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Comparative law and legal universalism: An historical perspective

Summary

At a time when world society is becoming increasingly mobile and legal life is internationalized, the role of comparative law is gaining in importance. One type of interest pertaining to knowledge and explanation in comparative law is associated with the traditional comparison *de lege lata* and/or *de lege ferenda*. Pursuant to this comparison are searches for models (both conceptual and substantive) for the interpretation of current law, or for the formulation and implementation of legal policy. Another type of interest is connected with the goal of integration, or at least harmonization and co-operation at a transnational or international level. The present paper considers the connection between comparative law and legal integration schemes from the viewpoint of legal history. It is believed that an historical examination of this connection can facilitate the understanding of some of the conceptual and practical challenges that the ongoing tendencies of globalization set for lawyers and jurists.

Regsvergelyking en regsuniversalisme: 'n Historiese perspektief

Op 'n tydstip wanneer die samelewing van die wêreld toenemend beweeglik word en die regslewe geïnternasionaliseer word, is die rol van regsvergelyking besig om in belangrikheid toe te neem. Een tipe belangstelling wat betrekking het op kennis en verduideliking in regsvergelyking, word met die tradisionele vergelyking *de lege lata* en/of *de lege ferenda* geassosieer. Ooreenkomstig hierdie vergelyking is soektogte vir modelle (beide konseptueel en substantief) vir die interpretasie van die huidige reg of vir die formulering en implementering van regsbeleid. 'n Ander tipe belangstelling hou verband met die doel van integrasie, of ten minste die harmoniëring en samewerking op 'n transnasionale of internasionale vlak. Hierdie artikel beskou die verband tussen regsvergelyking en regsintegrasieskemas uit die oogpunt van regsgeskiedenis. Daar word geglo dat 'n historiese ondersoek van hierdie verband, begrip kan bewerk vir sommige van die konseptuele en praktiese uitdagings wat die voortgesette tendense van globalisering aan prokureurs en juriste stel.

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1. Introduction

Over the last few decades there has been an increasing tendency among lawyers and jurists to look beyond their own fences. While the growing interest in foreign law may well be attributed to the dramatic increase in international transactions, this empirical parameter to the growth of comparative legal inquiries accounts for only part of the explanation. The other part, at least equally important, is the expectation of obtaining a deeper understanding of law as a social phenomenon through the study and comparison of diverse legal orders. At its simplest level, that of description of differences and similarities between legal systems, the comparative method allows one to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example, when the socio-economic and political structures, historical background and cultural patterns that underpin the institutions or rules are taken into account, the comparative method begins to produce explanations based on interrelated variables — explanations which become progressively more scientific in nature.

A distinction may be drawn between three types of comparative legal inquiry: idealistic, realistic and particularistic. According to the idealistic approach, legal order is a normative matter that is present in the factual legal order although it cannot be identified with it. The realistic approach, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic perspectives are concerned with the problem of generalization. The study of legal orders brings to light innumerable differences and similarities. Should a comparatist strive to arrive at generalizations capable of application to different legal orders? 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 perspectives have universalism in common: they are not content with a mere description as they 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, by contrast, claim that general principles 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 orders into one language. In most cases, however, some kind of intermediate position between universalism and particularism is sought, as far as it is recognized that there are both general and particular features in every legal order.[1] It might also be said that the task of legal dogmatics (the study of contemporary national law) is to examine particular legal orders at a quite concrete level, whereas the level of comparison represents a higher step.[2] It is submitted that the universal and individual features of legal phenomena are different aspects of a uniform whole, although both aspects are necessary in order to grasp reality.

