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## Introduction

Ugo Mattei

*UC Hastings College of the Law*, [matteiu@uchastings.edu](mailto:matteiu@uchastings.edu)

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## Introduction

For a number of years, we have been increasingly concerned about the teaching and scholarship of comparative law in the United States. In particular, we have sensed a lack of methodological reflection and theoretical foundation. We have therefore decided to take a fresh look at this time-honored discipline and encourage others to do so as well.

### I.

Some readers of this *Journal* may view a symposium on "New Directions in Comparative Law" as a waste of time and effort. Comparative law, they will say, has been too self-conscious, too hung up on reflecting upon its own sense or nonsense all along. What we need, so the argument will go, is "hard-nosed comparative work," not theoretical musings about goals, methods, and agendas.<sup>1</sup> *Theoria sine praxis, rota sine axis.*

There is much to be said for such a view. For a discipline to thrive, it must produce substantive work and useful results, not theories about itself. As the German legal philosopher Gustav Radbruch once observed, obsession with one's own well-being is a sign of sickness in people as well as in scholarship.<sup>2</sup> It is tempting therefore simply to roll up our collective sleeves and get to work. Just do it!

Yet, just doing it makes sense only if there are timely ideas of what one is doing and why. Recently, such ideas have been in short supply. Of course, we recognize the traditional work done by the older generation of scholars. They laid the groundwork for comparative law in this country, provided the basic information about foreign, especially European, legal systems, and mapped major areas of interest for teaching and scholarship. This work has been done, and it was, for

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UGO MATTEI is Alfred and Hanna Fromm Professor of International and Comparative Law, University of California, Hastings. Professore Ordinario di Diritto Civile, Università di Torino.

MATHIAS REIMANN is Professor of Law, Universität Trier, Germany.

Special thanks to Nancy Paul at the University of Michigan Law School, who not only performed all of the logistical work on this symposium, but also policed deadlines, edited manuscripts, completed footnotes, and helped us, as well as many other contributors, in countless ways.

1. See Bernstein, "Book Review" (of Bernhard Grossfeld, *The Strength and Weakness of Comparative Law*), 40 *Am. J. Comp. L.* 261 (1990).

2. Gustav Radbruch, *Einführung in die Rechtswissenschaft* 293 (13th ed. 1980).

the most part, done well. Yet, it has inevitably aged. In the late twentieth century, the legal universe has been beset by dramatic changes. The importance of the nation state has diminished while the significance of international organizations and regimes has grown, the role of legal actors and institutions has changed, the meaning of legal sources has shifted, and international transactions have become routine. In the midst of these changes, mainstream comparative lawyers in the United States soldier on as they have for decades, talking mainly about the same issues and holding much the same conferences year after year. To be sure, we have all duly joined the chorus of globalization and even reveled in a renewed sense of importance. But we have made no serious effort to reexamine our traditional canon of goals and methods and adjust to the new realities. As a result, we have recently produced little exciting work and lost a sense of future direction. *Praxis sine theoria, caecus in via.*

## II.

Thus it was not interest in theoretical musings but a perceived, and rather dire, need to revitalize a stagnating discipline that led us to return to fundamental questions about the basis and purpose of comparative law. We decided to convene a group of scholars interested in exploring contemporary theoretical foundations and new agendas.

We focused mainly on the younger generation because we were looking for fresh ideas. We did seek the input of a few senior colleagues as well, but only for general guidance and to avoid reinventing the wheel.<sup>3</sup> We also insisted that all participants had worked and taught in the United States since we wanted to focus primarily on the status and future of the discipline in this country. Of course, many issues of goal and method are of a general nature but we considered it prudent not to tackle them on a worldwide scale since they may differ significantly depending on the particular context.<sup>4</sup>

Ultimately, about a dozen scholars met for two workshop-style conferences in September of 1996 at the University of Michigan in Ann Arbor and a year later at the Hastings College of Law in San

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3. We thank especially Professors Antonio Gambaro (Università di Milano, Italy) and Professor Eric Stein (University of Michigan) for their advice and comments on the essays in the symposium. They bear, of course, no responsibility for the form or content of the papers.

