Sem V - Comparative Law
(2)

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The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*

INTRODUCTION

The 50th anniversary of the *American Journal of Comparative Law*, founded at the University of Michigan by Hessel Yntema in 1952, is an appropriate occasion to look back at the development of our discipline, though mainly for reasons that reach beyond this anniversary itself. Most importantly, it was around the time of the *American Journal's* beginnings five decades ago that comparative law as we know it today began to take shape. In the United States, the early 1950s were the birth-hour of the discipline as a clearly identifiable subject. They were marked not only by the foundation of the *Journal* but also by the publication of Rudolf Schlesinger's seminal casebook,[1] soon to be followed by Arthur von Mehren's competitor volume[2] and by a general rise of interest in comparative and international studies. In Europe, where comparative law was already more broadly established, the field experienced a new start as well after the devastation of the war. Witness, for example, Harold Gutteridge's now classic introduction;[3] the emergence of new leaders redefining the field, such as René David in France,[4] Gino Gorla in Italy,[5] and

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* I will make no effort to cite all the relevant literature because that would require an almost full-fledged bibliography of comparative law over the last fifty years, at least in the American-European orbit, expanding the already copious footnotes beyond all reasonable limits. I will cite only works that have become classics or milestones, that I consider typical examples of an argument or genre, or that are necessary to support quotations or particular less than obvious assertions. I ask the forgiveness of all authors who consider their work important enough for inclusion but are still not mentioned.

1. Rudolf Schlesinger, *Comparative Law, Cases and Materials* (1950).

2. Arthur von Mehren, *The Civil Law System, Cases and Materials for the Comparative Study of Law* (1957).

3. Harold Gutteridge, *Comparative Law* (1946); see also Frederick Lawson, *A Common Lawyer Looks at the Civil Law* (1953).

4. See, e.g., René David, *Traité Elementaire de Droit Civil Comparé* (1950).

Konrad Zweigert in Germany; and the (re-)establishment of the Max Planck Institut for Foreign and Private International Law. Reviewing the first five decades covered by the *American Journal* is also useful in sheer calendar terms because it calls for an evaluation of the past half-century at the beginning of a new one.[6] Finally, assessing the progress and failure of comparative law over that period is particularly appropriate at a time of rising complaints about the discipline's malaise because such an assessment helps to gauge how justified these lamentations are—and what might be done next.

This essay presents nothing like a full-fledged history of comparative law in the last fifty years. It merely seeks to gauge the discipline's progress and failure during that time. Even that endeavor is severely restricted in three regards. First, it is limited to the development of comparative law as a scholarly discipline. Thus it does not cover its accomplishments or shortcomings in practice or education because those are separate matters which require assessments in their own right.[7] Second, it is written mainly from an American and Western European perspective. This bias reflects not only the limits of my personal expertise, it is also somewhat justified by the nature of the occasion as well as by the primary orientation of our discipline during the time under review.[8] Finally, much of my appraisal is im-

5. See, e.g., Gino Gorla, *Il Contratto; Problemi Fondamentali Trattati con il Metodo Comparativo e Casistico* (1954).

6. There are many historical surveys of the discipline's development but most of them do not extend beyond the middle of the twentieth century, either because they were written at or before that time, see, e.g., Gutteridge, supra n. 3, at 11-22; Hug, "The History of Comparative Law," 45 *Harv. L. Rev.* 1027 (1932) (ending around the middle of the 19th century), or because they were at least not updated in later editions, see, e.g., Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 48-62 (3d ed., Tony Weir transl., 1998). Probably the most elaborate treatment is Jean-Leontin Constantinesco, *Rechtsvergleichung*, vol. 1: *Einführung in die Rechtsvergleichung* 69-196 (1971) which actually contains a few pages covering the post World War II-period until around 1970, id. 191-96. Limited exceptions are Kötz, "Comparative Law in Germany Today," 1999 *Revue Internationale de Droit Comparé* 753 (2000); and Martinek, "Wissenschaftsgeschichte der Rechtsvergleichung und des Internationalen Privatrechts in der Bundesrepublik Deutschland," in Dieter Simon (ed.), *Rechtswissenschaft in der Bonner Republik* 529 (1994), covering the discipline's development in Germany ca. 1945-1990. I know of no in-depth study of the particular American, European, or of more general developments.

7. On the side of practice, probably the most important developments since World War II are the pervasive role comparative law has come to play in the work of the European Court of Justice and the massive export of US-American and Western European law to former socialist countries democratizing their political systems and opening their markets. In legal education, the field has become an established part of the curriculum (mostly as an elective), at least in most developed countries; of course that does not mean that all, or even a majority, of students are exposed to comparative aspects of law.

8. Scholarship from and about both the United States and Europe has clearly dominated the field. This is not to deny the importance of comparative studies performed in, or focusing on, other regions, such as Eastern Europe or the Asian countries. These studies have contributed enormously to the field but, for better or worse, they have not defined it the way American and European scholarship has.

pressionistic if not outright personal. It is no more than one view among others of recent developments and future tasks.

The course of comparative law over the last fifty years is marked by a paradox. On the one hand, the discipline has made great progress because it has accumulated huge amounts of valuable knowledge (I.). On the other hand, comparative law has been a serious failure because it has not developed into a coherent and intellectually convincing discipline (II.). The recent success of comparative studies as a tool for the Europeanization of private law is somewhat of an exception but does not fundamentally change the general picture (III.). The most urgent agenda for comparative law today is to integrate the accumulated information into a whole which is more than the sum of its parts—an endeavor that would be facilitated by establishing a canon, defining goals, and committing to cooperation (IV.).

I. PROGRESS: THE EMERGENCE OF COMPARATIVE LAW AS BODY OF KNOWLEDGE

The most important accomplishment over the last fifty years is that comparative law has developed into a respectable body of actual knowledge. This knowledge is stored in the enormous amount of increasingly diversified literature we have today (1.). It pertains mainly to three major areas: foreign law, legal families, and the process of comparison itself (2.). To recognize this knowledge is important because it shows that comparative law is no longer merely a method (3.).

1. The Proliferation and Diversification of Scholarship

Since the middle of the last century, comparative law has accumulated huge amounts of knowledge. In sheer quantitative terms, this is particularly obvious if one looks at the scholarship produced, or at least available, in the discipline's most important common language today, i.e., English. Before 1950, there were no full-fledged comparative law treatises or casebooks, few monographs and certainly no standard reference works, no specialized journals, and only a limited number of articles. Today, we have an impressive stock of treatises and casebooks known to every member of the guild,[9] a re-

9. The list of standard treatises includes at least René David, *Major Legal Systems of the World Today* (J. Brierly transl., 3d ed. 1985); Zweigert & Kötz, supra n. 6; one might also mention Michael Bogdan, *Comparative Law* (1994); Peter deCruz, *Comparative Law in a Changing World* (2d ed. 1995); and the brief account by Mary Ann Glendon, Michael W. Gordon and Paolo G. Carozza, *Comparative Legal Traditions* (1999). The leading casebooks are (in alphabetical order by first author) Mary Ann Glendon, Michael W. Gordon & Christopher Osakwe, *Comparative Legal Traditions* (2d ed. 1994); John H. Merryman, David S. Clark & John O. Haley, *The Civil Law Tradition* (2d ed. 1994); Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog & Edward M. Wise, *Comparative Law* (6th ed. 1998); Arthur T. von Mehren & James

spectable set of monographs and collections of essays, a virtually complete multivolume international encyclopedia,[10] dozens of specialized law journals, thousands of articles, and the flood is rising. In 1950, one could have mastered the comparative law literature available in English in a few weeks; today, it would take years of study, if it was possible at all. In terms of quality, much of this output is very respectable. Even if we compile only the works recognized as high quality scholarship, we get an impressive collection, easily filling a large book case. It is this library which represents comparative law as a body of knowledge.

This scholarship is also much more diverse than it was half-a-century ago. To begin with, it covers more subject matter. While private law continues to dominate (more so in Western Europe today than in the United States), we have a large number of writings, and thus of knowledge, about other areas as well, especially criminal law, constitutional law, courts and procedure.[11] Geographic coverage has also expanded. It is true that Europe and the United States still take the lion's share, but the literature on Asian legal systems, (former) socialist regimes, and about mixed jurisdictions is substantial, though Latin America continues to be understudied and Africa is almost ignored.[12] Finally, there has been a considerable diversification of genre and style. Blackletter rule comparison is still popular but has partially been overcome by studies of historical developments,[13] cultural characteristics, and by narratives.[14] We even have some broad model-building[15] and nascent interdisciplinary work[16] though they are hardly more than first steps in the right direction.

R. Gordley, *The Civil Law Tradition* (2d ed. 1977, a new edition is currently in preparation).

10. *International Encyclopedia of Comparative Law* (René David et als. eds., 1971 ff.). A much less well-known competitor is the *Modern Legal Systems Cyclopedia* (K.R. Redden ed. 1984 ff.).

11. This is true in many countries, see, e.g., for Germany, Martinek, supra n. 6, at 565-66.

12. According to one count of the articles published in the first 46 years of the American Journal of Comparative Law, 41.12% were about Europe, 8.67% about Asia, but merely 1.79% about Africa, see Upham, "The Place of Japanese Studies in American Comparative Law," 1997 *Utah L.R.* 639, at 641. There are some exceptions, see, e.g., Ian Edge (ed.), *Comparative Law in Global Perspective* (2000) (including articles about customary law in Africa), and the Journal of African Law (1957-) (the "Official Organ of the International African Law Association").

13. See, e.g., Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); John P. Dawson, *The Oracles of the Law* (1968); Alan Watson, *The Making of the Civil Law* (1981).

14. A classic is Sybill Bedford, *The Faces of Justice* (1961); a more recent example is Inga Markovits, *Imperfect Justice* (1995).

15. The best example is Mirjan Damaška, *The Faces of Justice and State Authority* (1986).

16. Examples include anthropological aspects, see, e.g., John H. Barton, James L. Gibbs, Victor H. Li & John H. Merryman, *Law in Radically Different Cultures* (1983); law and economics, see, e.g., Ugo Mattei, *Comparative Law and Economics* (1997); Kötz, "Precontractual Duties of Disclosure: A Comparative and Economic Perspec-

2. *Major Areas of Knowledge*

The knowledge we have accumulated is best grouped in a tripartite fashion. Most of it is descriptive and covers foreign law, with or without explicit comparison. A substantial part is about the world map of legal families, traditions, or cultures. And some of it even concerns the goals, methods, and pitfalls of comparison as such.

