Introduction: The Philosophies of Comparative Law

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Abstract

This introductory essay outlines the Special Issue's aims and contents. After having offered a general overview of the development and state of comparative law as a discipline, it introduces the reader to the issue's articles. The issue features articles by leading scholars and emerging researchers that make significant contributions to the academic debate on the current status and future directions of comparative legal analysis and methodologies of research. More particularly, combining theoretically-oriented essays with empirical accounts of socio-cultural, pluralist dynamics of ordering from the Global South (i.e., Latin America) and Asia (i.e., Japan), it takes a further step towards molding a body of interdisciplinary, pluralist, critical, and contextual comparative legal scholarship by (a) critically exploring what "philosophies" have been informing and shaping its development over the past few decades, and (b) suggesting possible new directions of thought for an age, such as ours, characterized by increasing regulatory density and complexity, and geopolitical instability. It is by meaningfully embracing this critical, interdisciplinary, and pluralist spirit that this Special Issue moves away from reductionist understandings of the comparative enterprise and speaks of "philosophies" of comparative law.

I. Overview

Today, comparative law is a broad academic field of legal knowledge that studies law comparatively as a normative phenomenon of organized human communities.[1] Thus understood, the comparative study of legal phenomena includes both the finding and the analysis of (i.e., reasons for) similarities and differences among legal systems, norms, cultures, mindsets, procedures, habits, and sensibilities. To this end, the comparative study of law(s) is not only about describing similarities and differences from the viewpoint of legal doctrine (or even theory); it is rather about moving beyond the mere description and cataloguing of law(s) towards a deeper (i.e., meaningful)[2] understanding of various legal phenomena and of how societal normativities operate and interact with one another.[3] In

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[1] Importantly, the new understanding of comparative law is considerably broader than how the field was understood by the last century's paradigmatic view. See Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (3d ed. 1998).

[2] Cf. Catherine Valcke, Comparing Law: Comparative Law as Reconstruction of Collective Commitments (2018).

[3] See, e.g., Geoffrey Samuel, An Introduction to Comparative Law Theory and Method (2014); Jaakko Husa, A New Introduction to Comparative Law (2015); Mathias Siems, Comparative Law (2d ed. 2018).

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short, as a field of legal research, comparative law has multiple, context-sensitive and other-regarding aims.[4]

Beyond a shadow of a doubt, present-day comparative law has no one-size-fits-all methodology or theory. Comparative law literature suggests that this situation is not a very recent development, however. Already some twenty years ago, comparative law had many understandings of itself guiding its research objectives and practices—including "law as rules," "law as system," "law as culture," "law as tradition," "law as social fact," "law in context," "law and history," "law and economics," "law and/as literature," and "law and theory."[5]

It therefore makes perfect sense to underline the differences between today's comparative law and that of the previous century. In its past form and intents, the comparative study of law was mostly the study of Common Law and Civil Law systems. In that context, the intellectual focus was on private law, while public law was neglected.[6] In addition, non-Western legal cultures were described in a sketchy manner, without the same level of detail and academic sophistication informing "Common Law vs. Civil Law" comparisons.[7] Moreover, and relatedly, historically, the epistemology of comparative law has been, by and large, characterized by implicit epistemic racism or instrumentalist logics of cultural governance.[8]

During this century, however, the intellectual climate of comparative law has changed, perhaps even drastically. A new generation of non-doctrinal comparative legal scholars has been trailblazing the movement towards the appreciation of differences and diversities.[9] Crucially, while comparative law has been opening itself to non-Western legal cultures,[10] empirical and interdisciplinary approaches also made progress.[11] In all of this, a

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[4] See, e.g., H. Patrick Glenn, The Aims of Comparative Law, in Elgar Encyclopedia of Comparative Law 65 (Jan Smits ed., 2d ed. 2012).

[5] Esin Örücü, Law as Transposition, 51 Int'l & Comp. L.Q. 205 (2002); cf. Methods of Comparative Law (Pier Giuseppe Monateri ed., 2012).

[6] Cf. Andrew Harding, Comparative Public Law: Some Lessons from South East Asia, in Comparative Law in the 21st Century 249 (Andrew Harding & Esin Örücü eds., 2002).

