Prologue

The 'Malaise' of Comparative Law

The enterprise of comparative law is familiar yet its conceptual whereabouts remain somewhat obscure. The purpose of this book is to reconstruct extant comparative law scholarship into a systematic account of comparative law as an autonomous academic discipline. The object of that discipline is neither to harmonize world law, nor to emphasize its cultural diversity, two opposite aims often advanced for comparative law, but to understand each legal system on its own terms. The specificity of each system indeed is uniquely elucidated in and through its contrast with the others. Moreover, the reconstruction exercise proposed involves bridging comparative law and contemporary legal theory insofar as it makes explicit fundamental assumptions about the nature of law that are currently implicit in comparative law scholarship. As such, it would also serve to show how comparative law and legal theory both stand to benefit from being exposed to the other.

The historical and abiding importance of comparative legal studies is well established.[1] For as long as there have been states, judges and legislators have looked to the law of other states for inspiration in the making and application of their own law. Comparative law has also played a central role in the harmonization

[1] An elaborate typology of the various historical and contemporary uses of comparative law can be found in Günter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 *Harv. Int'l L. J.* 411 (1985). See also: Rudolf B. Schlesinger, The Past and Future of Comparative Law, 43 *Am. J. Comp. L.* 477 (1995); Michael Bogdan, *Comparative Law* 18 (1994); Ferdinand F. Stone, The End to Be Served by Comparative Law, 25 *Tul. L. Rev.* 325 (1951); George A. Bermann, The Discipline of Comparative Law in the United States, 51 *Revue Internationale de Droit Comparé [R. I. D. C.]* 1041, 1042 (1999) (Fr.); Hein Kötz, Comparative Law in Germany Today, 51 *R. I. D. C.* 753, 761–66 (1999); David J. Gerber, System Dynamics: Toward a Language of Comparative Law, 46 *Am. J. Comp. L.* 719, 720–21 (1998); Mathias Reimann, The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century, 50 *Am. J. Comp. L.* 671 (2002); Mathias Siems, *Comparative Law* 2–5 (2014); *Comparing Comparative Law* (Samantha Besson *et al.* eds., 2017).

and unification of domestic law within federated states, as well as between states involved in punctual or long-term cross-border joint ventures. The contribution of comparative law at the international level has been similarly significant. As private international law seeks to coordinate the domestic law of the world's nations or transnational law more generally, it cannot but involve heavy doses of comparative legal knowledge. As for public international law, it has always tapped more or less directly into "the law of the civilized nations."[2] On the academic front, comparative law has long been drawn upon for the purpose of supporting or refuting philosophical, economic, sociological, anthropological and other theories about law,[3] as it indeed offers an invaluable "reservoir of institutional alternatives not merely theoretical but actually tested by legal history."[4]

The interest in comparative law moreover has risen to unprecedented levels over the last decades.[5] The dramatic increase in cross-border activity attending the rise of globalization has led to the creation of a plethora of transnational institutions and partnerships that are both the outcome and the source of considerable comparative legal work, in fields as diverse as trade, finance, crime control, civil responsibility, human rights, environmental protection and intellectual property. Countless comparative legal studies have been produced in the context of such historic political events as German reunification and European unification, as well as in connection with the numerous development initiatives led by the World Bank. Comparative law scholars have likewise been central players in the latest waves of constitutional,

[2] Statute of the International Court of Justice, June 26, 1945, art. 38 (1)(c), 59 Stat. 1055, T.S. No. 993, reprinted in 3 Bevans 1179.

[3] In legal philosophy, similarities and differences in the world's legal systems have respectively been advanced as evidence for (e.g. James Gordley, Is Comparative Law a Distinct Discipline?, 46 *Am. J. Comp. L.* 607 (1998); *Towards Universal Law – Trends in National European and International Lawmaking* (Nils Jareborg ed., 1995); R. Saleilles, *Conception et objet de la science juridique du droit comparé*, 173, vol. I (1905–07); Giorgio del Vecchio, *Humanité et unité du droit: essais de philosophie juridique* (1963)) and against (e.g. Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries, 31 *Ariz. St. L. J.* 737 (1999); Vivian Grosswald Curran, Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives, 46 *Am. J. Comp. L.* 657, 661, 663, 666–67 (1998); Richard L. Abel, Law as Lag: Inertia as a Social Theory of Law, 80 *Mich. L. Rev.* 785 (1982)) universalistic theories about the nature of law.

