1. Comparative law as discipline

1. FROM CINDERELLA TO QUEEN

Comparative law has been suffering for quite some time, in the Western comparative community, from what can be accounted for as an inferiority syndrome. Comparatists feel (or, at least, felt) neither adequately recognized by their academic peers nor sufficiently represented in the law school curriculum. Comparative law, some argue, ‘has enjoyed so little prestige in the inner circles of the academy’; colleagues ‘see our work as peripheral.’ Their field of research and study, some complained, continued to be ‘a subject in search of an audience’ and was treated, as others imagined with mild disdain, as the ‘Cinderella of the legal sciences.’

In the meantime, a participant observer diagnosed that ‘[c]omparative law is moving swiftly from a long infancy to teenage maturity … This is the nature of a healthy adolescence.’ A decade later two comparatists turned to psychology again and, noting the growing popularity of the discipline, stressed that it was still ‘fraught with internal contradiction, uncertainty, and a sense of mid-life crisis.’

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1 Comparatists from Japan claim that comparative law has always played a leading role in Japanese legal academia – a princess all along, rather than a stepdaughter and maidservant hidden in the attic.
Over the years, the feeling of marginalization has developed into a Cinderella complex,\(^8\) which has only become more knotty and perplexing, one might say. It combined the reality of curricular marginality with the fantasy of liberation from the ‘atmosphere of hostility … at best the chilly environment of indifference’\(^9\) and, ultimately, the hope for the well-deserved invitation as princess to the sciences’ academic dance. Some comparatists entertained the grandiose idea that the princess would marry the prince and become queen of all the legal sciences in the end.

To these visions and diagnoses we have to add today the rare predicament of late puberty and adolescence combined with mid-life crisis. And there is more: comparative law, a.k.a. Cinderella, has always been accompanied by a twin sister, unheard of in the fairy tale. Where the former complained about her ancillary role and her lack of appreciation, the latter leaned toward the pretentious and was liable to overestimate the powers of legal comparison.

T]oday comparative law studies are admitted to be a necessary part of any legal culture and training.\(^10\)

Comparative law manifestly has a crucial role to play in the development of legal philosophy.\(^11\)

Comparative law is useful in gaining a better understanding of one’s own national law and in the work of improving it.\(^12\)

Comparative law is helpful in the understanding of foreign peoples; it thereby assists in the creation of a healthy context for the development of international relations.\(^13\)

Oh, comparative law! The self-aggrandizing comments are succinctly summed up in Esin Örücü’s observation: ‘Such important things have taken place in Europe recently [that is, the process of convergence] that


\(^11\) Ibid., 5.

\(^12\) Ibid., 6.

\(^13\) Ibid., 8.
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comparative law is now referred to as the science of the 21st century.'¹⁴ Voilà, comparative law after its coronation as queen!

Over time, things – the ancillary status of comparative law, its collateral reputational damage and crises – have changed. One may conclude, on a more sober note, paraphrasing Rodolfo Sacco’s opening statement in 2000 as to the state of the discipline one hundred years after the Paris Congress: ‘Les nouvelles sont meilleures.’¹⁵ After a century of muddling through, in attics and royal coaches, comparative law has firmly established itself as a genuine field of study. What is more, it has generated a series of mainstreams, which in turn have represented comparative law with vigor, though not always with theoretical and methodological rigor.