[7] See Jaakko Husa, The Future of Legal Families, in Oxford Handbooks Online (2016) (DOI: 10.1093/oxfordhb/9780199935352.013.26).

[8] See, e.g., Upendra Baxi, The Colonialist Heritage, in Comparative Legal Studies: Traditions and Transitions 46, 53 (Pierre Legrand & Roderick Munday eds., 2003); Pier Giuseppe Monateri et al., Le Radici Comuni del Diritto Europeo: Un Cambiamento di Prospettiva (2005).

[9] See also James Gordley, Comparison, Law, and Culture: A Response to Pierre Legrand, 65 Am. J. Comp. L. Supp. 1 133 (2017); James Q. Whitman, The Hunt for Truth in Comparative Law, 65 Am. J. Comp. L. Supp. 1 181 (2017).

[10] See, e.g., Werner Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (2d ed. 2006); H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (5th ed. 2014).

[11] See Mathias Siems, New Directions in Comparative Law, in The Oxford Handbook of Comparative Law 852 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

significant development to report is the emergence of a decolonial sensibility within Europe-based scholarship.[12] Considering comparative law's practical imports, the significance of this epistemological change can hardly be exaggerated as it reflects a new (and much-needed) intellectual climate and academic pedigree.[13]

As one might expect, there are certain core consequences concerning this new, general atmosphere of legal scholarship in comparative law. Past comparative law scholarship conceived of the comparative approach as a means of creating uniformity through the voiding of differences.[14] In contrast, today's comparative law scholarship emphasizes plurality and embraces values and goals which defy the old understanding and employment of comparison as an instrument to create or promote similarity. In this sense, one might say that comparative law scholarship has developed into a field that recognizes, accommodates, and furthers the multi-dimensional diversity and plurality of all sorts of legal phenomena, including non-official (in the Western, modern sense of the term) normativities, such as Indigenous legal traditions. More specifically, present-day comparative law scholarship recognizes pluralism in two forms: firstly, as an issue that concerns the substance of regulatory dynamics; secondly, as an issue that concerns the methodologies of comparative legal analysis.[15] The two themes are related and mutually inform each other: as there are different concepts of—and sensibilities toward—what amounts to law, so there is more than one research method.[16]

The renewed, pluralist understanding of comparative law has expanded comparative law's scope and made it more complex. If macro-, meso-, and micro-legal pluralism(s) are taken into account, then old, insular theories and methodologies inevitably lose much of their analytical grip.[17] Stated otherwise, what worked (or gave the appearance that it worked) with and within Common Law and Civil Law comparisons turns out to be outdated when the scope and spirit of research are broadened. The answer to the new, multi-dimensional challenges is not difficult to pinpoint: "We have no universally accepted or agreed definition of law."[18] It is hardly an overstatement to maintain that for the comparative study of law this fact is of principal significance.

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[12] Max Planck Institute for Legal History and Legal Theory: Decolonial Comparative Law (Colloquium Methods for Legal History) (https://www.lhlt.mpg.de/1924284/event20-01-14-decolonial-comparative-law).

[13] Luca Siliquini-Cinelli, Experience vs. Knowledge in Comparative Law: Critical Notes on Pierre Legrand's "Sensitive Epistemology," 16 Int'l J. L. Context 443, 449-53 (2020).

[14] See, e.g., Hessel E. Yntema, Comparative Research and Unification of Law, 41 Mich. L. Rev. 261 (1942).

[15] See Mark Van Hoecke, Is There Now a Comparative Legal Scholarship?, 12 J. Comp. L. 271, 280 (2017) ("[The] new approach is clearly characterized by pluralism—pluralism as to the kinds of legal systems compared (not just State law) and a methodological pluralism.").

[16] Seán Patrick Donlan & Lukas Heckendorn Urscheler, Concepts of Law: An Introduction, in Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives 1 (Seán Patrick Donlan & Lukas Heckendorn Urscheler eds., 2014).

[17] See Paul Schiff Berman, Global Legal Pluralism, 80 S. Cal. L. Rev. 1155 (2007).

