Konrad Zweigert et Hein Kötz, *An Introduction to Comparative Law*, 3e éd., trad. par Tony Weir, Oxford, Oxford University Press, 1998 [*Einführung in die Rechtsvergleichung*, 3e éd., Tübingen, J.C.B. Mohr, 1996].

A. GENERAL CONSIDERATIONS

I

The Concept of Comparative Law

ADAM, 'Ethnologische Rechtsforschung', in: Adam/Trimborn, *Lehrbuch der Völkerkunde* (3rd edn. 1958) 189.

BANAKAS, 'Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited', *Rev. hell. dr. int.* 33 (1980) 155.

v. BENDA-BECKMANN, 'Einige Bemerkungen über die Beziehung zwischen Rechtssoziologie und Rechtsvergleichung', *ZvglRW* 78 (1979)51.

——, 'Ethnologie und Rechtsvergleichung', *ARSP* (1981) 310.

CARBONNIER, 'L'Apport du droit comparé à la sociologie juridique', in: *Livre du centenaire de la Société de législation comparée* I (1969) 75.

COING, 'Die Bedeutung der europäischen Rechtsgeschichte für die Rechtsvergleichung', *RabelsZ* 32 (1968) 1.

DE CRUZ, *A Modern Approach to Comparative Law* (1993).

DROBNIG, 'Methods of Sociological Research in Comparative Law', *RabelsZ* 35 (1971) 496.

DROBNIG/REHBINDER (eds.), *Rechtssoziologie und Rechtsvergleichung* (1977, with important contributions from Drobnig, Gessner, Heldrich, Rehbinder, Terré, Zweigert, and others).

GENZMER, 'Zum Verhältnis von Rechtsgeschichte und Rechtsvergleichung', *ARSP* 41 (1954/55) 326.

——, 'A Civil Lawyer's Critical Views on Comparative Legal History', 15 *Am. J. Comp. L.* 87 (1966).

HAILBRONNER, 'Ziele und Methoden völkerrechtlich relevanter Rechtsvergleichung', *ZaöRV* 36 (1976) 190.

LAMBERT, 'Conception générale et définition de la science du droit comparé', Procès-verbaux des séances et documents, Congrès international de droit comparé I (1905) 26, printed in: Zweigert/Puttfarken (eds.), *Rechtsvergleichung* (1978) 30.

LEGRAND, Book Review, 58 *Mod. L. Rev.* 262 (1995).

MARTINY, 'Rechtsvergleichung und vergleichende Rechtssoziologie', *Zeitschrift für Rechtssoziologie* 1 (1980) 65.

POSPISIL, *The Ethnology of Law* (2nd edn., 1978).

POUND, 'Some Thoughts About Comparative Law', in: *Festschrift Ernst Rabel* 1 (1954) 7.

——, 'Comparative Law in Space and Time', 4 *Am. J. Comp. L.* 70 (1955).

RABEL, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (1925), reprinted in: Rabel, *Gesammelte Aufsätze* III (ed. Leser, 1967) 1.

RHEINSTEIN, 'Legal Systems: Comparative Law and Legal Systems', in: *International Encyclopedia of the Social Sciences* IX (ed. Sills, 1968) 204.
——, *Einführung in die Rechtsvergleichung* (2nd edn., 1987).
SACCO, *Introduzione al diritto comparato* (5th edn., 1992).
SCHWARZ-LIEBERMANN V. WAHLENDORF, *Droit comparé, Théorie générale et principes* (1978).
STONE, 'The End to Be Served by Comparative Law', 25 *Tul. L. Rev.* 325 (1951).
TALLON, 'Comparative Law: Expanding Horizons', 10 *JSPTL* 265 (1968).
WENGER, 'Rechtsgeschichte und Rechtsvergleichung', in: *Mémoires de l'Académie internationale de droit comparé* III 1 (1953) 149.
YNTEMA, 'Roman Law as the Basis of Comparative Law', in *Law—A Century of Progress* 1835–1935 II (1937) 346.
ZWEIGERT, 'Das soziologische Dimension in der Rechtsvergleichung', *RabelsZ* 38 (1974) 299.
——/PUTTFARKEN (eds.), *Rechtsvergleichung* (1978).

I

BEFORE we try to discover the essence, function, and aims of comparative law, let us first say what 'comparative law' means. The words suggest an intellectual activity with law as its object and comparison as its process. Now comparisons can be made between different rules in a single legal system, as, for example, between different paragraphs of the German Civil Code. If this were all that was meant by comparative law, it would be hard to see how it differed from what lawyers normally do: lawyers constantly have to juxtapose and harmonize the rules of their own system, that is, compare them, before they can reach any practical decision or theoretical conclusion. Since this is characteristic of every national system of law, 'comparative law' must mean more than appears on the surface. The extra dimension is that of internationalism. Thus 'comparative law' is the comparison of the different legal systems of the world.

Comparative law as we know it started in Paris in 1900, the year of the World Exhibition. At this brilliant panorama of human achievement there were naturally innumerable congresses, and the great French scholars ÉDOUARD LAMBERT and RAYMOND SALEILLES took the opportunity to found an International Congress for Comparative Law. The science of comparative law, or at any rate its method, was greatly advanced by the occurrence of this Congress, and the views expressed at it have led to a wealth of productive research in this branch of legal study, young though it is.

The temper of the Congress was in tune with the times, whose increasing wealth and splendour had given everyone, scholars included, an imperturbable faith in progress. Sure of his existence, certain of its point and convinced of its success, man was trying to break out of his local confines and peace-

ably to master the world and all that was in it. Naturally enough, lawyers were affected by this spirit; merely to interpret and elaborate their own system no longer satisfied them. This outgoing spirit permeates all the Congress papers; the whole Congress was dominated by a disarming belief in progress. What LAMBERT and SALEILLES had in mind was the development of nothing less than a common law of mankind (*droit commun de l'humanite*). A world law must be created—not today, perhaps not even tomorrow—but created it must be, and comparative law must create it. As LAMBERT put it (above p. 1, pp. 26 ff.), comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.

Comparative law has developed continuously since then, despite great changes in man's attitude towards existence. The belief in progress, so characteristic of 1900, has died. World wars have weakened, if not destroyed, faith in world law. Yet despite a more sceptical way of looking at the world, the development and enrichment of comparative law has been steady. Comparative lawyers have come to know their field better, they have refined their methods and set their sights a little lower, but they remain convinced that comparative law is both useful and necessary. Scholars are more resistant to fashionable pessimism than people in other walks of life; they have no immediate aim, only the ultimate goal of discovering the truth. This is true also of research in comparative law; it has no immediate aim. But if one did want to adduce arguments of utility, comparative law must be at least as useful as it was, especially as technological developments since 1900 have made the world ever smaller and, to all appearances, national isolationism is on the wane. Furthermore, by the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice.

Despite all this, comparative law still occupies a rather modest position in academic curricula (see further Ch. 2 IV below). Though LAMBERT's great claims in this respect, as developed in his report of 1900 (above p. 1, pp. 53 ff.) were much more realistic than his dream of a 'droit commun de l'humanité', they have not yet been realized anywhere in the world. He thought that it would be greatly to the good of society if pride of place in academic studies were accorded to comparative private law, the heartland of all comparative law. For if clear and consistent general principles of law were established, this would promote international trade and advance the general

standard of living, and if lawyers were induced to look beyond their borders, international exchanges would increase. Future lawyers would have to be exposed to 'comparative common legislation' and comparative law while still at university. This would refresh and enrich the study of their native law, which was increasingly confining itself to interpreting the actual texts and neglecting principle for doctrinal detail.

It may indeed be that the mere interpretation of positive rules of law in the way traditionally practised by lawyers does not deserve to be called a science at all, whether intellectual or social. Perhaps legal studies only become truly scientific when they rise above the actual rules of any national system, as happens in legal philosophy, legal history, the sociology of law, and comparative law.

Now it is precisely the broad principles which comparative law lets one see; it can help the economist by discovering the social preconditions of particular rules of law, and by the comparisons it makes across time it can assist the legal historian. Students today are often put off by textual disputes, arid logomachies, and logical demonstrations, which prevent their seeing the living problems which lurk behind these technical facades. For this reason LAMBERT claimed for comparative law a place in the curriculum equal to that of the home system: four lectures a week should be given in comparative law for each of three semesters. Everything he said is as valid today as when he said it in 1900, but though much has improved in many countries in the ensuing century, the radical restructuring of the curriculum which he showed to be necessary has yet to take place.

II

Comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is sometimes called *macrocomparison*. Here, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law. For example, one can compare different techniques of legislation, styles of codification, and methods of statutory interpretation, and discuss the authority of precedents, the contribution made by academics to the development of law, and the diverse styles of judicial opinion. Here too one could study the different ways of resolving conflicts adopted by different legal systems, and ask how effective they actually are. Attention may be focused on the official state courts: how is the business of proving the facts and establishing the law divided between attorneys and judges? What role do lay judges have in civil or criminal proceedings? What special arrangements, if any, are made for small claims? But one

should not confine one's study to the state courts and judges: one should take account of all actual methods of settling disputes. Studying the various *people* engaged in the life of the law, asking what they do, how, and why, is a very promising field of work for comparative lawyers. First of all one would look at the judges and the lawyers, the people, whatever they are called, who apply or advise on the law in any system. But it can also be profitable to compare other persons involved in the law, such as the lawyers in Ministries and Parliaments who work on forthcoming legislation, notaries, the experts who appear in court, the claims adjusters of insurance companies and, last but not least, those who teach law in universities.

Microcomparison, by contrast, has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests. When is a manufacturer liable for the harm caused to a consumer by defective goods? What rules determine the allocation of loss in the case of traffic accidents? What factors are relevant for determining the custody of children in divorce cases? If an illegitimate child is disinherited by his father or mother, what rights does he have? The list of possible examples is endless.

The dividing line between macrocomparison and microcomparison is admittedly flexible. Indeed, one must often do both at the same time, for often one has to study the *procedures* by which the rules are in fact applied in order to understand why a foreign system solves a particular problem in the way it does.