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

Contemporary comparatists often employ seemingly contradictory approaches, combining particularistic with universalistic perspectives. The more general a description is, the more phenomena of concrete life it covers, and the better it is as a scientific description, but the less does it represent a particular form of life. The exact course of historical events is always individual and can be explained only by reference to its particular elements; but the broad outline of the events is subject to general socio-historical laws. Comparative law has to deal with very complex phenomena: social, cultural and religious diversities (not to mention the impact of particular individuals) produce distinctive legal systems, that each must be studied and understood on their own, even if some or all systems manifest similar traits. In other words, knowledge of the particular as opposed to knowledge of the general is crucial to the understanding of law and legal institutions. Even though legal sociology might strive towards a universalist knowledge of law, as does legal philosophy in a different sense, comparative law is by its own nature forever bound to vacillate between the general and the particular. The comparative process may be described as dialectical, since it focuses upon the inter-connection between general principles and concrete observations made when these principles were applied in practice. Thus, the general explanatory background is concretized in particular cases; at the same time, a general historical outlook enables one to make certain generalizations from particular events within the framework of a general model of explanation.

2. The early origins of comparative law

As a distinct field of science and as an academic discipline, comparative law has a relatively short history — it emerged in the late nineteenth century. However, the origins of comparative law can be traced back to ancient times. Since antiquity, people have observed that the legal norms of different states and communities were not identical. These diverse norms were taken into consideration when legislation was being developed. The rationale appears to be that the laws of states which were perceived as superior or more advanced were deliberately imitated or adopted by other states, and this process was probably repeated in various parts of the ancient world.

There is evidence that in ancient Greece the comparison of different systems of law attracted the interest of both legislators and philosophers.[3] The idea

2 The generalizations of comparative law have a wider scope than those of positive law, but a narrower scope than those of a general theory of law. In this respect, comparative law can be regarded as the intermediate link between legal dogmatics and legal theory.

3 Apart from certain passages in the works of Plato and Aristotle, where reference to foreign laws is made, we know of a work by Aristotle, probably written between 328 and 322 BC, that dealt in depth with the constitutions of 158 city-states, both Greek and non-Greek (these were classified as democratic, oligarchic, aristocratic and tyrannical). Of this work, only a small part has survived (the 'Athenian Constitution'). Another work which seems to have been concerned with the comparative study of laws was written by Theophrastus, a student of Aristotle, but this has not survived. This work was entitled '*peri nomon kata stiheion*' ('concerning the laws by reference to their subject-matter').

that comparative material may furnish a basis for the justification of valid law was developed by Greek philosophy when it faced the legal particularism that prevailed in the Greek world at that time. In view of the fact that every city-state had laws of its own, some philosophers drew the conclusion that law was a voluntary human phenomenon and not the reflection of a divine and natural order. Thus, according to the sophist philosopher Protagoras, who had himself participated in the drafting of some law-books, human beings were the measure of everything. The Aristotelian natural law thinking expresses a combination of sophistical legal thought with its concomitant voluntarism and Platonic natural law, which allowed a philosophical deduction of rational, ideal law. Aristotle viewed law as an ontologically unitary phenomenon: all law was the law of the *polis*. But the comparative study of law revealed certain uniform features in different legal orders. These features were not incidental: in similar circumstances it would have been rational to enact laws of this kind. Law was justifiable by two epistemological means: by referring to the will (voluntarism) and natural reason. Stoic natural law thinking was by no means a unitary phenomenon. But one characteristic often surfaced when the Stoics spoke about natural law; they seem to have considered it an ontologically independent category that furnished a means of criticism of law. Law was regarded as something that resided in nature — not only human beings but the entire physical world was seen as governed by natural norms.

With respect to legislative practice, many examples point to the frequent adoption of legal norms by one Greek city-state from another. These include the so-called 'homicide laws' of Attica, which were imitated by a number of Greek cities; the legislation of Charondas in Southern Italy (Catania) that was adopted by several Greek colonies in Italy and Sicily; 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. Moreover, according to Roman tradition, after the patricians gave in to the plebeians' demand for the recording and codification of the law, a three-member commission was sent to Greece to study and record the legislation of Solon in Athens and the legal systems and constitutions of the most important Greek states. After the return of the commissioners to Rome, the Law of the Twelve Tables — the earliest codification of Roman law — was drawn up.

