by side and do not mingle their waters." Browne (1933), p. 18. This approach appears to gain support from the exclusive jurisdictions left to the Queen's Bench and Chancery divisions. As a matter of fact, the work formerly conducted by the Court of Chancery is exactly that dealt with in the Chancery division. A Chancery case remains something quite different from a common law case, and the same can be said with respect to procedure.

[75]"The Place of Equity and Equitable Doctrines in the Contemporary Common Law World", paper delivered at the *Second International Symposium on Trusts, Equity and Fiduciary Relationships*, University of Victoria, British Columbia, 20–23 Jan. 1993, at 10.

[76]Hansard, 3rd Series, vol. 214, 339.

the violation of an equitable obligation. Alternatively, a common law defence may be raised against an equitable claim. It is important to point out here, however, that the notion that law and equity are fused or merged remains highly controversial in some common law jurisdictions.[77]

9.4 Equitable Principles and Remedies

As previously noted, in many cases it was not possible for a wronged person to obtain redress for a wrong from the courts of the common law. This might be so because the law was flawed in that no remedy existed, or because the form of remedy the common law provided (damages) was unsuitable. Equity emerged to meet these needs. Equity is said to be more flexible than the common law. It is based on a series of basic principles expressed in general terms, in contrast with the common law, whose rules are couched in a very rigid and relatively narrow manner. Because of the general character of equitable principles, and the underlying philosophy drawing on concepts such as conscience, justice and fairness, there is very rarely conflict between equitable principles. From the large number of equitable principles developed by the Court of Chancery to provide guidelines as to how the equitable jurisdiction should be exercised, a few will be mentioned here:

(i) *A person who seeks equity must do equity*. A claimant must act fairly towards the defendant and abide by any reciprocal orders issued by the court.
(ii) *Equity will always allow a remedy for a wrong*. This principle makes it possible for equity to intervene where a legal technicality prevents a right from being enforced at law. This principle is in effect the basis of the development of law through judicial interpretation.
(iii) *A person who comes to equity must come with 'clean hands.'* This means that equity, in dealing with a claim, will consider whether the claimant has acted fairly in the matter for which he or she is seeking relief. If the claimant has acted maliciously, he or she will not be granted a remedy.
(iv) *Equity acts in personam*. Proceedings and remedies based on equity are directed against a particular individual rather than an object or property item. If a defendant fails to comply with the remedy, he or she may be prosecuted for contempt of court or have his assets confiscated.
(v) *Equity looks on that as done which ought to have been done*. If the parties have created an enforceable obligation, equity will treat them as being in the

[77]For example, in Australia the position prevails that the doctrines and remedies of equity are clearly distinct from those of the common law. Indeed, some authors call the notion of the fusion of law and equity the 'fusion fallacy'. See on this matter Meagher et al. (2002), p. 54. In New Zealand, by contrast, the Court of Appeal has adopted the view that, with respect to remedies, it is now settled that equity and the common law are merged. Consider, e.g., *Mouat v Clark Boyce* [1992] 2 NZLR 559.

position they would be when the obligation is discharged. For instance, if two parties enter into an agreement for the sale and purchase of house, the purchaser will be considered to hold an equitable interest in that house, even if the house has not yet been transferred. This principle provided the basis for an important remedy, namely specific performance.

(vi) *Delay defeats equity*. An equitable remedy may not be granted unless it is requested as soon as possible. This principle is intended to discourage unreasonable delays regarding presentation of claims and enforcement of rights.

(vii) *Equity follows the law*. Equity was never intended to replace the common law or statute law. It will depart from the established law only in exceptional circumstances.

(viii) *Where equities on both sides are equal, the law prevails*. The rules of the common law will be given priority where claimants in equity are able to establish equal rights in the same property.

(ix) *Equity looks to intent rather than the form*. In determining whether a remedy should be granted or not, attention is to be given to the substance rather than the form of the relevant transaction. Intended transactions that do not meet formal requirements will be enforced where the justice of the circumstances requires it.

(x) *Equity is equality*. There is a presumption of equal division where two or more people are able to establish that they have an interest in the same piece of property.

(xi) *Where equities are equal, the first in time prevails*. Equitable interests are ranked in order of time of creation.

(xii) *Equity will not decree a vain thing*. Equity is concerned with making a practical contribution to substantive justice and not with making judgments that cannot or will not be implemented.

The above maxims emphasize that equity has its foundations in fairness and natural justice. Although they have lost much of their earlier significance, judges may still rely on them when determining whether or not to exercise equitable jurisdiction.

In light of our discussion so far, a number of important qualitative differences between the common law and equity can be identified:

(1) The flexible and discretionary nature of equity's doctrines and remedies.
(2) Equity's ability to impose terms and conditions.
(3) Equity's dominance over the common law.

Equitable doctrines and remedies are flexible and discretionary in the sense that judges will consider all the circumstances of the case according to established criteria and on this basis decide whether the equity of the case calls for a remedy. The corollary is that while a plaintiff may satisfy the basic requirements of an action, they may nevertheless be denied a remedy on account of the operation of an equitable maxim or defence. An example of the discretionary nature of equity arises

in the context of an alleged breach of contract for which the remedy of specific performance is requested. It may be that although the requirements necessary to show a breach of contract are met, the equitable defence of laches (inordinate delay) prevents an order for specific performance being made. The laches defence operates when the plaintiff has delayed in bringing their action to the point where they are taken to have: (a) acquiesced in the defendant's conduct; or (b) caused the defendant to alter his or her position in reasonable reliance on the plaintiff's acceptance of the status quo; or (c) otherwise permitted a situation to arise which it would be unjust to disturb. Further, it may have been that the conduct of the plaintiff in the matter has been improper. If so, the equitable maxim "He who comes into equity must come with clean hands" will prevent an order for specific performance being made. On the other hand, the common law in general contained no such discretionary criteria in respect of the remedies it could award and thus it could be employed to produce results that were less than equitable.[78]

The ability of equity to impose terms and conditions on both the plaintiff and the defendant when granting a remedy is the natural corollary of the aim of equity to achieve justice in the particular circumstances of each case. An example of equity's ability to impose terms and conditions is the equitable remedy of rescission: the setting aside of a contract, which is thereby treated as if it had never existed. In these circumstances *restitutio in integrum* requires the parties be restored to their pre-contractual status. To achieve this end, equity is able to order an account of profits with terms and conditions that make allowance for the deterioration of the property transferred under the contract. As Goff and Jones note, the application of this doctrine was much stricter at common law prior to the passing of the Judicature Acts in the late nineteenth century.[79]