[18] John O. Haley, Law's Political Foundations: Rivers, Rifles, Rice, and Religion 2 (2016).

Importantly, the paradigmatic change towards legal plurality has also transformed the relationship between the philosophy of law and comparative law.[19] As in jurisprudential studies, there is growing awareness within comparative circles that deep-rooted theoretical assumptions need to be replaced with new, critically charged analyses capable of revealing what is occurring when we compare legal phenomena beyond old disciplinary and cultural parameters.[20] Accordingly, the old paradigmatic assumptions about how to do comparative law are now being increasingly reconsidered, if not openly challenged. As part of the re-shaping of comparative law *qua* scholarly discipline, there is a marked attentiveness to what, why, and how one compares.[21] Yet more needs to be done if we are to recognize the pervasiveness of established theoretical assumptions (including misconceptions) and depart from them.[22] This we affirm cautiously, knowing that it would not be quite right to argue that intellectual engagements and turns are foreign to comparative law scholarship. There have been, and there still are, a great number of controversies in comparative law.[23] In this sense, the lively but dispersed debate testifies to comparative law's "never-ending methodological self-doubts"[24] and consequential inability to reach, at least for the time being, its much awaited "maturity."[25]

This prompts a further reflection—namely, that the many aims and methodologies informing the comparative enterprise in all its ramifications make it at times difficult to gain a comprehensive view of contemporary comparative law scholarship. While normative pluralism, openness toward empirical and interdisciplinary methods, and the growing importance of Global South and like-minded, inclusive research are all necessary for the healthy development of the discipline, they can make it difficult to tell what is going on in the field of comparative law.[26] Still, some developments are easily detectable. Recent trends in the theory and practice of comparative law indicate that the time is ripe for a contextualization, or even reconsideration, of comparative law's tasks, aims, benefits, perils, and methods. For those who are familiar with comparative law theory and literature this may sound like an alarming idea: "Not again! Why does this endless lamentation on the sorry

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[19] Cf. Bálazs Fekete, Paradigms in Modern European Comparative Law: A History ch. 5 (2021).

[20] In Pursuit of Pluralist Jurisprudence (Nicola Roughan & Andrew Halpin eds., 2019).

[21] See Günter Frankenberg, Comparative Law as Critique (2019).

[22] See Siliquini-Cinelli, supra note 13.

[23] See Esin Örücü, The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century (2004).

[24] Peer Zumbansen, Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance, in Practice and Theory in Comparative Law 186, 188 (Jacco Bomhoff & Maurice Adams eds., 2012).

[25] Esin Örücü, Developing Comparative Law, in Comparative Law: A Handbook 43, 44 (Esin Örücü & David Nelken eds., 2007).

[26] See, e.g., Balakrishnan Rajagopal, International Law and Its Discontents: Rethinking the Global South, 106 Proc. Ann. Meeting Am. Soc'y Int'l L. 176 (2012); The Global South and Comparative Constitutional Law (Philipp Dann et al. eds., 2020).

state of comparative law never end?" Indeed, as noted above, comparatists have been increasingly debating about the very basic issues which the comparative study of law revolves around: "What to compare, how to compare, why to compare?" they (we) tirelessly ask. Now, it would be too harsh to affirm that all that ink has been wasted. As Geoffrey Samuel noted, "Comparative legal studies, if it has done nothing else, has provoked a number of fundamental questions about methodology."[27] Furthermore, looked at closely, one can be excused for thinking that this state of affairs is not as novel as it might first appear: to some extent, late nineteenth and early twentieth century comparatists too were struggling with these (and similar) issues in their attempt to create a discipline detached from legal theory and international law.[28]