Describing Law: Information about Foreign Systems

Comparative law has made huge progress with regard to knowledge about a variety of legal systems. Although it is true that the "mere study of foreign law falls short of being comparative law,"[17] this knowledge should count among the discipline's accomplishments. Knowledge of foreign law is an indispensible prerequisite to explicit comparison, information about other legal regimes is the discipline's most valuable contribution to legal practice, and its production is what most comparatists do in fact most of the time.[18] In the last fifty years, the discipline has generated a veritable panoply of books, articles, and reports about foreign law. Not only has such information grown exponentially, its coverage has expanded as well. Much of it now goes well beyond blackletter rules and often pertains to the foreign system's historical genesis and underlying values, legal education and actors, institutions and procedures, sources and interpretive practices,[19] and sometimes even cultural habits and (hidden) working styles.[20] It has also expanded geographically beyond the traditional Western European and North Atlantic orbit.[21] Just the International

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tive," 9 *European Journal of Law and Economics* 5 (2000); and language studies, see, e.g., Vivian Curran, *Learning French Through the Law* (1996).

17. Zweigert & Kötz, supra n. 6, at 6. Indeed, "foreign law studies" ("Auslandsrechtskunde") would be a more precise term, Max Rheinstein, *Einführung in die Rechtsvergleichung* 22 (2d ed. 1987); see also Merryman, Clark & Haley, supra n. 9, at 1.

18. "[O]ur principal subject matter is foreign law," Merryman, "The Loneliness of the Comparative Lawyer," in John H. Merryman, *The Loneliness of the Comparative Lawyer* (1999) 1, at 4. Looking through the volumes of the American Journal of Comparative Law, one quickly recognizes that almost invariably, the articles about foreign law outnumber (often by a huge margin) those explicitly comparing two or more systems.

19. For more two recent examples see Christian Dadomo & Susan Farran, *The French Legal System* (1993); Jeffrey S. Lena & Ugo Mattei (eds.), *Introduction to Italian Law* (2002).

20. See, e.g., Lasser, "Judicial (Self-)Portraits: Judicial Discourse in the French Legal System," 104 *Yale L.J.* 1325 (1995); see also Lasser, "Comparative Law and Comparative Literature: A Project in Progress," 1997 *Utah L. Rev.* 471.

21. Especially the literature about Asian legal systems is substantial and growing rapidly, see, e.g., John O. Haley, *Authority Without Power. Law and the Japanese Paradox* (1991); John O. Haley, *The Spirit of Japanese Law* (1998); Kennth Port, *Comparative Law: Law and the Legal Process in Japan* (1996); Mark Ramseyer & Minoru Nakazato, *Japanese Law. An Economic Approach* (1999); Frank K. Upham, *Law and Social Change in Postwar Japan* (1987). On Chinese Law, there is even a Nutshell, Ralph H. Folsom, John H. Minan, & Lee Ann Otto, *Law and Politics in the*

Encyclopedia of Comparative Law, whatever its shortcomings, is a huge storehouse of such information compiled in the last three decades.[22]

This is not to say that all this knowledge is highly valuable nor that we have all the information we need. Much of it is rendered obsolete by time, much is misleading because it is confined to blackletter rules without regard to context, and much is so superficial as to render it useless. In addition, there are huge gaps. In partcular, we know too little about the developing areas of the world.[23] We also sorely lack solid empirical data and reliable statistics.[24] It is nonetheless clear that we know vastly more about the world's legal systems than we did fifty years ago.

Mapping Law[25]: Dynamic Models of Families, Traditions, and Cultures

In the last half-century, comparatists have gradually developed fairly sophisticated views of the world map of law. Most of the basic work was done by scholars from continental Europe with their greater penchant for classification schemes but this work has now become common currency in the English speaking world as well. In addition, both emigrant and native scholars in common law countries have made important contributions in this regard.

Earlier beginnings[26] notwithstanding, mapping the world's legal systems really came into its own in the first decades after World War II. Today, everybody in the field is familiar at least with the modern classics: René David's scheme[27] and Zweigert's and Kötz' widely accepted definition of families according to "style,"[28] both first published in the 1960s. It is important to note, however, that comparative law has moved way beyond these relatively rudimentary models in at least three regards.

People's Republic of China (1992). See also Merryman, Haley, and Clark, supra n. 9 (covering the civil law tradition in East Asia); Barton, Gibbs, Li & Merryman, supra n. 6 (including materials on Chinese law).

22. Supra n. 10.

23. A noteworthy effort to include law in developing countries was made by Barton, Gibbs, Li, & Merryman, supra n. 16.

24. There is also the question whether today, electronic means of information are so superior that traditional scholarship about foreign law is simply outdated. I, for one, doubt it and would argue that, just to the contrary, the immense amount of information available in cyberspace makes selection, ordering, and quality control through scholarship more important than ever.

25. The phrase is borrowed from William Twining, *Globalization and Legal Theory* 136 (2000).

26. See Zweigert & Kötz, supra n. 6, at 63-64.

27. René David, *Les Grands Systèmes de Droit Contemporains* (1964); David had developed a somewhat different classification already in 1950, see René David, *Traité Élémentaire de Droit Civil Comparé* 222-26 (1950).

28. Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* I (1969) 67-80.

First, it is understood today that all classifications are mere approximations to, not accurate reflections of, reality.[29] We mostly continue to divide the world into civil law, common law, and several other systems but we know that these are ideal types which merely serve our need to maintain a rough overview.[30] For example, we have by and large laid to rest simplistic divisions between codified and caselaw systems, have developed a more sophisticated understanding of the relevant sources, and realize that they may contradict each other.[31] We recognize not only that there are some mixed jurisdictions[32] but that most actual systems blend a variety of ingredients, e.g., codified rules and caselaw, inquisitorial and accusatorial elements, or traditional and modernized Western notions of law. We understand that the most fundamental differences do not exist between substantive rules but between institutions, procedures, and techniques.[33] We know that groupings depend on perspective and context and that they are subject to change over time.[34]

Second, we have learned to look beyond legal systems and families as static and isolated entities. Conscious of their historic contingency and ongoing development, we have come to think, in a more dynamic fashion, primarily of *legal traditions.*[35] In the last quarter century, this concept of a legal tradition has become the dominant paradigm at least in the United States where it has broadened comparative studies to include a legal system's whole "law machine".[36] Comparative law has also come to look at the world in terms of coexisting *legal cultures*, i.e., as parts of larger social structures consisting of economies, religions, social habits, etc.[37] This idea has recently

29. See, e.g., David, supra n. 9, at 17-20; de Cruz, supra n. 9, at 32-34.

30. See, e.g, Antonia Gambaro & Rodolfo Sacco, *Sistemi Guiridici Comparati* 19-22 (1996); Kötz, "Abschied von der Rechtskreislehre?," 1998 *Zeitschrift für Europäisches Privatrecht* 493, especially 504-05.

31. See David, supra n. 9, at 14-15. For a more sophisticated model, see Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1, 343 (1991).

32. See, e.g., Vernon Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family* (2001).

33. See, e.g., Merryman, Clark & Haley, supra n. 9, VIII.

34. Zweigert & Kötz, supra n. 6, at 66-67.

35. For an essay on the concept of (legal and other) traditions, see Patrick Glenn, *Comparative Legal Traditions of the World* 1-29 (2000).

36. The phrase is John H. Merryman's, see Legrand, "John Henry Merryman and Comparative Legal Studies: A Dialogue," 47 *Am. J. Comp. L.* 3 (1999) at 25 (quoting John H. Merryman). Leading examples are John H. Merryman, *The Civil Law Tradition* (2d ed. 1985), as well as the casebooks by Glendon et al. and by John H. Merryman et al., supra n. 9. For a more recent, in-depth analysis and model, see Glenn, supra n. 35.

37. See, e.g., Barton, Gibbs, Li & Merryman, supra n. 16; Volkmar Gessner, Armin Hoeland & Csaba Varga, *European Legal Cultures* (1996); David Nelken (ed.), *Comparing Legal Cultures* (1997); Csaba Varga (ed.), *Comparative Legal Cultures* (1992); Mark van Hoecke & Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," 47 *Int'l & Comp. L.Q.* 495 (1998). See also Waxman, "Teaching Comparative Law in the 21st Century: Be-

been vigorously emphasized by many critical comparatists[38] and is gradually being recognized even by more traditional scholars.[39] In this context, there is also a renewed emphasis on the old idea to explore and understand primarily the underlying *mentalités* of other cultures, i.e., their basic assumptions, thought processes, and predilections.[40]

Finally, we have developed at least some understanding of the interactions between these legal families, traditions, and cultures. We know that they constantly influence, and in particular borrow from, each other[41] in changing export and import patterns.[42] We understand that legal transplants often assume new meaning in a new environment. And we realize that legal systems may converge but also diverge, perhaps even at the same time, and that much of such convergence and divergence is a matter of perspective.[43]

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yond the Civil/Common Law Dichotomy," 51 *J. Leg. Ed.* 305 (2001) (introducing a course on Law in Comparative Cultures); Reimann, "Droit positif et culture juridique. L'americanisation du droit européen par reception," 45 *Archives de philosophie du droit* 61 (2001). For an idiosyncratic illustration of this approach, see Bernhard Großfeld, *Kernfragen der Rechtsvergleichung* (1996) (embedding the comparison of laws in a context of geography, language, alphabets, number systems, religions, and conceptions of time); see also the review of the book by Vivian Curran, 47 *Am. J. Comp. L.* 535 (1999) and Bernhard Großfeld, *The Strength and Weakness of Comparative Law* (Tony Weir transl. 1990). Looking at legal culture has long been a dominant paradigm especially with regard to Asian legal systems, see Upham, supra n. 12, at 652. For a much earlier versions of this idea, see Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung," in Ernst Rabel, *Gesammelte Aufsätze* (vol. III), Hans G. Lesser ed. 1967) 1 at 5; Adolf Schnitzer, I *Vergleichende Rechtslehre* 113-14 (1961).