4. In Europe, for example, comparative law is more of a living, integral part of legal theory and practice than in the United States. It is a necessary and frequently employed tool for integration, and its practical uses, for example in the European Court of Justice, in the drafting of directives by the Commission, or under the dense network of private international law conventions, are much more obvious. This does not mean that a discussion from an American viewpoint is irrelevant to the discipline in Europe but it does mean that great caution is in order when drawing European conclusions from American ideas.

Francisco. The discussions were broad-ranging, frank, and vigorous. This symposium issue contains the papers resulting from these two meetings.

We required every participant to present ideas for injecting new life into comparative law. We asked them to make concrete proposals and take intellectual risks. We wanted the papers to be short and readable. The authors were not to produce exhaustive treatments but provocative essays. While we are unsure of how successful we have been in this endeavor, we considered the contributions sufficiently interesting to publish them. We felt encouraged to do so by the recent signs of a growing interest in rethinking and reforming comparative law in the United States.<sup>5</sup> We hope that this symposium will contribute to the renascent reflection, encourage responses, and thus help stimulate a broader discussion.

### III.

We present the papers in four groups. While there is an inevitable element of arbitrariness in any such categorization, it provides a structure and thus helps the reader perceive how the various ideas relate to each other. The papers in each group are united by a common starting point or purpose.

#### 1. Comparative Law in the United States Today: Distinctiveness, Quality, and Tradition

Three papers essentially take the discipline as it stands today in the United States and reflect upon how to use and improve it, implicitly or explicitly suggesting change.

At first glance, James Gordley's essay appears to be a mere description of what comparative law is about. He questions whether it is a distinct discipline at all and finds that, for the most part, it is not. Yet, his position implies a strong normative claim: comparative law *should not be* a separate discipline. Professor Gordley sees it primarily as a tool to understand and clarify the law and conceives of law as a set of general principles which respond to largely identical issues arising in all modern societies. His conclusion is that in elucidating and developing these principles, all lawyers should work comparatively all the time. In particular, they should consider not only the legal sources of their own country but solutions developed in other countries as well. Thus, a nationalist and positivist approach would yield to a transnational and functional one. Professor Gordley's paper raises interesting questions. Should all lawyers ultimately become

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5. Another Symposium Conference, entitled "New Approaches to Comparative Law," took place at the University of Utah, October 10-12, 1996. Also, a Long-Range Planning Committee is currently proposing a reform agenda for the American Society of Comparative Law.

comparatists? Does his analysis still hold true if we venture beyond substantive private law as the traditional mainstay of comparative law in the United States? Or if we conceive of law not as a set of rules and principles but, in the modern American vein, as consisting of actors, institutions, and processes?

John Reitz asks a different question: assuming comparative legal scholarship does in principle what it has traditionally done, how is it done well? He proffers a set of very concrete criteria to guide scholars in doing their work and others in judging its quality. His emphasis is not on a radical reformulation of the discipline but on improving its method, its craftsmanship, and its results. Upon reading his paper, one immediately realizes how little explicit thought we have devoted to these matters in the past. This is more than just embarrassing. It is a telltale sign of our discipline's lack of theoretical and methodological foundations that it has no clearly understood standards of quality. This is not to say that Professor Reitz' canon should be taken as gospel. One should hope that others will join issue with him or suggest additional criteria, such as originality of insight or utility of result.

Mathias Reimann has a more openly critical attitude that pervades his essay "Stepping Out of the European Shadow." Many of the problems plaguing comparative law in the United States today exist because the discipline continues to adhere to a tradition that is based on a poorly designed model. It was once imported, via the founding generation of immigrants, from Europe and thus reflects the European situation of half a century ago. It never fit American circumstances well to begin with and, more importantly, it has now largely gone out of date. The point of the paper is mainly one of deconstruction since it suggests that we go beyond this traditional model in order to fashion a discipline meeting modern American needs. Surely not everybody will agree with this analysis, and even those who do will note that this paper makes but scant suggestions about what should replace the traditional approach.

