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The Jurisprudence of Comparative Legal Systems

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ESSAY

The Jurisprudence of Comparative Legal Systems

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Comparative law had traditionally been thought of as a method without substantive import. However, comparative law is now recognized as having a contribution to make to both international law and order, and the study of legal history, anthropology, and philosophy.[1] The common ground between the ideal of a world law and the totality of legal theory is, in fact, the province of comparative law. Comparative law, however, has always been subject to competing claims of authorities in setting appropriate boundaries for its study. Current interest in comparative law reflects an awareness of its profound importance. The author's intention is to review the changed perspective resulting from this renewed interest by defining the boundaries of comparative law and by explicating the importance of this new perspective for legal theory.

The focus in comparative law has changed from a narrow technical emphasis with general classifications of families or styles of law into a more unified historical, cultural, and practical perspective. A study of comparative law has evolved into a study of legal systems. Therefore, the author prefers the phrase "comparative legal systems" rather than "comparative law" as a descriptive title for this field of study. The significance of this evolution not only has consequences for legal theory, but *involves* legal theory.

The change in focus of comparative law is part of a reorientation of legal theory from the study of rules and concepts of law to the study of the experiences of legal systems as social orders. History, anthropology, and philosophy contribute to this reorientation. Hence,

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1. On being merely a method, see Hamson, *H.C. Gutteride of Cambridge*, 3 INT'L & COMP. L.Q. 377 (1954). *See also* Green, *Comparative Law as a "Source" of International Law*, 42 TUL. L. REV. 52 (1967); Green, *Comparative Law Contributions to the International Legal Order: Common Care Research*, 37 GEO. WASH. L. REV. 615 (1968); Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978).

the goal of comparative law as a universal system of law and order has been, and hopefully, always will be a source of inspiration to all concerned.

The "jurisprudence of comparative legal systems" connotes how the subject matter of law has taken shape when viewed from a comparative perspective. The perspective and subject matter are obviously interrelated so that as one changes, it affects the other.[2] Therein lies the key to the development of comparative law in the narrow sense of jurisprudence, and in the wider sense of legal theory. At the Congress of Comparative Law in Paris in 1900, alternative concepts of comparative law emerged, one from Saleilles and one from Lambert. Saleilles' perspective was practical while Lambert's was intellectual. To Saleilles, the potential of comparative law lay in a legislative common law, "un droit idéal relatif." To Lambert, comparative law was useful to discover the natural laws of legal development through "la vie juridique."[3] The dynamic confrontation between comparative study for the narrow purpose of developing an international, transnational or common law in a scientific or instrumental sense, and comparative study for the purpose of describing and accounting for the relationship between law and society, either from an evolutionary or existential perspective, has enabled comparative law to defy labeling and categorization. This has been its latent strength. Today, apparently these distinct approaches are not seen as alternatives, but parts of a consistent whole. The fact that comparative law incorporates such widely divergent studies as those of a particular branch of law of a particular foreign system or the relationship between families of legal systems proves that comparative law is not merely a method, but rather, it unites all the selective

2. For example, one form of classification used "vertical" and "horizontal" approaches. An example of the former might be historical legal systems while the latter would be contemporary. Mayda, *Some Critical Reflections on Contemporary Comparative Law*, 39 REV. JUR. P.R. 431, 453 (1970). However, the horizontal approach could be described as a survey, whereas the vertical approach would necessitate a thorough immersion into a branch of law of a particular country. Kozolchyk, *Comparative Legal Study — Another Approach*, 14 J. LEGAL EDUC. 367, 379 (1962). The approach is meaningless without reference to its field of study. The different uses of such terms as "vertical" and "horizontal" only serve to warn of the danger of regarding different emphases as matters of mere opinion. The relationship of perspective to a field of study implies more than a mere matter of taste.

3. H. GUTTERIDGE, COMPARATIVE LAW 5 (2d ed. 1949). J. HALL, COMPARATIVE LAW AND SOCIAL THEORY 17 (1963). *See also*, Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485, 488 (1974); K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 1-2 (T. Weir trans. 1977).

disciplines of legal theory. Such disciplines include legal anthropology, legal history, the sociology of law, and political science, together with the creative discipline of international law, in a study of the very relationship between rules of law and the conception of law.

The persistent debate concerning the origin of "comparative law" is tied to the relationship between perspective and subject matter. However, it is more complex than the contrast between theory and practice. For example, it can be said that the debate began with the study of primitive law. Pollock believed that it made no difference whether one talks of comparative or historical jurisprudence, since the expectation was to discover universal principles in the development of law. Such principles include Maine's famous dictum that "the movement of the progressive societies has hitherto been a movement from status to contract."[4] Yet, in Pollock's own words, comparative jurisprudence was significant as "a handmaid to the theory of legislation."[5] From Plato to Montesquieu, it was this which served to distinguish the modern practice from all other applications of the comparative method. Although at first comparative law was viewed from a distinctly idealistic and metaphysical historical perspective, it was conceived as a new branch of legal science with a practical end, the subject matter being the universal principles of positive law.[6] This ambiguous interplay of the universal and the empirical was a result of the application to law of the distinct influences of the comparative method and the idea of evolutionary progress.[7]

The comparative method was hailed as an intellectual advance

4. Pollock, *The History of Comparative Jurisprudence* in ESSAYS IN THE LAW (E. Pollock ed. 1922 reprint 1969). H.S. MAINE, ANCIENT LAW 100 (1861 & reprint 1917). *See also*, HALL, *supra* note 3, at 16.