38. See, e.g., Blankenburg, "Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany," 46 *Am. J. Comp. L.* 1 (1998); Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law," id. 43; Pierre Legrand, *Fragments on Law-as-Culture* (1999); Horatia Muit-Watt, "La Fonction Subversive du Droit Comparé," 2000 *Revue Internationale de Droit Comparé* 503 (2000).

39. See Kötz, "Abschied von der Rechtskreislehre?," 1998 *Zeitschrift für Europäisches Privatrecht* 493 (1998) at 502; Kötz, "Alte und Neue Aufgaben der Rechtsvergleichung," 2002 *Juristenzeitung* 257, at 263; Basedow, "Rechtskultur zwischen nationalem Mythos und Europäischem Ideal," 1996 *Zeitschrift für europäisches Privatrecht* 379 (1996).

40. This is reminiscent of Montesquieu's phrase: "it is not the body of the law that I am looking for, but their soul," quoted after Pierre Legrand, "European Legal Systems are not Converging," 45 *Int'l. & Comp. L.Q.* 52 (1996) at 81. The need to understand foreign mentalities was emphasized already by Rabel, supra n. 37 at 18; Schlesinger, supra n. 1 (1st ed.) Preface at XII (quoting Roscoe Pound); Zweigert, "Zur Methode der Rechtsvergleichung," 13 *Studium Generale* 193 (1967); and René David, David, supra n. 9, at 16. For a modern version, see Pierre Legrand, "A Redemptive Programme," in Legrand, supra n. 38, 1, at 6-9.

41. The classic work is Alan Watson, *Legal Transplants* (1974). See also Sacco, supra n. 31, at 394-400.

42. See Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law," 42 *Am. J. Comp. L.* 195 (1997).

43. Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law," 17 *Stan. J. Int'l L.* 357 (1981); reprinted in John H. Merryman, *The Loneliness of the Comparative Lawyer* (1994) 17. See also Alessandro Pizzorusso, *Sistemi Giuridici Comparati* 343-46 (1995). See also infra nn. 65-66 and text.

Again, this does not mean that all is well nor that nothing is left to be done. Many of our taxonomies remain relatively crude and may have become outdated,[44] our understanding of the deep historical and cultural aspects of legal traditions is still rudimentary, and empirically solid studies of the con- or divergences of legal systems are in short supply. Nonetheless, we have arrived at a much richer, especially more nuanced and dynamic, view of the world map of law than we had in 1950.

Comparing Law: Traditional Approaches and Post-Modern Critiques

But has comparative law also generated substantial knowledge about the very endeavor of comparison itself? Has it further developed its assumptions, agendas and tools? As I shall argue in more detail below (II.), the condition of comparative law as an intellectual enterprise is where the major deficits lie today. Yet, we have moved on even in this regard.

In part, comparative law has moved on because several insights originating in the first half of the century, especially in the work of Ernst Rabel, have become generally accepted in the past fifty years.[45] Today, we understand that when we compare rules, we must take a functional approach, i.e., analyze not only what rules say but also what problems they solve in their respective legal systems.[46] We realize that we need to consider rules in context, i.e., at least within the existent procedural and institutional frameworks,[47] and, if we want to grasp their deeper meanings, also within their socio-economic and cultural environments.[48] And we know that we must observe not only the law on paper but also the law in action, i.e., the application and interpretation of rules and their true force and effect including, perhaps, their impotence.[49] In short, we know that we must go way be-

44. For alternative taxonomies, see Heiss, "Hierarchische Rechtskreiseinteilung," 100 *Zeitschrift für vergleichende Rechtswissenschaft* 396 (2001); Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems," 45 *Am. J. Comp. L.* 5 (1997).

45. See Zweigert & Kötz, supra n. 6, at 62.

46. Rabel, supra n. 37, at 2-4. For a modern exposition of this functional approach, see Zweigert & Kötz, supra n. 6, at 34-36. See also Bogdan, supra n. 9, at 60; Glendon, Gordon & Carozza, supra n. 9, at 9, 12; Glendon, Gordon & Osakwe, supra n. 9, at 11-13; Kahn-Freund, "Comparative Law as an Academic Subject," 82 *L.Q.R.* 40 (1966) at 44-45, 54; Kamba, "Comparative Law: A Theoretical Framework," 23 *Int'l. & Comp. L. Q.* 485 (1974) at 517-18. See also Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 350 (4th ed. 1990).

47. Rabel, supra n. 37, at 3-4; Bodgan, supra n. 9, at 48-50. All four leading American casebooks, supra n. 9, consider these frameworks, most of them in considerable detail.

48. Rabel, supra n. 37, at 4-6; Bogdan, supra n. 9, at 54-56; Glendon, Gordon & Carozza, supra n. 9, at 11; Grossfeld, Kernfragen, supra n. 37, e.g., 12-13.

49. See, e.g., Bogdan, supra n. 9, at 51-53; David, supra n. 9, at 13-14; Glendon et al., supra n. 9, at 9; Sacco, supra n. 31, at 22-30, 344.

yond mere rule comparison.[50] These insights may have been novel three generations ago but, today, every self-respecting comparative lawyer can be expected to know them. If they are often ignored, this is not due to a lack of established knowledge, only to ignorance or indifference in practice.[51]

Comparative law has also moved on, however, in a very different sense: not by *consolidating* new ground but by *questioning* traditional premises, goals, and approaches. Most of this critique has developed in the last decade and much of it was expressed at two conferences and subsequently published in two symposia.[52] It is essentially of two kinds which tend to blend into each other. One kind remains on a fairly conventional level. Its main target is current mainstream comparative law in practice which is taken to task for a variety of shortcomings: for frequent failure to go beyond a mere description or juxtaposition of laws and to strive for true comparison and analysis of results;[53] for isolationism vis-á-vis related legal subjects (such as jurisprudence[54] or international law[55]) and for lack of interdisciplinary efforts;[56] for excessive rule-orientation and insufficient attention to historical and philosophical dimensions;[57] for persistent Eurocentrism and obsession with private law;[58] as well as for lack of attention

50. See Kamba, supra n. 46, at 513-15; Legrand, supra n. 36, at 4, 66 (quoting John H. Merryman); Merryman, "Common law and Scientific Explanation," in Merryman, supra n. 18, 478 at 485-89; Merryman, *The Loneliness of the Comparative Lawyer*, supra n. 18, at 6-7; van Hoecke & Warrington, supra n. 37, at 495. For equivalent developments in Germany, see Martinek, supra n. 6, at 550-51.

51. We have also become more acutely aware of the pitfalls of legal translations, Bodgan, supra n. 9, at 50-51; David, supra n. 9, at 12; see also Gambaro & Sacco, supra n. 30, at 18-12; Sacco, supra n. 31, at 10-20; deCruz, supra n. 9, at 211-22. For a critical view, see Legrand, "A Redemptive Programme," in Legrand, supra n. 38, 1, at 3-4.

52. A group strongly influenced by critical legal studies met at the University of Utah in October of 1996; see "Symposium: New Approaches to Comparative Law," 1997 *Utah L. Rev.* 255 (1997). A more traditionally oriented group met at the University of Michigan in September 1996 and again a year later at the Hastings College of Law; see "Symposium: New Directions in Comparative Law," 46 *Am. J. Comp. L.* 597 (1998).

53. See, e.g., Merryman, Clark & Haley, supra n. 9, at 1; William Twining, *Globalization and Legal Theory* 185 (2000); regarding the rarity of truly comparative analysis in teaching, see Reimann, "The End of Comparative Law as an Autonomous Subject," 11 *Tul. Eur. & Civ. L. Forum* 49 (1996), at 60.

54. Twining, supra n. 53, at 174-94.

55. See, e.g., Obiora, "Toward an Auspicious Reconciliation of International and Comparative Analyses," 46 *Am. J. Comp. L.* 669 (1998).

56. See, e.g., Mattei, "An Opportunity Not to Be Missed: The Future of Comparative Law in the United States," 46 *Am. J. Comp. L.* 709 (1998); for a much earlier call to "cooperate with representatives of the other social sciences," see Kahn-Freund, supra n. 46, at 47-48.

57. Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?," 143 *U. Pa. L. Rev.* 1889 (1995); for a critical response, see Zekoll, "Kant and Comparative Law—Some Reflections on a Reform Effort," 70 *Tul. L. Rev.* 2719 (1996). See also Merryman, supra n. 18, at 6-7.

58. Reimann, "Stepping out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda," 46 *Am. J. Comp. L.* 637 (1998).

to international regimes.[59] A second, more radical, kind of critique is launched from what may be called a post-modern platform.[60] The respective attacks question the foundations of the whole comparative enterprise as it exists today because they conceive of the legal universe not in terms of unity, harmony, and gradual assimilation but of complexity, ambiguity, and persistent heterogeneity.[61] In particular, they challenge the traditional obsession with, and concomitant search for, similarity of laws,[62] emphasizing instead the importance of recognizing (and tolerating) the "other" in foreign legal systems and cultures.[63] They question the time-honored principle of functionality by pointing to its systemic bias in favor of like solutions and to its inherent insensitivity towards difference.[64] They also contradict the mainstream view that legal systems, especially the civil and the common law, are—happily—converging;[65] the critics either doubt

59. "Reimann, Beyond National Systems: A Comparative Law for the International Age," 75 *Tul. L. Rev.* 1103 (2001). For a critical analysis of the relationship between comparative law and (public) international law, see Kennedy, "New Approaches to Comparative Law and International Governance," 1997 *Utah L. Rev.* 545.

60. For a lucid summary of this phenomenon, see Erik Jayme, *Rechtsvergleichung. Ideengeschichte und Grundlagen von Emerico Amari zur Postmoderne* 103-18 (2000). In contemporary American legal academia, proof of one's erudition requires the citation of at least one French author in this context: my main reference here is Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington & Brian Massumi transl. 1984, orig. 1979).

61. See, e.g., Glenn, supra n. 35, at 323-24; Frankenberg, "Critical Comparisons: Rethinking Comparative Law," 26 *Harv. Int'l L.J.* 411 (1985); Gessner, Hoeland & Varga, supra n. 37, at XVII, 3, 5.