For example, no picture of the rules which apply when a patient is suing a doctor for damages can be complete or accurate unless it describes how malpractice is established in court and tells us whether the experts are appointed by the court or are chosen by the parties themselves to battle it out in the courtroom, as happens in Common Law countries.—Nor could one give a true picture of the American law regarding the strict liability of the manufacturer just by listing the elements of a successful claim at law. One must also say that the claim will be decided in a trial by jury and show what roles the judge, lawyers, and jury play in such proceedings and how this influences the substantive law, by noting, for example, that in such a claim the plaintiff's attorney normally stipulates for a fee of 30–50 per cent of the damages awarded and that the jury takes account of this fact when fixing the damages. Indeed, one must cast one's net wider still. Tort liability is just one of the ways of improving the quality of products and reducing the risks to the public: administrative and criminal law may have a contribution to make, and if product liability law seems to play a different and more important role in the United States than in Europe (see below Ch. 42 V), this may perhaps be because Americans take a less sanguine view than Europeans of the efficacy or cost of administrative controls and criminal sanctions. These examples must suffice to show that 'microcomparison' may not work at all unless one takes into account the general institutional contexts in which the rules under comparison have evolved and are actually applied.

III

In order to understand what comparative law really is, it is as well to distinguish it from related areas of legal science, that is, to show what comparative law is *not*.

Since comparative law necessarily has to deal with foreign law, it must be distinguished from those other branches of legal science which have to do mainly or occasionally with other legal systems. As has often been observed, the mere study of foreign law falls short of being comparative law. For example, in 1937 the League of Nations produced a study of The Status of Women in the World, consisting merely of reports from different countries on their own solution of the problem. There was no real comparison of the solutions presented, and so at most one could call it descriptive comparative law. One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of his own system.

The neighbouring areas of legal science which also deal with foreign law, and from which comparative law must be distinguished, are private international law, public international law, legal history, legal ethnology, and finally sociology of law.

1. *Comparative Law and Private International Law*

These two areas are, on the face of it, entirely distinct, but they interact. Private international law, or conflict of laws, is a part of the positive national law, while comparative law seems to present itself as a *science pure*. Private international law tells us which of several possible systems of law should be applied in a particular case which has foreign connections; it contains rules of competence which determine which specific national law is to be applied and which lead to its application. One could therefore say that private international law is basically more selective than comparative. Comparative law, on the other hand, deals with several legal orders at the same time, and does so without having any practical aim in view.

Yet comparative law is enormously valuable for private international law, indeed so indispensable for its development that the methods of private international law today are essentially those of comparative law.

The most striking example is the well-known theory of *qualification* or *characterization*, which tells us how to understand those concepts, such as marriage, contract, and tort, which figure as connecting factors in the national rules of private international law. On one view (qualification according to the *lex fori*) these concepts

are to be given the same meaning as they have in the substantive national law; according to the theory of qualification developed by ERNST RABEL (see RABEL, 'Das Problem der Qualifikation', *RabelsZ* 5 (1931) 241), they are to be understood in the light of comparative law, independently of the *lex fori*. Comparative law also has to be used in the *application of the foreign law* indicated by the conflict rules of the home system. Suppose that in a will which is governed by English law the widow is made 'life-tenant' or a third party is appointed 'trustee'. These terms must somehow be converted into the language of the legal system which is controlling the disposal of the estate. The only way of doing this is to compare the English institutions with the nearest thing in the legal system involved: the German lawyer would therefore consider *Vorerbschaft*, *Nießbrauch*, and *Testamentsvollstrecker*. Now in English law the estate does not vest directly in the 'heirs', but goes to a 'personal representative', that is, a person who must administer the estate on behalf of those entitled to it, and divide the estate between them after paying off its debts. In Germany, these English rules cause difficulties in drafting the certificate of entitlement (*Erbschein*) which persons with rights of succession may demand, and these difficulties can only be resolved by intensive researches of comparative law. 'For example, if a person dies intestate, leaving a widow and several adult children, the certificate must indicate that the moveables in the estate pass under English law to the administrator appointed by the English probate court, who must manage the property in trust (*zu treuen Händen*) for the beneficiaries and use the net proceeds of the estate, after payment of its debts, to provide the widow with the personal chattels and the sum of [£125,000] after which one half of the rest is divided between the children in equal portions, and the other half is administered in trust (*zu treuen Händen*) for the widow, the children being entitled to equal parts of it on her death' (see the instructive treatment of this question by GOTTHEINER, 'Zur Anwendung englischen Erbrechts auf Nachlässe in Deutschland', *RabelsZ* 21 (1956) 33 ff., 71). Comparative law is also essential for the proper treatment of the concept of *ordre public* in private international law. Sometimes a foreign rule which is indicated by the conflict rules of the forum is so shocking to the *ordre public* of the forum that it cannot be applied, but in order to discover whether this is so one must make a comparison between the foreign rule and the closest analogue in the home system. Finally, there is the question of *renvoi*, whether consistency of decision—the principal aim of private international law—is best advanced by applying or not applying the conflicts rule of a foreign system which remits the matter back to the forum. This also can only be solved by the comparative method, and it was ERNST RABEL'S comparative work on 'Conflict of Laws' which conclusively showed how absurd it was to carry on applying national tests in an area like conflicts law which is devoted to international intercourse (see especially vol. I (2nd edn., 1958), 3 ff., 103 f.).

2. *Comparative Law and Public International Law*

At first sight there is little in common between comparative law and *public international law*, for public international law, or the law of nations, is essentially a supranational and global system of law. Yet comparative law is essential to the understanding of 'the general principles of law recognized

by civilized nations' which are laid down as being one of the sources of public international law by art. 38 (1) (*c*) of the Statute of the International Court of Justice—whether this means principles of law accepted by all nations without exception, which would include only a few trivial truisms, or rather the principles of law accepted by a large majority of nations. The recognition of such general principles is rendered more difficult by the basic differences of attitude between the developed industrial nations and those in process of development. Now one of the aims of comparative law is to discover which solution of a problem is the best, and perhaps one could include as a 'general principle of law' the solution of a particular problem which emerges from a proper evaluation of the material under comparison as being the best. To do this would avoid reducing the valuable notion of 'general principles of law' to a mere minimum standard, and could gradually lead us to accept progressive solutions as being examples of such general principles.

The methods of comparative law can also be extremely useful in interpreting treaties, and in helping to understand some of the concepts and institutions of customary international law. The rule *pacta sunt servanda*, the idea behind the *clausula rebus sic stantibus*, and the theory of *abus de droit* in international law all have their roots in institutions of municipal private law, and it is only through comparative law that they can be made to yield their full potential.

3. *Comparative Law, Legal History, and Legal Ethnology*

The relationship between comparative law and legal history is surprisingly complex. At first sight one is tempted to say that while comparative law studies legal systems coexistent in space, legal history studies systems consecutive in time. But there is more to it than that. For one thing, all legal history involves a comparative element: the legal historian cannot help bringing to the study of his chosen system, say Roman law, the various preconceptions of the modern system he is familiar with; thus he is bound to make comparisons, consciously if he is alert, unconsciously if he is not. Again, unless the comparatist is content merely to record the actual state of play, he really has to take account of the historical circumstances in which the legal institutions and procedures under comparison evolved. How does historical research differ from comparative work? Where does one end and the other begin? At what point must the comparatist yield the floor to the legal historian? The questions admit of no rational answer. Legal history and comparative law are much of a muchness; views may differ on which of these twin sisters is the more comely, but there is no doubt that the legal historian must often use the comparative method and that if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history.

The founders of comparative legal ethnology, J. J. BACHOFEN (*Das Mutterrecht* (1861)) and Sir HENRY MAINE, had an aim rather different from that of true comparatists, namely to produce a general world history of law as part of a general history of civilization. At its outset legal ethnology rested on a specific belief, stemming from the teachings of AUGUSTE COMTE, the historical dialectic of HEGEL, and BASTIAN's theories of elementary and folk ideas. This belief, now regarded as invalid, was that mankind, with its common psyche, follows the same path of development in everything regardless of location or race. This belief led scholars to focus on the so-called primitive systems of law, if systems they can be called, still to be found among backward peoples. From the legal practices of these peoples they drew conclusions about the condition many ages ago, at a period from which we have no legal muniments or even evidence of any kind, of the legal systems which are now highly developed. Foremost among such scholars were H. H. POST in his *Einleitung in das Studium der ethnologischen Jurisprudenz* (1886) and JOSEPH KOHLER in his *Zeitschrift für vergleichende Rechtswissenschaft*. The basic tenet of ethnological legal studies, namely that all peoples develop as it were in parallel from a common original condition, was controverted principally by the so-called theory of cultural groups (*Kulturkreislehre*) according to which every cultural development of any group anywhere was, as a historical event, unique. The adherents of this theory could not deny the surprising similarities between the legal institutions of different peoples at the same stage of development, but sought to explain them as being the result of adoption or migration. Certainly such events did take place, but they cannot explain all the instances of parallel development. The more modern view, represented by KOSCHAKER, is that the development of a legal system is the product of factors, some of which are typical and occur everywhere, and some of which are atypical. According to KOSCHAKER the typical factors are not natural and inevitable, like BASTIAN's elementary ideas, but historical: a group of people in a particular geographical social and economic situation develops in a particular way with regard to law as well as other things. Such a typical development may be influenced by atypical factors, such as race, special aptitudes, or historical accident. The principal aim of legal ethnology, therefore, must be to distinguish the typical factors from the atypical aberrancies, for otherwise no safe conclusions could be drawn for our original law from the legal practices of surviving primitive peoples.

Nowadays we see legal ethnology not so much as a constituent of a general history but more as a branch of ethnology and comparative law which concentrates on the legal aspects of surviving societies, unhappily called 'primitive' because they are not yet equipped with all the apparatus of civilization. Its discipline is historical only in seeking to discover 'the origins and early stages of law in relation to particular cultural phenomena' (ADAM (above p. 1), 192). But the few older societies hitherto untouched are being increasingly exposed to the modernizing influence of the expanding

industrial revolution and being drawn into the community of mankind. Accordingly the task of modern legal ethnology is to study the changes suffered by societies already observed in adjusting to the intrusion of a higher civilization. Thus to a large extent legal ethnology has become a branch of modern comparative law, one of whose most pressing tasks it is to assist the legal systems of developing societies by giving them the benefits of its comparative researches. To this aim legal ethnology has its special contribution to make.

4. *Comparative Law and Sociology*

After the discussion in recent years of the relation between *sociology of law* and comparative law, it now seems to be generally agreed that the two disciplines not only have a great deal to learn from each other but also use much the same methods.

Sociology of law aims to discover the causal relationships between law and society. It seeks to discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change, whether of a political, economic, psychological, or demographic nature. This is an area where it is very difficult to construct theories, but if one can support one's theory with comparative data from other nations and cultures, it will be much more persuasive.