5. Pollock, *supra* note 4, at 1, 2.

6. For example, see Comte's division of history into theological, metaphysical, and positivistic changes. A. COMTE, THE POSITIVE PHILOSOPHY [1830-1842](Martineau trans. 1896). *See* Maine's movement of progressive societies from status to contract. H. MAINE, ANCIENT LAW 170 [1861] (Dutton trans. 1972). Lastly, Spencer's evolution of society from a primitive military hierarchy to the individually and socially integrated industrial state. H. SPENCER, THE PRINCIPLES OF SOCIOLOGY [1876-1886](Appelton trans. 1910). On the other hand, note for example Maine's statement that "the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law." H. MAINE, VILLAGE COMMUNITIES 4 (1871).

7. For example, Pollock refers to J. Austin's *On the Uses of the Study of Jurisprudence* in THE PROVINCE OF JURISPRUDENCE DETERMINED 365 (1863 & reprint 1954). However, according to Austin, comparative jurisprudence was not concerned with the utility of legal principals — only the descriptive and analytic. Pollock also refers to Darwin. *Id.* at 25.

as great as the revival of Greek and Latin learning. It was expected that the comparative study of law would reduce its data to generalized propositions arrangeable according to the essential characteristics of concepts and categories as if, like species, they were objectively real and independent of both function and social context.[8] Indeed, as early as 1854, a major study of the commercial laws of the world concluded with a proposal to unify commercial law by international conferences.[9] Although by the time of the Paris Congress of Comparative Law in 1900, the idea of the possible unification of European private law had taken hold, it never quite eclipsed the underlying sense of comparative or historical jurisprudence because unification required progress and evolution. It has taken two world wars and their qualified successes in international political cooperation to undermine the faith in progress which historical change implied. Today, legal history is used to determine the relationships among legal systems, and not to unfold the idea of law. Similarly, the formal analysis of rules of law has been replaced today by a cataloguing and systematizing of laws and solutions which will possibly lead to a universal law. However, this cataloguing has not demonstrated the reality of legal concepts, but rather how legal concepts depend on society and culture. As a result, the realization of a unification of law has been left to the piecemeal development of transnational law. In fact, it is the underlying and original sense of comparative law as comparative jurisprudence that has come to the fore again. The subject matter of comparative law is as likely to be society, culture, or tradition, as rules of law, but the practical end of its application to international society seems very remote.

The different conceptions of comparative law that have evolved since the early nineteenth century remain to form the framework of the field of study today.[10] There is, therefore, a tension between science and history as the legitimate cornerstones of comparative law; between its practical and its theoretical value and between a superficial

8. HALL, *supra* note 3, at 125 (quoting W. WHITNEY, THE LIFE AND GROWTH OF LANGUAGE: AN OUTLINE OF LINGUISTIC SCIENCE (1875)), and at 131 (quoting E. FREEMAN, COMPARATIVE POLITICS (1873)).

9. ZWEIGERT & KOTZ, *supra* note 3, at 49, referring to LEVI, COMMERCIAL LAW OF THE WORLD; or, THE MERCANTILE LAW OF THE UNITED KINGDOM COMPARED WITH THE CODES AND LAWS OF THE (58) FOLLOWING MERCANTILE COUNTRIES, AND THE INSTITUTES OF JUSTINIAN (1854).

10. Kozolchyk, *Trends in Comparative Legal Research*, 24 AM. J. COMP. L. 100, 109 (1976). ZWEIGERT & KOTZ, *supra* note 3, at 54. M. HOOKER, LEGAL PLURALISM, AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 14 (1975).

and an unscientific analysis of incomparable details. It remains true that comparative law is at the experimental and innovative stage and has perhaps suffered from the ambitions of its originators.[11] But it is also true that whether the intent is descriptive, identificatory, explanatory, or reformative, there is a relationship between the subject matter and the perspective adopted toward law as a whole. Moreover, this relationship is itself a jurisprudential matter. Thus, the two extremes of comparative law are easy to identify. Either it should include "as much as is possible . . . of all peoples and all times,"[12] or it should be limited to the law as seen "from within and in itself rather than in relation to other human standards of conduct."[13] Any possible area of research can therefore be mapped out, in a pure sense, as a method and no more. However, such research will necessarily involve a part of every branch of law. In a less pure sense, that would involve segments of legal systems such as procedural law. The avowed intent here, however, is not to study functions or social contexts, but to discover common concepts. Alternatively, impure comparative law might compare whole systems, thereby revealing styles of law. This approach would act as a prelude to a classification of the whole legal universe into families and types of law.[14] Obviously, when viewed in this way, comparative law can, with justification, lend itself to the study of other methods and techniques of law. These other methods include the study of different sources and structures of law, of one area of law in different systems, of one system as a social whole, or even of the overall relationships between legal systems, because the very nature of law itself encompasses not merely rules, principles, and concepts, but also systems of social order.