A third distinctive qualitative difference between equity and the common law was the dominance of equity over the common law in the areas of the common law in which equity had concurrent jurisdiction.[80] The term concurrent jurisdiction comes from Justice Story's division of equity's jurisdiction into three categories: exclusive, concurrent and auxiliary.[81] The exclusive jurisdiction refers to cases where equity alone has jurisdiction to grant relief. Examples are in respect of trusts and fiduciary

[78]It should be noted here, however, that the common law has developed to permit some discretion as to the remedy in certain cases. An example arises in the context of the judicial review of administrative action. The common law remedy of certiorari (a remedy in which the High Court orders decisions of lower courts, tribunals and administrative authorities to be brought before it and quashes them if they go beyond the limits of the powers conferred on them or show an error of law on the face of the record) may be denied on the basis of misconduct by the applicant. For example, in the English case of *R v Stephens, ex parte Callendar* ([1956] CLY 2160, The Times, October 26, 1956) an infant's application for the writ of certiorari was refused on account of serious misrepresentations in the mother's affidavit.

[79]Goff and Jones (1986), p. 169.

[80]As previously noted, equity's dominance with respect to the concurrent jurisdiction was settled in the *Earl of Oxford's Case*.

[81]Story (1892), pp. 19–20.

relationships. The concurrent jurisdiction pertains to matters in which both the courts of common law and equity have jurisdiction to grant relief. For example, cases involving fraud and error. The auxiliary jurisdiction relates to matters in which equity enables parties claiming legal rights to establish those rights more effectively or conveniently than they would otherwise be able to in a court of common law. Examples of such aids are *quia timet* injunctions issued to prevent irreparable damage pending a decision at law.[82] Other examples are bills for discovery or for the perpetuation of testimony designed to facilitate proceedings at law. The dominance of equity over the common law entails that equity would grant common injunctions in certain circumstances to restrain an action being brought or a judgment being executed at common law.[83] Equity's dominance is attributed to the fact that equity's jurisdiction is *in personam* and its origin was as a court of conscience.

Other differences between equity and the common law pertain to equity's treatment of property ownership and other property-related interests. Acting *in personam*, equity recognises property ownership in certain individuals beyond those recognized by the common law. An example is the *bona fide* purchaser of a legal title in property where a third party holds an equitable interest in the property. Provided the purchase is made for valuable consideration and without notice of the equitable interest, the *bona fide* purchaser's rights are upheld.[84] In contrast, the common law acts *in rem*, only providing the *bona fide* purchaser with protection by exception to the general rule that legal ownership is a universal and general right of ownership enforceable against everyone Examples of equitable property interests that were not fully recognized at common law include restrictive covenants[85] and the mortgagor's equity of redemption.

Equity has contributed a large number of alternative actions, principles and remedies to the legal system. One of the most significant legal creations that evolved from the equitable jurisdiction of the courts was the *trust*, which has become an important part of property law. It pertains to a special situation where one person (a *trustee*) holds property on behalf of and for the benefit of one or more other persons (called *beneficiaries*). As a result of the special nature of this relationship, the law places very strict duties on the trustee (fiduciary duties), which require that the trustee must always act in the interests of the beneficiaries and should avoid conflict between his or her own interests and those of the beneficiaries. Since, in a trust the trustee is effectively dealing with property belonging to another, there are also restrictions as to the manner in which the relevant property is handled. The powers of the trustee are usually set out in a document called a *trust instrument*. These powers normally include the right to sell, buy, repair and invest the property.

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[82]The court will only grant such a remedy if the applicant can show that there is imminent danger of a substantial kind or that the injury, if it occurs, will be irreparable.

[83]For some examples see Jones (1967), pp. 442–443.

[84]See e.g. *Pilcher v Rawlins* (1872) LR 7 C App 259.

[85]A restrictive covenant is an obligation created by deed that curtail the rights of an owner of land. An example is a covenant not to use the land for the purposes of any business.

A trustee is not allowed to take risks (as he or she might with his or her own property), and if he or she fails to carry out any of the duties laid down in the trust instrument he or she commits a breach of trust and is answerable for any resultant loss.

Furthermore, equity recognized the use of the mortgage as a method of borrowing money against the security of real property. The borrower who offers the security is referred to as the *mortgagor*; the lender who provides the money is called the *mortgagee*. Equity introduced the previously mentioned, 'equity of redemption', that is the right of the borrower/mortgagor to redeem the mortgaged property at any time on payment of principal, interest, and costs, even where there was default under the strict terms of the mortgage deed.

Of the new remedies developed by equity, the most important are considered to be injunction and specific performance. At common law the principal remedy for breach of contract was damages, a money payment given as compensation for the loss suffered. Equity realized that, for many claimants, monetary compensation did not provide adequate relief, and therefore proceeded to introduce the equitable remedies of injunction and specific performance. An injunction is a court order that is granted to prevent a party from acting in breach of his or her legal obligations, in other words from doing some wrongful act such as breaking a contract or committing a tort. For example, if Thomas sells his business to Alice and promises not to compete, but then opens us a shop next door, Alice will probably not be satisfied with monetary compensation, especially as the amount of her loss would be hard to prove. In equity, she could obtain an injunction (enforceable by the threat of imprisonment) compelling Thomas to close his shop.[86] The remedy of specific performance is an order of the court that commands a party to carry out his or her side of a contract. For instance, at common law where a seller of land refused to convey the purchaser could only get a money award; in equity, on the other hand, he or she could get an order of specific performance compelling conveyance of the relevant land. The remedy of specific performance is granted only if monetary compensation cannot produce the desired result, under the principle 'equity follows the law'. Furthermore, this remedy is not available in the case of donations, under the principle 'equity will not assist a volunteer.'[87]

There are a number of other remedies developed by equity that are regarded as having a significant effect on substantive rights. These include the right to have a contractual document corrected by a process known as 'rectification'; and the right to rescind or withdraw from a contract. Written contractual documents were considered to be conclusive of the parties' legal rights; however, if convinced that such a document misstated the parties' true intentions, the court of equity would 'rectify'

[86]A distinction is drawn between *prohibitory injunctions*, prohibiting a person from doing or continuing to do a certain act, and *mandatory injunctions*, ordering a person to carry out a certain act. A person who fails to abide by the terms of an injunction can be found guilty of contempt of court.