[4] Ugo Mattei, *Comparative Law and Economics* ix (1997).

[5] Global Modernities (Mike Featherstone, Scott Lash & Roland Robertson eds., 1995); Volkmar Gessner & Ali Cem Budak, *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (1998); William Twining, Globalization and Comparative Law, 6 *Maastricht J. Eur. & Comp. L.* 217 (1999); *Comparative Law in the 21st Century* (Andrew Harding & Esin Örücü eds., 2002); Horatia Muir Watt, Globalization and Comparative Law, *in The Oxford Handbook of Comparative Law* 579 (Mathias Reimann & Reinhard Zimmermann eds., 2006). The political importance of comparative law however may have been declining: Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, *in* Reimann & Zimmermann eds., *ibid.*, 539, 577–78; Mathias Siems, The End of Comparative Law, 2 *J. Comp. L.* 133, 137 (2007); Ralf Michaels, Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports and the Silence of Traditional Comparative Law, 57 *Am. J. Comp. L.* 765, 777–78 (2009).

private law and criminal justice reforms in Asian, African and Latin American countries.

Recent trends in legal education confirm the rising prominence of comparative law in all aspects of domestic, transnational and international legal reform.[6] Whereas the law school curriculum traditionally contained nothing but domestic law courses, foreign and comparative law offerings are now standard fare. Even domestic law courses, moreover, are commonly being taught from a comparative perspective. Transnational student and faculty recruitment and exchanges are proliferating rapidly, as are comparative and foreign law mooting, journals and internships; most faculty research, regardless of the field, now draws on foreign law to some extent.

The voluminous comparative law literature accumulated to date however remains highly fragmented, and its theoretical foundations and overall scholarly purpose(s) at times difficult to ascertain. A cursory examination of that literature confirms that the issues for investigation, the jurisdictions and representative materials identified, and the comparison criteria are often selected haphazardly or based on factors of convenience (linguistic abilities, availability of documents, domains of expertise, etc.), fuelling enduring questions as to the scientific value of the whole enterprise.[7] The very status of comparative law as an academic discipline indeed is periodically called into question.[8] In particular, it has been said that comparative law scholarship

[6] See generally: Catherine Valcke, Global Law Teaching, 54 *J. Leg. Educ.* 160 (2004); *The Law School – Global Issues, Local Questions* (Fiona Cownie ed., 1999); Mary C. Daly, The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century, 21 *Fordham Int'l L. J.* 1239 (1998); Anthony O'Donnell & Richard Johnstone, *Developing a Cross-cultural Law Curriculum* (1997); Alberto Bernabe-Riefkohl, Tomorrow's Law Schools: Globalization and Legal Education, 32 *San Diego L. Rev.* 137 (1995).

[7] Jaro Mayda, Some Critical Reflections on Contemporary Comparative Law, 39 *Revista Juridica de la Universidad de Puerto Rico* 431 (1970); Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 10–16 (2nd ed. 1993); William Ewald, Comparative Jurisprudence (I): What Was It Like to Try a Rat?, 143 *U. Pa. L. Rev.* 1898, 1961–90 (1994–95); John Henry Merryman, Comparative Law Scholarship, 21 *Hastings Int'l & Comp. L. Rev.* 771 (1998); Étienne Picard, L'état du droit comparé en France, en 1999, 4 *R. I. D. C.* 885, 888–89 (1999); Bermann, *supra* note 1, at 1044 ("virtually all recent assessments of the discipline in the legal literature find it wanting in basic ways. Even discounting for the fact that academic literature is always more likely to bear witness to dissatisfactions than satisfactions, the assessments are conspicuously negative."); Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* 15 (2014) ("a tradition … that can at best be described as theoretically weak and at worst startlingly trivial"). These traditional critiques admittedly may lack traction against more recent streams of comparative law scholarship as the 'legal origins' literature (surveyed in Legal Origin Symposium 57 *Am. J. Comp. L.* (2009)), whose analytic frameworks and overall purposes are, by all accounts, carefully articulated. Whether such recent streams might not be better slotted within comparative economics/comparative sociology than within comparative law however remains an open question.