Each way of exploring and defining the field of comparative law involves very real dangers. Much of the academic literature bears out the vested interests its participants have felt in defending their approach, practical or theoretical, from attack. The functional

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11. Tallon, *Comparative Law: Expanding Horizons*, 10 J. SOC. PUB. TCHRS. L. 265 (1969).

12. Wagner, *Research in Comparative Law: Theoretical Consideration*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 511, 517 n.1 (R. Newman ed. 1977) (quoting Del Vecchio, *Les Bases du droit comparét les principles généraux du droit*, 12 REV. INT. DEV. COMP. 493, (1960)).

13. Wagner, *supra* note 12, at 531 (quoting Sereni, *On Teaching Comparative Law*, 64 HARV. L. REV. 770, 776 (1951)).

14. ZWEIGERT & KOTZ, *supra* note 3, at 56-57. *See also* Wagner, *supra* note 12, at 523.

approach, which involves comparing legal systems on the basis of their solutions to relatively similar problems, has the distinct disadvantage of tending to equate unequals.[15] As a corollary, it can be argued that such comparison must be limited to systems at the same stage of evolution. Thus, only rules which are part of some positive legal order can be compared. Such comparison must be based on their role rather than their doctrinal significance. This approach automatically invalidates a more general and theoretical approach beginning with the system as a whole. The same point can be made in a different way. As a tool of reform, comparative law is limited due to its political nature because only in exceptional cases can law be transplanted. The utility of comparative law is not that it leads to the adoption of foreign solutions, but rather that it teaches the variety of solutions that exist. At the most, general or common principles seem possible. The macro-perspective of the historian or anthropologist is immediately suspect, while the lawyer's descriptive or analytic study is validated.[16] The premise that rules alone are the data of law results from nineteenth century legal science and its progeny, the case method. However, neither cases nor the function of rules constitute law. The law is the very process of decision making, with all the sociological, historical, and philosophical implications surrounding constitutive processes. Thus, the choice of focus between theory and practice depends little on the end of adapting law, or comparing doctrine or social function, but on the conception of law. The functional approach, therefore, puts doctrinal rules into a systematic context, but does not necessarily put the system into a social context.[17] Thus, we assume we may have a conception of law in the examination of our own legal system, though the Jurisprudence of

15. Stone, *The End to be Served by Comparative Law*, 25 TUL. L. REV. 325, 329 (1951). ZWEIGERT & KOTZ, *supra* note 3, at 36, 39.

16. On the debate concerning "Legal transplants," see generally Stein, *Uses, Misuses and Non-uses of Comparative Law*, 72 NW. U.L. REV. 198, 203-04 (1977). *See also* Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 11 (1974). *Cf.* Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79, 82 (1976). The issue of the relationship of perspective and field of study is also evident here, since the contrast between function and doctrine does not have to match the contrast between lawyer and anthropologist.

17. LePaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 853 (1922). *See also* M. HOOKER, LEGAL PLURALISM, AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 42 (1975) ("[T]he law itself is made up of concepts plus referents; a demonstration in similarity of function of the latter does not necessarily imply the same supporting epistemology").

Comparative Legal Systems tends to reveal its limitations. However, we cannot assume to define another law even as duly constituted without knowing the significance of it in the context of the legal process or its meaningfulness as part of the social order.

This confrontation between the practical and theoretical is composed of a dynamic interaction of three focal points of study within the field of comparative law: the forms of law, the forces behind the functional reality, and the processes of expression of those forces in a historical and philosophical sense. Thus, it was quickly understood that the functional approach would reveal relationships between precepts, techniques and ideals.[18] The comparison of solutions and the appreciation of alternative methods and principles is but the first, albeit necessary, step to understanding foreign law, for that entails the analysis of which social forces, ideals, and values have formed the methods and solutions of law. These influences also have historical and philosophical dimensions which are part of their significance. Hence, the legal theories and the process of development of a legal system are as important to its comparative understanding as are the very rules themselves. Both the practical and the theoretical share the danger of losing sight of each other. What binds the two approaches together is this unity of the field of study; the forms of law, the values they express, and the process of their development comprise systems of law as social order. The practical/theoretical dichotomy therefore simplifies the divergencies within comparative law. It contrasts "law" with "laws," whereas the real contrast is between law as the sum of laws and law as a system of social order. Whether the focus of study is on functions and forms, social forces and ideals, or the historical and philosophical processes of legal development, the value ascribed to each focus is both practical and theoretical. From the perspective of law as a part of social order, knowing what the law *is* also means knowing its application and usefulness. The two categories of the practical and theoretical are in fact mediated by a third: the idealistic.

Contemporary comparative law is part of the emergent humanistic awareness of the significance of cultural relativity and the limited shared resources of the world. Appreciating how various other legal systems interpret social order may minimize ethnocentricity and the prejudice and destructiveness exhibited as a result of imperial

18. Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70, 76, 83 (1955).

self-conceptions of law.[19] This humanistic purpose of comparative law goes deeper than the deprovincializing of the mind toward domestic law. Such a purpose is also a means of generally understanding law and order, and thus, human nature and the bonds that unite man in the search for Justice.[20] It implies a global outlook on world problems so as to bring people face to face with their cultural essence, and with the essence of the various cultures in the world. This purpose also implies a faith in the universality of law as social order. In the study of law, we come to know ourselves as social animals, dependent for recognition of our individuality on the mediating forces that let us see ourselves in other people and themselves in us. Through Man's very existence in the world with others, through his example and the expectations he generates, he reveals the Law's meaningfulness.