From an early period the Romans realised that certain institutions within their own domestic law (*ius civile*) could also be found in the legal systems of other nations. For example, as contracts of sale, service and loan 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*). But this understanding of the *ius gentium* had little practical value for the Roman lawyer as the specific rules relating to the operation of such generally recognised institutions differed considerably from one legal system to another. Connected with the above understanding of *ius gentium*, as the legal principles observed by all nations, was the development of a body of law that was particularly important to the Roman lawyer. As the number of foreigners living in Rome continued to increase, especially after the third century

BC, the need arose for the formulation of rules to regulate legal transactions involving foreigners living in Roman territory. What emerged as a response to this need was a distinct body of law which, although thoroughly Roman in origin and content, lacked the rigidity and complexity of the Roman *ius civile*. 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 nationalities and customs would have been difficult without appealing to generally recognised and understood principles. Thus, what characterised *ius gentium* was its simplicity and adaptability, and its emphasis upon general principle rather than form. For that reason, not only foreigners but also Roman citizens often relied on it as a means for resolving legal disputes. Moreover, elements of the *ius gentium* entered the edict of the *praetor urbanus* (the magistrate in charge of the administration of the *ius civile*) and thereby the domain of the domestic Roman law. However, it was only in the classical period of Roman law (the early imperial period) that the further development of the *ius gentium* was influenced by comparative inquiries, and therefore was denationalized and turned into a form of 'universal law'. This was accomplished by a combination of comparative jurisprudence and rational speculation.[4] 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*). However, there was no systematic attempt to support this view on comparative grounds.[5]

In the early Middle Ages, after the fall of the Roman Empire in the West, the once universal system of Roman law was replaced by what may be described as a plurality of legal systems. The Germanic tribes that settled in the lands of the former Roman Empire lived under their own laws and customs, whilst the Roman portion of the population and the clergy were still 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, the national group, to which they belonged. The coexistence of Roman and Germanic laws within the same territory suggests that there was a familiarity between both systems, although this was not established in any systematic comparative study. With the progress of time, the division of people according to their national origin tended to break down, and this was

4 See Mommsen1887:606.

5 There appears to have been only one comparative attempt to collect diverse laws together dating from the later period of the Roman Empire: the *Collatio legum Mosaicarum et Romanarum* (fourth century AD). The purpose of this work appears to have been to compare some selected Roman norms, chiefly of a penal character, with related norms of the Mosaic law to show that Roman law, in its basic principles, corresponded with, or possibly was based on, Mosaic law. The author of this work remains unknown, although the attempted comparison of Roman and Mosaic law suggests that he was probably of Jewish origin.

replaced by territorial groups that were governed by the same body of law, a mixture of debased Roman and Germanic law. In the course of the ninth century, the shift from the principle of the personality of law to that of territoriality was further precipitated by the growth of the feudal system. But the intermixture of races meant that the laws applicable to a territorial unit could no longer be those of a particular race. Instead, all people living within a given territory were governed by a common body of customary norms that varied in different places and phases of time. Thus, the diversity of laws no longer persisted as an intermixture of personal laws, but as a variety of local customs.

In the late tenth century, the growth of trade, commerce and industry and the return of a measure of political order to Europe precipitated a revival of interest in the study of law. Although the legal revival at first tended to concentrate on the systematic exposition of the native Lombard law, it also embraced feudal law and canon law, which were already part of the law of Western Europe, as well as aspects of Roman law in the pre-Justinianic version. But by the end of the eleventh century the *antiqui*, the jurists concerned with the study of Germanic law, were replaced by the *moderni*, whose interest lay primarily in Roman law. From the eleventh to the thirteenth century, the interpretation and analysis 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. But by the middle of the thirteenth century, the primary attention of the jurists was no longer directed at the dialectical examination of Justinian's texts, but rather at the need to develop contemporary law. The School of the Glossators was thus superseded by the School of the Commentators, whose principal objective was the adaptation of the Roman law, as explained by the Glossators, to the conditions of medieval life. The positive law enforced by the courts at that time comprised, in addition to Roman law, the customary law of Germanic or feudal origin, the statute law of the Holy Roman Empire of the German Nation (established in the tenth century AD) and the self-governing municipalities, and canon law. The integration of these bodies of law into a unitary system was the concern of the Commentators. The result was the creation of a system of law in which the non-Roman element was, so to speak, Romanized. This version of Roman law, together with canon law, enjoyed an absolute, unquestioned authority and this accounts for the lack of any interest in comparative legal studies at that time.