[8] Otta Kahn-Freund, Comparative Law as an Academic Subject, 82 *L. Q. Rev.* 40, 41 (1966); Arthur T. Von Mehren, An Academic Tradition for Comparative Law?, 19 *Am. J. Comp. L.* 624 (1971); Basil Markesinis, Comparative Law – A Subject in Search of an Audience, 53 *Mod. L. Rev.* 1 (1990); Nora V. Demleitner, Challenge, Opportunity and Risk: An Era of Change in Comparative Law, 46

is bereft of the usual hallmarks of a discipline proper, viz. some measure of consensus on analytic premises and overall direction, a somewhat constant and transparent methodology, a pool of problems, designated criteria and parameters with which to test hypotheses and control for scholarship quality, etc. As a discipline, comparative law hence would in fact be deeply 'malaised':[9] far from a somewhat unified "scholarly tradition susceptible of transmission to succeeding generations" and a "shared foundation on which each can build,"[10] it would amount to no more than "a chance to satisfy idle curiosity,"[11] the product of "a blind eye to everything but surfaces,"[12] on par with "stamp collecting, accounting, and baseball statistic hoarding."[13]

Reactions to this indictment vary widely. Some have seen in it a welcome impetus for fresh and broadened reflection on the object and nature of comparative law, in time leading to the elaboration of new conceptual foundations, if not a shift towards altogether new directions.[14] In that spirit, a wave of literature has emerged which offers theoretical reflections on the main process issues facing comparative lawyers, viz. whether to compare entire legal systems ('macro comparisons') or only some of their components ('micro comparisons'); whether to focus on cross-jurisdictional similarities or differences; what legal materials to investigate in each jurisdiction and from what perspective; how to delineate and select relevant legal systems; and so on.[15] A few scholars have even undertaken to construct more systematic models

Am. J. of Comp. L. 647 (1998); Reimann, *supra* note 1; Gordley, *supra* note 3; Siems, *supra* note 1, at 5–6; Samuel, *supra* note 7, at 8–10; Jaakko Husa, *A New Introduction to Comparative Law* 1–2 (2015); Günter Frankenberg, *Comparative Law as Critique* 9–13 (2016) (questioning the notion of 'discipline' altogether).

9 Frankenberg, *supra* note 1, at 624ff; Watson, *supra* note 7; Ewald, *supra* note 7; Vivian Grosswald Curran, Law and the Legal Origins Thesis: "[N]on scholae sed vitae discimus", 57 *Am. J. Comp. L.* 863 (2009) (referring to comparative law's "existential angst", at 863); Harding & Örücü, *supra* note 5, at xii ("a sense of mid-life crisis").

10 Von Mehren, *supra* note 8, at 624.

11 Walter J. Kamba, Comparative Law: A Theoretical Framework, 23 *Int'l & Comp. L. Q.* 485, 489 (1974).

12 Lawrence M. Friedman, Some Thoughts on Comparative Legal Culture, *in Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* 49 (John Henry Merryman & David S. Clark eds., 1990).

