II. Comparative Law: A Plurality of Methods

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(I) Introduction

At the 50th anniversary of the American Journal of Comparative Law, Mathias Reiman famously lamented that comparative law has not developed "into a coherent and intellectually convincing discipline."[1] What was Reiman referring to and has the discipline of comparative law not changed since his observation in 2002? This challenge to be a "convincing discipline" is even more critical today for the field of comparative law as nation states are increasingly turning inward, a perspective contrary to comparative studies.

Indeed, pressures of globalization have strained population movements, restructured markets have led to widening economic instability, and terrorism has been allowed to redefine national borders and identity. All of these pressures have led to an anti-globalization movement resulting in national responses such as Brexit (Britain's exit from the European Union), America First (U.S. President Trump's foreign policy platform),[2] and the Chinese Dream (a set of national ideals set forth by Chinese President Xi Jinping). These policy positions represent retrenchments that are notably distinct from the early 2000's when there were optimistic predictions of inter-

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1 M. Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century," 50 *American Journal of Comparative Law* 671, 673 (2002).

2 S. Dunn, "Trump's 'America First' Has Ugly Echoes from U.S. history," *CNN Opinion*, 27 April, 2016, <http://www.cnn.com/2016/04/27/opinions/trump-america-first-ugly-echoes-dunn/>.Except otherwise stated all websites have been last visited 30 April 2017.

national integration, the interchange of world views and ideas, and even of a transnational legal system and globalized judiciary.[3]

This anti-globalization trend presents a challenge to those of us who work in and champion the cause of comparative law. Comparative law is said not only to promote better international understanding by looking outward. It also informs national law making, aids judges in difficult decisions, and provides a basis for legal unification or harmonization by seeking answers from other nations and states.[4] But how should comparative law respond to recent challenges to our tasks? In part, answering this question requires a better understanding of the trajectory of comparative law, its present-day critiques as well as some consideration of how next to proceed.

(II) What is Comparative Law?

Comparative Law describes the comparison of various laws; it is not itself a distinct body of law. Comparative law may be macro- comparisons - that is concerned with entire legal systems or general questions, or micro-comparisons - that deals with specific institutions or specific problems.[5] It is as Pierre Lepaulle once wrote, "to see things in their true light, we must see them from a distance, as strangers, which is impossible when we study any phenomena of our own country."[6] Hence, the comparatists, precisely because of their outsider perspective, can illuminate features of the law that internal observers would not realize.

But the comparatist cannot simply skim on the surface. Adequate knowledge of foreign law is an indispensable prerequisite of every legal comparison. Furthermore, comparative law goes beyond the mere study and understanding of a foreign legal system. In assessing and understanding the differences/similarities that exist between divergent laws and legal systems and discovering the attendant benefits of these differences/similarities,[7] comparative law can deepen one's understanding of inherent features of legal systems, as well as one's own home rules and legal system.[8] Comparative law is therefore said not only to promote better international understanding, but it also informs national law making, aids judges in difficult decisions, and provides a basis for legal unification or harmonization. In sum, the purposes of comparative law are understanding, reform and unification.[9]

While it was not until the end of the 19th century that the term "comparative law" was introduced, reformers and scholars have long used the technique of comparison. In the 4th century, Aristotle was said to have collected the constitutions of no fewer than 158 city-states in his effort to devise a model constitution. But it was not until the year 1900 that the first International Congress of Comparative Law was held in Paris, and chairs in comparative law established in universities with projects in foreign law undertaken all over the continent of Europe.[10]

The late 19th century was also a time of nation states and so it was to national laws that comparatists turned as the cornerstone of this new science of comparative law. Influenced by developments in the physical sciences, a comparatist's task in this era was to find a legal system's true and distinct identity and assign each system to a particular classification. Legal systems were primarily classified either as a common law or civil law system. The focus was on comparing legislation and codification because (with the exception of one English jurist) the first congress had attracted only jurists from continental European countries, all of which had coded law, in contrast to English common law. The focus was on the diversity of laws but the search was for a universal jurisprudence and the preparation of a "common law for the civilized world."[11]

3 See K.I Kersch, "The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law," 4 *Washington University Global Studies Law Review* 345, 345-387 (2005).

4 H.E. Chodosh, *Global Justice Reform: A Comparative Methodology* 28 (2005).

5 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* 4-5 (trans. Tony Weir, 3rd ed, 1998).