Arguably, comparative law was founded as a discipline during and with the 1900 Congress in Paris, where it experienced its mythical moment.¹⁶ Although it had taken shape gradually, here and there, and with a heavy private law accent, throughout the nineteenth century, it was only then, at the fin de siècle, that the mainstream began to flow. 1900 saw legal comparison beginning to move on two contrasting tracks. First, the speculative orientation, energized by history, philosophy, and anthropology, continued the nineteenth-century preoccupation with origins and evolution. Second, comparative law’s somewhat traditional and philosophical orientation soon had to compete with, and was superseded by, a basically positivist interest in legislation that focused on more mundane, present matters. While the first group was preoccupied with the construction of law’s universal history or a universal jurisprudence, the members of the second compared legislation and legal solutions to social problems. They routinely assumed the laws of diverse countries, ‘systems,’ ‘families,’ ‘circles,’ ‘styles’ and ‘traditions’ to be factually ‘out there,’ ready and only waiting for comparative scrutiny. Where methodologically rigorous analysis was avoided, legal comparison settled for juxtaposition, classification, structural accounts or functionalist appraisal. Furthermore, comparatists regarded the legal vocabulary and grammar as an autonomous body of rules and decisions, arguments and doctrines.

¹⁵ Sacco, Rodolfo (2000) ‘One Hundred Years of Comparative Law’ 75 Tulane Law Review, 1159; see also Reimann ‘The Progress and Failure,’ 671.
Undaunted by the charge of epistemological naïveté, they were able to pursue (with considerable success and relative ease) what they believed to be an ‘objective’ access to the reality of foreign law.

Mainstream comparative law embraced the formalist notion of legal validity entertained by legal positivism as well as its unlikely ally, the anti-formalist style. This combination betrays the impossibility of what positivists are desperately trying to do: to neutralize, albeit analytically, all extralegal incursions – notably politics, ethics, culture and the economy – on law-making and law-deciding.

Textbooks and treatises have always affirmed the spirit of the mainstream and have spread the traditional canon that was basically constructed on the foundations of the Anglo-European concept of common/civil law and its entrenched ideology of law-rule (rule of law, Rechtsstaat, état de droit). Legal comparison tended to start from the West, and it would invariably return there, leaving little cognitive and imaginative space, in this circular movement and intellectual round-trip, for recognizing the other – foreign legal systems, cultures, institutions – in its own right and therefore genuinely appreciating differences. Critical insights came from some mainstream authors whose explorations into the territory of anthropology may have sensitized them to the ethnocentrism infecting ‘good comparative practice’:

Ethnocentrism means that the researcher uses his or her own bias while problematizing, concluding, reasoning, or systematizing the study of another culture. Comparative law can claim no special immunity from this virus [of ethnocentrism].

So it must be asked how does an external observer, despite the best will in the world, ever escape from his or her own framework of imbedded conceptions and looks outward with a detached eye (l’œil agnostique) that does not superimpose these conceptions onto the object under observation? … The comparative investigator must hope to keep a certain distance from his own culture and prejudice, from the society under study, and from the biases of his informants.

Undaunted by doubt and self-reflection (reflecting the Anglo-European legal self), navigators of the mainstream comfortably accept the traditional object-subject conception of comparison, which of course would

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grant them, free of charge, permanent subject status, and the idea that 'complete objectivity' is impossible to achieve, which justifies, they firmly maintain, their lack of self-criticism. With their cultural return ticket safely stowed away in their pocket, they are likely to follow the directions of an ethnocentric compass. And it takes a critical perspective to uncover comparative law’s dark side.

2. COMPARATIVE LAW’S DISCIPLINARITY

Disciplinarity

Tradition and convention have it that studies and research, to gain recognition as academic science, need to be constituted as a ‘discipline.’ Scholars and researchers have to demonstrate that knowledge is acquired in an orderly fashion and then integrated into some kind of systematic order. The production of knowledge in academic institutions by professionally trained scholars in disciplinary form is widely considered to be ‘so natural that we tend to forget their historical novelty and fail to imagine how else we might produce and organize knowledge.’ As academics produce disciplines, so disciplines produce ‘disciplinary’ practitioners. They are disciplined in their world-making by the established criteria and conventions of ‘normal science’ that scholars are expected to meet and conform to in their work. They learn to recognize the borders of their field of study and its topography. They are trained to apply the methods introduced in every discipline to establish and protect the ‘order of things.’