Legal sociologists use a technique quite like the 'control group' of experimental natural scientists: if in a given sector of experience two systems have different rules and one can show that the relevant social facts in those countries are also different, this may point towards the hypothesis that the social facts and the rules are causally connected (see examples given below pp. 37 ff.). Likewise if one brings in the time dimension, one may be able to show that as the social development in different countries converges (or diverges) the rules in force there also converge (or diverge). If people behave the same way in similar situations despite a difference in the rules which purport to control their conduct, one may infer that the rules are ineffectual, and the same inference may be drawn when the rules are the same but people behave differently. On all this see MARTINY (above p. 1): he shows how the sociology of law can use the discoveries of comparative law, while making it clear that the practice of international and intercultural legal sociology is a very difficult matter indeed.

If comparative sociology of law can make use of the experience and discoveries of comparative law, comparative lawyers undoubtedly have a great deal to learn from legal sociologists. This is important, first, for what one can call the *definition of the problem*. Comparative lawyers have long known that only rules which perform the same function and address the same real problem or conflict of interests can profitably be compared. They also know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts with which to describe such problems or conflicts of interests (on this see further Ch. 3 II). Legal sociologists not only

accept this but apply it with a rigour which the comparative lawyer finds stimulating, if also a bit worrying, for legal sociologists can sometimes show that concepts and features which the comparative lawyer regards as 'neutral' and therefore suitable for the definition of the problem are in fact nationally or culturally conditioned, or that they implicitly presuppose the existence of a particular social context which in reality exists in only one of the places under comparison and not in the other. Once the problem has been defined and it comes to the question of the *statement of the rules* which the systems under review use to resolve it, the situation is similar. Here too comparative lawyers agree that one must take account not only of legislative rules, judicial decisions, the 'law in the books', and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mould human conduct in the situation under consideration (on this see below Ch. 3 II and III). Sociologists of law take this for granted, since they start out from the assumption that human behaviour is controlled by many factors other than law, but lawyers find it more difficult—and comparative lawyers are generally lawyers of some kind. They have to force themselves to be sufficiently receptive to the non-legal forces which control conduct, and here they have much to learn from the more open-minded sociologists of law. So also when the comparative lawyer comes to *explain his findings*, that is, to describe the causes of the legal similarities or differences which he has discovered. He knows, of course, that causal factors may exist anywhere throughout the fabric of social life, but often he will have to go to the sociology of law to learn just how far he must cast his net, so as to include, for example, the distribution of political power, the economic system, religious and ethical values, family structure, the basis of agriculture and the degree of industrialization, the organization of authorities and groups, and much else besides.

One must not forget that comparative law has several different goals. In its *theoretical-descriptive* form the principal aim is to say how and why certain legal systems are different or alike. In this respect it must, as we have shown, work on and profit from the theoretical models and empirical data produced by the sociology of law. But comparative law can also aim to provide advice on legal policy. In its *applied* version, comparative law suggests how a specific problem can most appropriately be solved under the given social and economic circumstances. In such cases the comparative lawyer often acts under considerable pressure: he may be pressed to say how the positive law should be altered on a particular point, how a perceived gap should be filled, or exactly what rules should be adopted in an international uniform law, and he may have to come up with detailed proposals in a very short time. In such circumstances he has to operate with assumptions which, plausible as they may be, would rightly be derided by the sociologist of law as simple working hypotheses. But this does not mean that they are necessarily false. Without

in the least suggesting that the comparative lawyer can ignore the insights and discoveries of the legal sociologist, he often cannot avoid adopting, however tentatively and provisionally, theses which the sociologist of law would regard as unproven, but which are nevertheless cogent enough to carry weight in discussions or decisions about changing the law.

2

The Functions and Aims of Comparative Law

AUBIN, 'Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung', *RabelsZ* 34 (1970) 458.

BLANC-JOUVAN, 'Réflexions sur l'enseignement du droit comparé', *Rev. int. dr. comp.* 40 (1988) 751.

BLECKMANN, 'Die Rolle der Rechtsvergleichung in den Europäischen Gemeinschaften', *ZvglRW* 75 (1976) 106.

COING, 'Rechtsvergleichung als Grundlage von Gesetzgebung im 19. Jahrhundert', *Ius commune* VII (1978) 160.

DAIG, 'Zur Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht', *Festschrift Zweigert* (1981) 395.

R. DAVID, 'The International Unification of Private Law', in: *International Encyclopedia of Comparative Law* II (1971) Ch. 5.

DÖLLE, 'Der Beitrag der Rechtsvergleichung zum deutschen Recht', in: *Hundert Jahre deutsches Rechtsleben, Festschrift zum 100jährigen Bestehen des deutschen Juristentages 1860–1960* II (1960) 19.

DROBNIG, 'The Use of Foreign Law by German Courts', in *German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law* (ed. Jayme, 1994).

DROBNIG/DOPPFFEL, 'Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber', *RabelsZ* 46 (1982) 253.

DUTOIT, 'L'Importance du droit comparé dans l'enseignement juridique', in: *Recueil des travaux suisses présentés au IXe Congrès international de droit comparé* (1976) 21.

EVERLING, 'Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft', *RabelsZ* 50 (1986) 193.

FERID, 'Die derzeitige Lage von Rechtsvergleichung und IPR in der Bundesrepublik Deutschland', *ZfRV* 22 (1981) 86.

FRANKENBERG, 'Critical Comparisons: Re-Thinking Comparative Law', 26 *Harv. Int. L. J.* 411 (1975).

GROSSFELD, *The Strength and Weakness of Comparative Law* (1990).

——, 'Vom Beitrag der Rechtsvergleichung zum deutschen Recht', *AcP* 184 (1984) 289.

HILL, 'Comparative Law, Law Reform and Legal Theory', 9 *Oxf. J. Leg. Stud.* 111 (1989).

HIRSCH, *Rezeption als sozialer Prozess* (1981).

JACOBS, 'The Uses of Comparative Law in the Law of the European Communities, Legal History and Comparative Law', in *Essays in Honour of A. Kiralfy* (ed. Plender, 1990) 99.

JUNKER, 'Rechtsvergleichung als Grundlagenfach', *JZ* 1994, 921.

KAHN-FREUND, 'On Uses and Misuses of Comparative Law', 37 *Mod. L. Rev.* 1 (1974).
KÖTZ, 'Gemeineuropäisches Zivilrecht', *Festschrift Zweigert* (1981) 481.
——, 'Rechtsvergleichung und Rechtsdogmatik', *RabelsZ* 54 (1990) 203.
——, 'Europäische Juristenausbildung', *ZEuP* 1993, 268.
——, 'Rechtsvergleichung und gemeineuropäisches Privatrecht', in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (ed. Müller-Graff, 1993).
KOZYRIS, 'Comparative Law for the 21st Century, New Horizons and New Technologies', 69 *Tul. L. Rev.* 165 (1994).
KROPHOLLER, *Internationales Einheitsrecht, Allgemeine Lehren* (1975).
KÜBLER, 'Rechtsvergleichung als Grundlagendisziplin der Rechtswissenschaft', *JZ* 1977, 113.
LAWSON, 'Comparative Law as an Instrument of Legal Culture', in LAWSON, *The Comparison, Selected Essays* II 68 (1977).
LEGEAIS, 'L'utilisation de droit comparé par les tribunaux', *Rev. int. dr. comp.* 46 (1994) 347.
LUTTER, 'Die Auslegung angeglichenen Rechts', *JZ* 1992, 593.
MANSEL, 'Rechtsvergleichung und europäische Rechtseinheit', *JZ* 1991, 529.
MARKESINIS, 'Comparative Law: A Subject in Search of an Audience', 53 *Mod. L. Rev.* 1 (1990).
MARTINY, 'Autonome und einheitliche Auslegung im europäischen internationalen Zivilprozessrecht', *RabelsZ* 45 (1981) 427.
VON MEHREN, 'The Role of Comparative Law in the Practice of International Law', *Festschrift Neumayer* 479 (1985).
NEUHAUS/KROPHOLLER, 'Rechtsvereinheitlichung—Rechtsverbesserung?' *RabelsZ* 45 (1981) 73.
NEUMAYER, 'Fremdes Recht aus Büchern, fremde Rechtswirklichkeit und die funktionelle Dimension in den Methoden der Rechtsvergleichung', *RabelsZ* 34 (1970) 411.
——, 'Rechtsvergleichung als Unterrichtsfach an deutschen Universitäten', *Festschrift Zweigert* (1981) 501.
PESCATORE, 'Le Recours dans la jurisprudence de la Cour de justice des Communautés Européennes à des normes déduites de la comparaison des droits des États membres', *Rev. int. dr. comp.* 32 (1980) 337.
POUND, 'The Place of Comparative Law in the American Law School Curriculum', 8 *Tul. L. Rev.* 161 (1934).
SACCO, 'Legal Formants, A Dynamic Approach to Comparative Law', 39 *Am. J. Comp. L.* 343 (1991).
——, *La comparaison juridique au service de la connaissance du droit* (1991).
——, *Introduzione al diritto comparato* (5th edn. 1992).
SCHERMERS, 'Legal Education in Europe', 30 *Cmn. Mkt. L. Rev.* 9 (1993).
SCHLESINGER, 'The Role of the "Basic Course" in the Teaching of Foreign and Comparative Law', 19 *Am. J. Comp. L.* 616 (1971).
E. STEIN, 'Uses, Misuses—and Nonuses of Comparative Law', 72 *NWUL Rev.* 198 (1977).
TALLON, 'Les Perspectives de l'enseignement universitaire de droit comparé', *Festschrift Zajtay* (1982) 479.
UYTERHOVEN, *Richterliche Rechtsfindung und Rechtsvergleichung* (1959).

WATSON, 'Legal Transplants and Law Reform', 92 *LQ Rev.* 79 (1976).
ZWEIGERT, 'Rechtsvergleichung als universale Interpretationsmethode', *RabelsZ* 15 (1949/50) 5.

I

IT is beyond dispute today that the scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration, that no study deserves the name of a science if it limits itself to phenomena arising within its 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.