62. Zweigert, supra n. 40, at 193, 198; Zweigert & Kötz, supra n. 6, at 34, 39-40 ("praesumptio similitudinis"), 46 ("the legal problems of all countries are similar"); in a very similar vein already Kahn-Freund, supra n. 46, at 45, and even Merryman, supra n. 18, at 8-9. For a more skeptical view, see deCruz, supra n. 9, at 230-31. The traditional predilection towards similarity may ultimately stem from a belief in the "unity of human nature" ("Einheit der menschlichen Natur"), Rabel, supra n. 37, at 6. It may have been reinforced by the psychological and emotional need of the emigrant generation to believe in such a unity of mankind after the disasters and dislocations which the emigrants experienced in the first half of the twentieth century, see Grosswald-Curran, "Cultural Immersion, Difference and Categories in U.S. Comparative Law," 46 *Am. J. Comp. L.* 43 (1998), at 66-78.

63. Glenn, supra n. 35, 31; Grosswald-Curran, "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives," 46 *Am. J. Comp. L.* 657 (1998); Demleitner, "Challenge, Opportunity and Risk: An Era of Change in Comparative Law," id. 647; Frankenberg, supra n. 61, at 415; Legrand, "Acts of Repression," in Legrand, supra n. 38, at 111, 113 ("A comparatist is someone who values diversity as a good and who is prepared to affirm it as a good."); Legrand, "A Redemptive Programme," id., at 1, 10-13. Even one of the co-authors of the strongest endorsements of the "praesumptio similitudinis" has recently expressed some doubt regarding the likeness of legal solutions, see Kötz, "Alaschied," supra n. 39, at 503.

64. Frankenberg, supra n. 61, at 434-40; Großfeld, supra n. 37, at 9-10, 292; see also Twining, "Globalization and Common Law," 6 *Maastricht J. of Eur.& Comp.L.* 217 (1999) at 229-30 (criticizing the current "rather simple form of functionalism that has echoes of the 1920s and 1930s").

65. See, e.g., Gordley, "Common Law und Civil Law: eine überholte Unterscheidung," 1993 *Zeitschrift für Europäisches Privatrecht* 498; Markesinis, "Learning from Europe and Learning in Europe," in Basil Markesinis (ed.), *The Gradual Convergence* 1 (1994), especially at 30; Basil Markesinis, *The Coming Together of the Com-*

such convergence altogether or at least see it as a complex and internally contradictory process and are skeptical of its benefits.[66] In a similar vein, they have qualms about the blessings of legal unification and display a preference for legal pluralism.[67] They even raise questions about the possibility and limits of inter-system communication, wondering whether linguistic and cultural barriers can really be overcome.[68] Last, but not least, they emphasize the role of comparative law as a critical or "subversive" discipline that can destabilize and undermine established beliefs and conceptions.[69] To more tradi-

mon Law and the Civil Law (2000); Sacco, "Diversity and Uniformity in the Law," 49 *Am. J. Comp. L.* 171 (2001); from a historical perspective, Reinhard Zimmermann, "Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science," 112 *L.Q.R.* 576, 580 (1996); Reinhard Zimmermann, "Civil Law and Common Law, The 'Europeanization' of Private Law within the European Community and the Re-Emergence of a European Legal Science," 1 *Col. J. Eur. L.* 64 (1994/95). See also deCruz, supra n. 9, at 477-79, 483-85, 487-89; Patrick Glenn, "La civilisation de la common law," 1993 *Revue internationale de droit comparé* 559, at 567. Similar views prevail in Germany today, see Martinek, supra n. 6, at 561.

66. Legrand, "European Legal Systems are not Converging," 45 *Intl. & Comp. L.Q.* 52 (1996); Merryman, supra n. 43, at 19, 32-34, 48 (emphasizing "multidirectional trends whose resultants point in opposite directions", id.); Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies," 61 *Mod. L. R.* 11 (1998). Persisting differences are pointed out from a more traditional perspective by E. Allen Farnsworth, "A Common Lawyer's View of His Civilian Colleagues," 57 *La. L. Rev.* 227 (1996), and by Geoffrey Samuel, "System und Systemdenken—Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law," 1995 *ZEuP* (375, especially 392-97); see also deCruz, supra n. 9, at 39-40 (emphasizing the persistence of deep-seated differences); Kötz, supra n. 39, at 500. For a critical analysis of the convergence debate, see Luke Nottage, "Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law," European University Institute (EUI) Working Papers Law No. 2001/1. Some critics also question the role and effect of legal transplants and exchanges between systems in this context, e.g., Teubner, supra; Elisabetta Grande, *Imitazione e Diritto: Ipotesi sulla Circolazione dei Modelli* (2000).

67. See, e.g., Glenn, supra n. 35, at 318, 331 (calling for a "Sustainable Diversity in Law"); Harlow, "Voices of Difference in a Plural Community," 50 *Am. J. Comp. L.* 339 (2002); Legrand, supra n. 66; Twining, supra n. 64, at 226; van Hoecke & Warrington, supra n. 37, at 520; Waxman, supra n. 37, at 312 (emphasizing the "abundance and diversity of legal systems"). Yet, more traditional comparatists have also long pointed to the downsides of legal unification, see Rabel, supra n. 37, at 9; Gambaro & Sacco, supra n. 30, 36-40; Neuhaus & Kropholler, "Rechtsvereinheitlichung—Rechtsverbesserung?," 45 *Rabels Zeitschrift* 73 (1981), especially 78-83; Kötz, "Rechtvereinheitlichung—Nutzen, Kosten, Methoden, Ziele," 50 *Rabels Zeitschrift* 1 (1986); Martinek, supra n. 6, at 574.

68. Some scholars have argued that different legal cultures are ultimately incommensurate and that it is impossible for a member of one culture fully to understand his or her counterpart, see, e.g., Legrand, supra n. 66, especially 62-63. Others have taken similar, though less categorical, views, see Grosswald-Curran, supra n. 62, at 58, 90-92. Yet, most comparatists have been more, albeit guardedly, optimistic that intercultural boundaries can be overcome, see Glenn, supra n. 35, at 32, 42-45; Glenn, "Are Legal Traditions Incommensurable?," 49 *Am. J. Comp. L.* 133 (2001); Großfeld, supra n. 37, at 153, 159-60, 283, 285; Frankenberg, supra n. 61, at 442-43. For an early rejection of the argument that communication between common and civil lawyers is ultimately impossible, see Yntema, "Comparative Legal Research," 54 *Mi. L. Rev.* 899 (1956) at 905.

69. Fletcher, "Comparative Law as a Subversive Discipline," 46 *Am. J. Comp. L.* 683 (1998); Frankenberg, supra n. 61; Muir-Watt, "La fonction subversive du droit

tional comparatists, some of these radical challenges seem overblown and riddled by internal inconsistencies.[70] Yet, on the whole, they inject a healthy dose of discord into an otherwise rather complacent discipline.[71]

These critiques, be they of a more traditional or of a post-modernist nature, are progress in an important sense: they have provided the impetus to rethink time-honored premises, methods, and practices, and to look for new directions. This is good reason to count them among the recent accomplishments of the field.

3. *Comparative Law Beyond Method*

Even this brief (and incomplete) survey of accumulated scholarship shows that, today, comparative law is more than just a method. There is no need here to enter into the time-worn debate about the true nature of the field as a technique, perspective, or a (systematic or empirical) science.[72] Suffice it to note that fifty years ago, when leading scholars considered comparative law merely a method,[73] their view may have been justified because back then the discipline consisted mainly of a particular way of looking at law and of a research agenda. Yet, when leading scholars today continue to subscribe to this view,[74] the actual *knowl-*

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comparé," 2000 *Revue internationale de droit comparé* 503 (2000); Legrand, "Seamlessness," in Legrand, supra n. 38, at 15, 26. For a more radical argument, see Berman, "Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion," 1997 *Utah L. Rev.* 281. One must not forget, however, that the critical potential of comparative law has in principle been recognized for decades, see, e.g., Rabel, supra n. 37, at 8.

70. For a pithy critique, see Peters & Schwenke, "Comparative Law Beyond Post-Modernism," 49 *Intl. & Comp. L. Q.* 800 (2000).

71. Id. at 830; others are less sure of their benefits, see, e.g., Kötz "Alte und neue Aufgaben," supra n. 39, at 264.

72. For a brief overview, see de Cruz, supra n. 9, at 222-23; Bodgan, supra n. 9, at 21-26. For an in-depth discussion, resulting in the conclusion that comparative law is both method and a science in its own right, see Constantinesco, supra n. 6, at 217-53. On the German side of this debate, Martinek, supra n. 6, at 558-59. See also Rheinstein, supra n. 17, at 11, 20, 25 (empirical science of law as a socio-cultural phenomenon, at 20).

73. See, e.g., Gutteridge, supra n. 3, at ix, 1; Kahn-Freund, supra n. 46, at 40-41.

74. Glendon, Gordon & Carozza, supra n. 9, at 4 (quoting Kahn-Freund); Glendon, Gordon & Osakwe, supra n. 9, at 8 (ditto); Schlesinger, Baade, Herzog & Wise, supra n. 9, at 2 ("primarily a method"); Kamba, supra n. 46, at 486 ("Comparative Law signifies the *systematic* application of the comparative technique to the field of law"). Zweigert & Kötz, supra n. 6, also lean in this direction ("intellectual activity with law as its object and comparison as its process", id. at 2) although earlier, Zweigert saw little sense in debating whether the field is only a method or an independent branch of legal science, Zweigert, supra n. 40, at 194. So does Merryman, supra n. 18, at 1-2 ("clearly more a process or method than a field of inquiry"). See also deCruz, supra n. 9, who considers comparative law "predominantly a method of study", Preface i, although he also sees it "becoming a branch of social science in its own right", id. and at 4.

edge accumulated in the meantime makes their position indefensible.[75]

This is not to deny, of course, that comparative law can be regarded as a method of inquiry which may be employed in many contexts and for many purposes. But it is no longer—if it ever was—*merely* that. At least today, it has *also* become a field of substantive knowledge.