6 P. Lepreud, "The Function of Comparative Law with a Critique of Sociological Jurisprudence, 35 *Harvard Law Review* 838, 858 (1922).

7 R. Sacco, "Centennial World Congress on Comparative Law: One Hundred of Comparative Law," 75 *Tulane Law Review* 1159 (2000-2002).

8 R. Michaels, "The Functional Method of Comparative Law," in *Oxford Handbook of Comparative Law* (M.Reimann & R.Zimmermann, eds., 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=839826.

9 Chodosh, *supra* n.4, at 10.

10 Sacco, *supra*, n.7, at 1164.

11 Hence, the *Societé de legislation comparée* de Paris adopted Jus Unum (the correct one) as its motto. Sacco, *supra*, n.7, at 1166.

The interwar period of 1918 -1939 saw the rise of such anti-formalist as Eduordo Lambert, Rosco Pound, Ernst Rabel, Max Rheinstein.[12] These comparatists placed their emphasis on ideals, social facts, practical effects, rather than simply on comparing black letter laws. The upheavals resulting from World War I (1914–18) also broadened the comparative gaze from European interests to common-law countries, and then further still to socialist legal systems, until finally, after 1945, to the laws of the newly independent states of Asia and Africa. With such varied legal systems, a new focus was thus opened up to comparative law. Rather than limited to comparing legislation and codes, comparative law now also include examinations of legal institutions, practices as well as legal doctrine. "The comparative approach searches for all of the factors that, by nature, influence the creative process of law and shape the rule and life of the law." [13]

After the two world wars, the classification project remained strong, but with "legal families" expanding beyond the common law/civil law distinctions in an attempt to straddle cultural and technical divide. René David's legal families of "Romano-Germanic, Common Law, Socialists systems, Muslim-Hindu-Jewish and Far East" were proposed as a middle way between cultural particularism and universalism.[14] More recently, the classification project has evolved into classifications of legal traditions. Where legal families are seen as static and isolated entities, legal traditions suggest not only a historical contingency but also an ongoing and more dynamic process.[15]

In the classification project, comparatists varied in the typologies they reached. Some argue that typologies of legal systems should be based on "differences in social-economic system," [16] while others argue for categorizations based on the "philosophical underpinnings of broad principles of

12 Ernst Rabel was particularly influential in arguing that any element capable of influencing the law as a source and moving comparative law from being simply an invoice of different official sources of divergent laws.

13 Sacco, *supra*, n.7, at 1170.

14 R. David, "The International Unification of Private Law," in *International Encyclopedia of Comparative Law*, Vol. II, *Legal Systems of the World: Their Comparison and Unification* (1975).

15 See e.g. H. Patrick Glenn, L*egal Traditions of the World: Sustainable Diversity in Law* (5th ed., 2014).

16 See e.g. J. Quigley, "Socialist Law and the Civil Law Tradition", 37 *The American Journal of Comparative Law* 781-808 (1989).

law."[17] Using such variables as the historical background, the characteristic way of thought, the different institutions, the recognized sources of law, and the dominant ideology, Konrad Zweigert and Hein Kotz classified systems as Roman, German, Common Law, Nordic, and family of the Far East, Religious family (Jewish, Muslim and Hindu Law). Uno Mattei focused on three main sources of social norm "politics, law, and philosophical or religious tradition," to divide legal systems accordingly[18] Maine, Durkheim and Gluckman differentiated between technologically simple and technologically complex societies; while Diamond and Hoebel viewed legal systems according to different stages of historical development.[19]

Comparative law received a revival of sorts in recent years with the double process of economic globalization and Europeanization of law. Hence, comparative law is critical to the work of European Union (EU) institutions. From the basic question of whether the EU should and is permitted to act to whether legal differences create obstacles to the internal market, comparative law is called upon as the EU decides on new areas of regulation and assesses how it interacts with national law in complex ways. And where EU law does not merely replace national laws, a good comparative understanding of member state laws is a prerequisite for the successful implementation of EU laws.

(III) What Are the Methods of Comparative Law?

Rosco Pound aptly wrote nearly 70 years ago, "[M]uch if not all depends on what is compared and how it is compared."[20] But how to determine what is to be compared is hotly contested in comparative law. Beyond mere doctrinal comparison, there are fundamentally two different methods, functional and cultural legal comparison.

17 K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, translation from the German original: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tony Weir trans., 3rd ed., 1998).