Medieval jurists did not really concern themselves with comparative studies. In their eyes, contemporary legal particularism represented 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.[6] Nevertheless,

6 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.

their new insight into the Roman legal inheritance led to the development of a true science of law, which had a lasting influence on the legal thinking and practice of succeeding centuries. The law developed by the Glossators and the Commentators, as the product of a synthesis between the 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.

In the seventeenth and eighteenth centuries, European legal thought moved in a new direction under the influence of the School of Natural Law. The background to classical Natural Law theory was the idea of an empirical science. In this field an optimistic view of a universally valid human reason played an important part. Human reason was no longer viewed as bound by Aristotelian syllogisms and religious dogma. Authority was replaced by legal experience, and this required the study of legal history and comparative law. Now the role of reason was considered to be not purely receptive but also selective. There were no temporal or spatial restrictions on the relevance of legal material. Neither was it presupposed that only Christian law should be relied upon. Natural Law was regarded as independent of God's (admittedly undeniable) existence. Classical Natural Law thinkers proceeded from an assumption of a universal social consensus, and the idea of rational law was but an expression of this. Laws and legal codes were neither sufficient nor necessary conditions of justice. They were important, however, as material from which reason could select the right norms. One could detect these norms in domestic as well as in foreign legal material; in valid as well as in abrogated law.[7]

In medieval and even later times, there was no clear connection between the state and the legal order. Thus the 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

7 To the rationalist Natural Law thinkers it was 'natural' to draw attention to the voluntary aspect of law. According to Christian Wolff, every positive law could be justified by Natural Law because it had been allowed by Divine Providence. On the other hand, it was stressed that certain natural matters, such as the cultural and geographical framework of law, set limits to the rational human will. But if law was perceived as a product of will, it was obviously possible to conclude that the authoritative power of the state should sanction the sources of law.

a basic assumption. At the same time the idea of a universal human community proved to be too idealistic.

In the seventeenth and eighteenth centuries, as national systems of law began to burgeon, European jurists focused their attention on the study and mastery of their own domestic law, rather than on comparative analyses. Despite the absence of a systematic practice of comparative law, a number of scholars stressed the importance for lawyers of the need to look outside their own systems of law in order to make a true assessment of their worth. The English philosopher Bacon, for example, drew attention to the value of the comparative study of laws in the context of the attempts made under King James the First to unify the laws of England and Scotland. The German philosopher Leibnitz proposed a plan for the creation of a 'legal theatre' (*Theatrum legale*), where the legal systems of all nations at different times could be portrayed and compared — though this idea was never realized. Hugo Grotius (1583-1645), a leading representative of the School of Natural Law, used the method of comparative law to place the ideas of natural law on an empirical footing. In 1748, Charles-Louis de Secodat, baron de la Brède et de Montesquieu, published his famous work On the Spirit of the Laws (*de l'esprit des lois*) wherein he compared a number of legal orders and structured his understanding of law on propositions relating to the reasons accounting for the differences among these orders. Many scholars regard Montesquieu as one of the most important precursors of modern comparative law. As Gutteridge has remarked, it was Montesquieu "who first realized that a rule of law should not be treated as an abstraction, but must be regarded against a background of its history and the environment in which it is called upon to function."[8]