Why would scholars bow to the yoke of a disciplinary regime? Because disciplines lend protection: they cover up ‘the historically contingent and adventitious way in which various ideas and practices’ are assembled and ordered into (and in) fields of study and research and essentialized there as ‘philosophy,’ ‘medicine’ or ‘law.’ Also, and more importantly, because only disciplines, as institutionalized formations,

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19 Ibid.
organize the procedures and communication for the production of knowledge in a way that lends itself to according the label ‘truth,’ which then may become the basis of power. Disciplines organize and account for the constitution of knowledges, discourses, objects and strategies of research, they privilege theories, methods and objectives for study. Furthermore disciplinary regimes are accepted because they ‘produce economies of value.’ Most importantly, in an immediately practical sense, they provide jobs, offer professional identities, secure funding for study and research, and, if all goes well, generate prestige.

Methods play a crucial role in the constitution of disciplines insofar as they organize the way knowledge is produced and information for study, research and education is processed. They organize schemes of perception and concepts of interpretation, and provide tools of cognition and translation.

Methods comply with and, by the same token, reproduce ‘scientific standards’ and the accepted conventions of an epistemic community. Methods that come across as ways of doing science are quite powerful tools: they define and distinguish academic disciplines more than, say, explanatory theories. Jointly, methods and theories, however, promise to guide scientific analysis of a discrete subject-matter or field of thought and investigation, like law or, for that matter, comparative law. In addition, they usually provide both scholarship and (university) education, based on and structured by a curriculum, with a disciplinary orientation ascertaining the reproduction of knowledge within a given domain, and they sustain the ‘illusion of disciplinary unity.’

For research, study and education to be externally perceived and internally understood as being governed by methods and theories pertaining to a specific discipline, they need to be distinguishable from other fields of inquiry, thought and teaching. Boundary-work is crucial for disciplinary activity, because it ascertains that the scientific practice in a bounded field is performed by professionals and, more so, specialists. Therefore, what this practice, like comparing law, is ‘about’ has to be protected (and limited) by boundaries on the outside and structured by routines within, that is, the subject-matter.

Over time the standards practiced in research and education, the borders limiting a field of study, as well as the internal and external perceptions, tend to establish a disciplinary identity, which lends a name to the field, the practitioners working there and their projects. As a result, the disciplinary identity provides the criteria for defining who is in and who is out and, if reified, forms the core around which the orthodoxy of thought and practice may crystallize. Orthodoxy tells its followers (and also curious visitors) that, at a time, only one method or theory or an established set of them is considered legitimate. It mandates a (serial) kind of intellectual monogamy that looks down upon pluralism and mandates for eclecticism to be integrated, as far as possible, in a unitary framework.

The orthodoxy of comparative law – or rather the sequence of orthodox approaches, their rhetoric, methods and agenda – will be discussed below as ‘mainstream.’26 I attempt to map and submit to critical review the varieties of disciplinarity by stressing the historically contingent forms and rhetoric of ‘doing’ comparative law.

Comparative Law as a Discipline

Most comparatists take it for granted that their field of research and study qualifies as an academic discipline, even if it may still be incoherent, of a ‘piecemeal nature,’ and in need of theoretical-methodological overhauling.27 Arguably, the (re-)production and ordering of comparative knowledge has been elevated to the level of science since the end of the nineteenth century. The authors of the widely read An Introduction to Comparative Law express the mainstream’s consensus when they endorse the scientific nature of the discipline, albeit insisting rather too much:

It is beyond dispute that the scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration: no study deserves the name of a science if it limits itself to phenomena arising within national boundaries. For a long time, lawyers were content to be insular in this sense, and to some extent they are so still. But such a position is untenable, and comparative law offers the only way by which law can become international and consequently a science. … [I]t is clear that the

26 See Chapters 3 and 4 in this volume.
27 See Reimann ‘The Progress and Failure,’ 671; Palmer ‘From Lerotholi to Lando,’ 261.