18 Uno Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems," 45 *American Journal of Comparative Law* 5, 36 (1997).

19 See Chodosh, *supra* n.4, at 41.

20 R. Pound, "What May We Expect from Comparative Law?" 22 *American Bar Association Journal* 58-59 (1936).Pound reiterated this question nearly two decades later in another article. R. Pound, "Comparative Law in Space and Time," *American Journal of Comparative Law* 4 (1955).

First advocated by Ernst Rabel, functional comparison was later popularized by Konrad Zweigert and Hein Kötz in 1971, who declared that 'The basic methodological principle of all comparative law is that of functionality."[21] Functionalism starts from the premise that the function of law lies in responding to social problems and that all societies face essentially the same problems. But the focus is not on rules but the effects of rules. This makes it possible to compare legal institutions, even if they display different doctrinal structures, as long as they fulfill the same function, because in this case they are functionally equivalent.

If law is seen functionally as a regulator of social facts, then the legal problems of all countries are similar and every legal system in the world is open to the same questions and subject to the same standards, even countries of different social structure and different stages of development.[22] Functionalism inevitably leads to a search for similarities, turning the entire comparison into an exercise of more of comparing similarities than differences.

Understanding legal norms as responses to problems supposedly also makes it possible to designate which law is better.[23] And so, functionality often is called upon to serve an "evaluative" function and on this basis, is used to reform domestic law, or to create an international uniform law, or to urge law reform in a particular foreign system. Functionality remains highly influential and has in recent times received a further boost through various projects such as those that aim to harmonize or unify European private law.

21 Zweigert and Kotz, *supra* n.17, at 34.

22 Zweigert and Kotz, *supra* n.17, at 40.

23 According to Ralf Michaels, functionalist comparative law is characterized by four elements. First, functionalism focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. Second, functionalism combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. Third, function itself serves as *tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems. Fourth, not shared by all variants of functional method, is that functionality can serve as an evaluative criterion .Functionalist comparative law then becomes a 'better-law comparison'- the better of several laws is that which fulfills its function better than the others. See Michaels, *supra* n.8; Michele Graziadei, "The Functional Heritage," in *Comparative Legal Studies: Traditions and Transitions* (Pierre Legrand & Roderick Munday, eds., 2003).

By contrast, cultural comparisons (sometimes called comparative legal studies or comparative legal cultures) reject the reduction of law to its function and instead seek to understand national law as an expression and development of its general culture.[24] The focus here lies on the mentality expressed in a legal system. Cultural comparisons tend to focus more on differences. Because cultural differences (particularly those between civil and common law) are sometimes seen as unbridgeable and because different legal cultures are deemed worthy of protection, cultural comparison usually opposes comparative evaluations and rejects legal unification as both impossible and undesirable. Instead, it promotes tolerance for foreign law and for differences in general.

The discrepancies between these two approaches may be smaller than the fierce debate suggests. Both approaches reject limiting comparative law to an analysis simply of black letter law; instead, both search for the role of law in society. Both approaches value and recognize the differences between legal systems. Properly understood, functional comparison does not, as is often claimed, fail to recognize or accept the identity of different legal systems and cultural comparisons does not necessarily reject a frame of analysis that can bridge differences. A comparison can grasp simultaneously the similarities in the solutions and the differences in the ways of reaching these solutions and vice versa. Recently, this insight has been used in the attempt to bring legal culture and functional equivalence together under the concept of legal paradigms. Paradigm describes the manner in which legal systems address problems in specific (cultural) ways to attain (functionally equivalent) solutions. Systems are classified as under the same "paradigm" if they share a hard core set of basic theories and concepts, e.g., a "common legal culture."[25]

There are other more recent approaches to comparative law. These include studies of legal history[26] law and economics[27] legal transplantation (that is, the study of relationships between legal systems and the migration

24 R. Cotterrel, "The Concept of Legal Culture," in D. Nelken, ed., *Comparing Legal Cultures*, 13-33 (1997).

25 M. Van Hoecke and M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," 47 *The International and Comparative Law Quarterly* 495, 510 (1998).

