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COMPARATIVE LAW BEFORE 1900[1]

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ABSTRACT

Modern comparative law emerged in the late nineteenth century primarily as a response to problems caused by the fragmentation of national laws in Europe. 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. This paper examines the role of legal comparatism in early modern European legal thought and practice with the view to tracing some key ideas that contributed to the rise of the contemporary comparative law discourse. First, 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. The paper then discusses the contribution of nineteenth century thinkers who endeavoured to explain legal phenomena on a historical-comparative plane and, in this way, paved the way for the recognition of comparative law as a special branch of legal science.

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1 INTRODUCTION

During the High Middle Ages (11th–13th centuries), political stability and improved social and economic conditions in Western Europe precipitated a revival of interest in the study of law. By the end of the eleventh century the *antiqui*, the jurists concerned with the study of Germanic law, were superseded by the *moderni*, whose interest lay primarily in Roman law as transmitted though the sixth century codification of Emperor Justinian.

The systematic analysis and interpretation of Roman law was the exclusive preoccupation of the jurists from the famous law school of Bologna, known as the school of the Glossators. From the thirteen century a new breed of jurists, known as Commentators, sought to develop contemporary law by adapting Roman law, as expounded by the Glossators, to the social and economic conditions of their own era. The positive law enforced by the courts at that time comprised Roman law, the customary law of Germanic or feudal origin, the statute law of the Holy Roman Empire of the German nation (established in the tenth century AD) and the self-governing municipalities, and canon law.

The integration of these bodies of law into a unitary system was the main 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.

The body of law developed by the Glossators and the Commentators, as the product of a synthesis between non-Roman elements and Roman law, achieved universal validity as 'written reason' (*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.

The universal *ius commune* was juxtaposed with the *ius proprium*, the local laws of the diverse medieval city-states and other political entities. But the universal and local laws were not necessarily antithetical; they 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*, who also took local law into consideration.

In their role as judges, lawyers and public officials, jurists trained in Roman law 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*.

In the sixteenth and subsequent centuries, the medieval feudal nobility was defeated by a central power that also represented the interests of the expanding urban class and the lower gentry. As a result, the role of legislation gained prominence as a means of centripetal policy. Furthermore, the idea of national social consensus, or that the members of a nation had common interests, emerged as a basic assumption. During that period, the nascent idea of the nation-state and the increasing consolidation of centralized

political administrations diversely affected the relationship between the received Roman law and local legal systems.

2 PIONEERS OF COMPARATIVE LAW IN THE RENAISSANCE AND ENLIGHTENMENT ERAS

In the sixteenth century, the homologation of French customary law, i.e., its official compilation and subsequent promulgation by decree, 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.[3] Guy Coquille's work *Institution au droit des Francois*, published in 1607, deserves special mention here. 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*.[4]

In his work he sought to explore the laws and customs of France in a comprehensive and comparative manner. 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

[3] 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*. 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-based *ius commune* and the emergence of national systems of law.

[4] 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.

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 asserts that such customs are 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*.[5]

In the seventeenth and eighteenth centuries, as national systems of law continued to burgeon, European jurists focused their attention on the study and mastery of their own domestic legal systems. Despite the absence of a systematic practice of comparative law, several scholars stressed the importance for lawyers of the need to look outside their own systems of law in order to make a true assessment of their worth. The English philosopher Francis Bacon (1561-1626), for example, proposed the development of a system of universal justice by means of which one might assess and seek to improve the legal system of one's own country (BACON, 1623, bk. VIII, c. 3). However, although Bacon 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*), an imagined repository that would embrace the entire corpus of the laws of all peoples at all places and in all times.[6] This, Leibniz assumed, could become the driving force behind the comparative study of laws and would allow for the discovery or articulation of truly universal legal principles. Hugo Grotius (1583-1645), a leading representative of the School of Natural Law, 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 diverse legal systems, he used legal material from diverse countries and ages to illustrate and support his system of natural law.

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

[6] See Von Leibniz (1667). Leibniz proposed a fourfold partition of jurisprudence: positive or didactic, historical, exegetic, and interpretative.