3. The development of comparative law in the nineteenth and twentieth centuries

Legal unity in Europe and the universality of European legal science ended with the further development and consolidation of the nation-states during the eighteenth and nineteenth centuries, and the proliferation of national legal codes. The 'nationalization' of law was clearly expressed by the exegetic school in France and by the German legal positivists of the mid-nineteenth century. National ideas, historicism, and the movement towards the codification of law gave rise to a sources-of-law doctrine that tended to exclude rules and decisions which had not received explicit recognition by the national legislator or the national judiciary.[9] Whether one stressed the will of the Nation as a source of law, or held that law expressed the organic development of the National Spirit, law came to be considered a national phenomenon.[10] In this respect, foreign law was not

8 Gutteridge 1949:6.

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

10 The influential German Historical School of the nineteenth century challenged the natural law conception that the content of the law was to be found in the universal

regarded as authoritative; it might only provide, through legal science, examples and technical models (it was still relevant in *de lege ferenda* connections).[11]

According to scholars, comparative law as a distinct discipline emerged in the second half of the nineteenth century. This development was precipitated by a number of factors. Of particular importance was the growing interest in the study of social phenomena in a broader historical and comparative context; the process towards the codification of the law that began in the eighteenth century with the introduction of the Bavarian (1756) and Prussian (1794) Civil Codes, and continued in the nineteenth century with the codification of the law in France, Austria, Italy, Switzerland and Germany; and the expansion of international commercial relations, which brought litigants, lawyers and judges into contact with foreign legal systems.[12]

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

By the early twentieth century comparative law was associated with a much loftier goal, namely the unification of law or the development of a common law of mankind (*droit commun de l'humanité*) as declared at the first International Congress of Comparative Law held in Paris in the summer of 1900. At that

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dictates of reason. In reality, it claimed, the law was a product of the history and culture of a people, of the *Volksgeist*, just as much as was its language, and thus particular to every nation. According to Friedrich Carl von Savigny, one of the leading representatives of this school, 'Positive law lives in the common consciousness of the people, and we therefore have to call it people's law (*Volksrecht*). …[I]t is the spirit of the people (*Volksgeist*), living and working in all the individuals together, which creates the positive law…'. Savigny 1840:14.

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

12 The growing interest in comparative law during this period is reflected in the establishment of various organizations and scholarly societies concerned with the furtherance of comparative law research, such as the *Société de Législation Comparée* in France; the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* in Germany; and the Society for Comparative Legislation in England.

Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of different national laws, of concepts and principles common to all 'civilized' legal systems, i.e. universal concepts and principles that constitute a relatively ideal law — a kind of natural law with a changeable character.[13] According to Édouard Lambert, a unity of general purpose can be detected in similar legislation from different states, in spite of the absence of such unity at the level of the rules embodied in the legislation. It is thus possible to discern a common basis of legal solutions and establish a 'common legislative law'. Lambert described the purpose of comparative law as the promotion of the convergence of national legal systems through the elimination of the accidental differences in the laws of peoples at similar stages of cultural and economic development. He believed, in other words, that the comparative study of the laws of nations that are on the same level of development might reveal the common characteristics of the legal measures adopted in particular legal systems. This study may also divulge the removable discrepancies originating from the contingencies of historical evolution and not from the 'political or moral attitudes' of the nations whose legal systems are compared. The ideal of legal unification was also stressed at the twentieth anniversary of the International Association for Comparative Law and National Economics, held on the eve of the First World War in Berlin, where it was proclaimed that the association would continue to strive for the harmonization of law under the principle through legal comparison towards legal unification. This statement reflects the hopes of early comparatists concerning the establishment of a future world law by relying upon 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 noted earlier, by that time national ideas and the great codifications of the law in Europe had put an end to the *ius commune Europaeum*, leading to the establishment of diverse national legal orders. When comparing different systems of law, many jurists of that time had idealist, rational, liberal and enlightened motives. Believing in the basic unity of human nature and human reason, they sought to identify, through the comparative study of foreign laws, the best solutions to legal problems that the national legislator could adopt. To them, the fact that laws and legal codes differed suggested that not all the various drafters fully grasped the precepts of reason in relation to certain common problems. Thus, they saw their chief task to be the elimination of confusion with a view to bringing to light the legal solutions that right reason would support. To them, legal rationalism, legal universalism and the uniqueness of solutions all pointed to the same unitary idea: the *Ius Unum*.[14]