## 2. A New Orientation: Toward Recognition of Difference

The next three papers also take the status quo of comparative law as their starting point but call for a new orientation. They share an emphasis on how the discipline can help to understand difference and to foster tolerance although they employ this idea in different contexts.

Nora Demleitner relates the current debate about the meaning and purpose of comparative law to "the larger contest about the future of the academy and of legal training." Just as there are proponents of a more theoretical and adherents to a more practical approach in legal academia at large, some comparatists see their dis-

cipline primarily as an academic device for the study of law as such while others emphasize the practical skills it can teach. And, just as in the law faculties generally, there is a more orthodox camp of comparatists as well as an emerging group of young Turks pushing the discipline beyond traditional boundaries. Professor Demleitner sees this split as a golden opportunity to learn amongst ourselves the tolerance toward other views that we preach so consistently as comparatists with regard to other legal cultures. Upon reading her paper, one is sorely reminded of the fact that tolerance indeed begins at home. It also invites the question, however, how a sensible dialogue can be constructed between different positions, be they academic camps or legal cultures. It is yet another important question, one realizes, to which we have precious few workable answers.

In a somewhat similar vein, Vivian Grosswald Curran emphasizes the cognitive potential of what she calls "the comparative act." Drawing on the experience of foreign language study, she sees the utility of comparative law not so much in the promotion of a cosmopolitan attitude but in allowing us to perceive the "other." Her paper alerts us to the fact that comparative law has traditionally been very much preoccupied with finding similarity and identity, perhaps as a result of the immigrants' reaction against their experience with exclusion and discrimination. Yet, this obsession with commonalities, Professor Curran argues, is largely outdated. It would be more timely, as well as more valuable, to focus on difference instead. Comparative law could then help us to square the emerging recognition of difference among human beings and cultures with claims to non-discrimination and inclusion—perhaps one of the most urgent social and political agendas of our time. The question then becomes whether comparative law can indeed play such an important educational role beyond law itself and indeed for society at large.

L. Amede Obiora explores the comparatists' ability to elucidate similarity and difference in the more practical context of international human rights. She explains how we have lost faith in the old universals but failed to replace them with a more convincing and workable paradigm. We have no choice but to build new foundations. If an international human rights regime is to succeed in practice, it has to accomplish two goals at the same time: It must reflect and respect the social and cultural diversity of societies, yet it must also maintain its universalist claim lest it fall prey to localism and relativism. As a result, we need to find out whether there are truly universal elements shared by all societies, including the more traditional ones found mainly in developing countries, and what these universal elements are. This is exactly the kind of service comparative studies can render. Professor Obiora's essay makes one realize how badly we have neglected our discipline's utility in this context and how large

its potential is for a more inclusive and thus more promising approach to international human rights. Perhaps the principal reason for this amazing neglect has been the traditional division between comparative law on the one hand and public international law on the other hand—a division that has long become anachronistic. Professor Obiora thus calls for an “Auspicious Reconciliation of International and Comparative Analyses.”

All three papers essentially call for a shift away from old universals and toward a recognition of diversity, be it for the sake of tolerance or as a starting point for a more inclusive search for commonalities. Their basic attitude is, as Professor Demleitner writes, that “it is necessary to manage the difference, not to abolish it.” This attitude reflects considerable belief in the human capability for open-mindedness towards cultural difference. Whether such optimism is warranted is a matter about which reasonable people can differ.

### 3. New Methods and Approaches: Jurisprudence, Interdisciplinary Study, and Systems Analysis

If we want to venture beyond the more traditional boundaries of comparative law, in which direction should we develop our discipline? Four papers pursue this question and proffer different ideas.