13 Ewald, *supra* note 7, at 1961.

14 E.g.: Hubert Izdebski, Le rôle du droit dans les sociétés contemporaines: essai d'une approche sociologique du droit comparé, 3 *R. I. D. C.* 563 (1988); Jonathan Hill, Comparative Law, Law Reform and Legal Theory, 9 *Oxf. J. Leg. Stud.* 101 (1989); Pierre Legrand, Comparative Legal Studies and Commitment to Theory, 58 *Mod. L. Rev.* 262 (1995); Geoffrey Samuel, Comparative Law and Jurisprudence, 47 *Int. & Comp. L. Quart.* 817 (1998); 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, 495–97 (1998); Twining, *supra* note 5, at 217; Lawrence Rosen, Beyond Compare, *in Comparative Legal Studies: Traditions and Transitions* 493 (Pierre Legrand & Roderick Munday eds., 2003); Mark Van Hoecke, Deep Level Comparative Law, *in Epistemology and Methodology of Comparative Law* 65 (Mark Van Hoecke ed., 2004); Annelise Riles, Comparative Law and Socio-Legal Studies, in Reimann & Zimmermann eds., *supra* note 5, 775; Frankenberg, *supra* note 1.

15 E.g.: Samuel, *supra* note 7; Harding & Örücü, *supra* note 5; Legrand & Munday, *supra* note 14; *Themes in Comparative Law* (Peter Birks & Arianna Pretto eds., 2004); *Epistemology and Methodology of Comparative Law* (Mark Van Hoecke ed., 2004); Reimann & Zimmermann eds., *supra* note 5;

for comparative law – 'legal transplants,'[16] 'legal formants,'[17] 'comparative jurisprudence,'[18] 'legal cultures'[19] – based on their respective conceptions of its ultimate purpose. Importantly, while these scholars obviously disagree as to said purpose, they are all agreed that comparative law must be redesigned from the top down – from a priori reflection on what comparative law *should* look like, come what may of the existing stock of scholarship.[20]

Others are much less concerned by the malaise indictment. In their view, the fragmentation and apparent theoretical randomness of extant scholarship only serves to confirm what should have been suspected all along, namely, that comparative law never was, or even aspired to be, a discipline proper, structured around a

Comparer les droits, résolument (Pierre Legrand ed., 2009); *Theorising the Global Legal Order* (Andrew Halpin & Volker Roeben eds., 2009); *Practice and Theory in Comparative Law* (Maurice Adams & Jacco Bomhoff eds., 2012); *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Mark Van Hoecke ed., 2011); *Methods of Comparative Law* (Pier Giuseppe Monateri ed., 2012).

[16] Watson, *supra* note 7 (comparative law as legal history, aimed at tracking the evolution of legal rules across time and territory). For critical discussions: William B. Ewald, The American Revolution and the Evolution of Law, 42 *Am. J. Comp. L. Supp.* 1701 (1994); Pierre Legrand, The Impossibility of 'Legal Transplants', 4 *Maastricht J. Eur. & Comp. L.* 111 (1997); Yves Dezalay & Bryant Garth, The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars, *in Adapting Legal Cultures* 241 (David Nelken & Johannes Feest eds., 2001); William Twining, Social Science and Diffusion of Law, 32 *J. L. & Soc.* 203 (2005); Jedidiah J. Kroncke, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (2016).

[17] Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), 39 *Am. J. Comp. L.* 1 (Part I), 343 (Part II) (1991) (comparative law as study in legal function, investigating all factors causally impacting court decisions). See likewise: Ernst Rabel, *The Conflict of Laws: A Comparative Study*, vol. I (2nd ed. 1945). For critical discussions: Michele Graziadei, The Functionalist Heritage, *in* Legrand & Munday eds. 100, *supra* note 14; Geoffrey Samuel, Dépasser le fonctionalisme, *in* Legrand ed., *supra* note 15, at 409; Ralf Michaels, The Functional Method of Comparative Law, *in* Reimann & Zimmermann eds., *supra* note 5, at 339; Richard Hyland, Gifts: A Study in Comparative Law 63–98, 112 (2009).

[18] Ewald, *supra* note 16 (comparative law as comparison of forms of legal reasoning). For critical discussions: James Q. Whitman, The neo-Romantic Turn, *in* Legrand & Munday eds. 312, esp. 334–36, 343–44; James Gordley, *Comparative Law and Legal History*, *in* Reimann & Zimmermann eds. 753, *supra* note 5, at 765–66.