[87]As a result of the Chancery Amendment Act 1858, s. 2, if the court grants an equitable remedy, it can still decide on damages instead of performance or damages in addition to performance.

the document, that is, put it right. Furthermore, whilst at law it was considered irrelevant that an agreement was unfair or harsh, the courts of equity would 'rescind', that is, annul, an agreement for 'unconscionability'—a degree of unfairness that affected the Chancellor's conscience. Moreover, an innocent misrepresentation leading to the conclusion of a contract was irrelevant at law, but equity would grant rescission for misrepresentation on the grounds that it is unfair for a person to profit by a statement that he or she at the time of litigation knows to be false. Notwithstanding the rigidity that had entered the system of equity by the nineteenth century, one can still detect the operation in contemporary common law systems of the general principles of fairness and good conscience cutting through the complexities of legal rules and procedures.

9.5 Concluding Remarks

The role that equity has played in the development of the English common law tradition cannot be overstated. Here we have an example of a system of general rules and principles, developed organically and over time by courts, which was able to address successfully many of the manifest injustices that arose in the common law legal system. Moreover, these general rules and principles developed from a system that at first appeared to be too vague to be able to administer objective justice to a system of principles, which while flexible, were nonetheless sufficiently concrete to support a system of justice that became increasingly predictable and uniform. Every system of law must embody elements of certainty, stability and predictability on the one hand, and elements of flexibility, fairness and justice in the individual case on the other. It is a peculiarity of the English common law tradition that these two often competing sets of values were 'institutionalized' in the two systems of law and equity. However, one cannot lose sight of the fact that the system of equity proved unable to maintain its flexibility. The search for stability and order led to rules, principles and guidelines that sought to limit equity's discretion and to make it certain and predictable. In reality, in England, as in other common law jurisdictions, while the import of general principles and maxims of equity has remained, their explicit invocation has gradually waned. This may be attributed to the increasing complexity of the legal system and the fact that the great number of court precedents employing equity and equitable principles to temper the letter of the law has enhanced the quality of legislative output. Lawmakers, wishing to ensure that the letter of the enacted laws is respected, endeavor to ensure coherence with equitable principles, and thus laws are drafted with such principles in mind. However, when clashes occur, as they still do, equitable principles are endowed with the same normative force.

Society requires certainty in the law in order that its individual members may sensibly organize their behavior around the prescribed standards of conduct. However, adequate development of substantive law does not require a rigid application of legal rules. While the virtue of legal certainty cannot be ignored, the objective of

having an adequate body of substantive law must be of equal concern. Accordingly, although the principle of precedent must be adhered to, such adherence should not restrict the ability of the courts to examine the real object and function of the law in a particular area. The law should be developed upon a principled basis and in line with the precedents that have been laid down before. In this respect, historical distinctions between the common law and equity that serve no useful purpose or detract from the real issues at stake in a particular field of the law should not be seen as obstacles. Where rules traditionally classified under different categories may appear to be in conflict or compete, an essential function of the legal system as a whole is to avoid, resolve or rationalize such conflict or competition, not to induce or perpetuate it. It is submitted that, in this respect at least, a case for the substantive fusion of law and equity can certainly be made.

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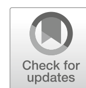
Chapter 10
African Legal Traditions



Matteo Nicolini

10.1 The Struggle for Recognition

One fundamental question about African law relates to its place among the legal systems of the world. Although this expression has always been used as a popular descriptor encompassing all African legal systems, the question whether it exists *per se* has always been controversial among comparative law scholars. Consequently, the answers to this question have varied over time depending on legal, temporal and historical contexts.

African law started gaining formal, albeit limited, recognition in the colonial era. This was somewhat triggered by the 'West African Conference' in Berlin (1884–1885), which led to both the partition of the Continent and the establishment of European formal empires. The first attempts to define African law date back to this period: the expression designates a set of legal rules applicable to groups and communities and, within them, to individuals. African law comprises the totality of legal institutions and refers to both public and private law: law-making, marriage, kinship, family, civil and public wrongs, law of obligations, evidence and land law fall under this wide-ranging legal descriptor.

European colonial approaches towards African law varied enormously. France's colonial policy, for example, pursued social and legal uniformity: its *mission civilisatrice* endeavoured to assimilate African natives by deliberately propagating "the best of French culture along with the rationalist and libertarian values deriving from the Enlightenment and French revolution."[1] It also forged the *indigénat*:

[1] Sharkey (2013), pp. 153–154. For a critical evaluation of French colonial policy see Sir Harris (1912), p. 97.

M. Nicolini (✉)
Faculty of Law, University of Verona, Verona, Italy
e-mail: matteo.nicolini@univr.it

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originally established in Algeria in 1881, this policy was applied across French colonies and eventually abolished in 1946. The *indigénat* neither recognised indigenous legal systems nor recollected customary law; by merely defining "the very status of 'native'," it listed the "offenses that 'by definition' only 'natives' could commit."[2]

In South Africa, the Boer Republics of Transvaal and Orange Free State recognised customary law in 1885. The creation of the Union of South Africa (1910) resulted in even more conflicting approaches: there was "complete non-recognition in the Cape, limited application in the Transvaal and full recognition and application in Natal and the Transkeian territories."[3] Odd as it may seem, African customary law obtained full recognition with the implementation of apartheid; the *South African Native Administration Act* (Act No 38 of 1927) recognised customary law and established a separate system of courts for Africans with the main purpose of fostering separateness among the different races living within the Dominion.

African indigenous law was granted limited application in tropical Africa. In British colonies—and, to a lesser extent, in Spanish colonies—, this was facilitated by the indirect rule, i.e. a method of administration whereby natives were associated to colonial governance.[4]

The limited recognition of African legal systems is usually traced back to its intrinsic features. Not only does African law comprise a variety of systems of law, but it is also handed down by means of oral transmission: law-making is a communal performance, the output of which is collective legal wisdom. As, for example, s 3(3) (c) *Traditional Authorities Act 25 of 2000* (Namibia) states, "In the performance of its duties and functions [. . .] a traditional authority may [. . .] make customary laws." Hence, legislators act as "poets and singers" on behalf of the whole society.[5]

These features hardly squared with the Western legal mentality and colonial policies. Since oral transmission might well have favoured contrasting interpretations of customary law, in dispute resolutions colonial agents depended on native assessors, i.e. 'reliable informants' on customary law.[6] Furthermore, local variations in customary law were reduced through legislative action and restatement, whereby customary rules were recollected in written form and accommodated to the colonial legal framework. In addition, European colonial authorities established legal dualism, within which customary law and European law coexisted. Their mutual interactions were arranged upon a hierarchical scale: according to the repugnancy clauses appended to restated law, African law was applied to the extent that it was not "contrary to justice and humanity."[7] In the event of inconsistency between European law and African law, the former prevailed.