This dual nature is not unusual at all. Comparative law shares it with many other disciplines, such as legal philosophy, legal sociology, and legal history. They all are both: a method of inquiry and a body of learning consisting of factual information, recognition of structures, and understanding of fundamental issues. To be sure, in these disciplines as well as in comparative law, there are disagreements about, gaps in, and errors affecting, what is known. But regardless of its quality, this knowledge is an essential part of the respective field.

To recognize comparative law as a body of knowledge is important for several reasons. To begin with, it accurately represents what the field has become *in fact*. Comparatists in fact rarely employ the comparative method in any sophisticated or sustained fashion but spent most of their time and energy, both as scholars and teachers, accumulating and transmitting knowledge about foreign law and legal families.[76] Moreover, acknowledgment of the accumulated substance is essential for a realistic assessment of what we know, what we don't know, and what we should know. Taking stock of established knowledge is also a prerequisite for setting a minimum standard of learning that every comparatist can be expected to master.[77] Last, but not least, whereas looking at a discipline merely as a method reduces it to an adjunct of other areas,[78] recognizing comparative law as a body of knowledge means recognizing it as an academic subject in its own right. Such recognition is timely and important. Yet, it also creates expectations which the discipline has yet to fulfill.

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75. For the same reason, I consider Pierre Legrand's position too narrow that "comparative legal studies is best regarded as a *perspective* permitting the illumination of law", Legrand, "Seamlessness," supra n. 38, at 20.

76. Whether this is what they *should* do is, of course, an entirely different question.

77. See infra IV.1.

78. See Kahn-Freund, supra n. 46, at 41 ("The trouble is that the subject. . .has by common consent the somewhat unusual characteristic that it does not exist. Comparative law. . .is not a topic, but a method"); Gutteridge, supra n. 3, at 2, 10; Kamba, supra n. 46, at 486 ("There are no rules or principles of comparative law."). The resultant marginalization of comparative law is pointed out by Samuel, "Comparative Law and Jurisprudence," 47 *Intl. & Comp. L. Q.* 817, 827 (1998). To make matters worse, reducing comparative law to a method reduces it to its weakest aspect because the method is what we know least about, see infra II.3.

II. FAILURE: THE PERSISTENT INCOHERENCE OF COMPARATIVE LAW AS A DISCIPLINE

While comparative law has been a considerable success in terms of producing a wealth of knowledge, it has been a resounding failure with regard to its more general development as a field of inquiry: it has failed to mature into an up-to-date, well-defined, and coherent discipline. Comparative law has rarely shown itself capable of generating broad and deep insight of general interest, e.g., into the structure and development of legal systems or into the relationship between law, society, and culture on a regional or worldwide basis. As a result, it does not have the intellectual prominence nor enjoy the academic recognition one would expect in our international age.[79] In some quarters, especially in the United States, this has led to an "identity crisis,"[80] triggering much soul-searching as well as attempts to find new directions.[81]

The discipline's failure to develop is evident in several regards. Most obviously, much of its mainstream continues to cling to the orthodox model established by European scholars (both on the continent and, as emigrants, in the United States) more than fifty years ago.[82] This "Country and Western tradition"[83] with its main focus on nation state legal systems of Western capitalist societies, its obsession with the common-civil law dichotomy, and its preoccupation with private law rules and doctrines, may have been adequate at the time but is now in dire need of a major overhaul.[84] Furthermore, despite many admonitions and obvious needs,[85] comparative law has still not become interdisciplinary. To be sure, there is occasional interdiscipli-

79. For a collection of scathing criticisms, see Legrand, supra n. 40, at 3.

80. Glendon, Gordon and Carozza, supra n. 9, at 3; Glendon, Gordon and Osakwe, supra n. 9, at 8. For many comparative lawyers, sensing this failure has led to a "Cinderella complex", i.e., a feeling of isolation, underappreciation, and marginalization, see Frankenberg, supra n. 61, at 419.

81. See, e.g., the symposia mentioned supra n. 52. All this is much more obvious in the common law world than in continental Europe where the current emphasis is overwhelmingly on blackletter rule harmonization and unification, see infra III.2. But see also the colloqium organized by the Centre Francais de Droit Comparé, *Le Droit Comparé: Aujourd'hui el Demain* (1995).

82. Note that the two treatises considered leading worldwide today, authored by René David and by Zweigert and Kötz respectively, were originally published more than a generation ago. Subsequent editions redesigned some of their chapters and updated many details but their overall approach has hardly changed. At their core, these works reflect a concept of comparative law developed in the 1950s and 1960s, if not earlier. Similarly, if one juxtaposes the discussion of the discipline's objectives and methods in the first (1950) and the sixth edition (1998) of Rudolf Schlesinger's leading casebook, the continuity over a 48-year period is striking.

83. Twining, supra n. 53, at 184.

84. See, e.g., Reimann, supra n. 58 and supra n. 59; Twining, supra n. 53, 184-89; see also Merryman, *The Loneliness of the Comparative Lawyer* (supra n. 18), Preface vii.

85. See, e.g., Legrand, supra n. 40, at 8-10; Mattei, supra n. 56.

nary work[86] but it is a rare exception and has not set a broader trend. And despite many criticisms, comparative law has still not acquired a solid empirical basis. We have ridiculously little statistical data about the legal systems we study and compare.[87] Without such data, most of our conclusions rest on personal intuition, anecdotal information, or plain speculation, rather than on systematic observation of hard facts. These are significant failures but since they have been sufficiently explained elsewhere[88] there is no need to belabor them any further.

Yet, there is more to the discipline's lack of overall progress than mere resistance to change or simple complacency. The failure of comparative law to develop into an intellectually successful field also reflects a deep structural problem: the subject consists of a multitude of bits and pieces that do not add up to a coherent whole (1.). This problem is due to the absence of a sound theoretical framework that can hold the pieces together (2.). The most embarrassing theoretical weakness is the continuing lack of an understanding of what it really means to compare (2.).

1. The Structural Problem

Our survey of knowledge accumulated over the past half-century has demonstrated the wealth and diversity of comparative legal scholarship. The problem is that these books, articles, ideas, and critiques do not add up to a sum that is larger than its parts. Instead, they constitute a potpourri of disparate elements that coexist side-by-side but rarely relate to any overarching themes.

Witness, for example, the structure and content of our standard books. They usually begin by talking about the character, history, goals, benefits, and tools of comparative law; almost suddently, they lay these matters completely aside and launch into descriptions of legal families or traditions; then they add discussions of particular substantive topics, and, along the way, they provide a fair amount of information about foreign law. The unifying theme in all this is hard to see. Another sign of the discipline's incoherence is its high degree of internal compartmentalization. Some studies focus on a particular foreign country (France, Germany, the United States, Japan, etc.) while others focus on a particular area of law (e.g., contracts, torts, civil procedure, or constitutional law). Some deal with larger legal traditions (mainly civil law, common law, Asian legal systems, and mixed jurisdictions) while others explore particular regions of the

86. See supra n. 16.

87. A small but laudable exception is Merryman, Clark & Haley, supra n. 9, chapter 6, 535-703; Twining, supra n. 53, at 154, suggests several possible sources, such as data collected by the UN, the World Bank, and the IMF.

88. Supra nn. 82-87.

world (primarily North America and Western Europe but also Eastern Europe, the Pacific Rim, and Latin America). Some discuss cultural aspects (such as perceptions of law, importance of rules, attitudes towards authority, and *mentalités*) while others investigate the use of sources (codification, statutory construction, precedent, and doctrine). Some compare blackletter rules (in codes, statutes, judicial decisions, and sometimes regulations) while others look at institutions (courts, governments, legislatures, and law faculties).

Of course, there is nothing wrong with diversity, and, of course, other disciplines have a variety of branches as well. But comparative law is a more troublesome case. There is precious little connection between its various subspecialties. The Japan scholars rarely talk to the China specialists, not to mention the European legal systems folks; the students of comparative judicial review care little about the scholars of legal traditions and vice versa; few contracts specialists show much interest in what the proceduralists do, etc. In short, the members of each group produce their respective bits and pieces of comparative law but do not seem to care a whole lot whether their work is of any more general interest. As a result, the sense of ultimately belonging to the same guild and of working towards similar goals is very weakly developed. Being a comparative lawyer does not create the same group identity as being an international lawyer, legal historian, or law and economics scholar. Outside of a small hard core, most of those engaged in comparative work of one sort or another do not even think of themselves (primarily) as comparative lawyers but mainly as Asia specialists, Russian law scholars, constitutional lawyers with comparative interests, etc.

The consequence of this highly fragmented situation is that studies in comparative law rarely relate to, or build on, each other. They may connect within the respective compartments but seldom contribute to larger common themes. In other words, comparative law keeps accumulating knowledge in a piecemeal fashion but then leaves the pieces "scattered, fragmentary and often difficult to access."[89] In a sense, it suffers from the general malaise of our much-advertised cyberage which produces unprecedented quantities of information but no overall structures to integrate it. As a result, comparative law, like many other fields, has made progress in lots of small ways but has failed to develop as a coherent discipline.

2. *The Lack of Theoretical Foundations*

The piecemeal nature of current comparative law is no wonder. In order to contribute to a larger theme (or themes), to build on each

89. These were Harold Gutteridge's words in 1946, Gutteridge, supra n. 3, at x. This situation has hardly changed, except that we have a lot more literature and perhaps somewhat better access to it due to enhanced search methods.

others' work in a systematic fashion, in short, to assemble the multitude of pieces in meaningful way, scholars need a shared view of what they are doing and why. They need, in addition to all their specialities, a common intellectual ground on which they can (at least occasionally) meet. As it stands today, comparative law does not have such a meeting place. Its only common denominator is that it has something to do with foreign law. Since there are lots of foreign legal systems, numerous kinds of "law", and plenty of ways to look at them, the "foreign law" denominator is far too vague to provide even minimal internal coherence. It can put all the pieces under one label but it cannot connect them.