In the natural and medical sciences, and in sociology and economics as well, discoveries and opinions are exchanged internationally. This is so familiar a fact that it is easy to forget its significance. There is no such thing as 'German' physics or 'British' microbiology or 'Canadian' geology. These branches of science are international, and the most one can say is that the contributions of the various nations to the different departments of world knowledge have been outstanding, average, or modest. But the position in legal science is astonishingly different. So long as Roman law was the essential source of all law on the Continent of Europe, an international unity of law and legal science did exist, and a similar unity, the unity of the Common Law, can still be found, up to a point, in the English-speaking world. On the European continent, however, legal unity began to disappear in the eighteenth century as national codes were put in the place of traditional Roman law. The consequence was that lawyers concentrated exclusively on their own legislation, and stopped looking over the border. At a time of growing nationalism, this legal narcissism led to pride in the national system. Germans thought German law was the ark of the covenant, and the French thought the same of French law: national pride became the hallmark of juristic thought. Comparative law has started to put an end to such narrowmindedness.

The primary aim of comparative law, as of all sciences, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system. Comparative law is an 'école de vérité' which extends and enriches the 'supply of solutions' (ZITELMANN) and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place.

Like the lively international exchange on legal topics to which it gives rise, comparative law has other functions which can only be mentioned here in the briefest way. It dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding; it is extremely useful for law reform in developing countries; and for the development of one's own system the critical attitude it engenders does more than local doctrinal disputes.

But four particular practical benefits of comparative law call for closer attention: comparative law as an aid to the legislator (II); comparative law as a tool of construction (III); comparative law as a component of the curriculum of the universities (IV); and comparative law as a contribution to the systematic unification of law (V), and the development of a private law common to the whole of Europe (VI).

II

Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question.

Ever since the second half of the nineteenth century legislation in *Germany* has been preceded by extensive comparative legal research. This was true when commercial law was unified, first in Prussia and then in the German Empire, and also, after the Empire had acquired the necessary legislative powers, of the unification of private law, law of civil procedure, law of bankruptcy, law of judicature (courts system), and criminal law. Account was taken not only of the different laws then in force in Germany, including the French law in force in the Rhineland, but also of Dutch, Swiss, and Austrian law (see COING and DÖLLE (above p. 13 and below)). As to the present, it can be said that no major legislation since the Second World War has been undertaken without more or less extensive research in comparative law. This is true not only of reforms in German and family law (see DROBNIG/DOPFFEL (above p. 13)), but also of numerous other laws, such as the law of commercial agents, company law, anti-trust law, the introduction of the dissenting opinion in the Federal Constitutional Court, the draft law of privacy (admittedly never enacted), the law for the compensation for victims of violent crime, the law regarding changes of sex, the law on legal advice for the indigent, and much more. Comparative legal studies also underlay the recent proposals of the Commission for the Reform of the Law of Obligations set up by the Federal Ministry of Just-ice: see, for instance, the submission of the Max Planck Institute for Foreign and International Law on 'Modern Development of Contract Law in Europe', published in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* I (ed. Ministry of Justice, 1981) 1. Here one of the motive forces was a concern to bring German law closer to that of other European countries by importing the rules of the Vienna Convention on

International Sales (CISG), itself based on comparative research.—In *Great Britain*, too, legislative proposals are grounded on comparative work. One example is the Pearson *Report on Civil Liability and Compensation for Personal Injury and Death* (see below p. 669), and though England has not yet felt able to follow the United States, France, and Germany in adopting a 'right of privacy', a 'droit au respect de la vie privée' or an 'allgemeines Persönlichkeitsrecht' (see below p. 704). foreign law has been consulted on the question of its introduction. The English Law Commission likewise refers to foreign law whenever appropriate, as it did when the question was whether to confer contractual rights on third parties (see below p. 469).

Comparative law has been proving extremely useful in the countries of Central and Eastern Europe where legislators face the need to reconstruct their legal systems after the collapse of the Soviet system. The experience of other European countries helps them choose the solution which best suits their own legal traditions, overshadowed for much of the century though they have been. Even outside Europe states which used to be 'Soviet republics' are finding that foreign laws can be of assistance in framing domestic legislation, as have the Republic of China and many of the developing nations in Africa.

Of course one must proceed with intelligence and caution. If comparative analysis suggests the adoption of a particular solution to a problem arrived at in another system one cannot reject the proposal simply because the solution is foreign and *ipso facto* unacceptable. To those who object to the 'foreignness' of importations, RUDOLPH V. JHERING has given the conclusive answer:

> 'The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.' (*Geist des römischen Rechts*, Part I (9th edn., 1955) 8 f.)

Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it. It may well prove impossible to adopt, at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit.

The 'reception' of foreign law and the question whether and under what circumstances it can succeed has provoked an interesting controversy between KAHN-FREUND and WATSON (above p. 14–15). (See also STEIN and HIRSCH (above p. 13–14), all with further references.)

III

Another practical use of comparative law lies in the interpretation of national rules of law. On this matter the standard textbooks say nothing, dealing only with the old question whether a law should be given the meaning attributed to it by the legislator at the time of enactment, or whether the statute, treated as leading a kind of independent life of its own, may not be interpreted in the light of changing social conditions. Our present question is whether the interpreter of national rules is able or entitled to invoke a superior foreign solution. It is clear that such foreign material cannot be used in order to bypass unequivocal national rules: the principle of respect for an unambiguous enactment must not be infringed in any legal system. But the question may be raised when the construction of a rule is doubtful, or where there is a lacuna in the system which the judge must fill. The purely logical techniques at our disposal are insufficient, and it is unconvincing to play with analogy or the *argumentum e contrario*. The rule applied all over the Continent which determines how a judge must find the law when all else fails is formulated in the Swiss Civil Code, art. 1 pars. 2 and 3, as follows:

> 'If no statutory provisions can be found, the judge must apply customary law, failing which he must decide according to the rule he would, were he a legislator, decide to adopt. In so doing the judge must follow accepted doctrine and tradition.'

The principal thought underlying this provision is that gaps in the Swiss Civil Code are to be filled in the spirit of the national, that is, the Swiss, law. But will this do? If the judge is to decide in the way he would have decided had he been a legislator, must we not ask: how does a modern legislator reach his decisions? Now we have already seen that, to a great degree, the modern legislator takes his solutions from comparative law. Thus, thanks to the greater breadth of vision which we obtain from comparative law, we must include the comparative method among the criteria traditionally applied to the interpretation of national rules. There may still be questions about how far this can and should be done. For example, should one, in using the comparative law method of interpretation, consult only related systems like those of Switzerland and France, or also systems that are quite different in style, such as the Common Law? Can the judge choose whichever of the foreign solutions seems to him the best, or can he choose only a solution which is common to a number of other systems? May we, with the help of comparative law, reach an interpretation of our legal rules which is independent of, perhaps even at odds with, the conceptual structure of our own system? These questions, with the possible exception of the last one, should receive a bold rather than a timid answer (see further in ZWEIGERT (above p. 15)).

As may be seen from the law reports, comparative law has often helped the courts to clarify and amplify *German* law, though it is true that comparative law arguments are usually deployed in conjunction with normal methods of interpretation, and thus serve to confirm and support a result reached by a traditional route. One excellent example is the development by the Bundesgerichtshof of the principle that the victim of an invasion of the 'general right of personality' may claim damages at large (see Ch. 43 below), a principle which the Bundesgerichtshof sought to defend against criticism by saying that

> 'In almost all the legal systems which, like ours, put a prime value on the individual, damages for pain and suffering are regarded as the proper private law sanction for invasions of the personality. The availability of such damages does not adversely affect the freedom of the press, which those systems also treat as of fundamental importance, so the objection that the award of such damages in cases of invasions of personality improperly invades or unduly imperils the constitutionally guaranteed freedom of the press is clearly without substance' (BGHZ 39, 124, 132). In another decision the Bundesgerichtshof held that the claim for such damages was limited to cases where the invasion of the right of personality had been particularly serious; the Court observed that such a limitation 'is also to be found in Swiss law, which is more concerned with legal protection of the personality than the BGB (see art. 49 I OR)' (BGHZ 35, 363, 369). In another case a seriously disabled child who would never have been born at all but for the negligence of its mother's doctor in failing to detect its probable condition sued the doctor for 'wrongful life'. In dismissing the child's claim the Bundesgerichtshof referred to *McKay* v. *Essex HA* [1982] QB 1166 and comparable American decisions (BGHZ 86, 240, 250 f.). Further examples from German courts are analysed by DROBNIG (above p. 13).

In general it must be said that comparative law has a much greater role to play in the application and development of law than the German courts yet allow. The situation is rather better in other European countries such as Greece and Portugal, and above all in Switzerland, where the decisions of the Bundesgericht are replete with comparative law (see BGE 114 II 131 and UYTERHOVEN, above p. 14). The French Cour de Cassation is certainly deaf to any such arguments, but this is because it has adopted a style of judgment which precludes any reference to considerations of sociology, legal history, policy or comparative law (see below p. 123). It is different in the Common Law countries. Courts in England, Australia, Canada, and other commonwealth countries have long made reciprocal reference to each other's decisions and are now invoking continental law to a remarkable degree.

In *White* v. *Jones* [1995] 2 AC 207 the question was whether a lawyer had to pay for the harm suffered by a third party as a result of his incompetence in following the instructions of his client. The opinion of LORD GOFF contains a marvellous comparative treatment of the problem, with reference to the German doctrine of

contracts with protective effect for third parties. (See, too, the opinion of STEYN LJ in the Court of Appeal ibid. at 236). In the event the House of Lords, like the Bundesgerichtshof (see BGH *JZ* 1966, 141, noted by LORENZ and BGH *NJW* 1977, 2073), granted the claim of the third party, but in tort rather than contract (see below p. 614). See also LORD GOFF in *Woolwich Building Soc'y* v. *Inland Revenue Comm'rs* [1993] AC 70, 174 (claim for restitution of taxes illegally exacted, see below p. 574); BINGHAM MR in *Interfoto Picture Library* v. *Stiletto Visual Programmes* [1988] 1 All ER 348, 352 ff. (good faith in negotiations); LORD GOFF in *Henderson* v. *Merrett Syndicates* [1994] 3 All ER 506, 523 ff. (concurrence of claims in contract and tort, see below p. 618); BINGHAM MR in *Kaye* v. *Robertson* [1991] FSR 62 (invasion of privacy, see below p. 704). See also the decision of the Supreme Court of Canada in *Norsk Pacific Steamship Co.* v. *Canadian National Ry.* [1992] 1 SCR 1021, which referred to numerous foreign decisions on the question of liability in tort for pure economic loss. In a note on this decision MARKESINIS makes a telling plea for courts to make more use of arguments from comparative law (109 *LQ Rev.* 5 (1993)). So, too, von BAR says: 'What a step forward it would be if the supreme courts of the states of the European Union accepted the idea of *persuasive authority*, if they felt bound to inquire whether the case before them had not already been decided somewhere else in the Union, and if, supposing there were a sort of "dominant European view" on the matter, they had to say why they were prevented from adopting it by the present state of their own law! If our courts were imbued with a European spirit, their reasoning would be greatly enlivened, and if the law, like other disciplines worthy of the name, were open to the world, its prospect of recapturing the intellectual elite of the country would be much enhanced.' ('Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union', *ZfRV* 35 (1994) 221, 231.)