[19] Pierre Legrand, *Fragments on Law-as-Culture* (1999); Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (1975); Bernhard Großfeld, *Macht und Ohnmacht der Rechtsvergleichung (The Strength and Weakness of Comparative Law)* (Tony Weir trans., 1990); *Comparative Legal Cultures* (Csaba Varga ed., 1992); *Comparing Legal Cultures* (David Nelken ed., 1997); *Lawrence Rosen, Law as Culture: an Invitation* (2006); John Bell, *French Legal Cultures* (2001); Van Hoecke & Warrington, *supra* note 14; Riles, *supra* note 14, at 796–99; Husa, *supra* note 8; Siems, *supra* note 1; Frankenberg, *supra* note 8; Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (2005); Sherally Munshi, *Comparative Law and Decolonizing Critique* (August 24, 2017): https://ssrn.com/abstract=3025595. For critical discussions: William Ewald, The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats", 46 *Am. J. Comp. L.* 701 (1998); Alan Watson, Legal Transplants and European Private Law, 4.4 *Electronic J. Comp. L.* (2000) (www.ejcl.org/44/art44-2.html); Ruth Sefton-Green, Compare and Contrast: Monstre à deux têtes, 54 *R.I.D.C.* 85 (2002).

[20] E.g., Ewald, *supra* note 7, at 1975–90, esp. 1990; Watson, *supra* note 7, at 10–16.

single overall purpose. Rather, it was always meant to be just a method – extending the scope of investigation beyond the domestic realm – that could be tailored to a variety of extraneous disciplinary purposes, be they economic, philosophical, anthropological or any other.[21] The existing scholarship would thus be not so much devoid of scholarly purpose as informed by a variety of competing purposes, none of which need be specifically legal.[22] In the view of this second group of observers, then, the real malaise lies not in the failure to find a single unifying conception for comparative law but in the persistent search for one that does not exist. And the best strategy forward in fact would be to proceed from the ground up: the multiple purposes underlying the current stock of scholarship first need to be exposed and sorted out in order for the true scientific value of that scholarship (and of comparative law as a whole) to eventually come to light.

As I see it, the malaise of comparative law, if any, boils down to a bifurcation overload. That is, on each of the process issues listed above, legal comparatists tend to divide into two camps, as if these issues indeed were either/or questions.[23] On whether to privilege macro or micro comparisons, the 'legal family'[24] treatises and more recent 'legal origins'[25] scholarship side with the first whereas the notorious 'common core'[26] projects and the 'legal transplant'[27] literature side with the second.

[21] Harold C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* 2 (2nd ed. 1949) ("its employment should not be hampered by confining it to specified categories"); Peter De Cruz, *A Modern Approach to Comparative Law* 3 (1993) ("a method of study"); Rudolf B. Schlesinger *et al.*, *Comparative Law: Cases, Text, Materials* 2 (6th ed. 1998) ("primarily a method, a way of looking at legal problems, legal institutions, and entire legal systems"); John C. Reitz, How to Do Comparative Law, 46 *Am. J. Comp. L.* 617, 625 (1998) (an "appendage of social science"); William P. Alford, On the Limits of "Grand Theory" in Comparative Law, 61 *Wash. L. Rev.* 945 (1986); Joachim Zekoll, Kant and Comparative Law—Some Reflections on a Reform Effort, 70 *Tul. L. Rev.* 2719, 2736 (1996); Mads Andenas & Duncan Fairgrieve, Intent on Making Mischief: Seven Ways of Using Comparative Law, *in* Monateri ed., *supra* note 15, at 25.

[22] See the debate over whether 'comparative law' (singular) would be best renamed 'comparative legal studies' (plural): Siems, *supra* note 1, at 5–6; Frankenberg, *supra* note 8, at 11; Husa, *supra* note 8, at 17.

[23] See Samuel's list of what he rightly describes as the 'methodological dichotomies' of the comparative law literature: Samuel, *supra* note 7, at 4.