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[2]Mann (2009), p. 336.

[3]Grant (2006), p. 13. See Himonga and Nhapo (2014), pp. 9–13.

[4]See Frederick (1922), pp. 192–213. And see Mann and Roberts (1991), p. 20.

[5]Leman (2009), p. 109.

[6]Ubink (2010), p. 96. On *native assessors* see, among others, s 48 *Indian Evidence Act*, 1872; s 19 *Supreme Court Ordinance* 1876 (Ghana); s 8 *Swaziland High Court Proclamation* 1938; and s 222 *Criminal Procedure Act of Northern Rhodesia* 1939.

[7]See, among others, s 12(1) (a) *Local Courts Act* 1966, Act No. 20 of 1966 (Zambia).

A new approach emerged in the 1950s and 1960s in the wake of decolonisation. As they gained independence, African countries addressed the topic within the broader framework of the dualistic legal regime they had received during the colonial era. It was not just a matter of defining African law; the application of customary law posed methodological problems. There was continuity between the colonial past and independent Africa. At the same time, however, the study of African law entailed a full understanding of its cultural underpinnings: it became a cross-disciplinary field of research for legal scholars, anthropologists and legal anthropologists.[8]

The winds of democratic change, which blew over Africa after the dismantlement of apartheid and the end of the Cold War, favoured the transition of several states from authoritarian rule to democratic regimes; the adoption of new constitutions soon followed.[9] This also led to the revival of customary law and African legal systems. Their institutions and rules, which had been displaced by Western legal paradigms for decades, gained new ground; under African constitutionalism, 'living' customary law became the subject of renewed legislative and judicial actions.

10.2 The Biases of Comparative Law

The recognition of African law did not have any significant bearing on comparative legal research. The question whether African legal traditions constitute either a family or a group of legal systems remains unsettled; and scholars still locate African law at the margins of comparative legal studies.

Scholarly comparative law is genuinely interested in African legal systems: several handbooks dedicate chapters to them.[10] Such an interest, however, is affected by a methodological bias. Legal scholarship exhibits a colonial attitude towards non-Western conceptions of law, and this ethnocentric approach advocates the superiority of European legal paradigms. During colonialism, European powers shaped African legal cartography and superimposed their own spatiality of law onto the continent; peoples, communities, territories and collective legal wisdom still bear the consequences of colonial domination.

The consequences are threefold. Firstly, the methodological bias explains why, despite the increasing interest in customary law, comparative law still focuses on the similarities between former African colonies and Western legal systems. By emphasising legal-colonial links, scholars rank French, Spanish, Portuguese and

[8] Roberts (1979), Vanderlinden (1996), Eberhard and Vernicos (2006).

[9] See the articles published in the *Journal of African Law* (1991) 35 (1/2) issue on "Recent Constitutional Developments in Africa"; consider also Richard (1997), p. 363.

[10] See, among others, Kischel (2019), Ajani et al. (2018), Rambaud (2017), David et al. (2016); Sacco (2012), p. 313 et seq.; Gambaro and Sacco (2009), Bennett (2019), p. 652; Menski (2006), Ntampaka (2005). As for monographs see Vanderinden (1983), Sacco (2006).

Italian former colonies among the civil-law legal systems; former British colonies and protectorates are ascribed to the common-law legal tradition, whereas Southern African countries, Mauritius and the Seychelles join the mixed jurisdictions.[11]

Secondly, ethnocentrism entails that inferior systems do not have anything to teach superior systems; and this provides an explanation for the limited extension of chapters on African law in comparative-law handbooks. In some cases, manuals include references to African law; but these, which are limited in range and scope, are confined within either classifications of legal systems or micro-comparative analyses. The bias is apparent even when scholars suggest the adoption of new taxonomies. For example, Glenn advocates the establishment of the chtonic legal tradition, into which several pre-colonial legal traditions (i.e. African, Asian, Polynesian and Inuit) coalesce.[12] However, the legal descriptor does not account for the rich variety of 'non-Eurocentric conceptions of the law': within the chtonic milieu, African law loses its own legal-specific features.

Ethnocentrism also affects how comparative legal cartography is arranged in manuals: not only do these contain succinct outlines of African legal systems, but these outlines are also superficial and often inaccurate. Both Africa and its legal traditions are depicted as an indistinct whole: scholars usually refer to them as either 'The sub-Saharan legal tradition' or 'African law' or 'The African family of legal systems.'[13] There is only a clear precinct separating 'customary' African law from Northern Africa (and its Islamic legal tradition): the Sahel region marks the transition between Africa's tropical areas to the south from and the lands located to the north of the sand belt. The precinct is geographical rather than legal, and therefore its cultural and linguistic connotation is not applicable when demarcating African legal traditions. Nor are political yardsticks of any practical use: as almost all African states are members of the African Union (AU)—which replaced the Organisation of African Unity (OAU) in 2001–, the geopolitical alignment still leads scholars to conceive of Africa as an 'indistinct whole', thus drawing a veil over the varieties of its legal systems.

Thirdly, according to this legal-colonial attitude, 'superior' European systems had the duty to nurture changes in African 'inferior' law. European colonial law promoted 'social engineering', i.e. the economic development, modernisation and transformation of indigenous African societies.[14] For this purpose, colonial agents forged new institutions whereby African societies could be both governed and 'civilised': chiefs, tribes and customary courts are "invented traditions", which

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[11]See Bamodu (1994), p. 127; Zimmermann and Visser (1996), pp. 7–8. On African mixed jurisdictions see Palmer (2012), p. 625; du Plessis (2019), p. 474.

[12]Glenn (2014), p. 60. However, Zweigert and Kötz (1996) and Valcke (2018) completely omit references to African law.

[13]See M'Baye (1976), p. 138; Allott (1968), p. 131 et seq.; Sacco (2012), p. 313 ss.; Fombad (2013), p. 48. On such inaccuracy see Vanderlinden (2006), p. 1187.

[14]Allott (1967), p. 55; Mar (1960), p. 447; Eisenstadt (1965), p. 453.