13 Saleilles 1905-1907:173.

14 Despite the decline of the idea of natural law, many scholars still believed in a universal truth, hidden behind historical and national variations, which could be brought to light through the comparative study of legal systems. In the words of the German philosopher Wilhelm Dilthey, "As historicism rejected the deduction of general truths in the humanities by means of abstract constructions, the comparative method became the only strategy to reach general truths." Dilthey 1965:99. In 1852, Rudolf von Ihering deplored the degradation of German legal science to "national jurisprudence",

A second strand of universalism, connected with the development of comparative law as a branch of legal science or a scientifically worked out and systematically applied method, was historicism, which in the nineteenth century became the basic paradigm of almost all sciences. The primary objective of legal-historical comparison was to reveal the objective laws governing the process of legal development and, following the pattern of the Darwinian theory of evolution, to extend the scope of these laws of development to social phenomena. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the 'idea of law'.[15] Of particular importance to the development of comparative and historical jurisprudence was Sir Henry Maine's work on the laws of ancient peoples (Ancient Law, 1861), wherein he applied the comparative method to the study of the origins of law that Charles Darwin had employed in his *Origin of the Species* (1859). By establishing the link between law, history and anthropology, Maine drew attention to the role of the comparative method as a valuable tool of legal science. According to him, comparative law as an application of the comparative method to the legal phenomena of a given period could play only a secondary or supporting role as compared to the real science of law, i.e. a legal science historical and comparative in character. While comparative law, as opposed to the properly so-called jurisprudence, is concerned with the analysis of law at a certain point of time, historical-comparative jurisprudence focuses on the idea of legal development or the dynamics of law. But it was F. Pollock, Maine's disciple and successor in his scientific endeavours, who synthesized science and comparative law by drawing attention to the connection or interrelationship between the 'static' point of view of comparative law in a narrow sense and the 'dynamic' approach of historical jurisprudence. To him, jurisprudence itself must be both historical and comparative; in this respect, comparative law plays more than a merely secondary or supporting role: it has a distinct place in the system of legal sciences.[16]

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which he regarded as a "humiliating and unworthy form of science", and called for comparative legal studies to restore the discipline's universal character. See Ihering 1955:15. See in general David 1950:111; Stolleis 1998:7-8, 12, 24; Zweigert and Kötz 1987:52 ff.

15 According to Franz Bernhöft, '[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, the idea of law'. Bernhöft 1878:36-37. And see Rothacker 1957:17. According to del Vecchio, "many legal principles and institutions constitute a common property of mankind. One can identify uniform tendencies in the evolution of the legal systems of different peoples, so that it may be said that, in general, all systems go through similar phases of development." del Vecchio,1950:688.

16 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." Pollock 1903:76. The influence of this school of thought is reflected in more recent discussions on the nature and aims of the comparative study of laws. Thus, according to Rotondi, comparison is one of two

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

At the First International Congress of Comparative Law, held in Paris in 1900, the first serious and systematic attempts were made to define the scope, functions and aims of comparative law. The position adopted at the Congress as to the nature and objectives of comparative law stressed both the independence of comparative law from other fields of scientific inquiry, and its long-term practical goal, namely the unification of the laws of peoples at similar stages of cultural and economic development through the elimination of the accidental differences between them. 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

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. Rotondi 1968:13. And according to 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. Yntema 1958:698.