In a wide-ranging essay, George Fletcher reflects upon comparative law as a “subversive discipline.” His starting point is the struggle between “establishment” and “subversion” that has marked the common law tradition since the days of Coke, Hobbes, and James I. Surveying the development of Anglo-American jurisprudence up to the present, we realize that jurisprudential schools have been interesting and influential primarily when they were “destabilizing” in the sense of challenging established assumptions—witness legal realism, law and economics, or critical legal studies. Comparative law has rarely been so “destabilizing.” Most writing in the field is “reportorial,” pays scant attention to the underlying philosophical and ideological assumptions, and provokes little reflection. As a result, it is rarely interesting from a broader point of view. Professor Fletcher urges us to overcome this state of affairs by conceiving of comparative law as a form of “cultural criticism.” We should employ it to question our own and most basic assumptions from an outside perspective. This will allow us to become conscious of matters of which we are now at best dimly aware. Realizing, for example, that terms like “reasonableness” or “fairness” are essentially untranslatable into other languages can open our eyes to the peculiar common law traditions and values they encapsulate. The “subversive discipline” becomes a catalyst for recognition of who we are, how we think, and why, as well as a stimulus to consider change.



In a somewhat similar vein, William Ewald argues that comparative law should be conceived of as what he calls "comparative jurisprudence." He succinctly summarizes and occasionally clarifies the argument he made in a lengthy article published in 1995. Finding a positivist, textual approach (law in books) too narrow and a purely contextual approach (law in action) too broad, Professor Ewald maintains that we should primarily seek to understand styles of legal thought (law in minds). We should view the law from inside the other system; i.e., to understand how lawyers in different legal cultures think. What are the underlying predispositions, ideas, and value systems? Answering these questions, Professor Ewald promises, will integrate the isolated pieces of information often generated by comparative studies and thus provide context and meaning to otherwise sterile facts. Moreover, it will have considerable practical utility as a prerequisite for international communication and cooperation among lawyers from different backgrounds. While some readers of Professor Ewald's essay will enthusiastically agree, others will undoubtedly be skeptical of the novelty or the feasibility of his approach.

The paper by Ugo Mattei, "An Opportunity Not to be Missed," takes a different course. This essay consists of two parts. The first is heretical as it suggests that the future of comparative law does *not* lie in its connection with the much-trumpeted globalization of law. For a variety of reasons, this globalization has not catapulted the discipline to prominence as one might have expected, nor will it do so in the future. Instead, it is argued in the second part, comparative law's greatest promise is to become the vital link between law and other social sciences. With its study of various legal systems, it can bring real facts and a much-needed dose of realism to sociology, anthropology, political science and economics. But in order to do so, comparative law needs to become interdisciplinary and comparatists need to seek cooperation with scholars from other fields. The agenda presented is old-fashioned and novel at the same time—old-fashioned because it asks comparatists to embrace the interdisciplinary approach that our colleagues have long pursued in most other areas of law, novel because we have failed so far to join that bandwagon. One notices, once again, that our discipline has fallen behind. Yet, how exactly to turn it into an interdisciplinary endeavor will require a lot more discussion.

Perhaps the most radical quest for a new direction comes from David Gerber. While recognizing that the traditional approach serves important functions, he finds that it suffers from two limitations: It is too norm-centered, and it produces bits and pieces of particularized knowledge without providing a means of relating them to each other. As a result, comparatists lack a common scholarly language and a

sense of a common agenda. Professor Gerber suggests that we turn our attention from norms to systems and their dynamics. We should try to understand the respective decisionmaking processes; i.e., the varying roles of texts, institutions, decisionmaking communities, as well as the different patterns of thought. Such a "system dynamics" approach could produce integrated and transferable knowledge that would be useful not only for legal and social theory but also for practitioners who need to cope with foreign legal regimes. As Professor Gerber admits, the idea of such an approach is not entirely new. But it is also true that we have never developed an analytical framework for it and, as a result, have rarely employed it in comparative legal studies.