When judges of a superior court are faced with a difficult problem of principle it is surely wrong for them to disregard solutions and arguments which have been proposed or adopted elsewhere just because they happen to emanate from foreign courts and writers. President ODERSKY of the Bundesgerichtshof was quite right to say:

> 'in giving his opinion the national judge is not only entitled to engage with the views of other courts and legal systems; he is also entitled, when applying his own law and naturally giving full weight to its proper construction and development, to take note of the fact that a particular solution conduces to the harmonisation of European law. In appropriate cases this argument enables him at the end of the day to adopt the solutions of other legal systems, and it is an argument he should use with increasing frequency as the integration of Europe proceeds.' ('Harmonisierende Auslegung und europäische Rechtskultur', *ZEuP* 1994, 1, 2.)

Taking comparative arguments into account certainly means more work for the judge, but nowadays, thanks to the researches of comparatists, there are many areas in which foreign material is much more accessible; in any case, even on the continent where the principle *iura novit curia* obtains, the court can look to the parties to proffer such material and if necessary insist that they do so.

The situation is different when *uniform laws* are being interpreted. Such laws normally result from international conventions, governmental cooperation, or supranational or international legislation, and since the underlying aim is to unify the law, their construction and development must be geared to this goal. This means that when a national judge is faced with a uniform law, he must not simply deploy his trusty old national rules of construction but modify them so as to arrive at an internationally acceptable result which promotes legal uniformity. This often calls for a *comparative law interpretation*: the judge must look to the foreign rules which formed the basis of the provision to be applied, he must take account of how courts and writers abroad interpret it, and he must make good any gaps in it with general principles of law which he has educed from the relevant national legal systems.

For details see LUTTER (above p. 14), especially at p. 604, and KROPHOLLER (above p. 14) 258 ff., 278 ff., 298 ff.—This is undoubtedly a hard and demanding task, and it may be beyond the powers of national judges who have to apply uniform law only very seldom. The only sure way to avoid national divergences in the construction and development of a uniform law is to grant jurisdiction to an international court. For the member states of the Common Market the Court of Justice of the European Communities is the leading example: it has already used the method of comparative legal interpretation in a large number of decisions with great success. On this see BLECKMANN, DAIG, PESCATORE, and MARTINY (above pp. 13–14).

IV

1. Comparative law also has an important function in legal education. In legal education as in legal science generally it is too limiting smugly to study only one's national law, and for universities and law schools so to act at a time when world society is becoming increasingly mobile is appallingly unprogressive. Comparative law offers the law student a whole new dimension; from it he can learn to respect the special legal cultures of other peoples, he will understand his own law better, he can develop the critical standards which might lead to its improvement, and he will learn how rules of law are conditioned by social facts and what different forms they can take. What he learns in this science, as in others, will prove useful in practice too. Here we need only mention how useful comparative law is in conflict of laws, for the interpretation of treaties, for those who are involved in international adjudication, arbitration, or administration, or concerned with the unification of law. The younger generation of lawyers, and probably their successors as well, will be faced with an unparalleled 'internationalization' of legal life. But it is the general educational value of comparative law which is most important: it shows that the rule currently operative is only one of

several possible solutions; it provides an effective antidote to uncritical faith in legal doctrine; it teaches us that what is often presented as pure natural law proves to be nothing of the sort as soon as one crosses a frontier, and it keeps reminding us that while doctrine and categories are essential in any system, they can sometimes become irrelevant to the functioning and efficacy of the law in action and degenerate into futile professorial games.

2. Despite all this, and notwithstanding the considerable improvement in the last few decades, the place occupied by comparative law in the university curriculum is still rather modest.

In *Germany* the teaching of comparative law varies quite widely from university to university. For the moment almost all universities offer a general 'Introduction to Comparative Law' which, in addition to giving an overview of the legal systems of the world, covers the aims and methods of the discipline and its relationship with other specialties with an international legal flavour. Rather less common are lecture-courses on a particular legal system, such as French law, or a group of related legal systems, such as the Common Law; even where such courses are on offer, it is noticeable that universities tend to specialize in, say, English law, or French law. Even less common is the 'comparison of institutions' in which one tries to see what all the relevant legal systems, or several of them, do in a particular area of law, such as contract or company law, and treats it comparatively from beginning to end, with each national rule being seen in conjunction with its functional counterpart in the other legal systems. But if the teaching of comparative law is perhaps just acceptable, the picture is wretched indeed when one comes to the vital question of the place of comparative law in *examinations*. Comparative law has never been a compulsory examination subject, although relevant questions are occasionally set as a test of the candidate's 'general juridical culture'. A student will admittedly be examined in the subjects which fall within his chosen 'group of elective subjects', though not much weight may be given to it, but in many of the *Länder* comparative law is regrettably yoked to family law or the law of succession in a single option. It is small comfort to learn that elsewhere in Europe complaints are raised about the provincialism of legal education; see the reports on the situation in Belgium (Meulders-Klein), France (Mouly), Greece (Yokaris), Great Britain (Jolowicz), Italy (Sacco), and Switzerland (Stoffel), published in *Rev. int. dr. comp.* 40 (1988) 703.

Although the need to open legal education up to comparative law is an urgent one everywhere, Germany faces a unique obstacle. In other European countries individual law faculties are fairly free to decide what subjects to teach and examine and to adapt them, if necessary, to the changing world. Law faculties in Germany do not have this freedom, and will never have it as long as they remain under the curse which deprives them of all initiative in this area, namely the system whereby future lawyers are examined by the state. Germany is the only country in Europe, almost in the whole world, where the state acts as 'external' examiner at the end of a candidate's legal studies in an examination whose content is prescribed in detail by statute. Under this system it makes no difference how good, wide-ranging or imaginative the teaching in the faculty is, or how well the student performs during his time at university, especially if he studies abroad. If this is ever to change in Germany legal education must be 'deregulated', so that, like everywhere else in the world, examinations are conducted by the university and not by the state, and law faculties finally acquire some freedom of action and a chance to compete with each other.

The prospect of any such deregulation is still poor: with a few honourable exceptions the ministries of justice in the Länder are in thrall to the practice of examination by the state, and most faculties have no interest in getting the system changed. For relief one may have to look, as in many other cases, to the European Union. Under the Rome Treaty foreign lawyers wishing to render legal services or establish a law practice in Germany must be treated basically on the same footing as German lawyers, and if a large number of young foreigners with a good legal education came to Germany, it might become politically possible to overcome the opposition of the state examination bodies and the even more regrettable indifference of many law faculties.

3. In order to see how the teaching of comparative law will and should develop, we must look at law teaching as a whole.

The critical feature of the academic teaching of law today is the constant increase in the bulk of the material to be learnt. Students in the past could learn to think like lawyers by concentrating on private law, but nowadays it is necessary to master not only criminal law, which has not increased so much in volume, but also the vast bulk of constitutional and administrative law, business law, labour law, and social security law. It is no longer possible to cram comparative law and legal sociology into a law course which already has to contain so much material.

From this it follows that we must *integrate comparative law into the teaching of national law*. That means that the problem being studied must be set in the context of the solutions obtaining in the most significant legal systems; then one must make a critical appraisal in order to determine which solution is best suited here and now to the national society as it is. Only in this way can one highlight the characteristics of the solution which is accepted in the positive law, and at the same time encourage the reforming spirit and develop a sense of how the law can be improved. Only in this way can it be shown that in certain areas—such as contract law, tort, and company law—a *ius commune* for all Europe is beginning to develop or already exists.

It follows from this that a textbook of comparative law should not try to stuff the student full of further foreign legal data; it should rather lay out the different approaches to a problem, state the critical arguments which illuminate and enliven it, and then indicate which is the best solution here and now. This involves that 'national' textbooks should be rewritten in the light of comparative law, and that in the long run all teachers of law

should master the comparative method so as to obtain the necessary information for themselves.

As early as 1934 ROSCOE POUND expressed, more precisely and tersely, the view here put forward:

'What is aimed at by such a course [sc. in comparative law] may be done more effectively by a group of teachers who are conscious of the possibilities of comparative law in their daily teaching and know how to realise those possibilities. Hence I suggest that the law teacher of the future should ground himself in comparative law and should bring out continually other modes of treatment of the questions he takes up from the standpoint of our law, as shown by the civil law and the modern codes, just as he canvasses the modes of treatment in different English-speaking jurisdictions. I suggest that he continually seek to lead the student by concrete examples to appreciate that there is no one doctrine or rule or institution or conception for every case in every land in every time. In other words, I believe comparative law will best be taught, for the purposes of our professional instruction, in the course of teaching the law of the land, except as graduate students are able, after due training in the civil law, to go deeply into some of its particular problems' (above p. 14, p. 168). Such 'integrated' law teaching has been opposed by SCHLESINGER and NEUMAYER (*Festschrift Zweigert* 507 f.) and defended afresh by KÖTZ (*RabelsZ* 36 (1972) 570 ff.).

V

1. *Unification of Law—Concept and Function*

The final function of comparative law to be dealt with here is its significant role in the preparation of projects for the international unification of law. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practised today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law. For states which are members of the European Union, the harmonization of law by supranational means (Community guidelines and directives) is of ever-increasing significance.

Unification cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones. Preparatory studies in comparative law are absolutely essential here;

without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which solution is the best. A model of such a preparatory study is ERNST RABEL, *Das Recht des Warenkaufs* I (1936: reprinted 1957); II (1958), which was of vital importance for the unification of international sales law.

The advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus unified law promotes greater legal predictability and security. International treaties for the unification of law often try to obtain the accession of all the states in the world, but none has yet succeeded. All unification of law so far has been limited in its geographical area of application, by force of circumstance rather than by design. Sometimes, however, schemes for the unification of law are designed to apply only within a limited area (regional unification of law, for example, in Scandinavia or the Benelux countries; here one can include also the *rapprochement* or harmonization of laws envisaged by the Treaty of the European Economic Community).