26 See for example, H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

27 See e.g. U. Matttei, *Comparative Law and Economics* (1997).

of legal rules),[28] and as Professor Christoph Kern noted in this volume, the use of statistical methods. Nevertheless, each approach must still grapple with the tension between similarities and differences in defining the basis of comparison. Just as one needs to recognize similarities during the description and analysis of legal as well as non-legal context, one also needs to search for differences in order to find gaps within legal systems. Comparative law requires the right mixture of differences and similarities. Indeed, similar results may be most interesting if produced by different legal rules, institutions or systems, and different results may be most interesting if produced by similar rules, institutions or systems.[29]

(IV) The Critique of Comparative Law

In recent years, comparative legal studies have gained prominence as a tool for the Europeanization of private law. It also serves as the tool for the many "rule of law" projects underway in many countries and funded by multi-national organizations such as the International Monetary Fund. But several critiques continue to plague the field drawing from the methodological debates above.

As noted earlier, Mathias Reiman was less than sanguine about the progress of the field and accused its failure to develop a sound theoretical framework. Comparative law, Reiman argued, "has made little progress as a coherent enterprise generating broader insight of general interest. Most of its scholarship remains random, unconnected, and thus inconsequential." Supporters of this critique point to the body of existing scholarship that are mostly descriptive of foreign law, with or without explicit comparison. At its strongest, this body of scholarship contributes to the categorization and world mapping of legal families, traditions, or cultures but

28 See for example, A. Watson, *Legal Transplants: An Approach to Comparative Law*, at xi (2nd ed.1993).

29 Different scholars also have focused on different "things." Thus, Edouardo Lambert – attention to social and economic needs and desires; Rosco Pound – attention to legal ideals; Ernst Rabel – attention to practical outcomes; Arthur Schlesinger – "factual problems"; Rudolfo Saco – legal informants, see R.Sacco, "Legal Informants: A Dynamic Approach to Comparative Law," 39 *American Journal of Comparative Law* 1-34, Installment I of II (1991); also at <http://www.uni-heidelberg.de/institute/fak2/mussgnug/historyoftaxdocuments/schrifttum/aufsaetze/AUFS00030.pdf>.

has yet to develop any overarching theoretical basis or framework towards a better understanding of legal systems. Situating more along the similarities end of the similarities/difference approach, this critique would like to see the development of broader theories to explain certain functional legal phenomenon underlying different legal systems.

On the other extreme, there are those comparatists who cautioned against the pronouncement of such "grand theories."[30] Particularly those who studied non-western legal systems, these critics point to the danger of speculating broadly across cultures and across times, and the danger that "efforts at engaging in broad theoretical work may unwittingly lead us to believe that we are considering foreign legal cultures in universal or value-free terms when, in fact, we are examining them through conceptual frameworks that are products of our own values and traditions, and that are often applied merely to see what foreign societies have to tell us about ourselves."[31]

These comparatists emphasize our responsibilities to appreciate more fully the importance of "descriptions" and in particular, the type of textured, reflective examination that anthropologist Clifford Geertz termed "thick description."[32] Not wishing to run the risk of cultural relativism, these critics recognize that the effort to understand a different legal system necessarily entails the formation of judgments. But these critics argue for more thoughtful and careful comparisons and particular and modest, rather than grand, guidelines for our endeavor and conclusions.

Still other critics argue for incommensurability and question whether comparative law is even possible since law is so rooted in national traditions. Theorists, such as those in the "legal origins" school, would point to the force of legal traditions (placing primacy on the common law and civil law traditions) as the root of national economic development and of such indelible and irreconcilable distinctions.[33] The "legal origin" school traces common and civil law to different ideas about law and its purpose that England and France developed centuries ago and argues that the funda-

30 W. Alford, "On The Limits of 'Grand Theory' in Comparative Law," 61 *Washington Law Review* 945 (1986).

31 *Ibid* at 945-6.

32 C. Geertz, "Thick Descriptions: Towards an Interpretive Theory of Culture," in *The Interpretation of Cultures: Selected Essays* 3 (1973).