[24] See generally: Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans., 3rd ed. 1998); Jaakko Husa, Classification of Legal Families Today – Is it Time for a Memorial Hymn?, 56 *R.I.D.C.* 11 (2004), esp. 14–16; Léontin-Jean Constantinesco, *Traité de droit comparé*, vol. I, p. 154, note 161 (1972); Esin Örücü, Family Trees for Legal Systems: Towards a Contemporary Approach, Epistemology and Methodology of Comparative Law, *in Epistemology and Methodology of Comparative Law* 359, 361 (Mark Van Hoecke ed., 2004); Mariana Pargendler, The Rise and Decline of Legal Families 60 *American Journal of Comparative Law* 1043 (2012).

[25] *Legal Origin Symposium*, *supra* note 7.

[26] E.g., International Institute for the Unification of Private Law, The Unidroit Principles (2004); *Formation of Contracts: A Study of the Common Core of Legal Systems* (Rudolf B. Schlesinger & Pierre G. Bonassies eds., 1968); *International Encyclopedia of Comparative Law* (André Tunc ed., 1983) (17 volumes covering 150 states); *The Common Core of European Private Law* (Mauro Bussani & Uggo Mattei eds., 2003).

[27] *Supra* note 16.

On whether to emphasize similarities or differences, the common core projects and some legal family treatises ostensibly fall under the first whereas the 'legal formants'[28] and 'legal cultures'[29] literatures resolutely align with the second. Concerning the materials for investigation, the common core projects and the legal transplant literature target the 'law in books' while the legal formants and legal cultures literatures centre on the 'law in action.' On the issue of perspective, the 'comparative jurisprudence'[30] scholarship and legal culture literature militate for an internal, participant ('expressivist,' 'hermeneutic' or 'constructivist') outlook on foreign law, in contrast with the legal transplants, legal formants and legal origins scholars, who favour an external, observer ('functionalist,' 'causal' or 'cognitivist') standpoint. Concerning the legal systems to be canvassed, any one legal transplant project typically limits itself to a small number of somewhat analogous legal systems,[31] whereas the legal culture literature and some legal family treatises reach more broadly, in fact encompassing systems that are as widely dissimilar as possible.[32] And whereas the new wave of 'legal pluralists' advocate a loose, strictly epistemic conception of legal systems, mainstream comparatists seem to want to hang on to the Westphalian, territorial conception.[33]

The bifurcation moreover persists, I would suggest, as we move from the groundwork of comparative law to the more theoretical scholarship, for the latter itself splits, as explained, into two streams respectively propounding a top-down and a bottom-up approach.[34] And zooming out further still, so as to capture the groundwork and theoretical scholarship at once, we notice that these likewise are quite neatly demarcated from one another: as legal comparatists tend to be either field workers ('doing it') or theorists ('talking about it')[35] – few are both – the groundwork typically is, as indicated, largely *a*-theoretical whereas the theoretical scholarship in contrast comes across as *strictly* theoretical, i.e. detached from any field work.

If that diagnosis of the malaise of comparative law is sound, the key to reconstructing it into an autonomous discipline arguably lies in some kind of synthesis. It indeed seems odd that legal comparatists should have to choose between

[28] *Supra* note 17.
[29] *Supra* note 19.
[30] *Supra* note 18.
[31] Watson, *supra* note 7, at 5.
[32] E.g. *Comparative Legal Studies in Asia* (Penelope Nicholson & Sarah Biddulph eds., 2008).
[33] See generally: John Griffiths, What is Legal Pluralism? 24 *J. Leg. Pluralism & Unofficial Law* 1 (1986); Gunther Teubner, The Two Faces of Janus: Rethinking Legal Pluralism, 13 *Cardozo L. Rev.* 1443 (1992); Boaventura de Sousa Santos, *Toward a New Common Sense* (1995); Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001); William Twining, *Globalisation and Legal Theory* (2000); Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (2009).
[34] *Supra*, text accompanying notes 20, 21 and 22.
[35] Husa, *supra* note 8, at 18–19. Likewise: Maurice Adams & Jacco Bomhoff, Comparing Law: Practice and Theory, *in* Adams & Bomhoff eds. *supra* note 15, at 1; Samuel, *supra* note 7, at 19–20.