It is from an appreciation of this deeper value to comparative law that its usefulness, theoretically and practically, makes sense and can be given direction. The result of clarification of one's own law, and the development of a critical awareness of one's own law are not merely seen in the reform of law, but in the work toward the unification of law through common principles and their harmonization.[21]

However, this must have a special sense. The idea of common or universal principles of law is only part of the story. It can only be realistically hoped for if it is fitted to the uniqueness of the world of international society, which is not structured vertically or coercively, nor is it centralized.[22] Thus, the humanistic impulse to see in law some general features of human nature and social organization necessitates not only the practical study of rules, systems, and normativity, but the theoretical study of what law *is*, for the common law—the core concept of Western law—is no more an acceptable model of law for an international legal order. But it is with comparative law's deeper value that there is most confusion. This confusion reflects a failure to grasp the perspective of comparative law as it regards the correlation between law and society, and to apply it to the field of study which includes its forms, values, and processes

19. Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 166 (1934); *cf.* von Mehren, *Roscoe Pound and Comparative Law*, 78 HARV. L. REV. 1585, 1588-90 (1965).

20. Kamba, *supra* note 3, at 505. *See also* R. UNGER, LAW IN MODERN SOCIETY 137 (1976); Hall, *Comparative Law and Jurisprudence*, 16 BUFFALO L. REV. 61, 66 (1966).

21. ZWEIGERT & KOTZ, *supra* note 3, at 40.

22. Watson, *A Realistic Jurisprudence of International Law*, 34 Y.B. WORLD AFF. 265, 266 (1980). Hicks, *International Order and Article 38(1)(c) of the Statute of the International Court of Justice*, 2 SUFFOLK TRANSNAT'L L.J. 1, 11 (1978).

of development. Thus, the ideal of a unified law must proceed upon an awareness of the nature of the legal experience of social order. Comparative law can realistically achieve this awareness. This is comparative law as legal humanism. It is properly jurisprudential for the organization of the materials of comparative study to lead to some conception of law as the experience of order, rather than universal or common rules of law. But more importantly, it means that the essence of jurisprudence is actually comparative jurisprudence as Austin himself realized long ago (though for different reasons). The desire to know law and see it in its human sense as a manifestation of order is the realization of comparative legal systems.

Certainly this is a wide claim. Others have claimed a similar importance for comparative law. For example, Hall has suggested that anthropology, political science, and sociology of law may form a single legal discipline because legal norms are of primary significance to social action.[23] It has been said that the utility of comparative law is architechtonic, so that no empirico-inductivist knowledge is possible without its general types.[24] Thus, Lawson claimed comparative law could verify results obtained by theoretical analysis.[25] Jurisprudence and comparative law effectively form the two essential moments of legal knowledge: content and form.[26] But of the two, it is jurisprudence (form) that cannot exist without comparative law.[27] Moreover, a hundred years ago, Jhering said, "comparative jurisprudence is the method of the future theory of law."[28] Thus, the essence of comparative law is jurisprudence. The fundamental question of the nature of law as the social experience of order renders coherent its study, is whether that study is directed to the unification of law or to mere functional comparison.[29] It has its own jurisprudence for the changing meaning of comparative law over the years is a reflection of the alternative perspectives and subject matters thought appropriate to it. The essence of jurisprudence is comparative in its fundamental question concerning the nature of law;

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23. HALL, *supra* note 3, at 111-12, 117.

24. Tur, *The Dialectic of General Jurisprudence and Comparative Law*, 22 JURID. REV. 238, 245, 248 (1977).

25. 2 F. LAWSON, THE COMPARISON, SELECTED ESSAYS 59 (1977).

26. Tur, *supra* note 24, at 249.

27. Kamba, *supra* note 3, at 494.

28. *Geist d. römischen Rechts*, Introduction No. 1, *quoted in* Mayda, *supra* note 2, at 438 n.17.

29. HALL, *supra* note 3, at 7, 11. "The question of what is comparative . . . . It is, instead, a jurisprudential problem." *Id.* at 7.

a question about the meaningfulness of the human experience of order in society. This is an historical, sociological, anthropological, and philosophical study. Comparative law makes each of these disciplines view their subject as the whole.[30] Moreover, comparative law offers a total overview which none of the other disciplines of law do since comparative law has within itself the dynamic interplay between the search for common and general principles of law, and the processes and causes of legal development, both of which are grounded in the basic conception of the experience of law. This is the meaning the author ascribes to Comparative Legal Systems.

The idea of systems of law involves more than the substance and procedure of law, its rules, techniques, and styles; it involves the relationship of the whole to itself, as an internally consistent form of rational expression of ideals of order or justice, and also an external perspective of how the whole of law, as defined internally, relates to the whole of society. The interrelatedness of both can only be interpreted from the viewpoint of the life of a participant in the society, rather than from that of a practitioner or an observer. Given an adequate concept of legal experience (i.e. law as a way of being) which hopefully unites perspective and field of study in a humanistic way, the given structural features and the open phenomenological variables of any legal system may be described, whether at the level of rules, categories, systems, or families of law. It is only from this viewpoint that the function of comparative law can be realized because the jurisprudential question, "what is law?" is preceded by, "who is it who asks?" Comparative law asks not for a fact, but for the meaning of the relationship between human beings and the law. The author suggests moreover, that an appreciation of this method of study can be discerned in certain changes in the textbooks in the field. The scope of comparative law is widening to include the notion of the whole legal world and its intellectual development. Its perspective is changing too, from an instrumental or evaluative one to an interpretative one, which concerns the meaningfulness of different forms of life or modes of existence.[31]

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30. Kuhn, *The Function of the Comparative Method in Legal History and Philosophy*, 13 TUL. L. REV. 350, 361 (1961).