As many others have noted, the main reason for this failure is that comparative law still lacks a solid theoretical foundation.[90] To be sure, there have been some noteworthy attempts to develop a framework[91] but the guild has by and large paid little attention to these endeavors and they have had no visible impact. Some comparatists positively believe, on grounds not explained, that sustained attention to theory does more harm than good;[92] most do not seem to care, if they even understand the problem.[93]

It is not entirely clear why comparatists put up with inhabiting such a "theoretical wasteland."[94] I suspect that their reasons are not altogether noble. Theoretical work is hard and likely to be controversial. It may be unrewarding especially since it is, as mentioned, often frowned upon. Perhaps most importantly, establishing a theoretical framework would terminate the current laissez faire approach. As Otto Kahn-Freund noted more than half-a-century ago, comparatists enjoy "the gift of freedom": nobody really tells them exactly what to do and how to do it, other than "to teach and develop some legal subjects by comparing a number of legal systems."[95] It is understandable that comparatists may be reluctant (consciously or not) to inhibit this unbridled liberty through developing, and imposing on themselves, more precise ideas about their work.

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90. See, e.g., Frankenberg, supra n. 61, at 418; Kamba, supra n. 46, at 485; Merryman, "Comparative Law and Scientific Explanation," in Merryman, supra n. 18, at 478-79; Legrand, supra n. 36, at 34-35 (quoting John H. Merryman); Samuel, "Comparative Law and Jurisprudence," 47 *Intl. & Comp. L. Q.* 817 (1998); Twining, supra n. 53, at 176-84, 189-93.

91. The most sustained and elaborate attempt is probably Constantinesco, supra n. 6, 203-73; see also Kamba, supra n. 46; Samuel, supra n. 90; Twining, supra n. 53; van Hoecke & Warrington, supra n. 37. See also the symposia mentioned supra n. 52.

92. Zweigert & Kötz, supra n. 6, 32.

93. See, e.g., Glendon, Gordon & Carozza, supra n. 9, at 1-3. The authors begin their book with the question "What is 'Comparative Law'?" but do not even attempt to answer it in the respective chapter, talking instead about the discipline's necessity and benefits.

94. Samuel, supra n. 90, at 823.

95. Kahn-Freund, supra n. 46, at 41.

Be that as it may, Kahn-Freund also pointed out that the "gift of freedom" is "the most dangerous" of all.[96] In the case of comparative law, its dangers have materialized. When comparatists reiterate their standard lists of their subject's necessity, purposes, tools, and benefits, these mantras are so imprecise and long as to be virtually all-inclusive. The only agreement, it seems, is that anything goes,[97] a few basic prohibitions aside. Such an agreement defines no field because it establishes no boundaries. Thus comparatists still have no overall theoretical framework explaining, *what* kind of "law" to compare for what purpose, *what* to prove or disprove through comparison, and, most embarrassingly, *how* exactly to go about it.[98]

3. *How (and What) to Compare?*

In a discipline with comparison at its heart, the centerpiece of its theoretical framework must be a thorough understanding of the comparative method (this is especially true if one believes that method is really all there is to the subject anyway[99]). Yet, as has often been noted both by comparatists themselves and by outside observers, it is exactly this centerpiece that is largely missing in our field.[100] Attempts to develop even a moderately sophisticated method of comparison have been exceedingly rare[101] and, as far as I can see, happily ignored. Although it may seem somewhat hard to believe, there is really no serious discourse about the comparative method, except for the old commitment to functionalism and routine warnings against terminological pitfalls. In most of the literature addressing the method, we normally find, again, a laissez faire attitude, i.e., the assumption that there is simply a "variety of methods"[102] or that "the comparative method is sufficiently elastic to embrace all scientific activities that relate to research in foreign law."[103]

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96. Id.

97. See, e.g, Tallon, "Quel droit comparé pour le XXIème siècle?," 1998 *Revue de Droit Uniforme* 703 (1998) at 705 (arguing that all agendas must be accepted).

98. Consequently, they also lack an accepted set of criteria to measure the quality of work and to gauge the importance of a contribution.

99. See supra nn. 73-74 and text.

100. See, e.g, Jean-Leontin Constaninesco, *Rechtsvergleichung* 30 vol. II (1972); deCruz, supra n. 9, Preface, at ii, 2, 222; Twining, supra n. 53, at 191; Legrand, supra n. 36, at 51 (quoting John H. Merryman); Watson, supra n. 41, 1. Significantly, on over a thousand pages, the volume published on the 50th anniversary of the Institute of Comparative Law in Japan, Chuo University, contains virtually nothing on the comparative method, see *Toward Comparative Law in the 21st Century* (1998).

101. Probably the most extensive effort was made by Constantinesco, supra n. 100); see also deCruz, supra n. 9, at 211-35; and Legrand, "A Redemptive Programme," supra n. 40.

102. Kahn-Freund, supra n. 46, at 40.

103. Genzmer, "A Civil Lawyer's Critical Views on Comparative Legal Theory," 15 *Am. J. Comp. L.* 87 (1967).

Perhaps most scholars assume "that the comparative methods which should be employed are obvious."[104] But that position is untenable upon even a moment's reflection. Comparative lawyers have not developed meaningful answers even to such fundamental questions as: "what is 'comparison' and how does it relate to description, abstraction, classification, induction, and generalisation? What are the conditions of comparability? Can a clear distinction be maintained between explicit and implicit comparison? Can 'parallel studies', 'seeing ourselves as other see us', or 'a common lawyer looks at the civil law', or explaining one's own legal system to a foreign audience, count as clear examples of 'comparison'?"[105] It has also been said that comparative methods are rarely discussed because "there is not much to say" about them[106] but this can hardly be true either. Other disciplines have found it both necessary and possible to develop theories of comparison,[107] and there is no reason why this should suddenly be unnecessary or impossible when it comes to law.

Yet, with regard to law we have not even defined a set of "'comparators' - that is standards, measures or indicators that provide a basis of comparison."[108] Without such "comparators," one cannot really gauge the similarity or dissimilarity of law or legal systems in a meaningful manner. Since laws are all alike in some and different in other regards, likeness is a matter of definition and degree. If there is no articulated set of criteria which define and measure likeness, agreements or disagreements about the similarity of, say, the common law and the civil law at best reflect mere differences in perspective; at worst they are empty word games.[109]

III. A European Exception? - Unifying Private Law

But hasn't comparative law recently made enormous progress towards the Europeanization of private law? Hasn't scholarship aimed at that goal been internally coherent? Haven't its authors built on

104. DeCruz, supra n. 9, at 4.
105. Twining, supra n. 53, at 191-92.
106. Merryman, supra n. 18, at 1.
107. See, e.g., Zelditch Jr., "Intelligible Comparisons," in Ian Valler (ed.), *Comparative Methods in Sociology* 267 (1971). See also Rothacker, "Die vergleichende Methode in den Geisteswissenschaften," 60 *Zeitschrift für vergleichende Rechtswissenschaft* 13 (1957).
108. Twining, supra n. 53, at 191.
109. For example, when James Gordley sees a virtually complete convergence of the two traditions today, Gordley, supra n. 65, while Pierre Legrand takes almost the opposite position, Legrand, supra n. 66, there is no meaningful way to discuss who has the better argument. Both scholars measure likeness in radically different manners—one by looking at the similarity of blackletter private law rules, the other by looking at mental habits—and without an idea which of these parameters is more appropriate or valuable or relevant for which purpose, the two arguments cannot be connected in a sensible way. Thus they are (more) bits and pieces of comparative law, interesting in and of themselves but of little value for the advancement of the discipline as a whole.

each other's work in exactly the way it should be? These are legitimate questions. In Western Europe, comparative legal studies have indeed gained a momentum and a significance unprecedented in the last hundred years (1.). But the situation is not nearly as rosy as it may seem. One must not overlook that the comparatists' approach as well as their success in the Europeanization context have been extremely narrow and that, more broadly speaking, the discipline has stagnated in Europe as well (2.). This, of course, raises the question what explains its undeniable, albeit limited, accomplishments (3.).

1. The European Success Story

From an American perspective, one may indeed look across the Atlantic with envy these days. Comparative law in Europe is a hot topic. It is practically relevant, self-confident, and enjoys a high profile.

It all began only about a dozen years ago. First, the political integration of Western Europe gained new momentum with the Single European Act of 1987 and accelerated shortly thereafter with the Maastricht Treaty of 1992. Then a few legal scholars revitalized an idea that had been floated a decade or so earlier[110] but had so far been largely ignored: if Europe was going to be a single market and a Community without borders, it probably needed a common private law as well. Soon others joined the bandwagon. Perhaps the erstwhile shared tradition of modernized Roman law could become the foundation of a new European *ius commune*,[111] perhaps comparative studies would have to start from scratch. Be that as it may, the idea caught on and spread like wildfire. Projects, working groups, and specialized journals were founded all over the continent in an almost frenzied manner. Comparatists, hungry for something meaningful to do and happy to return to the forefront of legal academia, set to work.

Their success has been impressive. Within slightly more than a decade, they have produced an enormous body of work. It ranges from model rules and principles[112] to comparative case studies[113] and voluminous scholarly treatises.[114] There are even casebooks presenting

110. See Kötz, "Gemeineuropäisches Zivilrecht," in Herbert Bernstein, Ulrich Drobnig & Hein Kötz (eds.), *Festschrift für Konrad Zweigert* 481 (1981).

111. See Zimmermann, "Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science," 112 *L.Q.R.* 576 (1996). See also Coing, "Europäisierung der Rechtswissenschaft," 1990 *Neue Juristische Wochenschrift* 937 (1990).

112. Most famously the work of the so-called Lando Commission, see Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law* (1999).

113. See, e.g., Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law* (2000).

114. See, e.g., Christian von Bar, *The Common European Law of Torts* (2 vols. 1998-2000) Thomas Kadner Graziano, *Gemeineuropäisches Jutemationales Privatrecht* (2002); Hein Kötz, *European Contract Law* (vo. I 1997, Tony Weir transl.); Peter Schlechtriem, *Restitution und Bereicherungsausgleich in Europa* (2 vols. 2000-2001).

materials from a variety of European jurisdictions.[115] And there is a lively discussion about a potential European civil code.[116] The ultimate success of comparative law in this context, however, is the expansion of the intellectual horizon: legal scholars are transcending their national systems and are beginning to think and to work on the European level. This is fast becoming routine.