Multilateral treaties are very difficult to achieve and rather clumsy in operation; furthermore, their results in the field of unification of law are not very satisfactory (see 3 below). Accordingly, one must think of alternative means of achieving the goal. One way would be to produce model laws, a method which has been used for the internal unification of law within the British Commonwealth and especially in the United States. This method is less heavy-handed since the adoption of such laws by the different countries is a matter of recommendation rather than of obligation.

Other methods have been proposed by RENÉ DAVID in his encyclopedia article: for example, the creation of a new and universal *ius commune*, applicable to international relationships to which national systems of law may be insufficiently adapted.—DAVID also urges a more widespread and international use of the device of *Restatements of the Law*, as practised in the United States. Every several state in the United States has its own private and commercial law, and the legislative competence of the Congress in Washington is rather limited. Nevertheless the laws of the several states have a great deal in common, thanks to the Common Law tradition. This common law in each principal area of law is set out in a series of books, called *Restatements*, with additional volumes which give the deviations in each state (see below pp. 251 f.).

Welcome though any idea is which tends to the greater harmonization of laws, overall the most suitable method for the immediate future seems to be that of *model laws*, provided that they are carefully drafted on the foundations of comparative law.

Running parallel with uniform enacted laws there may arise a kind of universal contract law, since in certain spheres of activity (such as wholesale trade in primary commodities, banking, insurance, and transport) there are general conditions or customs of business which are the same or similar in many countries. Here one might instance the Conditions of Business of the London Corn Trade Association, the General Conditions for the Supply of Plant and Machinery for Export, produced by the UN Economic Commission for Europe, and the so-called Incoterms (such as fob and cif clauses) and the Uniform Customs and Practices on Documentary Credits drawn up by the International Chamber of Commerce in Paris. Many observers think of these rules as forming a nascent, perhaps actual, *lex mercatoria* of a new and autonomous variety (on the whole question see SPICKHOFF, *RabelsZ* 56 (1992) 116 and KROPHOLLER, *Internationales Privatrecht* (2nd edn. 1994) §11 I 3, both with references to the extensive literature).

2. *Areas and Agencies*

Since the end of the nineteenth century the unification of law has produced its main results in private law, commercial law, trade and labour law, in copyright and industrial property law, and in the law of transport by rail, sea, and air, as well as in parts of procedural law, especially in connection with the recognition of foreign judgments and awards. Even where the substantive private law should not, or cannot, be unified, it may be possible to achieve a harmony of outcome by unifying the rules of conflicts of law, and thereby avoid differences attributable to the accident of the forum.

It is in private law in the widest sense that the world forces tending towards the integration of law are at their strongest.

The results already achieved by way of unification of law are too numerous to be listed here (compare ZWEIGERT/KROPHOLLER, *Quellen des Internationalen Einheitsrechts*, 3 vols. (1971 ff.)). The League of Nations and the United Nations Organization have done much for the law of negotiable instruments and of arbitration, the Rome Institute for the Unification of Private Law (UNIDROIT, founded in 1926) has worked on the law of sale of goods, the Hague Conferences have helped in private international law, and various international organizations have advanced the unification of the law of transport, copyright, and labour. In 1966 the United Nations Organization resolved to set up a Commission for International and Commercial Law (UNCITRAL) charged with promoting the harmonization and unification of international trade law. Its greatest achievement so far is the Convention on Contracts for the International Sale of Goods (CISG) concluded in Vienna in April 1980 (see VON CAEMMERER/SCHLECHTRIEM, *Kommentar zum Einheitlichen UN-Kaufrecht* (2nd edn. 1995)).

3. *Experience*

In the past, enthusiasts have planned to unify the law of the whole world; people now realize that only the specific needs of international legal business can justify the vast amount of energy which is required to carry through any project for the unification of law. These needs are most pressing in the fields of law mentioned above (less, for example, in land law, family law, and the law of inheritance), and even there only for particular topics or specific institutions.

One must not underestimate the difficulties involved in the preparation and adoption of uniform laws. Some of these have psychological causes, such as dislike of novelty or pride in the national law, others are technical (differences in legal concepts or presuppositions, which only intensive preparatory studies in comparative law can overcome) or political: national parliaments are reluctant to adopt in their entirety the agreed drafts of international conferences. These difficulties are lessened somewhat if the uniform law is made applicable only to international transactions. Then each state has two concurrent sets of rules in the same area. This is what happens in the sale of goods, for example: internal transactions are covered by municipal law, while CISG, if adopted in the state whose courts are seised of the matter, applies to 'international' sales, that is, contracts of sale between parties with places of business in different states.

When uniform laws are applied by national courts, there is always the risk that the uniformity of law apparently achieved in that area will be eroded by its being differently construed and applied in the different member states. This risk cannot be wholly excluded by even the most careful drafting. Just as in any country a Supreme Court of Cassation or Appeal is needed to procure that the law is uniformly applied, so in the long run an international court is necessary to ensure the uniform application of uniform laws. The uniform construction of the law of the European Economic Union is guaranteed by the Court of the European Communities (arts. 164 ff., Treaty of Rome), and it is to be welcomed that the member states have also entrusted to this court the power to interpret legal concepts used in certain treaties made pursuant to art. 220, Treaty of Rome. But apart from a few minor exceptions, this is the only court so far with power to give a uniform construction to uniform law. Until an international court is set up, the best that can be done is to procure that at least the highest courts of the member nations know what their opposite numbers have decided (see above p. 20). If a uniform law is being differently construed in the different member states, it is impermissible to have recourse to the rules of conflicts law in order to determine whether in a particular case it is the law as applied, for example, in France or as applied in Germany which is to control (*aliter* the French Court of Cassation in *Hocke*, Rev. crit. 53 (1964) 264, and the Federal German Supreme Court,

IPRspr. 1962–1963 no. 44). If the substantive law has been unified, it is the substantive law which must control, and not the rules of conflicts law. In brief: unification of substantive law excludes the application of private international law. Until we have an international court for the construction of uniform laws, the highest municipal courts should adopt as their own whichever construction, proposed or actually adopted elsewhere, seems to them the best and proper one.

VI

If barriers to trade within the European Union are to be overcome, legislation in the form of ratification of international treaties or Regulations and Directives is clearly indispensable in certain areas. Even so, it is increasingly being questioned whether legislation is really the best way to unify the whole of European law. Unification hitherto has been sporadic, impinging on specific points only, so that in some areas the result is a patchwork of overlapping scraps of national and unified law with ill-defined areas of operation and different animating principles; far from simplifying the application of the law, unification of this kind has made it much more difficult. It is now clear that unified legislation can deprive member states and their courts of the freedom to alter and develop their law and introduce a barrier to change which thwarts the adoption of much needed adjustments at the national level. True, a state can always seek to have the unified law changed, but it would take years of negotiation to obtain the agreement of all the other states involved even if it were possible at all.

The point is developed in KÖTZ, 'Rechtsvereinheitlichung—Nutzen, Kosten, Methoden, Ziele', *RabelsZ* 50 (1986) 1; BEHRENS, 'Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung', *RabelsZ* 50 (1986) 19.

Accordingly people are now beginning to see that legislation is not necessarily the ideal way to unify the law; it has costs as well as gains, and they must be soberly calculated and weighed against each other. The law of Europe cannot be unified by sporadic texts. What we need is to 'Europeanize' the way lawyers think, write, and learn. Legal history and comparative law teach us as much, and people are now readier to accept it. The idea that legislation is the only possible source of law is an error from the Age of Enlightenment which should have had its quietus long ago. German and French law today do not turn exclusively on the wording of legislative texts, and European law cannot turn exclusively on European unifying legislation. Years ago COING was quite right to say that

'unification of law cannot come about simply by laying down uniform rules, as was sometimes thought in the nineteenth century. In many cases it may be necessary, but it is also essential that it be accompanied by progressive legal scholarship on which the courts in different countries can rely. . . . Our mission must be to reinduce in our jurists an attitude of mind and a common way of thought which will enable them to do justice to the unified rules and apply them in a consistent manner' ('Jus commune, nationale Kodifikation und internationale Abkommen, drei historische Formen der Rechtsvereinheitlichung', in *Le nuove frontiere del diritto* (Atti del Congreso di Bari) I, 171, 192 (1979)).

It is significant that the herald of this mission was a *legal historian*. COING was not writing on a *tabula rasa* or proposing anything novel when he referred to a common European outlook on law: he was reminding us of something we have tended to forget, namely that right up to the eighteenth century, when the idea of codification took root, Europe actually did enjoy a unity of legal outlook under the *ius commune*. Codification then made its triumphal progress through the nascent nation states with the deplorable result that lawyers stopped looking beyond their national borders. But two centuries of legal nationalism have not destroyed the fundamental unity of European private law, as research in legal history has demonstrated; it has also shown us that even the Common Law of England was affected by its contacts with continental legal culture.

See ZIMMERMANN, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', *JZ* 1992, 8; SCHMIDLIN, 'Gibt es ein gemeineuropäisches System des Privatrechts?' in SCHMIDLIN (ed.), *Vers un droit européen commun/Skizzen zum gemeineuropäischen Privatrecht* (1994) 33; SCHULZE, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', *ZEuP* 1993, 442; KNÜTEL, 'Rechtseinheit in Europa und römisches Recht', *ZEuP* 1994, 244; ZIMMERMANN, 'Der europäische Charakter des englischen Rechts, Historische Verbindungen zwischen civil law und common law', *ZEuP* 1993, 4; GORLA/MOCCIA, 'A "Revisiting" of the Comparison between Continental Law and English Law (16th–19th Century)', 2 *J Leg. Hist.* 143 (1981); MOCCIA, 'English Law Attitudes to the Civil Law', 2 *J Leg. Hist.* 157 (1981); HELMHOLZ, 'Continental Law and Common Law: Historical Strangers or Companions?' [1990] *Duke LJ* 1207; NÖRR, 'The European Side of the English Law, A Few Comments from a Continental Historian', in COING/NÖRR (eds.), *Englische und kontinentale Rechtsgeschichte: Eine Forschungsprojekt* (1985) 15; GORDLEY, 'Common Law and Civil Law: Eine überholte Unterscheidung', *ZEuP* 1993, 498; GLENN, 'La civilisation de la common law', *Rev. int. dr. comp.* 45 (1993) 559.