33 R. La Porta, F. Lopez-de-Silanes, and A. Schleifer, "Economic Consequences of Legal Origins," XLVI *Journal of Economic Literature* 286-288 (June 2008).

mental assumptions of each legal system survive today and have continued to exert substantial influence on economic outcomes. These theorists reject projects of unification because "minds of continental and common lawyers follow incommensurable patterns of thought." Such comparatists in particular point to the inherent power disparity in any legal reforms efforts and opined that the failure to recognize the power imbalances leads to hegemonic impositions of supposedly objective values by more economically developed countries on to less developed countries.[34]

Then, there are those who bemoan the self-professed apolitical stance of comparatists. Critics, such as David Kennedy, accuse comparatist of "talking about distributional effects like accidental tourists." [35] Pointing to comparative law giants such as Arthur Schlesinger and Rudolfo Sacco, critics such as Kennedy suggest that such post-war comparatists avoided ideological positions, and are less easily linked with particular social interests (labor, commerce) than their prewar predecessors. It is a decision by the comparatist, these critics assert, to downplay distributional consequences in assessing similarities and differences among legal regimes, and instead, to investigate and highlight technical similarities or cultural differences.[36]

For example, Kennedy argues that these scholars are methodologically eclectic and in being careful to remain "objectively" neutral, become disengaged from ideological debates and participated less readily in public life or government work.[37] Yet, not only is this "objectivity" intellectually impossible, this "objective" perspective also limits the impact and contributions that comparative law can make. The "objectively" neutral position would limit comparative law to societies that are comparatively similar,

34 See for example, P.G. Monateri, "Methods in Comparative Law: An Intellectual Overview," in *Methods of Comparative Law* 7-24 (P.G. Monateri, ed., 2012).

35 D. Kennedy, "Law and the Political Economy of the World" in *Critical Legal Perspectives on Global Governance* (G.D. Burca, C. Kilpatrick & J. Scott, eds., 2014), also in 26 *Leiden Journal of International Law* 7 (2013).

36 See O. Kahn-Freund, "On Uses and Misuses of Comparative Law," 37 *Modern Law Review* 1, 29 (1974)

37 The distance from practical engagement with government was explicitly promoted by Rodolfo Sacco, the Italian comparatist who provides the link between Schlesinger's Cornell project and the effort led by Sacco's students to mobilize researchers for a description of the common core of European private law in Trento project. As Sacco stated, "with regard to the unification of the law, comparative science is neutral." Sacco *supra* n.7, at 1162.

and hence, to areas of law that are decidedly "apolitical" such as private and commercial law. This emphasis only on private law is in contradiction to the change understanding of private law in the 20th century which reorients private law as a political tool of regulation, and constitutions and administrative law emerging and superseding private law as dominant areas of a country's legal structure.

(V) The Next Iteration of Comparative Law?

There is certainly no single answer to resolve this debate, but rather, there are a number of cautionary guidelines to keep in mind in our comparative work. First, we must keep in mind Rosco Pound's admonishment that "a fruitful comparative law... has to do much more than set side by side sections of codes or general legislation."[38] In order to understand law, one must not simply know the rules, nor how they operate in practice. One must also understand from where they derive, the choices they represent, and the imagination they encompass.

And so, our comparative task must very simply be to shed "cognitive lock-in" and engage in "cultural immersion," as Vivian Curren advocates. This requires "immersion into the political, historical, economic and linguistic contexts that molded the legal system and in which the legal system operates," the subterrainian.[39] Because law is recursive - that is, it is both reflective as well as constructive of social life - law cannot be studied in isolation, but must be analyzed within the context of the whole historical and cultural structure.[40]

Immersion could require an understanding of the interaction between multiple laws in producing "legal formants," as urged by Rudolfo Sacco. Understanding the historical and social context of a particular rule, institution or practice and in focusing on how law is "formed" will also assist in understanding the transferability of these rules, institutions or practice. In

38 R. Pound, "Comparative Law in Space and Time" 4 *American Journal of Comparative Law* 70, 75 (1955).

39 V. Grosswald Curran, "Cultural Immersion, Difference and Categories in U.S.Comparative Law," 46 *American Journal of Comparative Law* 43 (1998).

40 C. Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *Local Knowledge: Further Essays in Interpretive Culture* 167, 215 (1983); J.E. Ainsworth, "Categories and Culture: On the 'Rectification of Names' in Comparative Law", 82 *Cornell Law Review* 19, 28 (1996).

fact, as noted by Kahn Freund, when a law is more closely tied to its local habitat, a foreign rule is less transplantable. If we understand more closely law as a social activity and the contexts of a particular rule, we would be less likely to impose imperialistically our version of an "ideal" rule unthinkingly, since choices made are often only reflective of particular time and place.[41]