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.[7]

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.[8] 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 civil 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.

[7] 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.

[8] 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. According to Wolff (1994, p. 298), "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.".

Although their approach is different from that employed by modern comparatists, some aspects of their work can be described as comparative in the sense that they occasionally rely on examples drawn from diverse systems of law to support the premises on which they worked.

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), regarded as the most important precursor of modern comparative law.

2.1 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.[9]

According to Montesquieu, positive law is oriented towards the idea of justice. But since positive law constitutes only an approximation (rather than a realization) of justice, the question presents itself upon what basis such an approximation can be envisaged. In addressing this question, Montesquieu departs from the natural law tradition, which sought to give a universal answer to this question and proposes that every people must formulate its laws in accordance with its own particular spirit, as shaped by the

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

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.[10]

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 relativistic approach to laws and legal systems had its roots in sixteenth century French thought, especially that of Huguenot scholars, who called in question the universal authority of Roman law as well as the universal power of

[10] *De l'esprit des lois,* Book 1, Ch. 3. As Gutteridge (1949, p. 6) 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.". According to contemporary scholars, Montesquieu's work also set the foundations of modern legal sociology. As Leopold Pospisil (1971, p. 138) 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.". Consider also Launay (2001, p. 22).

the Roman Catholic Church.[11] 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. Thus, less attention is given to examples from antiquity, although these are certainly not lacking (see LAUNAY, 2001, p. 24).

Montesquieu held that there are three types of government: republican (ruled by an elected leader), monarchical (ruled by a king or queen), and despotic (ruled by a dictator). These are in turn grouped according to whether they are founded on law or not: republican and monarchical governments are taken to rest on law, whilst despotic ones do not. 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. Montesquieu's criticism of absolute monarchy, as it emerges from his *On the Spirit of the Laws* (see LAUNAY, 2001, p. 25-26). has its roots in the implicit conflict between the French *parlements* and the monarchy.[12] Montesquieu sought to defend the *parlements* and the interests of the aristocracy they represented, by drawing a comparison between France and Western Europe in general with other societies and forms of government that existed in Europe in the past or prevailed in other parts of the world. His chief concern was to demonstrate the supremacy of European political systems,

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

[12] The great majority of the members of the *parlements* belonged to the French aristocracy and tended to react with hostility whenever the monarchy introduced measures taken to undermine their own privileges.

especially constitutional monarchy, over Asian absolutism, and other 'primitive' systems,[13] without, however, to support European territorial ambitions for, according to him, such ambitions were the hallmark of absolutism.[14]

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.[15]

It is important to note, however, that Montesquieu seeks to detach laws from the fetters of rationalism[16] 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.

[13] It should be noted here that not all of Montesquieu's contemporaries subscribed to his notion of 'Asian despotism.' 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. See Launay (2001, p. 37).

[14] 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.

[15] 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 Montesquieu (2001a, p. 14).

[16] 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.

From this general assumption, Montesquieu proceeds to develop a series of important distinctions between diverse fields of law. In the *On the Spirit of the Laws* Montesquieu draws attention to the importance for the legislator of the comparative study of the laws of diverse nations. He 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." (MONTESQUIEU, 2001b, p. 11). He adds that "as the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether both [nations] have the same institutions and the same political law" (MONTESQUIEU, 2001b, p. 13).

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 [or law] 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 (HEGEL, 2001, p. 24).

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 (HEGEL, 2001, p. 199-200).

3 FOUNDATIONS OF MODERN COMPARATIVE LAW

The growth 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 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. 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 a national phenomenon. 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.

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 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.

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 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.[17]

A second strand of universalism, connected with the development of comparative law 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'.[18] The

[17] Notwithstanding the decline of the idea of natural law in the nineteenth century, 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 (1965, p. 77 at 99), "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.". In 1852, Rudolf von Jhering (1955, p. 15) 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 in general Stolleis (1998, p. 7-8, 12, 24); Zweigert and Kötz (1987, Chapter 4, 52 ff.).