cross-system similarities and differences: insofar as these are just counterparts of one another, one would expect comparative law to attend to both. After all, the very process of comparison is possible only as between objects that are distinct *yet also* somewhat alike.[36] And it likewise is difficult to see what might prevent comparatists from engaging with the foreign 'law in books' *as well as* the foreign 'law in action,' given that each arguably shines light on the other. Similarly, one would be hard pressed to think of a comparative law project that would be best conducted *exclusively* from an internal or external perspective. With law being a practice, a rich understanding of it presumably requires looking, at least to some extent, to what the participants aim to express through it. But this does not preclude also examining its actual impact on the ground, since concerns about that impact typically motivate legal actors. What the law expresses indeed most likely is somewhat related to how it functions, and conversely. To be sure, from the moment the scope of study widens beyond just one national legal practice, an external perspective simply becomes unavoidable. Comparison presupposes the possibility of viewing the objects compared side by side, which presumably requires standing outside them all. If anything, then, comparing legal systems seems to call for some kind of a *mix* of internal and external perspectives. This in turn might suggest that the best conceptualization of such systems would correspondingly comprise a material *and* an epistemic dimension. Finally, why wouldn't investigating a small number of very similar, or a large number of very dissimilar, legal systems be *equally* legitimate comparative law projects? Could it not be that some pointed legal issues are best explored through the (micro) comparisons of otherwise similar legal systems while larger questions call for more broadly scoped (macro) comparisons? If that is the case, wouldn't any self-respecting discipline of comparative law have to offer guidance on micro and macro projects alike?

Similar remarks come to mind concerning the debate over the proper way to proceed to rebuild comparative law, moreover. While a heavy dose of the conceptual rebuilding proposed by the 'fresh start' scholars does seem both inevitable and desirable, such rebuilding could hardly proceed without any regard to what already exists. For one, an analytic framework that might account for the work produced to date as well as guide future research clearly would, all else being equal, prove superior to one that does only the latter. And whereas reflection from first principles might achieve the latter, it would likely fail to account for the existing scholarship. Conversely, a purely inductive method might work descriptively but would likely do little on a prescriptive level. Admittedly, while it is theoretically possible that what has come to be accepted as 'comparative law scholarship' in fact is, as the most virulent critics have claimed, so theoretically random as to be altogether undeserving of that label, that is unlikely. More likely, comparative lawyers have been struggling along on a somewhat instinctive basis, at times perhaps even losing track of where

[36] Sefton-Green, *supra* note 19.

they were going, but without for that matter running completely off course. If so, their work is bound to be of at least *some* relevance to any purported theory 'of comparative law.' In this respect, it is worth noting that whereas scholars and practitioners form distinct groups in domestic law, in comparative law (as in legal history, legal philosophy, etc.) these groups are in fact one and the same: the practice of comparative law *is* its scholarship.[37] As a result, to ignore the scholarship here would effectively amount to ignoring the only practice that exists. The deductive/inductive split running through the current debate over the reconstruction of comparative law hence seems no more warranted than the divisions pervading the comparative groundwork.[38]

This book aims to bridge these various divisions by offering a comprehensive account of comparative law that distils and merges the strengths on each of their two sides. It aims to show, in particular, that it is possible to view extant comparative law scholarship as simultaneously and coherently attending (even if only implicitly) to legal similarities *and* differences, to the 'law in books' *and* the 'law in action,' to the material *and* epistemic dimensions of legal systems, as housing narrow- *and* broad-scoped, and micro *and* macro, projects alike, as calling for a mix of internal *and* external perspectives, as speaking to both past *and* future research, etc.