31. Thus, von Mehren's second edition of *The Civil Law System* "devotes substantially more space" to Western legal philosophy prior to the nineteenth centrury. A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM ix (2d ed. 1977). In the book by J. H. Merryman and D. S. Clark entitled *Comparative Law: Western European and Latin American Legal Systems*, a distinguishing feature of the approach is said to be "a greater attention to . . .

A complete study of comparative law, therefore, would include a consideration of the interplay between law, society, and politics, with some overview of the theories and possibilities of social change and evolution. It would obviously cover Western philosophical, religious, and simple legal systems, for each connotes a different mode of making meaningful the experience of living in an ordered whole. It would analyze the forms and functions of their rules, the social forces and values at work, their theories and self-concepts of the legal system. If there are universal qualities to the relationship of law and society, they are as likely to be found in the classical law of ancient Greece, Rome or India, as in their modern progeny. Therefore, ancient, classical and medieval legal systems are relevant in the nature of legal experience because these systems are part of the whole complex of law and order. Finally, a view of the emergence of the modern State and its law needs to be developed from a practical, historical, and philosophical sense to set the stage for either the identification of what constitutes our Anglo-American conceptions of law, or the identification of the universal and the general disputes as discrete cases. Thus, any particular concept of law is rooted in and grows out of historical contingency and its interpretation. It can only be seen in its essence from the perspective of its relationship to other self-conceptions of law as the way law is experienced. Comparative Legal Systems must not only accept the notion that legal systems form traditions, cultures, or families, but also must find some means to account for the very significance of law, ontologically, as well as logically and historically. Only with such an overview can the idea of the field of study, as inclusive of the forms of law, the forces underlying them and their processes of development, and the perspective of the search for the meaningfulness of order in society be accomodated, whether or not the ultimate end of comparative law is the discovery of universal qualities to the experience of law alone or

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intellectual history" among other things. "[I]t is seldom the rules of law that are truly significant or interesting about a foreign legal system; it is the social and intellectual climates." Secondly, the new book by M. A. Glendon, M. W. Gordon and C. Osakwe is entitled *Comparative Legal Traditions* because among legal systems, rather than substantive law, there are constants that can serve to group and organize them into families. M. GLENDON, M. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS 2, 10 (1982). The basic text in this field has always been R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1978). Finally, note that M. Cappelletti and W. Cohen in their book *Comparative Constitutional Law* (1979) at vii, talk of "legal cultures," as do J. Barton, J. Gibbs Jr., V. Li, and J. Merryman in their *Law in Radically Different Cultures* (1983), and G. Dorsey in his unpublished materials on Jurisculture.

as a preliminary to the creation of some universal law.

On the one hand, such an overview combines the analytic, sociologic, anthropologic, historic and philisophic perspectives with their appropriate normative, factual, and interpretive fields of study. On the other hand, it is more than a grand overview because it focuses on the very idea of order in society. It is a humanistic endeavor because the experience of order in society may be the one attribute universal to human beings and because it leads man to ponder the role of law in social organization as a way of our being human. Perspective and field of study, therefore, come together not so much in the combination of all possible approaches, but because these approaches lead to the same question: How do societies make meaningful the experience of order through law? Thus, the perspective is that of the search for the significance of experience, while the field of study is that of the experience of order. But Comparative Legal Systems is humanistic in another way. In this Jurisprudence of Comparative Legal Systems, as in the experience of law itself, it is necessary to recognize the dynamic interplay of structure and openness, of the given and the created. Just as law is not wholly objective, as the rules or systems are often represented, neither is it wholly subjective. But from the point of view of the person in society who is involved with the law, law is experienced as a partial, avoidable, ambiguous and contingent order. The facts to which the rules of law apply are made in the process of existence, and their meaning is contingent on a human drama, not a legal one. No one is a law unto himself, but neither is the law wholly without a human aspect. We start with a personal, not a private sense of the law. In this way, our humanity is incorporated into the law. We are responsible for the law as it has shaped our society. But the more objective the self-conception of law in a legal system, the more the person who is actually involved in the law is alienated from the legal person as seen by the law. In other words, alienation is a function of the reification of concepts, such as law, which eliminates the openness and creativeness of existence to the thinking of law in terms of rules, functions, and traditions without the appreciation for the experience of law as a way of being in society.