At minimum, then, a comparative study cannot simply be the juxtaposition of blackletter rules nor a search for presumed similarities which are then taken to elucidate shared principles. We must discard the three elements associated with what Jaakko Husa calls hardcore functionalism: namely the presumption of similarity, the search for causal explanations for similarity, and the notion of a neutral framework in comparative law. This will mean greater increase in serious interdisciplinary work and a long-term commitment to collaborations with our partners in sociology, political science, and history.[42] A deeper level comparative law could mean the pairing of comparative cognitive approach of law as reflecting jurisprudential concepts (that is, the 'cognitive structure of the legal system from the inside) and a comparative study of external socio-legal aspects of how law works. Towards these goals, partnerships with other methodologies, such as those utilized in law and society or law and economics, through the collection of quantitative or qualitative data, would enrich the study of comparative law.

Second, we should recognize the limitations of harmonization and convergence as the sole goal. The goal of harmonization has driven mainstream comparative legal studies in Europe harmonization since the Paris Congress of 1900, was envisaged by Ernst Rabel around the middle of the century. Unquestionably, comparative law has played an important role in the various harmonization projects of the European Union, including that of the Common Core Project.[43] This project is compiling the similarities and differences between European legal systems using detailed compara-

41 As Karl Llewlyn warned long ago, "Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery – the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians." K. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 44 (1930).

42 Reiman, *supra* n.1 at 673.

43 See M.Bussani and U.Mattei, *The Common Core Project*, delivered at the first general meeting on 6 July 1995, < http://www.jus.unitn.it/dsg/common-core/meeting_10_project.html>; M. Bussani and U. Mattei, *The Trento Common Core Project* July 2004 <http://www.jus.unitn.it/dsg/common-core/meeting_10_html.>

tive law case studies, largely without evaluation of these solutions. Other groups connect comparative law surveys with normative searches for the best solution (Restatements). This is the case for the Lando Commission on European Contract Law (Principles of European Contract Law) and the Study Group on a European Civil Code, which emerged from it, as well as the European Group on Tort Law (Principles of European Tort Law).

But an undue focus on harmonization or convergence can limit one to an undue focus on looking for single answers and to the perennial common law/civil law divide.[44] Harmonization and convergence must be in the context of accommodating overlapping normative orders of national legal systems, the European Union and the European Convention on Human Rights. More problematically, harmonization/convergence can funnel one into a view that only the state can make law, and neglect other sources of legal norms. Theorists such as those of the legal pluralism school, recognize that legal orders may be rooted in differences sources of legitimacy, such as tradition, religion, or will of the people, with often the co-existence of such legal forms in the same field as state promulgated norms.[45] And the reality of pluralism between state and non-state legal orders inevitably take the comparative focus away from western legal systems to in the customary law of developing countries, and in the laws of groups and communities such as the Quakers, Romani, Native Americans and religious organizations.

Third, we must caution against the development of grand theories of law. Here, comparative law functions as the discipline that attempts to understand the various legal systems in their totality (similarities and differences) and in their relationship to each other. Without the ambition of promoting a generalized theory of the law, one can nevertheless examine one aspect of a legal norm in the context of "thick descriptions," and develop an understanding of how each is related to each other. Without leading to a politics of apology for totalitarian departures nor underestimate the positive force of the universality and rights, I am simply proposing a compara-

44 Rodolfo Sacco warned of this danger of looking for single answers as far back as the centennial celebration of the Society of Comparative Law. Sacco, *supra* n.7, at 1165.

45 F. von Benda-Beckmann, K. von Benda-Beckman, and A. Griffiths, "Introduction," in *The Power of Law in a Transnational World. Anthropology Enquiries*, pp.1-29 (F. von Benda-Beckmann, K. von Benda-Beckmann and A. Griffiths, eds., 2009).

tive law methodology that is more attuned to history culture, context and difference with more particular and specific understandings rather than grand theories.

Indeed, such a comparative method can provide a check on the claim of jurists within a legal system that their method rests purely on logic and deduction. Proponents of looking at "legal formants" make it possible to keep the ambivalence and multiplicity of legal rules in each system at play in the comparison. Living law contains any different elements such as statutory rules, formulation of scholars, decision of judges, and the multiplicity can give rise to several interpretations with no single one being correct and the other one false. "Within a given legal system with multiple 'legal formants' there is no guarantee that they will be in harmony rather than in conflict."[46]

Finally, we comparatists may want to be explicitly political. The call to recognize the political nature of our work may ring particularly true for those comparatists involved in legal reform projects. We cannot ignore the reality of power disparity between whichever legal system we study and the distributional effects of whatever solution we suggests. Indeed, the most important factor in the ability of transplanting foreign models is the congruence between the comparative power structure of the sending and receiver countries. If law reform is to be achieved, the political context and the recognition of distributional effects cannot be ignored. Otherwise, law will serve as a centrifugal rather than a centripetal force for nation states.