This presents comparative law with a challenge. No longer can it confine itself to making proposals for the reform of national law, valuable though that is, for as long as it does so, it will inevitably be tainted with nationalism, regarding national legal systems as given and fixed, and looking to divergences and convergences only to see what can be of use to them. Comparative law must now go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe; it can do this by

taking particular areas of law such as contract, tort, credit arrangements, company law, and family law and showing what rules are generally accepted throughout Europe and whether they are developing on convergent or divergent lines. What is needed is a body of legal literature which presents the different areas of law from a European perspective, not focusing on any particular legal system or its systematics and not addressed to readers of any particular nation. Of course such works must take account of rules of French, German, and English law, but they should treat them as local variations on a theme, a theme common to all Europe. They must take account of the powerful social policies which have influenced private law throughout Europe, such as the protection of the consumer and the environment, and social security provision in the event of accident, illness, and unemployment. They must not confine themselves to the substance of the law, they must also portray the way it is created and applied, and study the legislative processes in the different countries, their method of applying the law, the style of their judgments, and the training and professional activities of their legal practitioners. The principal aim of the enterprise is not to ascertain the rules, or even compare them with a view to improving the national law: it is to make people conscious of European private law as a subject for research and teaching, common to all the countries of Europe.

These issues have been much discussed in recent years. See, for example, the articles by COING, DAVID, and SACCO in CAPPELLETTI (ed.), *New Perspectives for a Common Law of Europe* (1978); KÖTZ, 'Gemeineuropäisches Zivilrecht', *Festschrift Zweigert* (1981) 481; KRAMER, 'Europäische Privatrechtsvereinheitlichung', *JBl.* 1988, 477; COING, 'Europäisierung der Rechtswissenschaft', *NJW* 1990, 937; HONDIUS, 'Naar een Europese rechtenstudie', *Ned. Jur. (Speciaal)* 1991, 517; FLESSNER, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', *RabelsZ* 56 (1992) 243; REMIEN, 'Illusion und Realität eines europäischen Privatrechts', *JZ* 1992, 277; REMIEN, 'Ansätze für ein Europäisches Privatrecht?', *ZVglRWiss* (1988) 105; ULMER, 'Vom deutschen zum europäischen Privatrecht?', *JZ* 1992, 1; MÜLLER-GRAFF, 'Europäisches Gemeinschaftsrecht und Privatrecht', *NJW* 1993, 13; MÜLLER-GRAFF, *Privatrecht und europäisches Gemeinschaftsrecht* (2nd edn. 1991); see also KÖTZ, 'A Common Private Law for Europe', in DE WITTE/FORDER (eds.), *The Common Law of Europe and the Future of Legal Education* (1992) 31; KOOPMANS, 'Toward a New "Ius Commune"', ibid.; KRAMER, 'Vielfalt und Einheit der Wertungen im Europäischen Privatrecht', *Festschrift Koller* (1993) 729; GOODE, 'The European Law School', 13 *LS* 1 (1994).—Two periodicals started in 1993 proclaim on their masthead their devotion to the development of European private law (*Zeitschrift für europäisches Privatrecht* and *European Review of Private Law*).—A 'Commission of European Contract Law' under the presidency of OLE LANDO has been occupied since 1980 with the production of 'Principles of European Contract Law'; see LANDO, 'Principles of European Contract Law, An Alternative or a Precursor of European Legislation', *RabelsZ* 56 (1992) 261; DROBNIG, 'Ein Vertragsrecht für Europa', *Festschrift Steindorff* (1990) 1149. The first volume of the Commission's conclusions has been published:

LANDO/BEALE (ed.), *The Principles of European Contract Law, Part I: Performance, Non-performance and Remedies* (1995).

In 1989 the European Parliament in Strasbourg passed a resolution (OJ EC No. C 158/400) requesting 'that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law', but it is very far from certain that the necessary political will exists at present; nor is it clear that any actual need for it has been demonstrated or that it falls within the competence of the European Union.

On this see TILMANN, 'Zur Entwicklung eines europäischen Zivilrechts', *Festschrift Oppenhoff* (1985) 495; TILMANN, *ZEuP* 1995, 534; GANDOLFI, 'Pour un code européen des contrats', *Rev. int. dr. comp.* 91 (1992) 70; LANDO, 'Is Codification Needed in Europe?', *Eur. Rev. P. L.* 1 (1993) 157; MENGONI, *L'Europa dei codici o un codice per l'Europa* (1993); see also the articles in HARTKAMP and others (eds.), *Towards a European Civil Code* (1994).

One thing is certain, however. One cannot even begin to contemplate a European Civil Code until the way has been prepared by thoroughgoing research. History tells us as much. For example, the law in pre-revolutionary France used to be very diverse, with customary laws in the North and received Roman Law in the South, until in the sixteenth and seventeenth centuries a series of famous writers, including DUMOULIN, COQUILLE, and DOMAT, gradually elicited out of them a 'droit commun français'. It never actually existed as strict law anywhere, but was so successful in providing a doctrinal basis for the unification of French law that the eventual Code civil could be finalized in four months (see below p. 82). Again, when EUGEN HUBER published his work on *System und Geschichte des Schweizerischen Privatrechts* in 1893 there was really no such thing as Swiss private law, only a great diversity of private laws in the cantons. Greatly to his credit, HUBER based his presentation of the cantonal laws on the concept of a Swiss private law, more ideal than real, and when the Confederation finally opted for the unification of Swiss private law it was his research that provided the basis that was needed. Legal scholars today are faced with a similar challenge. They too must use the comparative method, though their material is not just the customary laws of France or the cantonal laws of Switzerland but the positive private law of all the countries in Europe. This is some task! But if we succeed in it, we will have produced the indispensable intellectual groundwork for a European Civil Code against the day when political and practical considerations enable it to be put on the agenda.

3

The Method of Comparative Law

ANCEL, *Utilité et méthodes de droit comparé* (1971).

CONSTANTINESCO, *Rechtsvergleichung* II: *Die rechtsvergleichende Methode* (1972).

DÖLLE, 'Rechtsdogmatik und Rechtsvergleichung', *RabelsZ* 34 (1970) 403.

DROBNIG, 'Methodenfragen der Rechtsvergleichung im Lichte der "International Encyclopedia of Comparative Law"', in: *Ius privatum gentium, Festschrift Max Rheinstein* I (1969) 221.

EÖRSI, *Comparative Civil (Private) Law* (1979).

ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (2nd edn. 1964).

FIKENTSCHER, *Methoden des Rechts in vergleichender Darstellung*, 4 vols. (1975–7).

FRANKENBERG, 'Critical Comparisons: Re-Thinking Comparative Law', 26 *Harv. Int. LJ* 457 (1985).

JESCHECK, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955).

KAHN-FREUND, 'Comparative Law as an Academic Subject', 82 *LQ Rev.* 40 (1966).

KÖTZ, 'Rechtsvergleichung und Rechtsdogmatik', *RabelsZ* 54 (1990) 203.

NEUMAYER, 'Ziele und Methoden der Rechtsvergleichung', in: *Recueil des travaux suisses présentés au Congrès international de droit comparé* 9 (1976) 45.

RABEL, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (1925), reprinted in: Rabel, *Gesammelte Aufsätze* III (ed. Leser, 1967) 1.

——, 'Die Fachgebiete des Kaiser-Wilhelm-Instituts für ausländisches und internationales Privatrecht', in: *25 Jahre Kaiser Wilhelm-Gesellschaft zur Förderung der Wissenschaften* III (1937) 77, reprinted in: Rabel, *Gesammelte Aufsätze* III (ed. Leser, 1967) 180.

RHEINSTEIN, 'Comparative Law—Its Functions, Methods and Usages', 22 *Ark. L. Rev.* 415, printed in: RHEINSTEIN, *Gesammelte Schriften* I (1979) 251.

——, *Einführung in die Rechtsvergleichung* (2nd edn. 1987).

SANDROCK, *Über Sinn und Methode der zivilistischen Rechtsvergleichung* (1966).

SCHLESINGER, 'The Common Core of Legal Systems, An Emerging Subject of Comparative Study', in: *Twentieth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema* (1961) 65.

ZACHER (ed.), *Methodische Probleme des Sozialrechtsvergleichs* (1977).

ZWEIGERT, 'Rechtsvergleichung, System und Dogmatik', *Festschrift Böttticher* (1969) 443.

——, 'Die kritische Wertung in der Rechtsvergleichung, *Festschrift Schmitthoff* (1973) 403.

I

ACCORDING to GUSTAV RADBRUCH, 'sciences which have to busy themselves with their own methodology are sick sciences' (*Einführung in die Rechtswissenschaft* (12th edn., 1969) 253). Though generally true, this is not a diagnosis which fits modern comparative law. For one thing, comparatists all over the world are perfectly unembarrassed about their methodology, and see themselves as being still at the experimental stage. For another, there has been very little systematic writing about the methods of comparative law. There are thus no signs of the disease in question. The same is true of comparative law as practised by legislators for a long time. Since the great codifications of Western Europe, national enactments and international regulations of all kinds have been preceded by critical and comparative surveys. This has been very successful and, because of its success, has given rise to no methodological worries. The same is true of modern comparative law as a critical method of legal *science*, as described and practised by RABEL, though the reasons for this are different: so recent a discipline could not be expected to have an established set of methodological principles. Even today the right method must largely be discovered by gradual trial and error. Experienced comparatists have learnt that a detailed method cannot be laid down in advance; all one can do is to take a method as a hypothesis and test its usefulness and practicability against the results of actually working with it. Earlier theories, some examples of which have been given in the previous chapter, committed the error of supposing that the basis, goals, and methods of comparative law could be determined a priori from a philosophy or scheme of law. Even today it is extremely doubtful whether one could draw up a logical and self-contained methodology of comparative law which had any claim to work perfectly. Most probably there will always remain in comparative law, as in legal science generally, let alone in the practical application of law, an area where only sound judgment, common sense, or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness.

If there is a 'sick science' in RADBRUCH's sense today it is not comparative law but rather legal science as a whole. Though the hollowness of the traditional attitudes—unreflecting, self-assured, and doctrinaire—has increasingly been demonstrated, they are astonishingly vital. New and more realistic methods, especially those of empirical sociology, have been developed, but it is mere wishful thinking to suppose that they characterize our legal thought. One of these new methods is comparative law and it is preeminently adapted to putting legal science on a sure and realistic basis. Comparative law not only shows up the emptiness of legal dogmatism and systematics but,

because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules, it develops a new and particular system, related to those demands in life and therefore functional and appropriate. Comparative law does not simply criticize what it finds, but can claim to show the way to a better mastery of the legal material, to deeper insights into it, and thus, in the end, to better law. It therefore makes good sense to pay quite close attention to the method of comparative law—not because comparative law is sick, but because legal science in general is sick, and comparative law can cure it.