2. *Inherent Limitations and Continuing Stagnation*

Yet, the recent success of European comparative law is easily overrated. In judging it, one must not overlook important inherent limitations. Most significantly, its accomplishments are mainly the success of a means to a politically and intellectually fashionable (though possibly important[117]) end: comparative law has simply supplied the standard toolkit necessary for the unification of positive law in the European context. Even in that regard, it has proceeded on an extremely traditional and narrow path: its underlying conception of "law" is positivistic, its methods are rather simple, and its goals are consciously one-sided.

The Europeanization projects' concept of law is narrow in three ways. First, it encompasses only positive rules and principles of law as laid down in written sources, i.e., in codes, statutes, cases, and scholarly works. Some projects emphasize their application by appellate courts, but their impact in practice receives next to no attention. Second, "law" is by and large still limited to substantive private law. A few projects are beginning to look at other areas as well but for the time being, the dominant field is the law of obligations, i.e., contracts, torts, and closely related matters. Third, "law" means the national law(s) of Western European nation states. Again, there are occasional glances at some international conventions or at a few mixed jurisdictions but most transnational regimes and the international practice of law are virtually ignored. As a result of these limitations, the Europeanization projects proceed with scant attention to law in action, to the institutional and procedural context, and to the predispositions, mentalities, or habits of legal cultures.[118]

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115. Walter Van Gerven et als., *Common Law of Europe Casebooks: Torts* (1999).

116. See, e.g., A.S. Hartkamp et als. (eds.), *Towards a European Civil Code* (1994); "European Civil Code (Symposium)," 5 *European Review of Private Law* 455 (1997). For a spirited critique, see Legrand, "Against a European Civil Code," 60 *Mod. L. Rev.* 44 (1997). See also Bénédicte Fauvarque-Cosson, "Faut-il un Code civil européen?," 2002 *Revue trimestrielle de droit civil* 463.

117. It remains to be seen how important the contribution of comparative studies will really be at the end of the day, see Bermann, "Comparative Law in the New European Community," 21 *Hastings Int'l. & Comp. L.R.* 865 (1998) (pointing out that the EU pursues its own political agenda).

118. Scholars who, like Bernhard Grossfeld or Pierre Legrand, emphasize the importance of these elements find themselves decidedly on the fringe. For better or worse, they have had no visible impact on the Europeanization agenda as a whole.

The methods employed do not invite complex analysis. Comparison essentially consists of the juxtaposition of blackletter rules or doctrines from a functional perspective or, at best, of potential case solutions. It proceeds as a search for presumed similarities which are then taken to elucidate shared principles. This methodology has not changed since the time of Rabel and in some regards not even since the nineteenth century. There is hardly any serious interdisciplinary work[119] except for some research in legal history, and even that is limited to the history of doctrine.[120] As is widely recognized, there is almost no empirical research worth speaking of[121] and there is even *less* interest in sociological studies today than there was a few decades ago.[122]

The goal driving mainstream comparative legal studies in Europe is decidedly one-sided. It is the same harmonization and unification of positive law that once animated the great codifications, excited the Paris Congress of 1900, was envisaged by Ernst Rabel around the middle of the century, and has been the primary lodestar of European comparative law ever since.[123] It is not based on any solid theoretical foundation[124] but on the rather unreflective and unshaken belief in the convergence of European legal systems, be it as a quasi-automatic process or as a result of conscious efforts. As its critics have pointed out, this agenda is untroubled by the possibility of (perhaps simultaneous) divergence of legal systems, the danger of deep contradictions beneath a harmonious surface, or even the inherent benefits of sustaining legal diversity.[125]

In sum, comparative law in the context of private law Europeanization is a soundly positivistic, methodologically simplistic, and amazingly biased enterprise. Its accomplishments are by and large limited to the harmonization of blackletter rules. This kind of work is

119. It is amazing how little has happened in this regard since Konrad Zweigert reflected upon looking at other disciplines forty years ago, Zweigert supra n. 40, at 194. Perhaps the foundation of the new Comparative Law Centre at the University of Paris I with the intention to promote interdisciplinary studies is a harbinger of change, see Muir-Watt, "On the New Comparative Law Centre at the University of Paris I", 2002 *Zeitschrift für Europäisches Privatrecht* 644. There are also some promising forays into law and economics, see Kötz, supra n. 16.

120. The most impressive example of this genre in modern times is still Reinhard Zimmermann, *The Law of Obligations* (Oxford University Press 1996, orig. 1990/1992).

121. See Kötz "Alte und neue Aufgaben," supra n. 39, at 263; Nottage, supra n. 66, at 35-36; Martinek, supra n. 6, at 552 (for Germany). A rare exception is the work of Erhard Blankenburg, see, e.g., "Civil Litigation Rates as Indicators for Legal Culture," in Nelken, supra n. 37, 41.

122. See Drobnig, "Rechtsvergleichung und Rechtssoziologie," 18 *RabelsZ* 305 (1953); Drobnig, "Methods of Sociological Research in Comparative Law," 35 *RabelsZ* 496 (1971); Zweigert, "Die soziologische Dimension der Rechtsvergleichung," 38 *RabelsZ* 299 (1974).

123. See Martinek, supra n. 6, at 567 (for Germany).

124. See Samuel, supra n. 90, at 818.

125. See the works by Legrand, Samuel, & Teubner cited supra n. 66.

practically important but does not signal any progress of the discipline on a larger scale.

This becomes quite obvious as soon as one leaves the prominent role of comparative law in the Europeanization context aside for a moment. Suddenly, one finds the discipline in Europe pretty much where it was in the 1950s. Reading accounts of its postwar development, one quickly senses that nothing exciting has happened in the last five decades.[126] Note that in twenty-first century Europe, the field continues to be defined by a treatise which was written in the 1960s.[127] In the decades since, mainstream European comparative law has neither developed a more sophisticated concept of law, nor refined its methods, nor discovered, and certainly not pursued, any really new goals.[128] As a result, there is no better theoretical framework in Europe than there is in the United States. There, as well as here, comparative law is in an "underdeveloped state."[129] It is just that on the continent, the discipline's importance for the Europeanization of private law makes it much easier to overlook, or at least to deny, the problem.

3. *Why Europe Succeeded*

Still, even if the success of European comparative law is narrowly circumscribed and even if it has not changed the larger picture, it is still success. What explains it? Of course, part of the explanation lies beyond comparative law itself: harmonizing private law within Europe is a practically relevant agenda which simply needs comparative studies as a tool. Part of the explanation lies in the very narrowness of the approach just described: harmonizing blackletter law is a straightforward job because it can draw on long experience, deals with a very limited set of materials, and looks for single answers. But

126. See Kötz "Comparative Law in Germany Today," supra n. 6; Martinek, supra n. 6.

127. Zweigert & Kötz, supra n. 28; while the two subsequent editions (1984 and 1996) brought considerable revisions, the introductory chapters (concerning the goals and methods of comparative law) and the overall approach of the book have remained by and large the same. Thus the book presents ideas conceived at least half a century ago.

128. In fact, the more ambitious goals discussed a few decades ago, such as the determination of the character and relationship of legal systems according to their defining elements and essential structures, see Constantinesco, supra n. 6, at 260, 272-73, are rarely even mentioned anymore. In recent years, I have seen only one truly new agenda published in Europe, and it was presented by an American scholar, Buxbaum, "Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft," 60 *RabelsZ* 201 (1996) (explaining the task of comparative law to coordinate national and supranational legal systems and norms in a situation where legal orders have large remained national while the economy has gone international). To be sure, beyond mainstream comparative law, there are several scholars in Europe who emphasize the critical potential of the discipline, see, e.g., Legrand, supra n. 69, Muir-Watt, supra n. 69, Teubner, supra n. 66.

129. Muir-Watt, supra n. 119, at 645.

the reasons underlying the recent European accomplishments go beyond practical needs and narrow agendas. They also lie in three particular working conditions.

First, comparatists participating in the Europeanization projects begin from common ground. They share the knowledge of certain basics which are indispensable for their work. They correctly assume that anyone on board understands the fundamental structure and content of private law as well as the time-honored methods employed in pursuit of legal unification. Second, they have a clearly defined goal: a common private law of Europe. They are working to distill the common principles from the multitude of national laws in order to create (or revive) an European academic tradition and possibly even to prepare a European civil code. Finally, they are committed to cooperation. The requisite platforms are provided by numerous research institutes, comparative law centers, and a plethora of project or working groups all over the continent. As a result, comparative law is an international team effort where expertise from different countries and areas generates synergetic effects.

Under these conditions, comparatists engaged in the great Europeanization project do not create just disjointed bits and pieces but carefully crafted building blocks for a larger edifice. As these blocks pile up, the building itself begins to take shape. Today, the contours of a European private law, widely considered a chimera merely twenty years ago, are gradually emerging. Thus the European success proves what comparatists can accomplish if they understand their basics, have a sense of direction, and work together.

IV. The Need for Integration: Three Initial Steps

While the main purpose of this essay is a retrospective and an assessment of the status quo, it would seem inappropriate simply to bemoan problems without suggesting improvements. If it is true, however, that the lack of theoretical foundations is the main (or at least a major) reason for the failure of comparative law to make overall progress, there is no simple remedy. Yet, perhaps we can learn something from the European success story. The chances of turning comparative law into an integrated discipline capable of sustained growth can probably be enhanced by taking three basic steps: establishing a canon (1.), agreeing upon a set of clearly defined goals (2.), and committing to long-term cooperation (3.).

1. Establishing a Canon

As a starting point, comparative law should define an internationally accepted canon of established knowledge and expect mastery of its content from everyone in the field. Such a canon provides the common ground on which ideas connect, the center around which

knowledge can be organized, and the launching pad from which further research starts. A canon is the hard core which gives a discipline coherence and continuity.

At present, comparative law does not have such a canon.[130] In fact, it is often said not to provide any "unified type of knowledge,"[131] not to have a "substantive core content,"[132] and thus not even to require the teaching of "certain basic matters."[133] In the spirit of the laissez-faire approach described above, this suggests that everyone can, as in a Nike commercial, "just do it"—simply by looking at foreign law.[134]

This may be fine for teaching purposes,[135] but as far as serious scholarship is concerned, such an attitude is not only lackadaisical, it is also highly unusual. After all, disciplines like legal history, philosophy, or sociology proceed (often tacitly) on the assumption that there are certain basics of which everyone in the field must be aware. Just looking at the past, thinking about broad questions, or collecting social data is not enough. It should be the same for comparative law.