[18] The influence of this school of though is reflected in more recent discussions of the nature and aims of the comparative study of laws. Consider, e.g., Rotondi (1968, p. 5, 13); Yntema (1958, p. 693, 698); Del Vecchio (1950, p. 686, 688). See also Bernhöft (1878, p. 36-37); Rothacker (1957, p. 13 at 17).

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 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 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.

3.1 THE ROOTS OF COMPARATIVE LAW IN GERMANY

By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[19] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence.[20] 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

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

[20] 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.

and 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 Roman law – referred to as *Usus modernus Pandectarum* ('modern application of the Pandects/Digest').

In the early years of the nineteenth century the French Civil Code enacted under Emperor Napoleon in 1804 attracted a great deal of attention in Germany and parts of the country adopted this law code as Napoleon extended his rule over Europe. However, the rise of German nationalism during the wars of independence compelled many scholars to stress the need for the introduction of a uniform law code for Germany to unite the country under one system of law and assist the process of its political unification. In 1814, 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' (THIBAUT, 1814a, p. 1-32; THIBAUT, 1814b).

Thibaut, a representative of natural law philosophy, 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).[21] 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.[22]

[21] Savigny officially founded the Historical School in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781-1854).

[22] Savigny (1814) elaborated his thesis in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science'.

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 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. They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany.

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.[23] In the early part of the nineteenth century, comparative law attracted the interest of a number of jurists, the most eminent of whom was Eduard Gans

[23] 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 Bierling (1894, p. 33) comparative law is "of little or no use for learning the principles of law.". 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).

(1798-1839) (FRANKLIN, 1954, p. 141) 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.[24] In his famous work on the law of inheritance (GANS), Gans attempted a comparison of a diversity of legal systems (including Ancient Greek and Roman, Scandinavian, Scottish, Portuguese, Chinese, Indian, Hebrew, and Islamic) in the spirit of *Universalrechtsgeschichte* or Universal History of Law.

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 related to the movement for the codification and unification of the law in Germany.[25] Extensive comparative law research preceded the German Civil Code of 1900 and other enactments,[26] 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

[24] 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. 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.

[25] 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 Zachariä; Mittermaier (1829, p. 25).

[26] 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.

particular cultural phenomena" (ADAM, 1958, 189 ff.).[27] 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 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." (POST, 1894, p. 2). 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." (POST, 1894, p. 4).

Ethnological jurisprudence thus focuses on the discovery of those legal norms and institutions which can be found among all peoples of the world (POST, 1894, p. 7).[28] It should be noted

[27] The new interest in ethnological jurisprudence and related matters was given a focus in the *Zeitschrift für Vergleichende Rechtswissenschaft*, founded in 1878.

[28] Post views law as a universal phenomenon. He observes that "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." (POST, 1894, p. 8).

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]

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. According to him, 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 nations.[30] 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. Kohler's work in comparative law was at first concerned with the comparison

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

[30] In Bernhöft's words, "Comparative 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 nutshell, within the systems of law, for the idea of law." (BERNHÖFT, 1878, p. 36-37).

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*) (consider GROSSFELD; WILDE, 1994, p. 59).

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.[31] 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 2,300 scientific publications, he describes and explores the laws of peoples in all corners of the earth.[32]

In seeking to build the foundation of a truly 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 in part from the relative scarcity of reliable sources of information on the law and customs of non-European peoples at the turn of the nineteenth century.

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

[32] 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." Kohler, 1887, p. 321). Also consider Kohler (1895, p. 1).

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 anthropology of law, Leonhard Adam (1891-1960), and Hermann Trimborn (1901-1986).

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 world's most eminent legal comparatists. 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 (see THIEME (1986, p. 251, 305).

He saw comparative law as having three distinct though interconnected aspects: (a) the first aspect is concerned with the historical evolution of legal systems and the interrelations between them;[33] (b) the second aspect pertains to the study of contemporary legal orders and the elucidation of their differences;[34] and (c) 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.[35] 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

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

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

[35] 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." (RABEL, 1919, p. 2).

'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*).[36]

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." (RABEL, 1924, p. 279-280).

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 at the same time 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 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

[36] 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, p. 77-190).

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.