Alienation is a world, legal and personal, problem. Humanistic and idealistic comparative law is devoted to this problem. We are able to accept and acknowledge incredibly diverse moral codes because of the relative universality of law. This acceptance enables us

to classify the law into families by the functional similarity of rules. The diversity of legal systems and their political and social implications is a stumbling block to an international system because we do not appreciate the relative universality of order in society that would put legal systems into perspective. The key idea here is the experience of law as a part of the social order. We think of this experience as a formal and rational system of rules of instrumental value, neutral as between the ends of wealth, efficiency or happiness, but involved in the means of protecting the free exchange or alienation of the deemed necessary attributes of the person: the possession of conscience, speech and property. The framework is essential, but the substance is contingent upon it. This is not only true analytically, but actually, for the substance of the law is not merely the givenness of rules but the openness of the experience of rules in concrete situations where law may be ignored, bent, made, or found as well as simply broken or applied. Thus:

> [D]ispute settlement, for instance, became identified with law enforcement, law enforcement with sanctions, sanctions with punishment and punishment with guilt, until the lawyers were convinced that the punishment of a guilty offender for the breach of a legal norm would settle the social dispute between, for example, a thief and his victim. The extraordinary transformation of a multi-dimensional social dispute into a two-dimensional legal dispute and the even more extraordinary re-transformation of a two-dimensional legal solution into a multi-dimensional social solution became accepted as fact.[32]

The emphasis, therefore, of Comparative Legal Systems is more on social order and law's place within it, than on law itself. Law is applied all the time. The idea of the application of law is constituted by principles or intellectual phenomenon.

This is certainly in keeping with much contemporary critical jurisprudence which puts such a concept of law into the perspective of liberalism as a particular rendering of the relationship of self, others and whole. Thus, the given aspect of law as an objective reality may be said to reduce the interplay of value with fact, desire with reason, or right with rule.[33] We usually regard such a reduction as

32. Sack, *The Cult of the Eight Foot Yam: Primitive Provocations on Law Development* in LAW AND THE FUTURE OF SOCIETY 326 (F. Hurtley, E. Kamenka, A. Ehrsoon Tay eds. 1979) with reference to Quintus Mucius Scaevola.

33. *See generally* R. UNGER, KNOWLEDGE AND POLITICS 63-103 (1975)(Society places restraints on individual behavior in order to satisfy the mutual needs of its members. Thus, laws must be general and impersonal).

an alienation, in the sense of being uprooted or losing the feeling of belonging. The role of law in this regard reflects the philosophical concept which originated in the word for the legal act in the common law.[34] We find in law, then, a means of interpreting such alienation as an estrangement from the social order of others. In essence, the person is reduced to a represented legal form which is referred to as the whole of legal experience.[35] The distinctive mode of the Western legal person's being tells us about the relationship between law and society as it is experienced.

It has been argued that the legal form of the person, as a citizen relative to the state, as a consumer relative to capitalism, and as a producer of surplus value relative to the powerful few, reflects the commodity form. In another way, legal experience, is reduced to polarities by the idea of the legal person as object of the rule. Thus, laws act to direct behavior, but are subjects of the system, for the laws are not divine or natural. This concept conveys the sense of positive law in a political, rather than economic, context.[36] But what is common to both conceptions is the coordination of self, others and whole in terms of personal relationships (contracts, torts) and relationships to things (property) as a constitutional process, which process asserts a person's legal attributes of both status and rights. In this way, property means not just land, labor, and commodities, but other people. As the language of rights liberates some individuals, its application alienates others.

The conception of law as the experience of social order and as a way of being reveals new property, group and community standards, and a new relationship to it, by way of rights. Property is thus inherent in oneself as an individual. Unfortunately, since the essential attribute of legal personality is the possession of rights, these same rights create in each person a sense of separateness. They alienate us from each other because we are alienated from ourselves, insofar as the essence

34. *See* Dove, *Alienation and the Concept of Modernity*, 5 ANALECTA HUSSERLIANA 187, 189 (1976). The German word for "alienations" was a translation of the English legal term for the release of a thing to another. The word now has many more connotations in English because of this German pedigree.

35. Northrop, *The Comparative Philosophy of Comparative Law*, 45 CORNELL L.Q. 617, 642-44, 648-49, 654-56 (1960).

36. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of Law*, 11 LAW & SOC'Y REV. 571 (1976); Warrington, *Pashukauis and the Commodity Form Theory*, 9 INT'L J. SOC. L. 1, 5-9 (1981). Sabine, *The Two Democratic Traditions*, 61 PHIL. REV. 451, 471 (1952). Stein, *Bentham, Austin and the German Pandectists*, in CONTINENTAL INFLUENCE ON ENGLISH LEGAL THOUGHT 1600-1900 at 1119 (1977).

of ourselves as beings in law means we have rights.

Similarly, we are alienated from an international society because the person in international law is the state, and its property means its territory or assets. Comparative law does have far to go in the unification of law or agreement on general principles. But the topic of international human rights engenders group and community standards. Comparative law must open up the possibility of a discourse concerning law and society that overcomes the alienating effects of thinking in terms of norms, rules, or rights. It is important that we do not overlook the possibility of a common order underlying the diversity of law because of the way progress forces us to see other legal systems, or that we ignore it because we think of law as being given. Particularly in international society's existence we are still free to mold law to suit our way of existence, rather than taking it in the form of a normative structure, system of rules, divine plan, or process of official behavior. To apply the insights of law as a system of social order on an international scale necessitates a conceptual framework for the nature of legal experience.[37]