"became in themselves realities through which a good deal of colonial encounter was expressed."[15]

Modernisation was also achieved by backing official customary law, the development of which required the 'unification' of native customary law, that is, the progressive amalgamation of its local variations. Its unification was achieved by fostering either 'codification' or 'restatement'. Whereas codification incorporates customary law and, at the same time, abolishes it in the fields it covers, restatement does not entail any legislative activity: it merely rearranges, in written form, the existing law, thus offering a "comprehensive account of a branch of the law which is unwritten or is scattered between a variety of sources."[16] The results are particularly interesting: in Madagascar (1957), Senegal and Tanganyika (1961), Kenya (1968–1969) and Malawi (1970–1971), restatement altered, i.e. modernised, 'native' customary law. This brought pervasive legal and cultural changes in native customary law, the aim of which was the preservation of both groups and their intrinsic social inequalities. Within the group, native customary law 'lawfully' discriminated against people on the grounds of rank and lineage (for accession to positions of power), status (low status people were excluded from enjoying some fundamental liberties), age and sex (older male members had more authority than the younger generations). Restatement mitigated the strictures of native customary law by infusing European values, such as individualism and liberalism, into the traditional systems, which favoured the relaxation of social inequalities of group-centered traditional societies.

Like social engineering, restatement of 'liberal' customary law is a legacy of the colonial era. The first attempts to modernise it date back to the early twentieth century: Germany started restating Tanganyikan family law in 1907—and the process was subsequently carried on by the United Kingdom in the 1940s.[17] The "School of Oriental and African Studies" (SOAS) of London fostered its own *Restatement of African Law Project* in 1959: this was a comprehensive pattern for the study and restatement of African customary law of 16 Anglophone countries in the fields of land tenure, succession, family law and status of women. The colonial legacy is apparent, because the project was delivered in London. In the aftermath of decolonisation, the task of modernising African law was resumed by the *Law and development* movement, whereby European and U.S. legal and economic assistance aimed to develop African countries by imposing their own legal paradigms.[18]

Africa is currently experiencing new forms of legal unification, which stem from supranational integration and trigger the creation of 'African transnational law'. Among them, there is the *Organisation for the Harmonisation in Africa of Business Law* (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*—

[15] Ranger (1983), pp. 211, 212.

[16] Prinsloo (1987), p. 411. For codification, see, among others, the Civil Code of Ethiopia (1960) and the 1964 Land Tenure Law (*Loi sur le Domain National*) (Senegal).

[17] Sippel (1998), p. 378.

[18] Merryman (1977), p. 457.

OHADA), a supranational union founded in 1993 by French-speaking countries which mimicks the EU. Like the OHADA, the *Common Market for Eastern and Southern Africa* (COMESA) is a process of supranational integration with economic and legal implications, among which the harmonisation of commercial law, in general, and contract law, in particular. Legal harmonisation is also the objective of several regional integration processes, such as the *East African Community* (EAC), the *Southern Africa Development Community* (SADC) and the *Economic Community Of West African States* (ECOWAS). Harmonisation entails the convergence of both state and customary laws in order to stimulate business and economic development.[19]

10.3 Ranking African Legal Systems

Together with unification and restatement, the modernisation of customary law may be attributed to the ethnocentric attitude which still saturates scholarly comparative research. However, the methodological bias is both procedural—i.e. it considers how comparative legal method is applied to African law—and substantive. To this extent, the study of African legal systems and institutions discloses a vast array of colonial underpinnings, which reflect the narratives of superiority and domination elaborated by European powers in the last few decades of the nineteenth century. As the processes of socio-legal engineering mentioned above uphold, domination and colonialism have common features: the latter is a species of the broader concept of domination, which endeavoured to impose 'superior' legal orders to the subordinate African legal systems. The changes in the law fostered by modernisation also account for how some scholars have answered the question whether African law constitutes a family of legal systems. Due to the relaxation of traditional societies triggered by liberalism and by the pervasiveness of Western legal paradigms, "the days of African customary law as a fully-fledged legal system are gone."[20]

The links between law and development also have a huge impact on classifications. How the varieties of legal systems are ranked depends, *inter alia*, on their performativity, which is in turn deep-rooted in their legal origins.[21] The Western legal tradition is dominant, and, within it, the common law prevails over the civil law because the latter is said to ensure elevated economic performances. Like Western societies, African societies might attain economic performativity provided that they evolve through various stages of development that are universal and lead to the same stage of superiority envisaged by European comparative legal traditions. What lies

[19]See Mancuso (2007), p. 165; Shumba (2015), p. 127.

[20]Oba (2010), p. 79.

[21]See Klerman and Mahoney (2007), p. 278; Siems (2016), p. 579; Grosswald Curran (2009), p. 863; Oto-Peralía and Romero-Ávila (2017), p. 121.

beneath such a predicament is the implicit assumption that the Western conception of law is a universal legal paradigm 'superior' to the African legal paradigms.

Such a narrative of superiority is apparent as regards both 'native' African systems and 'received', i.e. European, systems. Not only did mixed jurisdictions replace the customary law substrate in Southern Africa, Mauritius and the Seychelles, but these 'received' laws are also deemed to be inferior to European legal systems. Suffice it here to say that, in Africa, 'common law of the land' designates only the legal systems derived from the English common law, thus disregarding the fact that, "In South Africa, the term 'common law' [. . .] denotes the systems of Roman-Dutch and English law that were imported during the colonial period".[22] The same linguistic connotations of the legal systems evidently share the epistemologies and hierarchies underpinning the colonial attitude.

This ranking approach to legal systems is also applied within 'native' African law. According to the majority of comparative legal scholars, African law is a complex legal reality where several strata overlap and each layer is superimposed onto the others: these are the traditional (or pre-colonial) stratum, the religious stratum, the colonial and the post-colonial strata.[23]

Stratification entails that African law has progressively evolved through various stages with the Western legal paradigm as the natural end point. It should be argued, however, that the post-colonial or independence stratum—which stands above all other layers—does not only imitate European legal paradigms (such as constitutionalism, rule of law, enforcement of rights), but also embeds the revival of African traditional legal values. Such a revival also characterises supranational legal harmonisation: OHADA's Uniform Acts on Contract Law and on General Commercial Law refer to custom, which, within the African context, also styles customary law as a source of obligations.[24]

10.4 Stratification and Evolution of African Law

The interweaving of modern and traditional legal strata discloses other substantive effects of Ethnocentrism. Stratification makes it possible to discretely analyse the different strata and, within the pre-colonial layer, to study legal arrangements prior to the contact with other civilisations. This also makes it possible to detect commonalities among different pristine African legal systems. This is not to deny that African societies followed divergent politico-legal patterns: comparative scholars and legal anthropologists usually draw a distinction between acephalous societies, which lacked a centralised political power (such as the Pygmies and the Wala people in

[22]Bennett (2011), p. 710.