The approaches proffered by Professors Fletcher, Ewald, Mattei, and Gerber are not necessarily incompatible. One can even see them as complementing each other. They are all concerned with foreign legal regimes as systems. They all conceive of such systems not as static constructs but as dynamic processes of thought and decision-making. Thus, they all insist that we overcome the traditional focus on rules and explore backgrounds, contexts and interrelationships of a much larger variety of elements. For all of them, such an approach promises to remedy the perhaps greatest problem of comparative law today: It could go beyond merely producing and collecting isolated bits of information, but integrate them into a framework and thereby give them meaning.

#### 4. A View from the Outside: Lessons from Comparative Political Science and Anthropology

Comparative studies are not limited to law but are firmly established in other disciplines as well. In order to learn from their experience, we invited scholars from other disciplines to participate in our conferences,<sup>6</sup> be it as authors of their own essays or simply as observers and discussants. Their participation proved extremely valuable in the discussions and two non-lawyers actually contributed their own papers.

Jennifer Widner's analysis of the methodological problems that have beset comparative political science points to striking similarities with comparative law. There as well as here, the question is not whether there is a demand for comparative studies—there clearly is—but how to supply it effectively. Professor Widner suggests a list of conditions under which such studies will flourish. Reading this list is somewhat depressing because comparative law has largely failed to

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6. In addition to political scientist Jennifer Widner and anthropologist Laura Nader, whose essays are included, Robert Cooter provided insights from economics at our meeting at Hastings which were highly stimulating, especially where they pinpointed failures and weaknesses in comparative law.

meet the criteria mentioned: A discipline must be based on a set of general theories that can be tested; it must produce cumulative wisdom, not only isolated bits of knowledge; the insights it generates must help to solve real world problems; and it must generate enough "big books," i.e., fundamental works, to keep the discipline exciting to its members as well as outsiders. Comparative lawyers in the United States will also note that they mostly lack the environment Professor Widner considers critical for the production of quality work: institutions bringing together a critical mass of scholars, stimulating contact with practitioners, offering regular forums for discussion, and providing support in terms of intellectual atmosphere and resources. At a minimum, the lesson to be learned from political science seems to be that comparatists need to seek a lot more cooperation with each other, with practitioners, and with scholars from other disciplines.

Laura Nader looks at comparative law from the perspective of a seasoned anthropologist. She notes that her colleagues still read the works of the great nineteenth century lawyer-anthropologists, such as Henry Sumner Maine and Louis Henry Morgan, while they pay scant attention to present-day comparative legal scholarship. The reason, she indicates, is probably that the nineteenth century scholars asked "big questions" (e.g., about the evolution of law in various societies) which continue to be fascinating, while current scholarship tends to produce "decontextualized facts or observations" mainly about "the internal aspects of legal systems viewed as autonomous," which are simply not very interesting or useful for an anthropologist. Yet, Professor Nader also finds considerable similarity between the disciplines even today: the comparative perspective itself, the current focus on (if not obsession with) globalization, the uneasy stance between the social sciences and the humanities, and the concern with both sameness and difference. She urges comparative lawyers to challenge the taken-for-granted and to give priority to research about "questions pertaining to the present biological revolution"—an agenda comparative law should share with anthropology. In conclusion, Professor Nader endorses the search for new questions and new critical perspectives "that go beyond either nations or globalisms," that "challenge ethnocentric view and hegemonic purposes," and that promote the "exploration of differences for 'institutional engineering' through just rule of law."

#### IV.

While this symposium presents a large variety of criticisms and suggests a host of new directions, we are acutely aware of its limitations. The papers deal neither with the extension of comparative law beyond the traditional areas to new regions, especially in the Third World, nor do they challenge the established pattern of legal families;

they address neither its connection with legal history nor the social and political implications of comparative studies. We are also conscious of the fact that the papers pose many questions but proffer few answers. Thus, what do they accomplish? We should like to leave that for the reader to judge. Yet, we should also like to invite him or her to conduct a small experiment. Read, or at least peruse, the papers that follow and then look back at the orthodox canons of goals and methods in the current standard works of comparative law. Do these time-honored agendas begin to look strangely antiquated and limited? If so, the symposium has at least succeeded in moving our view of comparative law beyond traditional terrain.