Such a framework must avoid the obvious pitfalls of applying the characteristics of a particular system to the whole of legal experience. Likewise, such a framework must not presume an essence to law. Thus, the polar opposites of consent/coercion, authority/power, or autonomy/dependence cannot account for their tension, their balance, and their mutual interaction when these opposites are perceived as parts of the relationship of law to society from the viewpoint of the person in law. Similarly, the classification of historical circumstance as a dynamic of status/contract, rational/irrational or formal/substantive reduces the overall complex of society as an accomodation of self, other, and whole into a partial and misleading pattern of characteristics, rather than essence. In the latter, all we see is the law's self-concept contrasted with its coherence over time. In the former, all we see is the law in its external relationship to the whole analyzed as if the law were transcendental to history. These two approaches (the historically contingent and analytically formal) can only be brought together if we consider the effect of law on our experience in society. We must think of how the law appears to us, how it is maintained and how it realizes itself. The conceptual framework of law for the study of comparative legal systems must include the *aspects* of law's appearance in social order in relation to religion,

37. *Cf.* Kamba, *supra* note 3, at 518.

politics, and ethics; the *qualities* of law's maintenance, whether original, reflective, or actual; and the *realities* of law's processes, substance, and ideals.[38] Comparing law cannot take place with regard to only the rules or the reasoning of a legal system, nor to its justification or self-image, whether historical or philosophical, for this type of comparison still assumes a sense to law. The jurist's conception of the law is experienced as already given, and the theorist's conception is found in the experience of the observer. The task of Comparative Legal Systems is to get an overview that is not oversimplified. The overview should combine the realities of the rules and forms of law, the forces that constitute and determine the law, and the historical and philosophical underpinnings of these forces, with the question: What does one's way of being in such a system of law mean? The significance of one's experience of law cannot be reduced to concepts such as community or solidarity, because the experience is a process, not a simple concept. Moreover, the nature of this process is personal, as well as institutional or official. Thus, the overview deals with the interrelatedness of self, others, and whole as the simple fact of social order in the world, but it does not assume any particular conception of law.

The *aspects* of law show how law presents itself as a part of the overall social order. The experience of self with others constitutes ethics, i.e., we should do unto others as they do unto us. On the other hand, the relationship of others to the whole constitutes politics. Generalized group interests represent the self's actual needs in the political realm. Moreover, the person is represented by the process as a citizen, an abstraction which necessitates that the personal self be subsumed into a public self, which acts toward the whole in a civil or civic fashion on behalf of others. The relationship of the whole to the unknown (and unknowable) constitutes

38. LePaulle, *supra* note 17, at 852-53, refers to "recoupement" as a method of verifying a hypothesis by successive observations of the same phenomena from different angles. The author believes that what the realities of law reveal transcend any particular essence of cause, form, end or nature because law is not turned through the axis of its own content, usefulness, or self-conception, but rather is turned on the axes of givenness and openness and their reversibility from the point of view of the individual person. By methodically examining comparative law in terms of the interaction of perspective and field of study, law is a phenomenon that we experience through the dimensions of appearance, maintenance and realization, of which law is a way of being. *Cf.* Gabel, *Reification in Legal Reasoning*, 3 RESEARCH L. & SOC. 25 (1980). Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method of Critical Legal Theory*, 61 MINN. L. REV. 601 (1977).

religion. Finally, the relationship between self and the social whole constitutes law. Thus, law's responsibility is to universalize particulars, and its claim depends on whether its universality can be particularized to the self. This classification gives us a way of looking at the whole of social order, and comparing types of authority according to whether certain relationships dominate. Thus, classical Confucianism exemplifies the moral authority of interpersonal relationships. In modern Islamic nations, such as Saudi Arabia, the authority of their social order still depends on the religious relationship of the State to the will of Allah. Western democracies are political social orders in which the authority of the whole depends on its relationship to the public, although the United States' emphasis on both individual and constitutional rights, on judicial review, and on the separation of powers, reveals the fact that the authority of its social order also depends on whether the whole meets interpersonal needs.

Basically, there are only two general types of authority: the politico-legal and the religico-ethical. This dichotomy should make clear that the classification is only intended to analyze the interplay between self-others-whole, and not to characterize any particular social order in an essential way. For example, law partakes of religious, ethical, and political relationships. However, if we view the law as being concerned with a different kind of experience other than the forces of social order, then this perception suggests some interesting aspects of the law. In politico-legal social order, the whole is central. In a religico-ethical social order, self-others-whole and the unknown lie in a continuum. In the former system, authority is focused in the form of the whole, and law's contribution to that whole. In the latter, authority is diffuse, and law overlaps with all other means of social order. In this manner, religico-ethical social orders have clearly defined group membership. They do not tolerate deviance because the sense of inner conviction and normativity is greater, although the need for institutionalization is less. On the other hand, there is a tension in law between the implicit ordering of principle, mediation, and custom because the form of the whole does not predominate. Individualism, deviance, and dissent as between self, others, and the unknown are easily tolerated in the politico-legal system because ethics, law and religion all come together in the form of the whole. However, the whole must be clearly defined as distinct from subjective ethics, transcendentalism, and natural law. This distinction is accomplished through the resolution of the relationship between law and morality, the delineation of the nature of legal obligation,

and the definition of the meaning of justice as welfare. These are the definitional questions of recent Anglo-American common law legal theory. Therefore, law actually concerns the relationship of the whole to the self, rather than the relationship of the self to the whole. The above three questions of modern legal theory reflect a positivistic distortion of the relationship between self and whole. This distortion illustrates much of the preceding discussion concerning the reduction of the person in law to the legal person, and the consequent loss of any sense of the experience of law.