3.2 THE GROWTH OF COMPARATIVE LEGAL STUDIES IN ENGLAND

During the nineteenth century England was a colonial power and interaction between domestic and foreign laws was unavoidable.

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, with the exception of Britain. 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).[37] Under these circumstances, there was a need for greater familiarity with those foreign bodies

[37] 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 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.

of law that were most frequently presented to the consideration of English judicial authorities.

Among the earliest attempts at applying the comparative method to practical aspects of law are William Burge's *Commentaries on Colonial and Foreign Laws*, written for legal practitioners and published in 1838 (BURGE, 1838);[38] and Leone Levi's *Commercial Law* (1852), an extensive treatise comparing the commercial laws of Britain with the laws and codes of other merchantile countries, including those of ancient Rome (LEVI, 1850-1852).[39] In 1848, the House of Commons' Select Committee proposed that the 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, though 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 (see on this matter, GUTTERIDGE, 1949).

Of particular importance to the development of comparative law in England was 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) was among the first scholars to argue that law and legal institutions must be studied historically if they are to be properly understood.[40]

[38] 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.

[39] See also Levi (1854). It should be noted that Levi was the first scholar to propose the international unification of commercial law through the method of comparative law.

[40] 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

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.[41] 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

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, p. 164-165).

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

have been particularly enlightening. Probably the most celebrated of them is his view of the way in which dynamic or progressive societies evolve:

> 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 (ANCIENT LAW, 1931, p. 139-130).

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 (see, e.g., JANSSEN, 2000, p. 168). 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.

Frederick Pollock, Maine's disciple and successor in his scientific endeavours, sought to elucidate the connection or interrelationship between the 'static' point of 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.[42]

[42] As Pollock (1903, p. 74-76) 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.".

3.3 THE DEVELOPMENT 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 française de législation comparée*) in Paris in 1869.[43]

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,[44] 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

[43] The Society's periodical, now called *Revue Internationale de Droit Comparé*, is still in existence today.

[44] 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).

he moved to Paris where he first held the chair of comparative criminal law and afterwards the newly created chair of comparative civil law.[45] 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 (see SALEILLES, 1905a, 68 ff.).

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.[46] 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.[47]

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

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

[46] Reference may be made here to Saleilles (1890) and Sailelles (1901). In 1901, Saleilles commenced work on an annotated translation of the German Civil Code (BGB).

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

'laws of evolution'. A defining moment in the development of his thought, a moment at which he recognized the inadequacy for legal science 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.[48] This approach reflects the position of the circle of the French *Juristes Inquiets*, of which Saleilles was a leading member.

4 THE PARIS INTERNATIONAL CONGRESS OF COMPARATIVE LAW

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 (Article 8), and selected French as the official Congress language.[49] The French

[48] For a closer look at Saleilles' arguments see Saleilles (1902, p. 80).

[49] Reports and other materials not in French were to be translated or summarized

jurist Édouard Lambert, a former student of Raymond Saleilles 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.

The Congress was declared to have four principal objectives (see SALEILLES, 1900, p. 228-236). 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 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

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.

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 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:

> 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 (LAMBERT, 1905-1907) p. 26).

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 development, its conceptual affinity with the laws of neighbouring countries and the social and economic reasons that justify its rules.[50]

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 into 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.[51]

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

[50] 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.

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

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 Saleilles' 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" (SALEILLES, 1905b, at 143).

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.[52]

According to Saleilles, the distinct science of comparative law would analyze the law-making function in three stages. At

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

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 gradually construct a unitary law out of diverse legal particularities.

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 (WEISS, 1900, p. 417, 420).

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.[53]

5 CONCLUDING REMARKS

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.[54] Until that 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

[53] For an account of the conference proceedings and the positions advanced at the Paris Congress see Clark (2002, p. 871).

[54] As Blanc-Jouvan (2001, p. 858, 862) 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.". 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 Reimann (2001, p. 1.103, 1.105), "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.".

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' (see on this matter SACCO, 2001, p. 1.159, 1.166).

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 (see REIMANN, 2001, p. 1.103; STOFFEL, 2001, p. 1.195).

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