A canon of comparative law can be established on the basis of the accumulated knowledge summarized above. In terms of substance, it should include primarily the history and features of the world's major legal systems, families, traditions, and cultures. As Frederick Pollock noted well over a century ago, "[c]omparison is profitable after the several things to be compared have been ascertained. If attempted earlier, it is hazardous at best."[136] It should also encompass "certain features of the process" of comparison,[137] i.e., whatever basic understanding of tools and agendas we have. Where such a basic understanding is lacking or deficient—as is the case with regard to the discipline's essential methods[138] and ultimate goals[139]—understanding this problem must itself be part of the canon. Indeed, a shared

130. It does not even have standards works that are up to date, see supra n. 82 and text.

131. Kamba, supra n. 46, at 487. As the overall context makes clear, however, Kamba is critical of this state of affairs.

132. DeCruz, supra n. 9, Preface i; in a similar vein, id. 3.

133. Kahn-Freund, supra n. 46, at 41.

134. Perhaps comparatists have no such canon because of the enormous fragmentation and potential "boundlessness of the subject," Schlesinger, supra n. 1, Preface ix. This would be an understandable reaction. But the fragmentation and boundlessness are exactly what makes it imperative to establish some common ground.

135. In fact, I believe that the best way to bring the benefits of comparative law to the classroom is to sprinkle individual aspects of, and comparisons with, foreign law, throughout the curriculum in small doses, see Reimann, supra n. 53. Of course, in an ideal world, all students would have an overview of the world's legal families but in order to open their eyes to the legal world beyond their own system, they do not need a full canon of knowledge.

136. Frederick Pollock & Samuel Wright, *An Essay on Possession in the Common Law* (1888) vi; see also Pizzorusso, supra n. 43, at 138.

137. Gutteride, supra n. 3, at 73.

138. Supra II.3.

139. Infra 2.

knowledge of these issues may be its most important element because it is the basis for a meaningful effort to find solutions.

2. *Agreeing on Goals*

Once a basic canon is established, comparatists should seek to clarify, and agree about, their discipline's overall goals. Without such an agreement, comparative law will remain aimless, its accomplishments scattered, and most of the energy invested will continue to dissipate. There will be no progress until we have a sense of direction. As Yogi Berra put it: you have to be very careful if you don't know where you're going because you might not get there.

Currently, comparatists have come to no meaningful agreement about their ultimate intellectual goals. It is true that there are standard lists of the discipline's practical uses and educational benefits and I do not mean to belittle their importance, but they are not enough. What comparative law needs in order to make real progress as an academic discipline is an agreement of its *scholarly agenda*: when we engage in comparative legal research, what do we *ultimately* want to know? What are the larger, overarching questions which the individual bits and pieces of scholarship can help to solve? It is to that question that we both sadly lack and urgently need better answers.[140] It is simply not to enough to say that "the primary aim of comparative law, as of all sciences, is knowledge"[141] without clarifying: of what?

Comparative law lacks such answers mainly for three reasons. First, many scholars believe that there are not, and cannot be, any such ultimate goals. This view reduces comparative law to a method, negates it as an academic subject in its own right, and thus makes further discussion moot. I consider this view wrong because I believe, along with many others, that comparative studies can generate insights into the basic structures, nature, and development of law as well as into its relationship with economy and society. Second, defining ultimate goals looks difficult. It probably is but difficulty is a challenge, not an excuse. Finally, agreeing on a set of goals seems reductionist—why not let a thousand flowers bloom? The answer is that we cannot tend to more than a dozen, and that it is better to have a few flowers bloom than a thousand wilt. Scholarly progress, like gardening, demands some concentration of effort. Of course, this does not require categorical determination of a single unchanging goal but it does require a farewell to the current randomness as well as a recognition of realistic limitations.

140. This does not necessarily entail embracing "grand theory" which, as is well known, must be handled with caution in comparative law, see Alford, "On the Limits of "Grand Theory" in Comparative Law," 61 *Wash. L. Rev.* 945 (1986).

141. Zweigert and Kötz, supra n. 6, at 15.

What might such goals look like? On the level of micro comparison, they can consist of testing limited falsifiable hypotheses (e.g., all democratic societies will sooner or later develop a system of judicial review), pursuing explanations of the data found (e.g., this is because no society is willing completely to trust the political process) or seeking to understand discrepancies (e.g., why does the strength of judicial review vary?). On the level of macro comparison, we can pursue broader inquiries into the basic structure of legal systems (e.g., patterns of division of labor), the relationship between these systems (e.g., the extent to which they follow similar paths) or into the relationship between law and politics (e.g., the influence of conceptions of the state on the character of private law). It is true that occasional pieces of scholarship do tackle such issues and the results can be eye-opening.[142] But without a set of shared goals, these results still end up on the heap of bits and pieces. Had they tied into broadly accepted agendas, they would have become integral parts of a larger whole and thus contributions to overall progress.

3. *Committing to Cooperation*

With a canon in place and the leading goals defined, comparatists should commit to carefully organized, long-term cooperation. The reasons are rather obvious. Even where comparison is limited to positive rules, there is an inescapable discrepancy between the knowledge an individual can command and the knowledge required for most comparative work. As scholars like Rabel, Rheinstein, Yntema, and others realized decades ago, this alone makes organized teamwork, preferably in "a cooperative institute of advanced legal studies,"[143] virtually indispensable. When comparatists go beyond blackletter rules and consider the historical background and social realities, or the political and economic environments, they need to cooperate with specialists from other fields.

Currently, there is much too little serious cooperation in comparative law, especially in the United States. Most comparatists continue to be soloists to an almost absurd degree. To be sure, there is routine division of labor in the sense that several scholars contribute chapters to a book but this mostly means merely a collection of separate pieces and creates no synergy. True cooperation in the sense of working closely together in pursuit of a clearly defined common agenda is rare, although where it exists at all, its benefits are imme-

142. See, e.g., Mirjan Damaška, *The Faces of Justice and State Authority* (1986); Reitz, "Political Economy and Abstract Review in Germany, France, and the United States," in *Constitutional Dialogues in Comparative Perspective* 62-88 (Sally J. Kenney, William M. Reisinger & John C. Reitz, eds. 1999). See also Herbert Jacob et al. (eds.), *Courts, Law and Politics in Comparative Perspective* (1996).

143. Yntema, supra n. 68, at 923.

diately obvious.[144] On the whole, there are surprisingly few conferences, and even fewer long-term research projects or regular workshop series that unite comparatists under a common theme. The quadrennial meetings of the International Academy of Comparative Law, like the annual meetings of the American Society of Comparative Law or similar national events, cannot provide a platform for meaningful teamwork. Even if they were attended by most scholars active in the field, and even if their academic quality was high, they are too intermittent and too poorly focused for that purpose.

This paucity of close cooperation is related to the lack of a canon and of clearly defined goals: cooperation seems to make no sense until we understand our point of departure and agree on an overall direction. In a way, though, this is a chicken-and-egg problem because establishing a canon and defining goals are themselves best pursued cooperatively. Comparatists should probably cooperate even without these basics and use teamwork in order to establish them in the first place.[145] A serious commitment to teamwork would be a major step away from the bits-and-pieces approach and towards an intellectually more powerful discipline.

CONCLUSION

Since the first issue of the *American Journal of Comparative Law* appeared fifty years ago, the discipline has had its successes as well as its failures. It has succeeded in producing a large and increasingly diversified body of scholarship much of which is very valuable. Thus it has moved beyond merely a method and grown into a body of substantive knowledge. But it has made little progress as a coherent enterprise generating broader insight of general interest. Most of its scholarship remains random, unconnected, and thus inconsequential. The main reason is that the field as a whole lacks a sound theoretical framework. In Europe, comparative legal studies have recently gained new prominence as a tool for the Europeanization of private law but their success is limited to a very narrow context. Overall, the field has stagnated in Europe as well. At the end of the day, comparative law has not yet matured into a truly impressive intellectual discipline on either side of the Atlantic.

Comparatists as well as outside observers are becoming increasingly conscious of this failure as they realize that the discipline "has

144. See, e.g., Patrick S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987); Mark Ramseyer & Minoru Nakazato, *Japanese Law. An Economic Approach* (1999).

145. Any teamwork does require, however, a willingness to subordinate one's own work to a larger purpose. Such willingness seems to be in short supply among comparatists, especially in the United States where academic individualism is a cherished, though overrated and often counterproductive, tradition.

made little headway" with regard to its basics.[146] On the occasion of the recent World Congress of Comparative Law,[147] celebrating the centennial of the Paris Congress of 1900, many scholars were led "to wonder whether, in spite of all appearances and in spite of countless colloquia, books, and articles, we have made any real progress in the field".[148] As others have noted, when it comes to the fundamental questions, methods, and agendas, the answer is, by and large, no.[149]

Comparative law will probably not make serious progress until it bids farewell to its current laissez faire approach to theoretical and methodological basics. The discipline would be better off if comparatists gathered the courage to define a common canon of knowledge, to agree on a limited set of ultimate goals, and to commit to long-term and interdisciplinary cooperation. By taking these steps, comparative law can perhaps learn to walk in a chosen direction rather than continue to stumble along without aim.

146. Samuel, supra n. 90, at 820.

147. November 1-4, 2000, Tulane Law School, New Orleans. The contributions are published in 75 *Tul. L. Rev.* 859 (2001).

148. Blanc-Jouvain, "Centennial World Congress in Comparative Law: Opening Remarks," 75 *Tul. L. Rev.* 859 (2001) at 862.

149. Clark, "Nothing New in 2000? Comparative Law in 1900 and Today," id. 871, especially at 893-94; Michaels, "Im Westen nichts Neues?," 66 *RabelsZ* 97 (2002), e.g. at 103, 107; see also Legrand, supra n. 36, at 34-35 (quoting John H. Merryman).