> political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.[17]

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*). He later argued that one may speak of two independent disciplines that are related to each other only with respect to the application of the comparative method within the framework of the science named '*droit comparé*'. One of these disciplines, under the name 'comparative history' (*histoire comparative*), forms part of legal sociology and seeks to uncover and construe the causal relations and regularities underpinning legal phenomena; the other discipline, under the name 'comparative legislation', is concerned with bringing to light the common elements in the legal institutions of different nations and, as a tool of law-making, serves largely practical purposes.

The unitary and universalistic mentality underpinning the approach to comparative law adopted in the Paris Congress reflects the influence of schools of thought that dominated European legal science in the nineteenth and early twentieth centuries. One of these schools was the German *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.[18] 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. At the same time, the approach to comparative law endorsed in the Paris Congress was in line with new jurisprudential trends emerging as a reaction to legal positivism and the formalism and extreme conceptualism of the German *Bergriffsjurisprudenz*. 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[19] and the sociology of law.[20] These new approaches are also connected with the development of functionalism in comparative law.

Functionalism may be regarded as the fourth strand of universalism in comparative scholarship. It was introduced in the 1920s in order to overcome the problems of the earlier formalist approach to the comparative study of laws. The functional approach revolves around the idea that in order to ascertain the similarities and differences between the substantive contents of legal

17 Lambert 1905:26.
18 See, e.g., Puchta1841:95-108; Windscheid 1891:59-60.
19 See, e.g., Holmes 1897.
20 See Pound 1911.

systems one must take as his starting-point not the wording of legal rules or the structure of legal institutions, but their functions, that is, those real or potential social problems or conflict situations which the relevant rules and institutions are designed to regulate.[21] The legal rules or institutions under examination must be comparable in terms of their function, i.e. they must be intended to address the same social problem. One should not consider and compare general or abstract concepts and terms, but rather the way in which the legal systems under comparison regulate the same factual situations in real life. When different legal systems are compared in connection with a particular legal need arising from a set of factual circumstances shared by all systems, the conclusions of the comparison can be directly relevant to all the systems under examination. It is 'function' that supplies the starting-point and basis — the necessary *tertium comparationis* — of all comparison. According to Rheinstein, the principle of functionality requires comparative inquiries to

> go beyond the taxonomic or analytical description or technical application of one or more systems of positive law…. [E]very 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?[22]

And as Kamba points out, a key question for the comparatist is:

> [W]hat legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?[23]

The functional approach constituted a departure from the methods of nineteenth 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 influence

21 As Ernst Rabel, one of the founders of functionalism, remarked, a common denominator for every comparative inquiry should be "the social purpose of the rules and the service of the concepts to this purpose." Rabel 1948:111. And see in general Rabel 1965; Rheinstein 1987:33.

22 Rheinstein1938:617-618.

23 Kamba 1974:517. 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." Zweigert and Kötz 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).

comparative legal scholarship today.[24] There is a universalist trend inherent to the functionalist approach as far as the latter 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."[25]

A great deal has changed since jurists, such as Lambert and Saleilles, envisaged a world governed by a common body of laws shared by all 'civilized nations'. The sheer diversity of cultural traditions and ideologies, the problems dogging European unification (despite the tremendous push for European unity furnished by the treaties establishing the European Economic Community[26] and the European Union),[27] and the difficulties surrounding the prospect of convergence of the Common and Civil Law systems have given rise to a great deal of skepticism regarding the feasibility of this ideal. Nevertheless, quite a few comparatists today still espouse a universalist approach either through their description of laws or by looking for ways in which legal unification or harmonization at an international or transnational level may be achieved.[28] It should be noted that whilst unification contemplates the substitution of two or more legal systems with one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards".[29] The current interest in matters concerning legal unification and harmonization is connected with the phenomenon of globalization — a phenomenon precipitated by the rapid rise of transnational law, the growing interdependence of national legal systems and the emergence of a large-scale transnational legal practice. Globalization and regional integration are nowadays levelling economic, political and moral standards, as well as lifestyles in different countries. 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 emergence of a global society will almost inevitably lead to the gradual convergence of legal systems.[30]

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24 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; 1994.