Now that the *aspect* that law presents relative to the whole of social order can be seen, the next level of comparison focuses on the *qualities* of law itself. These qualities will vary according to whether the type of order is religico-ethical or politico-legal, and the role of law in the order. What is needed is some means to describe how law's role is legitimated and justified, that is, how law maintains itself as part of the experience of the participants in the social order, but without reducing the process to one of consent, coercion, or coherence. Thus, law may be justified according to the basic plan or vision of the social order, i.e., its original quality. Law may also be justified according to its accomodation of interests, desires, and needs, i.e., its reflective quality. Lastly, law may be justified by reference to its relevance to the conditions and circumstances of the particular time and place, i.e., its actual quality. Although none of these qualities alone is likely to be an essential characteristic of a legal system, the balance and proportionality among them are significant. Essentially, the question is whether the basic principles or values of the law, as part of the whole social order, legitimate it; or whether the results of the application of the law are the source of its legitimacy. A basic difference can be drawn at once. In a religico-social order, the emphasis upon the role of law throughout the continuum of experience of self-whole-others means that the actual quality of law, in terms of its fit with the particular situation, is the basic justification of law.[39]

In the politico-legal social order, there is an obvious tension between the justification of law by its conformity with social practices, and its reference to basic principles, such as equal respect. Dworkin

39. Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 LAW & SOC'Y REV. 217, 240-43 (1980). Weber referred to this as "Kadijustiz," implying its basis to be individual expediency. Rosen's article shows the definite regularities implicit in a one-by-one *ad hoc* determination. The author believes that these regularities are different from the rules' content reflecting social values or interests, and from the system as a whole expressing certain fundamental values.

argues for the priority of the original quality. He says that law does not necessarily reflect social practices, nor is it justified by them. Instead, law is attained through the interpretation of principles, and serves to justify social practices.[40] To this extent, there is a connection in law with the whole system rather than with the ethics of self or others. Therefore, this political conception of law draws a distinction between social democracy and democratic liberalism. In the latter, the reflective quality predominates, and in the former, the original quality predominates. The difference is not simply between a balancing of interests in the application of rules and the basic principles to which the rules and the balancing test must refer because the original quality of law (the basic principles of the system as a part of the whole) means that the law need not only be consensus-oriented but also not result-oriented in the particular case. Law is autonomous from the personal and the interpersonal. However, if the reflective quality of law is used to justify the maintenance of the law, its actual application and coherence in the instance, and its fit and coherence with basic principles, are also relevant. For this reason, Dworkin overemphasizes the argument that the law need not reflect social practices and is not constituted by them, but in fact serves to justify them. He distorts the complexity of the experience of the maintenance of law. His is an institutional, professional, and systematic perspective which ultimately serves only to obscure the overall aspects of law as a part of the social order by identifying it with the political whole.[41]

What is important is the way law originates, reflects and actualizes itself in the context of society as a whole. We cannot simply view other legal systems as coercive when they are compared with our own. Meaningful comparison proceeds according to the relative weight given to principles, practices, and the practicalities.

Equally misleading is the representation of coercion, consent, or coherence by ideas such as a habit of obedience, an official rule of recognition, or the convergence of social practices. Each objectifies the mutual interaction of the qualities of law into a single essential quality. From the viewpoint of comparative legal systems, this

40. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 867 (1972).

41. This is a separate topic. It involves Dworkin's theory as a whole and the politics of jurisprudence as both the study of political society and the absence of a social theory of law. *See* Hicks, *Dworkin, Society and the Politics of Jurisprudence*, 12 REVUE DE DROIT UNIVERSITE SHERBROOKE 483 (1982).

representation can only lead to a judgmental attitude. From the viewpoint of jurisprudence, this representation removes the personal dimension from law.

Finally, when comparing legal systems one explores the *realities* of the law, in terms of its content and substance, its process, and its ideals. These realities reveal the differences in the sources of law, types of law, methods of judicial review, and methods of truth finding among varieties of legal systems. But if the subject of the comparison includes not just the forms and functions of law, but its forces and processes of development, and also its historical and philosophical implications, then some means of orienting one's approach to the whole social order is necessary. Thus, the significance of codification, the structure of administrative courts, or the reliance on religious leaders for counsel, is seen in the context of how the law is justified, and how the law reveals itself in the entire social order. The overall comparison of the aspects, qualities, and realities of legal systems enables differences in legal families to be accounted for in the overall framework.

The total overview of comparative law suggested above can be dealt with through the means of this framework of the aspects, qualities and realities of law. It provides a very useful pedagogical device for an overview without fragmentation, and for insight without superficiality. What we really see is how law is experienced between the given aspect and the open aspect of its existence. To the extent comparative law can reveal the universality of the experience of law as a way of being in society relative to other means of social order, we may yet dream of a world law. But our alienation is rooted in the loss of this sense of the experience of law to a political and not wholly social, interpersonal and personal account of the bonds that unite us.