[23]See, among others, Seidman (1979), p. 17; Sacco (2012), p. 314; Oba (2010), p. 58.

[24]See Art 194 of OHADA Uniform Act on Contract Law and Arts 238–239 of OHADA Uniform Act on General Commercial Law.

Upper Ghana), and those communities (the Akan or the Birim-Volta, for example), whose societal arrangements were highly structured and possibly influenced by Northern African civilisations.[25] Legal anthropological research focuses on how supernatural and magico-religious beliefs forged socio-legal relationships in pre-colonial African law, thus playing a major role as far as laws relating to kinship, evidence and inheritance were concerned.[26] Supernatural entities also give a reason for the role ancestors were granted within family groups and settlements: they were (and still are) part of the community, and therefore actively engaged in both lawmaking and dispute resolution. Not only does it enhance the role of kinship, but it also emphasises the centrality of the group over individuals and explains the relevance of marriage settlements (e.g. the bride price) when it comes to constituting bonds between families—or among families, as far as polygamous marriages are concerned.[27]

The search for commonalities among the diverse African legal systems might be of practical help for didactic purposes; yet, it conceals the Ethnocentric attitude prevalent in scholarly comparative studies. African legal systems certainly share common features or unifying traits. However, scholars keep under wraps Africa's pluralistic mosaic and mask its diatopic variation. Despite the superimposition of homogeneous colonial and post-colonial strata, it is not an easy task to universalise legal concepts when it comes to African law: its variety entails "that there is almost an exception to any generalization somewhere."[28]

Like the tiles of a roof, then, the different strata are so imbricated that is impossible to disentangle—and therefore study—them as if they were in watertight compartments. Due to the interaction between customary law and European legal paradigms, the line between pristine customary laws and the colonial stratum is constantly blurred: in *Lewis v Bankole* [1909] NLR 100, for example, it was stated that courts must enforce "existing native law and custom and not that of bygone days."

The interweaving of the different strata is particularly apparent when it comes to considering statehood as the major legacy Europeans handed over to African communities. Boundaries were unfamiliar to African conceptions of the law; they were also incompatible with traditional societal organisation, which was primarily built upon family settlements and non-territorial arrangements. However, colonial policy disregarded borderless, communal arrangements: since they were divided among different states, communities were arbitrarily separated and subsequently merged with other groups with the aim of creating political entities based on

[25]"Screened by a tropical forest from the north and facing the Gulf of Guinea, the region remained isolated from external influences [. . .] creating specific systems of state law": Sinitsina (1994), p. 264.

[26]Elias (1955), pp. 228–238; Sacco (2012), p. 315.

[27]The role of individuals depends on their position in the group to which they belong: Rambaud (2017), p. 258; David et al. (2016), p. 483.

[28]Woodman (2010), p. 9.

territorial jurisdictions. Odd as it may seem, when the representatives of the newly independent African states met in Addis Ababa in 1963 in order to create the OAU, they immediately conformed to the status quo.

Contemporary African legal systems should be assessed, taking into consideration that their full understanding entails a full understanding of all the variables which may have some bearing on them. Hence, scholars must examine customary law by taking into account how it has evolved through interaction between the different strata.

Interactions between traditional and colonial strata often cross the public-private divide. This is apparent as far as African land law is concerned: the African land tenure system was mainly communal and governed by both supernatural entities and the group; therefore, there was no room left for Western possessive individualism. The rise of trade pushed for its suppression—or, at least, reduction—, "because the land market could not fit with ideas regarding the communal nature of African land tenure."[29] In the aftermath of decolonisation, Western, i.e. individual, land titles were retained and colonial laws regarding customary lands were adapted to the African context: land acts transformed former communal lands into public lands, such as in Tanzania and Ghana. Like in England, Tanzanian legislation assigns the land to the Head of State (the President), who acts as trustee on behalf of all citizens: the latter "cannot own land, but they can own rights over the land," which "may be bought or sold, and inherited, and can thus be seen as (limited) decision-making rights." The 1992 Constitution of Ghana does the same: "All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana;" whereas "stool lands," which the communal soul (the stool) granted to its own people, are vested "in the appropriate stool on behalf of, and in trust for, the subjects of the stool in accordance with customary law and usage."[30]

Supernatural entities and societal structures are also relevant when it comes to settling disputes or performing the most relevant legal deeds. Marriage, divorce, adoption, guardianship, inheritance, acknowledgment of either cession or acquisition of rights over the land, and other acts made or taken are considered legal, valid and binding provided that they are performed before the whole community. In Madagascar, for example, Malagasy law and custom (*fomba*) has always been part of its dualistic legal system together with French-derived law. In the wake of the revival of customary law, the Preamble to the 2010 Constitution enshrines both traditional law and the system of village councils (*Fokon'olona*), where men and women that are descendants of a single ancestor and live within the same territory (*Fokon'tany*) gather. Acting as a notary, the community embodies the local rule-making process (*Dina*) and secures the validity of the most relevant legal deeds;

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[29]Joireman (2010), p. 298.

[30]ss 255(1) and 167(1) of the 1992 Constitution (Ghana); *Loi* no 034-2009/AN du 16 juin 2009 *portant régime foncier rural* (Burkina Faso); URT, *Land Act* (No. 4), sec. 7 and URT, *Village Land Act* (No. 5), sec. 8(1), 12(1) (Tanzania). For more on the three land classes in Tanzania ('General Land', 'Reserved Land' and 'Village Land') see Martina Locher (2016), pp. 395–396. On the supernatural see Hamer (1998), p. 311.

these thus become part of the collective legal wisdom and are handed down to future generations.[31]

Unlike continental customary laws, Malagasy law thus tolerates limited forms of women's participation in communal rule-making processes. We have already noticed that customary law tends to preserve social inequality by 'lawfully' discriminating against people on the grounds of sex. Indeed, African societies see women "as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals."[32] This is evident when it comes to marriage, i.e. a communal engagement where economic aspects merge with societal considerations: due to the overwhelming importance of the group, it constitutes an agreement between families and clans rather than a spousal union. To this extent, modernisation has not favoured any improvement in women's antenuptial conditions: national legislation, which enables Africans to enter into a statutory marriage, usually does not prescribe any forms for the solemnisation of customary-law marriages. Nor does legislation set any age for such a solemnisation but leaves it to customary law. As polygamous marriages are allowed under customary law, national legislation merely presupposes their existence, the continuance of which impedes contracting any valid statutory marriage.[33]