It is also an acceptance that no analytical frame is completely neutral. Law is "social engineering," and legal science is social science. Rather than largely concentrating on private law, which was viewed as apolitical and therefore appeared to be the only area of law fit for strict, scientific legal comparisons, comparative law could focus on legal practices, institutions and methods rather than simply on legislative text, and on constitutional, administrative, and procedural law. Indeed, comparative civil procedure law may be ideal for a study of comparative law in this regard.

46 Sacco, *supra* n. 24, at 23.

(VI) Development of Comparative Procedural Law

For a number of reasons, procedure law is fruitful for comparative studies. Specifically, rules of procedure uniquely combine the universal with the cultural. Procedural rules are simultaneously cultural messages about how we fight. Yet, procedural rules receive legitimacy precisely from their universal claim of "rule of law" and procedural justice.

Furthermore, civil procedure reforms have been unusually active in national systems of civil procedure. These trends and developments may serve as good starting points for comparative studies.

Indeed, while encompassing the participants' notions of rights and entitlement, the process of disputing and dispute resolution unveil "the meaning participants attach to going to court, [as well as] social practices that indicate when and how to escalate disputes to a public forum."[47] The administration of justice are less judgments based on objective reality and more, judgments made on legal facts that are "socially constructed by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges and scholasticism of law school education."[48]

Yet, rules on how to dispute (what we call civil procedure) are also driven by universal norms of efficiency, predictability and consistency. Procedural law, or procedural justice, gets its legitimacy precisely from perceptions of its neutrality, rationality, and ability to curb individual and political discretion. This "neutrality" and "rationality" are said to rise above local particularities of time and place. Legal procedure rules are then not simply the practical way of ensuring the enforcement of substantive rights; they are also seen as an important aspect in securing the rule of law. Closely related and in tension are the comparative efforts to harmonize national procedural systems with attention to the relationship between domestic systems and international norms.

In regulating how a case is brought in court, how it is investigated, how it is argued, and how it is decided, civil procedure rules also distribute power amongst the parties, the judges, the lawyers, and the political authorities that house the courts. In turning disputes over to a neutral third party for resolution, disputing parties give up their powers in exchange for

47 S.E. Merry, "Disputing Without Culture," 100 *Harvard Law Review* 2057, 2063 (1987).

48 C. Geertz, *supra* n.40, at 173.

peace and resolution. In determining who gets to do what in a litigation, procedure rules distribute power among the players and in some instances, restore power disparities but in others, preserve existing power hierarchies. Thus, civil procedure situates the comparatist to be explicitly political and examine power distribution and how different societies allocate this power.

Finally, civil procedure is uniquely interrelated to the legal actors and institutions in which it rests. As Langbein pointed out, "legal procedure bears the most intimate relation to the institutions that operate the procedures."[49] Procedural rules are "insider" rules that regulated how lawsuits and actors operate with the legal system. Thus, one can argue that while substantive law can be easily changed by legislation, legal process as institutionalized may require more coordinated and sustained efforts in order for change to occur, precisely because of its embeddedness and interconnectedness.[50] This unique positionality of procedural law renders comparative study of it inevitable and informative.

And in many countries, civil procedure reforms have drawn attention. For one, the concern with high costs and undue delay, and increase in litigation rates in the last few decades, has occupied many civil justice systems. Some of the strategies employed include new rules of civil procedure; reorganization of courts and additional funding; and changing procedural culture. Specifically, this included considerations of the changing role of judges in different national systems resulting in judges having more power and authority to manage and steer litigation. This was true in Austria as a result of the 1895 Code of Civil Procedure, French law from 1935 onward, recent changes in English law and in U.S., managerial judging.[51] Yet, other systems are experimenting with different ways of diffusing authority by including the layperson in the judicial decision making

49 J.H. Langbein, "The Influence of Comparative Procedure in the United States" (1995). Faculty Scholarship Series. Paper 505. http://digitalcommons.law.yale.edu/fss_papers/505 9.