In today's context, where pluralism is affirmed and old paradigms are rightly seen as problematic, there is an obvious need to reconsider with fresh eyes some of the old questions and answers regarding the comparative study of law. Accordingly, apparent certainties should no longer be taken for granted. In fact, these so-called certainties need to be (and are) questioned, criticized, and rejected. For up-to-date comparative law scholarship this means, for instance, abandoning the idea of the functional method as the key method for comparative research,[29] rejecting the so-called Country and Western approach,[30] critically evaluating the value of fixed macro-comparative law taxonomies,[31] and fully appreciating what culturally oriented, other-regarding comparison really entails.[32] As Mark Van Hoecke argues, the old certainties have, more or less, "been replaced by a more scholarly approach to comparative law, starting from research questions and hypotheses, using methods, including those from the social sciences, which seem appropriate to find answers to those research questions and to test the hypotheses."[33] Some of the problems, not addressed by this Special Issue, are connected to the globalization of law.[34]

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[27] Geoffrey Samuel, Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?, in Methodologies of Legal Research 177, 208 (Mark Van Hoecke ed., 2011).

[28] Annalise Riles, Introduction: The Projects of Comparison, in Rethinking the Masters of Comparative Law 1, 2-4 (Annalise Riles ed., 2001).

[29] See Ralf Michaels, The Functional Method of Comparative Law, in The Oxford Handbook of Comparative Law 345 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); Jaakko Husa, Functional Method in Comparative Law—Much Ado About Nothing?, 2 Eur. Prop. L.J. 4 (2013); Otto Brand, Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies, 32 Brook. J. Int'l L. 405 (2007).

[30] William Twining, Diffusion of Law: A Global Perspective, 36 J. Legal Pluralism 1 (2004).

[31] See, e.g., Jaakko Husa, Classification of Legal Families Today: Is It Time for a Memorial Hymn?, 57 Revue Internationale de Droit Comparé (2004).

[32] Siliquini-Cinelli, supra note 13.

[33] Van Hoecke, supra note 15, 280.

[34] See Maurice Adams, Comparative Law in a Globalizing World: Three Challenges, 17 Tilburg L. Rev. 263 (2012); Geoffrey Samuel, Comparative Law and Epistemology: Is Globalisation Changing What It Is to Have Legal Knowledge?, 16 J. Comp. L. 465 (2021).

This Special Issue is an attempt to contribute to the academic debate on the current status and future directions of comparative legal analysis and methodologies of research by pushing comparative law's reflexive, pluralist, and context-sensitive stance further. Bringing together established scholars and emerging researchers from Europe and Latin America, it embraces the in-the-making critical, interdisciplinary, and pluralist wave which comparative law has been enjoying.[35] It does so by distancing itself from reductionist understandings of the comparative enterprise and by drawing attention to some of the "philosophies" animating comparative law today and contextualizing them from various perspectives of inquiry.

Importantly, while our main interest is in comparative *legal* analysis, "philosophies" are not, for present purposes, necessarily conceived as *legal* philosophy/ies.[36] Rather, in light of the pluralistic spirit animating this collective effort, "philosophies" refers broadly to various and diverse mindsets, theories, and methodologies propelling and shaping the comparative legal endeavour in its concrete declensions.

II. Outline

In her opening contribution to this Special Issue, Esin Örücü depicts comparative law as a thread running through a necklace. The necklace of comparative law is described as having three gems: theories of methodology, theories of legal systems, and theories of the mobility of laws over the borders. In her pluralist view, there is no one definition of the comparative study of law and its method. Örücü argues that the focus of comparative law has moved from justifying the practical utility of comparison to conceiving of comparative law as a big tent that covers several forms of scholarship. Örücü also notices how younger comparative law scholars are looking into applied comparative law, quantitative (i.e., numerical) methods, and the use of online tools for comparative law. Importantly, the author stresses the value of comparative law as a comparative way of thinking—that is, as *modus vivendi* and *modus operandi*. Written in an eloquent and intellectually vivid style, Örücü's piece is particularly encouraging as it contains an optimistic message about passing on knowledge and curiosity to the following generations of comparatists.

Geoffrey Samuel asks if film studies can contribute to the comparative study of law. Samuel concedes that the very idea of film studies contributing to comparative law is bound to meet skepticism that is not unreasonable. However, Samuel makes clear that over the last few decades, comparative law's epistemological attitudes have changed in such a way that discussing film studies and comparative legal studies may not only make sense but may also be fruitful. Samuel claims that, to the extent that it can shed light on comparative law scholarship, film scholarship may help legal scholars to see themselves in a more realistic (i.e., objective) way. Samuel's main point is that discussing film studies together with legal

[35] Originally, the Issue was also going to feature one more theoretical essay and two essays on Japan. Regrettably, these could no longer be submitted due to the current situation.