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method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation … 28

From this statement one may infer that comparatists no longer mix neglect with contempt, nor do they treat foreign laws ‘more like objects of simple curiosity than of real science’ 29 – even if faint echoes of this complaint can still be heard today. 30 And despite the porous boundaries that demarcate the subject-matter and methodological problems, comparatists no longer appear as ‘intellectual nomads,’ 31 bereft of a genuine field of research. Many would indeed subscribe to the conclusion ‘that comparative law has developed into a respectable body of actual knowledge.’ 32 Moreover, the typical genres of literature covering fields of research, their genealogy and tools – encyclopedias, handbooks, monographic studies and elaborate introductions 33 – as well as intensive debates about theory and method 34 provide comparative law with the widely recognized credentials of science. It comes with a peculiar feature, though, because many comparatists argue that, in comparative law, method and subject-matter are coextensive. In other words: there is only method – a claim that will have to be discussed in detail later.

32 Reimann ‘The Progress and Failure,’ 672. One wonders about the ‘actual,’ though.
34 See only Monateri, Pier Giuseppe ed. (2012) Methods of Comparative Law, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing; Zweigert and Koetz Introduction to Comparative Law, 8; Palmer ‘From Lerotholi to Lando,’ 261.
What is more, aside from the receding Cinderella complex, the profession seems to be grappling with an identity problem, if only a minor one. Scholars express concern about the accurate label for their work. The majority, which will be referred to as ‘mainstream,’ clearly favors comparative law, whereas a significant number of dissenters privilege comparative legal studies.\textsuperscript{35} Sure enough, not everyone associates dissimilar programs with this semantic distinction. Generally speaking, however, the ‘law’ faction tends to follow approaches, such as formalist taxonomies and surveys, functionalist searches for better (legal) solutions, structural analyses, and factual accounts geared towards legal harmonization projects, which by number and institutional influence qualify as mainstream. From a critical perspective these attitudes and the practices of comparison they generate have been characterized as (a) featuring ‘Comparative Nomoscopy,’\textsuperscript{36} (b) seeking to describe other legal systems as fact,\textsuperscript{37} (c) propagating a ‘legocentric’\textsuperscript{38} style of positivism, narrowly focused on laws, appellate court decisions, legal doctrines and legal institutions, and finally (d) being preoccupied with perceptual and conceptual tidiness and, above everything else, similarities.

As paradoxical as it may seem given that one would expect comparatists to be extolling the value of diversity – and the virtue of appreciating it – much about comparative legal studies – or rather, comparative law – has been written, and continues to be written, as Pierre Legrand put it, from ‘Uncle Theo’s’ theocratic point of view: commonalities \textit{envers et contre tout}, no matter how much manipulation of data must intervene in the process.\textsuperscript{39}

In contrast, the comparative-studies faction is disposed to reject traditional comparative law, some members take the studies orientation to be an alternative to the ‘armchair’ manner of legal comparison. They call for (and, at times, practice) a shift from law-in-books to law-in-action, more interdisciplinary research, a widening of the legocentric lens to

\textsuperscript{37} \textit{Ibid}.
\textsuperscript{38} Frankenberg ‘Critical Comparisons,’ 411, 438, 445.
bring text and context into focus. They invite their fellow comparatists to transgress the ‘really fuzzy’ borders of the discipline. Accordingly, studies-persons lean toward treating norms, cases, and institutions as artifacts of culture. They base comparison on contextual analysis to include the social struggles behind the law and to develop ‘a consciousness of difference.’

Even if taken to designate diverse comparative agendas and not only signifying a more or less contingent shift in perspective or expressing the narcissism of the small difference, these labels as such do not argue against a disciplinary status, but only for lively internal debates (if that is what they are) and divisions over theory and method not uncommon in other disciplines. As a matter of fact, this semantic distinction and the theoretical-methodological orientation that comes along with it, bring to mind the ‘positivism debate’ in the social sciences.