African customary tort law and law of contract have a broader scope if compared to their civil-law and common-law counterparts. On the one hand, tort law protects individuals and groups, as well as their name, integrity and interests—such as familial unity and marital relationships—also from mere vulgar abuse. On the other hand, the law of contract, which also has knowledge of consideration and requires formalities for contractual performances, gives prominence to the group, thus curbing individuals' freedom of contract.[34]

10.5 From African Law to African Legal Traditions

The "subversive potential of comparative legal thinking"[35] has thus allowed us to detect how methodological biases affect the study of African law. When it comes to legal systems and institutions, traditional comparative research still displays noticeable colonial underpinnings. Furthermore, such a colonial attitude turns out to be a truly Ethnocentric approach, which is apparent in scholarly examination of the different legal strata. This approach is based on the assumption that African law

[31] Blanc-Jouvan (1964), p. 7; Molte (1967), p. 123.

[32] Ndulo (2011), p. 89.

[33] See s 34 *Marriage Act* 1963 (Zambia); s 1(2) *Marriages Act* 1964 (Eswatini). For example, Nigeria legislation does not set any age for such solemnisation: see the *Marriage Act* 1990 (Nigeria). Namibia, South Africa, Togo, Rwanda and Niger and few other coutries explitictly recognise customary marriages. See, among others, s 4(3)(b) Constitution of Namibia; *Recognition of Customary Marriages Act*, 1998 (Act No. 120 of 1998) (South Africa).

[34] See, respectively, Dagbanja (2015), p. 412; Mancuso (2007), p. 174.

[35] Fletcher (1998), p. 684. See also Muir Watt (2012), p. 270.

has progressively evolved through various stages with the Western legal paradigm as the natural end point.

The subversive potential of comparative law has its own strategy, which aims to revise the study of African law. Like post-colonial studies—which examine history through the lenses of the peripheries of the colonial empires—, comparative law gives voice to legal systems which have been traditionally disregarded by 'official', i.e. mainstream, comparative legal research. The re-examination of African law in the light of post-colonial legal studies is therefore relevant. We noticed above that African law is considered 'inferior' to Western law, and therefore has been set at the ostensible margins of comparative studies. Comparative law aims to overturn this perspective and unveils colonial methodological legacies; by adopting the point of view of 'marginalized' legal systems, it endorses Africa's "disengagement from the whole colonial syndrome."[36]

Hence, the aim is to subvert the established master-narrative, which shares the European perspective on African law and conceives of Africa as a peripheral 'family' of sundry legal systems. Furthermore, such a perspective challenges the assumption according to which, in legal cartographies, Africa might be depicted as an indistinct legal whole. Undoubtedly, scholars acknowledge that one of Africa's distinctive features is its intrinsic legal pluralism[37]; when it comes to enquiring into its legal institutions, however, they regularly point to the commonalities among systems rather than delve into a closer analysis of their specific constitutive traits.

Comparative law must critically examine the idea that African law is an indistinct whole, a miscellaneous 'family' into which heterogeneous legal systems coalesce. To put it differently: within post-colonial comparative legal research, the study of African law moves towards the examination of different 'African legal systems.' Scholars might recover Africa's legal pluralism provided that they take into account the variety of legal substrates, each of which is dominant in a specific area of the continent. The most relevant substrates are: Cape colonial law in Southern Africa; customary law in tropical Africa; Malagasy law in Madagascar. The Islamic legal tradition coexists with customary law in Somalia and in the Barbary states and is the 'traditional' substrate north of the Sahel region.[38]

Due to its insularity, it is easy to demarcate the Malagasy legal tradition. When it comes to African continental legal systems, however, the demarcation process must be complemented with several criteria. The Sahel region, which marks the transition from Northern Africa to tropical Africa, also denotes a linguistic transition (from Afroasiatic languages in the north to Nilo-Saharian and Niger-Kordofanian languages in the south) and an ethnic transition. Consequently, these criteria supplement the legal criterion, i.e. the boundaries between the countries situated north of the Sahel and those located south of it. Boundaries also mark the transition from

[36]Hulme (1995), p. 120.

[37]Rambaud (2017), pp. 257–258; David et al. (2016), p. 483 et seq.; Sacco (2009), Vanderlinden (2000), p. 279.

[38]On Islamic law as variety of customary law see Anderson (1962), p. 617.

tropical Africa and Southern Africa, whose legal substrate is the Cape colonial law, i.e., the jurisdiction stemming from the mixture of Roman-Dutch law and English common law which was applied in the Cape Colony in the nineteenth century. This explains, for example, why Zimbabwe and South Africa share a common legal substrate, but, at the same time, Zimbabwe has strong political ties with Zambia and Malawi, whose legal substrate complements customary law with common law. From 1953 to 1963, indeed, the former British colonies of Nyasaland (Malawi), Northern Rhodesia (Zambia) and Southern Rhodesia (Zimbabwe) joined the Federation of Rhodesia and Nyasaland, that is, a quasi federal-dominion created within the British Empire.

Not only does the variety of substrates reflect the pluralistic mosaic which embeds African legal traditions, but it also accounts for the different legal-historical narratives of Southern Africa, tropical Africa and Madagascar. With the disembarkment of the Dutch flotilla and the creation of a supply base in the Cape peninsula (1652), Roman-Dutch law became the common law of Southern Africa. After the British occupation (1795), the Dutch handed over the Cape colony to the United Kingdom (1806). The 1828 *First Charter of Justice* abolished the civil-law Court of Justice and established a judiciary styled after the English common-law courts: this favoured the blending of Roman-Dutch law and English common law, and Cape colonial law became the legal substrate of both the Boer Republics and Southern African colonies and protectorates.[39] Within the Cape legal tradition, Lesotho is unique in that its customary law was codified. British colonial authorities promoted a codification process which led to the promulgation of the *Laws of Lerotholi*: the code collects Basotho customary law and covers several subject matters, which range from public law to private law. In Lesotho, its status and authority are relevant, albeit subordinate to Western law.[40]