[36] Cf. Geoffrey Samuel, Comparative Law and Jurisprudence, 47 Int'l & Comp. L.Q. 817 (1998); John Bell, Is Comparative Law Necessary for Legal Theory?, in Law in Theory and History: New Essays on a Neglected Dialogue 127 (Maksymilian Del Mar & Michael Lobban eds., 2016).

scholarship is particularly useful as it reminds legal scholars that their discipline is largely backward-looking in a way that is anti-historical when compared to film studies. Crucially, Samuel's piece reminds legal scholars of the importance of legal history not only for comparative study of law but for all kinds of legal scholarship.

Kimberley Brayson, in turn, argues that the agonistic approach undermines comparative law's potential to generate knowledge by obstructing the forming and implementing of sensitive philosophies in the comparative study of law. In essence, Brayson considers comparative law as a kind of intergenerational exchange and kaleidoscopic attempt at generating knowledge of law. Using this reading, the comparative study of law is conceived as a reflexive, embodied practice driven by a philosophical and epistemological curiosity. Importantly, Brayson holds that this type of approach reveals comparative law to be more than a mere legal discipline. Brayson's analysis seeks to re-imagine comparative law *qua* new, comparison-as-philosophy that recognizes the passions and experience of comparative law scholars as knowledge-generating factors.

In her contribution, María Julia Ochoa Jiménez centers the discussion on the philosophies of comparative law around the Latin American context. For the discussion on comparative law scholarship, this move makes perfect sense as it refocuses the investigative gaze from a Eurocentric direction to a less discussed, yet increasingly relevant, path of inquiry. Ochoa Jiménez is interested in how Latin American countries can free themselves from the harmful effects of the neo-colonial character of law by using the very same law—an analysis that uses private international law as a case study. The choice of approach is explained by the fact that neo-colonial legal institutions do not sufficiently consider the diversity of pre-State normative orders that existed in the region before colonization took place. The interplay between private international law and comparative law is used as a case study to critically explore not only how indigenous normative pluralism has been neglected in Latin America's state-centered legal development, but also the very potentialities that a pluralist approach to normative orders bears.

Jorge González-Jácome and Nicolás Parra-Herrera likewise focus on Latin America as they maintain that expectations around transitional justice seem to indicate that Latin American law has failed. They claim, however, that these expectations are the result of an understanding of transitional justice as a mythological narrative. The problem with these expectations, González-Jácome and Parra-Herrera argue, is that they aim to interrupt time as they conceive of the past as an experience of authoritarianism and violence. In turn, transition promises something else: the rule of law, democracy, and reconciliation. The authors use an Argentine film, *El Secreto de sus Ojos* (*The Secret in Their Eyes*), to question this understanding of temporality that seeks to break with the troubled past. The film helps them to both question the transitional justice's narrative on temporality and address the nonlinearity of time. In so doing, González-Jácome and Parra-Herrera show how the movie's understanding of the legal system reveals a blind spot of mainstream discourse on transitional justice. Their analysis challenges ideas about the law in the Global South by providing a nuanced and cultural understanding of law through its relationship with time.

For comparative law scholarship, the task is to critique fundamental assumptions about time, space, and modality in comparative study of law.

In this Special Issue's final essay, James C. Fisher explores key themes and directions of thought within comparative law scholarship from a legal theoretical-philosophical angle. Its main argument is that comparative law scholars' discussions about the discipline's nature, content(s), and method(s) can be fruitfully recontextualized by bringing the insights at work in the comparative legal enterprise to bear on comparative legal discourse itself. Specifically, engaging with some vexed jurisprudential themes such as legal reasoning's objectivity or comparative law's analytical aspirations, Fisher offers a valuable contextualization of the author's perspectival positionality within acts of comparison. Unfolding comparative law's inner dynamics, Fisher's article is a fruitful gesture of critical (self-)reflection on comparative law's past and present experience(s), and future potentialities.