Such an account first involves going back to basics and revisiting the 'law' in 'comparative law.' That is, before reflecting on the ins and outs of '*comparative* law,' it might prove useful to firm up what is here meant by 'law.'[39] Relatively little work has been done that tries to connect, in any systematic fashion, the theoretical work on comparative law with existing theories about law in general.[40] That is puzzling, to say the least, given that any theory of 'comparative law' cannot but presuppose a particular theory of 'law.' What is more, greater reflection on the 'law' underneath 'comparative law' might prove pointedly helpful for the purpose of resolving the divisions afflicting the latter. For it may be that these divisions denote an inadequate (perhaps just incomplete or conflicted) theorization of law. A thoroughly hybrid conception of law, one that would smoothly merge apparently antithetical

[37] Neil Walker makes a similar point with respect to global law: Neil Walker, *Intimations of Global Law* 148–49 (2015). But see: Basil Markesinis, *Engaging with Foreign Law* (2009), esp. 28ff ("*(d) The Practitioner Comparatist: An Untapped Gold Mine*").

[38] For a suggestion that comparative law indeed involves a form of practical wisdom (Aristotelian *prudentia*), defying clear theory/practice dichotomization, see: Husa, *supra* note 14.

[39] See however: Ralf Michaels, A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz, 2 *J. Int. Dispute Settlement* 417 (2011) (suggesting that 'law' and 'comparative law' need not rest on the same theoretic foundations).

[40] See however: John Bell, Comparative Law and Legal Theory, *in Prescriptive Formality and Normative Rationality in Modern Legal Systems* 19 (Werner Krawietz, Neil MacCormick & Georg Henrik von Wright eds., 1994); Ewald, *supra* note 7; Samuel, *supra* note 7, at 121–51; Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013); Whitman, *supra* note 18; Michaels, *supra* note 39.

dimensions, presumably would open the door to a conception of comparative law that would likewise prove unified rather than bifurcated.[41] If so, one path to unifying comparative law would lie in legal theory pure and simple. Thus, whereas comparative legal knowledge as mentioned has long contributed to legal theory, the time may have come for legal theory to return the favour.

The book accordingly opens with a particular, hybrid conception of law. Drawing on the Aristotelian intellectual tradition pursued through the Enlightenment and German idealism in particular, this approach, which I call 'law as collective commitment,' conceptualizes law as a social practice that both reflects and constitutes a community's commitment to governing itself in accordance with certain shared ideals. As a *practice* embodying *ideals*, law as collective commitment combines a material and an ideal dimension, very much in line with Kant and Hegel's teachings, and with such later accounts of law as those penned by Lon Fuller, Ronald Dworkin, Neil MacCormick, Jeremy Waldron, Nigel Simmonds and Gerald Postema.

Chapter 1 first analyzes law in terms of six formal features – effectiveness, argumentativeness, coherence, publicness, formality and normativity – all of which are shown to derive from the central notion of 'collective commitment,' and its attendant premises: citizen equality and citizen-official reciprocity. Thereafter, in Part II, these six features are synthesized into what will hopefully prove a smooth blend of material and ideal. The argument there proceeds through the contrasting of law as collective commitment with two antithetical legal ideal-types, constructed for the occasion, viz. the 'natural law ideal-type,' on one hand, and the 'positivist ideal-type,' on the other. Whereas the natural law and positivist ideal-types indeed respectively are ideal and material through and through, I argue that law as collective commitment in contrast is a truly hybrid, ideal cum material, conception.

The remaining chapters aim to establish that the corresponding hybrid conception of comparative law – comparative law as comparison of the collective commitments underlying the world's legal systems – transcends, or even pre-empts, the various divides described above. Chapter 2 considers the extent to which law as conceptualized in Chapter 1 is amenable to comparison. More specifically, I there argue that the hybridity of law as collective commitment is the key to legal systems possessing the combination of distinctness and commonality required for their 'meaningful comparison,' by which I mean a comparison holding the potential of yielding new knowledge about either or both of the systems compared and/or legal systems in general. Whereas under radical natural law, legal systems exhibit commonality but insufficient distinctness, and conversely boast distinctness but insufficient commonality under radical positivism, they are adequately distinct *and*

[41] In the same vein, Adler and Pouliot describe, in the field of international relations, their central notion of 'community of practice' as "[o]vercoming dichotomies in social theory": Emanuel Adler & Vincent Pouliot, International Practices: Introduction and Framework, *in* INTERNATIONAL PRACTICES 3, 12 (Emanuel Adler & Vincent Pouliot eds., 2011).