Disciplinarity, or what constitutes a disciplinary identity, also has a bright side. It actually has two. First, its constraints and burdens provoke (some?) scholars, particularly in comparative studies, to test the permeability of disciplinary boundaries, try out collaborative research, borrow insights from neighboring disciplines, and so forth – in short: to rethink ‘the way we think about the way we think.’ Second, disciplinarity brings forth criticism. One might even argue that disciplinarity presupposes critical thought. I will take up this argument again, which is suggested by the title of this book, in the next chapter.

Disciplinarity means quite practically that it may serve as a point of departure for interdisciplinary enterprises. Interdisciplinarity logically presupposes disciplinarity. Boundaries need to be there so that they can be crossed, fields of study need to be defined and segregated before they can be combined or deconstructed. However, there seems to be some

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43 I will return later to the positivism controversy.
confusion\textsuperscript{46} (at least no consensus) about what ‘interdisciplinary’ means. For all intents and purposes it is here defined, in rather general terms, as a specific modality of scientific interaction and, more specifically, as the exchange of scientific tools and the exchange of insights.

Comparative law, one might assume, offers the perfect platform – and is a ‘natural’ – for border-crossing travels not only to other countries, systems and laws but also to other disciplines, such as history, philosophy, anthropology and political science. However, the standard ‘good practice’ informs us otherwise. Originally, notably in the post-1900 era, which will later be referred to as the immensely productive ‘golden era,’ the comparison of laws and legal systems was open to information from the neighboring sciences, especially philosophy, history and anthropology. During the nineteenth century, comparative constitutional law started quite straightforwardly as political science.\textsuperscript{47} As will be shown below, throughout the twentieth century, the interdisciplinary predisposition of comparative legal scholars got lost in the mainstream(s). The discipline became known for its ‘entrenched ahistoricism’\textsuperscript{48} and the loss of the speculative dimension, rather than a yearning for interdisciplinary adventures. Interestingly enough, the very comparatists who reduce comparative law to a method are especially likely to keep research intra-disciplinary.

3. MAINSTREAM AS ORTHODOXY

Comparative law looks back on a venerable academic tradition. Neither ethnocentrism, that is, the focus on the Anglo-European legal hemisphere and its privileged position in comparative studies, nor the preference for cognitive control\textsuperscript{49} – ordering the phenomena under comparison rather than providing a genuine learning experience – undermined the mainstreams’ disciplinary success.

‘Mainstream’ does not denote a monolithic camp or homogeneous comparative practice but is made up of a series of diverse schools of

\textsuperscript{46} Thompson Klein Interdisciplinarity, 12–14.
\textsuperscript{48} Legrand ‘The Return of the Repressed,’ 1037.
\textsuperscript{49} Frankenberg ‘Critical Comparisons,’ 416 seq.
thought committed to divergent purposes of legal comparison and to
different comparative methods and theories. Each phase or era, dominant
school or trend was characterized by a paradigm of legal comparison
privileging a specific tool-kit (method/theory), distinct goals and a
peculiar interpretive framework. Justified by the prevailing discourse,
each paradigm shaped the nature, style and purpose of ‘good comparative
practice’ and congealed into an orthodoxy or mainstream. The ortho-
doxy came with the trinity of a disciplinary identity, institutional power
and mechanisms of exclusion:

Beyond fashionable designations … the pertinent research and teaching
enterprises remain infused by one abiding concern, which is a determination
to exalt the value of the foreign in terms of what is relevantly legal locally. As
is no doubt the case with every other field, ‘comparative law’ boasts an
orthodoxy. I have in mind established comparativists, those who edit the
journals, are called upon by leading academic publishers to assess book
proposals, secure large budgets to launch major research projects or fund new
postgraduate programs, and direct centers or institutes. These comparativists
function in a structuring capacity in that they uphold an identifiable regime of
knowledge and information. On account of the institutional positions they
hold, they defend what they regard as good comparative practice, that is, good
comparative manners …

In other words, the orthodoxy (or mainstream) of the discipline, institu-
tionally influential or not, prefers not to take help from outside (say,
Derrida) or inside (internal crits) but steers unflinchingly its legocentric,
positivist and Anglo-Eurocentric course.