50 K. Pistor & P.A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development* 238 (1999); T. Ginsburg, "Does Law Matter for Economic Development? Evidence from East Asia," 34 *Law and Society Review* 829, 841-842 (2000).

51 G. Hazard, Jr. and A. Dondi, "Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits" (2006). Faculty Scholarship Series. Paper 2329.http://digitalcommons.law.yale.edu/fss_papers/2329.

process. Where countries such as Korea and Japan[52] have introduced the jury system; in the U.S., this has meant the disappearance of the jury trial.[53]

Many systems have also instituted multi-track litigation with a small claims or simplified procedure solution as well as adoption of different alternative dispute resolution methods. In Austria, legislation on mediation accepted by the Nationalrat; in Belgium, there is in legislation in this field.[54] Within the framework of Council of Europe, the Committee on Experts on the Efficiency of Justice examines questions connected with mediation as an alternative to court proceedings in civil cases. Certainly, countries like China and Japan have long turned to mediation as a preferred alternative to litigation.

In this era of transnational conflicts, the pressure for harmonization of domestic civil procedure rules is particularly strong to prevent parties from forum shopping in transnational disputes. As international economic transactions aided by technology increasingly lead to complex legal problems without borders, efforts were being made to draft transnational rules. In the regime of globalized legal practice,[55] there were even optimistic predictions that judges will cooperate in "equal but distinct legal spheres, to the presumption of an integrated global legal system."[56]

And so, we see the trend of influential international regulations and conventions playing an important harmonization role, such as article 6 of the European Convention of Human Rights. Within Europe, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in civil and commercial matters, now converted into a European Regulation, applicable to all member states except Denmark. In the European Union, Article 65 of the Treaty Establishing the European Community (Articles

52 "Trial by Jury Returns to Japan," *The Guardian*, 3 August 2009; Jae-Hyup Lee, "Korean J Jury Trial: Has the New System Brought About Changes?" 12 *Asian Pacific Law and Policy Journal* (2010)

53 See S. Thomas, *The Missing American Jury: Restoring the Fundamental Constitutional Role of Criminal, Civil and Grand Juries* (2016).

54 See generally, *Global Trends in Mediation* (N. Alexander, ed., 2006); *Global Perspectives on ADR* (C. Esplugues Mota & S. Barona Vilar, eds., 2014)

55 For example, Anne-Marie Slaughter calls it "judicial globalization," a process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international courts. A.M. Slaughter, 'Judicial Convergence,' 40 *Virginia Journal of International Law* 1103-04 (2000).

56 *Ibid* at 1115.

III-158, and III-170 of the proposed European Convention) provides a legal basis for the harmonization of civil procedural law, at least as regards civil matters having cross border implications and in so far as necessary for the proper functioning of the internal market. More globally, under the sponsorship of the American Law Institute and UNIDROFT, The Principles of Transnational Civil Procedure were drafted under the sponsorship of the American Law Institute and UNIDROIT aimed at providing a framework that a country might adopt for the adjudication of disputes arising from international transactions that find their way into the ordinary courts of justice.[57]

In sum, also in the field of comparative civil procedure, harmonization efforts are strong. Yet, law is national identity and in no stronger area than in civil procedure. For example, rules delineating a court's organizational structure and powers such as jurisdictional and civil procedure rules are actually delineating the political power of any given state.[58] A court's organizational structure defines where it sits in the political division of governance. Similarly, jurisdictional rules define a state's right to exercise coercive power over an individual or dispute. Thus, the growth of a court's jurisdiction often coincides with state expansion. A comparative look at jurisdictional rules then not only adds insight to how each society approaches the protection of individual basic rights and powers, but also the project of state building. As enactments of the state, procedural requirements are symbolic and physical messages as to the power of the state. Tensions between states often morph into more technical disputes over jurisdiction of the courts.

And so, the historic tensions of comparative law methodology – similarities and differences -functionalism and cultural studies - are all too clearly reflected in the study of comparative civil procedure. The interaction of the two trends - that is, global legal convergence and assertion of local cultural practices - also continue to shape the conversation and debate. Both local culture and a universal rule of law are features in contemporary social development and their interplay is the critical foundation for new and more adaptive values and institutions to emerge.

57 See Unidroit/ALI, Principles of Transnational Civil Procedure < http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>

58 M. Woo, "Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation State," 15 *Nevada Law Review* 1261 (2015).

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