Like Lesotho, Madagascar experienced the restatement of Malagasy law, which was promoted by Queen Ranavalona I (1828–1861) before the French protectorate (1884) and colonisation (1895–1897).[41] The establishment of the Kingdom of Madagascar (1824) as a highly centralised independent state undoubtedly favoured

[39]See *De Grondwet* 1854 (Orange Free State); *Royal Charter of Natal* 1856 (Natal); *De Grondwet Der Zuid-afrikaansche Republiek*, alson known as The Thirty-Three Articles (*Drie en Dertig Artikelen*) of 1844–1849 (Transvaal). On Cape colonial law as the common law of Soutern African protectorates territories see: *Order in Council* 3 November 1871 and s 2 *General Law Proclamation 2B of 1884* (Basutoland-Lesotho); *Order in Council* 9 May 1891, *Proclamation* 10 June 1891 and *General Law Proclamation* 1909 (Bechuanaland-Botswana); *Order in Council* 20 October 1898 (Southern Rhodesia-Zimbabwe); *General Administration Act No. 11 of 1905* and *General Law and Administration Proclamation No. 4 of 1907* (Swaziland-Eswatini); *Proclamation No 21 of 1919* which granted the *Roman-Dutch law* “as existing and applied in the Province of the Cape of Good Hope” to South-West Africa-Namibia.

[40]See, among others, Juma (2011), p. 92.

[41]The first code was promulgated by Queen Ranavalona in 1828; Queen Radama II enacted a second code in 1862. Queen Rasoherina promulgated two codes in 1863; Queen Ranavalona II issued a Malagasy-law criminal code in 1869. Two more codes where enacted in 1868 and 1881.

the adoption of these pre-colonial collections, which restate pre-colonial customary law in written form.

Finally, in tropical Africa the legal substrate consists of customary law, which coexists alongside ‘received’ European, i.e. mainly French- and English-derived, legal systems.

10.6 Pluralism in African Legal Systems

Within the variety of African legal traditions, customary-law substrate is a *per se* pluralistic mosaic: it combines manifold legal arrangements, which are usually inseparable from their societal contexts. National constitutions and legislation also entrench customary law. In so doing, not only do they reflect the variety of native laws, but they also provide them with a flexible legal frame within which ‘official’, i.e. restated, customary law might be revitalised by local and communal variations of ‘living’ customary law.

Constitutional and statutory provisions on customary law operate as conflict of law rules whereby lawyers and judges might determine the law applicable to a specific community or ethnic group. Between contrasting norms, indeed, conflict of law rules make a renvoi not only to official customary law, but also to living customary laws enacted by the collective legal wisdom. This allows native law to flourish and vary throughout African communities; it also fits the requirements set by the ‘superior’ Eurocentric legal framework, because customary law, when applicable, is considered as if it were the law of a different legal system. This also accounts for the transnational character of customary law, which is inherent to African legal systems. Seldom does it reflect colonial borders; as “it grows and evolves for and with that [specific] group,” it does not reflect a specific territory, but “the group that obeys it.”[42]

Throughout the whole of Africa, judicial dispute resolution plays a meaningful role in allowing ‘living’ customary law to prosper. This is particularly apparent when we consider how constitutions and primary legislation accommodate the interweaving of the different legal strata. Firstly, customary courts are often integrated into the European-oriented judicial system, in order to “preserve as much of the traditional customary laws principles as possible, whilst extending the perceived benefits of the received laws.” Secondly, European-oriented judicial systems usually act as

[42]See, *inter alia*, Art. 162 of the 2018 Chad Constitution; Art. 211 of the 1996 South African Constitution; Art. 11(3) 1992 Ghana Constitution (customary law comprises “rules of law which by custom are applicable to particular communities in Ghana”); s 68 *Courts (Amendment) Act* 1967 (Malawi) (conflict of law rule for determining the applicable customary); s 2(b) *Customary Law and Local Courts Act* 1990 (Zimbabwe) (“customary law” means the customary law of the people of Zimbabwe, or of any section or community of such people”); s 258(1) *Evidence Act* 2011 (Nigeria) (“Custom” is a rule which, in a particular district, has, from long usage, obtained the force of law”). On the inherent transnational character of customary law see Mancuso (2007), p. 176.

reflective judiciaries, and therefore resort to ‘indigenous reasonable test’ which reflect community standards and rules.[43] Thirdly, the proof of living customary law is usually a matter of fact. When, however, a court takes judicial notice of a custom, customary law ceases to be considered as a matter of fact: it is noticed as a matter of law and therefore acts as a binding precedent.

Finally, judicial proceedings consent to expand the scope of customary law. Suffice it to consider s 20(2) of South Africa’s *Black Administration Act* 1927, according to which “The procedure at any trial . . . shall . . . be in accordance with Black law and custom.” This also allows state law to be infused with traditional communal African socio-legal conceptions; among them, *ubuntu*, which comprises traditional key values, such as ‘restorative justice’, ‘reconciliation’, and ‘humaneness’.[44]

When it comes to African law, “So great is the ascendency” of procedural law “that substantive law has at first the look of being gradually secreted in the interstices of procedure,” as Henry Sumner Maine stated in his *Dissertations on Early Law and Custom* (1883) with regard to English law. Not only do ‘native’ legal proceedings make living customary law flourish,[45] but Sumner Maine’s predicament also allows us to draw up an intriguing equation between the ‘superior’ English legal system and the ‘inferior’ African customary law. In England, the forms of actions played a pivotal role in the development of the legal system. With a hint of irony, like ‘superior’ English law, native law and custom also adapts through judicial application and enforcement. To put it another way: both systems, irrespective of their ranking, evolve through the depositaries of their respective collective legal wisdom, which is “effectively made [by] both legislators and adjudicators” in common law and in African legal systems.[46]

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[43]On the integration of customary courts into the received legal system see Fombad (2013), p. 113. See also *Common Law and Customary Laws Act* 1969 (Botswana). For Swaziland see Whelpton (2005), p. 348. On indigenous standards see Oba (2010), pp. 76–78.

[44]Jordaan (2017), p. 402. And see Himonga et al. (2013), p. 369; Oko Elechi et al. (2010), p. 73; Louw (2006), p. 161.

[45]See van der Waal (2004), p. 113: “Benefits [. . .] include the fact that the customary courts are more open (‘like democracy’) because all adults can participate in them, they are public and they keep traditions alive. A lawyer is not needed since the system is not professionally driven and the fines are not high. The emphasis is on social outcomes rather than on individualizing outcomes.”

[46]See Himonga and Nhapo (2014), pp. 253–254.

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