Good comparative practice looked different in the different ages of the
discipline, though. It is striking, how each mainstream or orthodoxy
domesticated and ‘othered’ the foreign whose co-presence in the com-
parative space haunts any ‘good comparative practice.’

In the days of Aristotle, the comparative imagination had concentrated
on ideal legal or constitutional orders. Based on a contextual analysis of
climate, religions, mentality and other factors, Montesquieu distilled the
spirit of the laws out of the real existing diversity. In the founding years
of the discipline, towards the end of the nineteenth century, comparatists

50 See Kuhn The Structure of Scientific Revolutions.
51 See also Palmer ‘From Lerotholi to Lando,’ 261; and, as regards to the
mainstreamer as one of the archetypical comparatists, Frankenberg, Günter
Law Review, 259.
first followed Hegel and the general trend towards codifications and focused on comparing legislation. Later, they picked up the spirit of globalism (that was soon to triumph disastrously in World War I) and constructed the comparative framework for a universal history of law or at least a universal jurisprudence. Thereafter the profession changed the register from code to system, from philosophy/history to taxonomy/geography and classified legal systems, usually from the vantage point of Western law, relegating the foreign, which should have been of primary interest, to the residual category of ‘other’ (minor, derivative, affiliated, radically different, etc.) and incorporated it into systems, traditions or families.

Since the middle of the twentieth century, the discipline’s modernist phase has coincided with the triumph of functionalism, complemented by structural analyses and factual accounts. Mainstream comparatists set out to find the optimal legal system producing or providing for better, if not the best possible, legal solutions to the problems arising from conflicts in organized societies. Needless to say, once again (very much as previous generations defined the ‘universal’) what counted as a ‘problem’ or ‘better solution’ happened to be defined from the vantage point of the West, that is in Anglo-European civil/common law terms. Until today, the functionalist paradigm has proven viable (because of its institutional power rather than its intellectual sophistication) in withstanding criticism and accommodating moderately alternative approaches, like structuralist functionalism or functionalist factualism, as will be shown below.

Comparatists have done their ‘good practice’ in a variety of spirits, reaching from noble humanism to straightforward instrumentalism, from lofty idealism to humble pragmatism. They have compared the law as philosophers, historians, anthropologists, and social scientists, as legal scholars and legal engineers, as reformers and defenders of the status quo, mostly, though, as legal positivists bent on determining what the law is in another country, the law as contained in statutes and court decisions and accompanied by scholarly commentary. 53

Therefore, ‘mainstreaming’ comparative law, like all reductions in complexity, does not capture the variety of motivations, spirits, and practices but encompasses the general drift of the discipline and, for starters, records who is in and who is out. What is more, the heterogeneity and vastness of the subject-matter dooms to failure any attempt to

53 For a definition and critique of positivism, see Frankenberg ‘Critical Theory’ in Max-Planck Encyclopedia of International Law; and Legrand ‘Siting Foreign Law,’ 598, 602.
identify and trace the various rivulets and strands and then to render a
detailed, accurate picture of the past and present of comparative law. So,
concentrating on mainstreams or, if you prefer, dominant paradigms
representing different modes of comparative *bricolage* will have to do.
The 17 volumes of the *Encyclopedia of Comparative Law* (with a focus
on private law!) demonstrate the futility rather than the utility of reaching
out and comparing the laws of all countries at all times. Instead of
attempting to (mis-)narrate ‘the true and comprehensive story’ of com-
parative law and getting lost in its maze of indeterminacy and global
reach, I want to lay out and submit to critical scrutiny dominant styles
and practices. Distorted and selective as this endeavor will be, it is
intended to highlight crucial features of what the mainstream has
considered to be, over and over again, ‘good comparative practice.’