25 Zweigert and Kötz 1987:31.

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

27 The Maastricht Treaty (1992).

28 A good example is Rudolf Schlesinger's common core theory, according to which "even in the absence of organized [legal] unification efforts, there exists a common core of legal concepts and precepts shared by some, or even by a multitude, of the world's legal systems … At least in terms of actual results — as distinguished from the semantics used in reaching and stating such results — the areas of agreement among legal systems are larger than those of disagreement … [T]he existence and vast extent of this common core of legal systems cannot be doubted". Schlesinger 1988:34-35, 39. See also David and Brierley1985:4-6.

29 See Kamba 1974:501.

30 See King 1996; Markesinis 1994; Zimmerman 1995. For a critical perspective on this issue see Legrand 1996. According to McDougal, the ultimate goal of legal unification through the comparative study of laws is the establishment of a democratic world order. In his own words: "Most broadly conceived, [the] central, overriding purpose [of

Today comparative law plays an important part in the preparation of projects aimed at the unification or harmonization of laws at a transnational or international level. These projects are designed to reduce or eradicate, as far as possible and desirable, the discrepancies and inconsistencies between national legal systems by inducing them to adopt common legal rules and practices. In pursuance of this objective, uniform rules are often drawn up on the basis of work by experts in comparative law that are then incorporated in transnational or international treaties obliging the parties, as a matter of international law, to adopt the uniform rules as part of their domestic law. It sometimes occurs, however, that the adopted uniform rules are not constructed in the same manner by the courts in the various countries, so that the whole effort fails to produce the desired effect. Despite the difficulties arising in connection with unification or harmonization efforts, there have been some notable successes, especially within countries that closely cooperate with each other, such as the member countries of the European Union, and within certain areas of law, such as international commercial law, transportation law, intellectual property law and the law of negotiable instruments.[31]

Furthermore, comparative law facilitates communication across the borders of legal systems and can assist the development of an international legal language, and the production of bi-lingual or multi-language law dictionaries.

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comparative law] is … the clarification for all our communities — from local through national and regional to global — of the perspectives, the conditions, and the alternatives that are today necessary for securing, maintaining, and enhancing basic democratic values in a peaceful world". McDougal 1980:196. 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; Knieper 1996.

31 There are numerous organizations involved in the unification of law and they have produced many draft uniform laws. These include the League of Nations and the United Nations, the European Union and many professional organizations that have convened international conferences in order to conclude international treaties. In connection with the latter, one could mention the International Institute for the Unification of Law (UNIDROIT); the UN Commission on International Trade Law (UNCITRAL); the Council of Europe Committee for Legal Cooperation; the International Labour Organization; the Comité maritime international; the International Civil Aviation Organization (ICAO); and the Paris and Bern international conferences for the protection of intellectual property. The subject-matter of such schemes of legal unification or harmonization pertained for the most part to matters and institutions of private law, both civil and commercial, as well as to issues of civil procedure. Only some of these were designed to become domestic legislation, while the majority were concerned with the regulation of inter-state transactions. Moreover, only some were ratified by interested states. Illustrations include the 1930 and 1931 International Conventions on Uniform Laws for Bills of Exchange and Promissory Notes and Cheques; the maritime law conventions; transport law (especially, air transport law ratified by a large number of states); intellectual property; labour law and others. Other examples embrace the UNCITRAL International Arbitration Rules; the EC Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which also constitutes domestic law; and the 1980 UN Vienna Convention on a Uniform Law of Sales, that is already accepted in many countries. Several important drafts have also been compiled by UNIDROIT (Principles on International Commercial Contracts, published in 1994) and various EC Commissions.

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

4. Concluding note

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 and scholars to operate effectively in new and diverse contexts.

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