We are concerned not only with a method of *thinking*—the principles whose application gives the right results—but also a method of *working*: How does one actually set about a task in comparative law? This at least the beginner can expect from an introductory work, to be told the lessons of experience so that he does not set to work without any guidance at all, and waste his time in unprofitable detours.

II

As in all intellectual activity, every investigation in comparative law begins with the posing of a question or the setting of a working hypothesis—in brief, an idea. Often it is the feeling of dissatisfaction with the solution in one's own system which drives one to inquire whether perhaps other legal systems may not have produced something better. Contrariwise, it may be the pure and disinterested investigation of foreign legal systems which sharpens one's criticism of one's own law and so produces the idea or working hypothesis.

The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. This proposition may seem self-evident, but many of its applications, though familiar to the experienced comparatist, are not obvious to the beginner. The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system. Thus instead of asking, 'What formal requirements are there for sales contracts in foreign law?' it is better to ask, 'How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?' Instead of asking, 'How does foreign law regulate *Vorerbschaft* and *Nacherbschaft*?'

one should try to find out how the foreign law sets about satisfying the wish of a testator to control his estate long after his death. To take another example: only in Germany does one meet with the concept of 'disappearance of enrichment' (*Wegfall der Bereicherung*, §818 par. 3 BGB), yet all systems must resolve the conflict which arises when a person who is bound to restore a thing received under an invalid contract no longer has the thing to restore. One must never allow one's vision to be clouded by the concepts of one's own national system; always in comparative law one must focus on the concrete problem.

The beginner often jumps to the conclusion that a foreign system has 'nothing to report' on a particular problem. The principle of functionality applies here. Even experienced comparatists sometimes look for the rule they want only in the particular place in the foreign system where their experience of their own system leads them to expect it: they are unconsciously looking at the problem with the eyes of their own system. If one's comparative researches seem to be leading to the conclusion that the foreign system has 'nothing to report' one must rethink the original question and purge it of all the dogmatic accretions of one's own system. The German legal system in particular is conceptually so highly developed that its practitioners think of it as being almost a product of natural law and have great difficulty in disentangling themselves from its concepts. It is only when one has roamed through the entire foreign legal system without avail, asking a local lawyer as a last resort, that one can safely conclude that it really does not have a solution to the problem. This hardly ever happens, but even if it does, that is no reason to terminate one's comparative study. To ask *why* a foreign system has not felt the need to produce a legal solution for a particular problem may lead to interesting conclusions about it, or about one's own law. Sometimes the solution in one's own system is quite superfluous, thought up in the interests of theoretical completeness by the academics who drafted the Code (compare the 'joke transaction' (*Scherzgeschäft*) of §118 BGB). Often a solution is provided by custom or social practice, and has never become specifically legal in form. The same is true if there is something about the structure of the foreign society which makes the adoption of a legal solution unnecessary. Again an inquiry into the source of so different a sense of justice may produce interesting conclusions.

This, then, is the negative aspect of the principle of functionality, that the comparatist must eradicate the preconceptions of his native legal system; the positive aspect tells us which areas of the foreign legal system to investigate in order to find the analogue to the solution which interests him.

The basic principle for the student of foreign legal systems is to avoid all limitations and restraints. This applies particularly to the question of 'sources of law'; the comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers

there would treat as a source of law, and he must accord those sources the same relative weight and value as they do. He must attend, just as they do, to statutory and customary law, to case-law and legal writing, to standard-form contracts and general conditions of business, to trade usage and custom. This is quite essential for the comparative method. But it is not enough. To prepare us for his view of the full requirements of the comparative method, RABEL says: 'Our task is as hard as scientific ideals demand . . .' and then he proceeds:

'The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history—war, revolution, colonisation, subjugation—religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences; and not least important is the striving for a political or legal ideal. Everything in the social, economic and legal fields interacts. The law of every developed people is in constant motion, and the whole kaleidoscopic picture is one which no one has ever clearly seen' (above p. 32, at pp. 3 ff.).

But one must be realistic. It is too much to say that one must systematically master all this knowledge and then keep it in mind before one is allowed to embark on any kind of comparative work. But RABEL's demands are justified if they are understood to mean that the comparatist must make every effort to learn and remember as much as he can about foreign civilizations, especially those whose law has engendered the great families of legal systems.

Writers often stress the number of traps, snares, and delusions which can hinder the student of comparative law or lead him quite astray. It is impossible to enumerate them all or wholly to avoid them, even by the device of enlisting multinational teams for comparative endeavours. The best advice one can give the novice is EICHENDORFF's: 'Hüte dich, sei wach und munter' (Watch out, be brave, and keep alert). Even so, the cleverest comparatists sometimes fall into error; when this happens the good custom among workers in the field is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right.

RABEL once said that in their explorations on foreign territory comparatists may come upon 'natives lying in wait with spears' (*RabelsZ* 16 (1951) 341); but let his wit not frighten us out of ours.

III

The comparatist who wants to find in a foreign system the rules which are functionally equivalent to those which interest him in his native law requires

both imagination and discipline. Many instances could be given, some of which are treated *in extenso* below. Suppose that the question is how to enable persons incapable of acting for themselves (minors, lunatics, persons under interdict) to participate in legal affairs. For the European lawyer the notion of 'statutory representative' provides the ideal, if not the only imaginable answer. The idea is so self-evident that he thinks nothing of it: every child from the day he is born is provided with a person—the local youth authority if all else fails—who is comprehensively empowered by statute to represent him. Yet the Common Law has got by quite satisfactorily without any such legal institution. There the parents of a child are not automatically entitled or bound to represent him in legal affairs generally or in litigation in particular. When an infant is making a claim, he does so through a person appointed by the court for this purpose, called his 'next friend'. When an infant is being sued, the court similarly appoints a 'guardian *ad litem*'. Should a minor become entitled to an estate, the court in certain circumstances appoints an 'administrator *durante minore aetate*'. Furthermore a child may under certain circumstances be declared a 'ward of court', whereupon the court itself assumes powers of representation which in the normal case it later transfers to others. In the Common Law 'trustees' have the duties in relation to a child's property which on the Continent are performed by the statutory representative, for it has long been the rule in Anglo-American law to transfer property not to the child himself but to a trustee to manage on the child's behalf. This example shows that what the Continental lawyer sees as being a single problem and solves with a single institution is seen by the common lawyer as being a bundle of more specific problems which he solves with a plurality of legal institutions, most of them of ancient pedigree. (See further Ch. 32 III.) One should be frank enough to say, however, that though the English system has a certain antiquarian charm about it, it is so extremely complex and difficult to understand that no one else would dream of adopting it.

But we must not too readily infer that it is only the Continental systems, with their tendency to abstraction and generalization, which develop the grand comprehensive concepts, while the Common Law, with its inductive and makeshift habits, produces low-level legal institutions specially adapted to solve particular concrete problems. Things may be the other way round. A counterexample demonstrates once again that even if the legal institutions in different systems are historically and conceptually quite different, they may still perform the same function in the same way. The counterexample is the Anglo-American *trust*. The trust stems from a brilliantly simple notion: interests in a piece of property are split between a 'trustee', who has powers of administration and disposition, and others, often successive in time, who have a defined right to part of the proceeds of the property. This unitary conception is used by common lawyers in family law, in the law of succession, in

the law of charities and companies, and even in the law of unjust enrichment; the trust thus satisfies a great many needs well known to European lawyers who deal with them with the aid of a whole panoply of extremely heterogeneous legal institutions.

Many more examples could easily be given. One system may meet a need by the *rei vindicatio* or the *actio negatoria* while another satisfies it by a claim in tort; claims for support in one country may be replaced in another by public relief of poverty; and claims for the division of property in one place may be paralleled by devices of inheritance law in another, or vice versa. All these examples are instances of the replacement of one legal rule by another *legal* rule, albeit of a different conceptual stamp. But often the comparatist must go beyond the purely legal devices, for he finds that the function performed in his own system by a rule of law is performed in a foreign system not by a legal rule at all, but by an extralegal phenomenon. One can only discern this by investigating the facts behind the law. Thus there may be general conditions of business which have not found their way into the books, but which in practice supersede or bypass rules of law fixed by the legislature or the judiciary. There may also be unwritten rules of commercial practice, matters of implicit agreement, which inhibit a party from using a right which the legal system accords to him. It may even be the case that a particular social problem, regulated in one system by rules of law, is wholly unregulated somewhere else, being controlled by mechanisms which operate outside the legal system altogether. Of course such a situation must be investigated, and the results brought into the comparison, for where a problem is solved by extralegal means one cannot simply assert that the foreign *law* does not deal with the problem without giving a false and misleading picture even of that legal system.

An example of this is provided by the question, when are offers binding? In German law the offeror is bound by his offer, in the sense that he cannot effectively withdraw it, either during a period set by himself or during a reasonable period (§145 BGB). In the Common Law, barring legislative intervention, the offeror may withdraw his offer at any time until it has been accepted, even when he has said that it will remain open for a stated time. The *reality* in both systems is quite different from what one would infer from these legal rules. It is well known that German merchants often insert terms like 'freibleibend', 'ohne Obligo', and 'Lieferungsmöglichkeit vorbehalten', which often appear also in general conditions of business; such clauses not only prevent the offer from being binding, they may prevent its being an offer at all, and have the effect of turning it into an invitation to submit offers, an *invitatio offerendi*. Contrariwise, the Common Law has developed several devices which weaken the practical effect of the rule that offers are freely revocable. What is especially interesting for us is that there are extralegal inhibitions which limit capricious revocation: such a revocation is

legally effective but it is regarded as unfair and therefore not done (see below Ch. 26 V).

Another example shows how the comparatist must sometimes look outside the law. All developed legal systems, one might think, must have legal rules which protect the purchaser of an interest in land from the harm which could result from any outstanding and unknown property rights of third parties. But the German system with its land register and its concept of 'public reliance' (*öffentlicher Glaube*) was and is nearly unique. It has been imitated recently by other countries, especially France, and even the Anglo-American systems have for some time been experimenting, though their register system operates successfully only in a few densely populated areas. But by and large England and the United States have stuck to the old 'conveyancing' system, whereby the purchaser's attorney has to search through the deeds provided by the vendor in order to see that there is an unbroken chain of title. This system is so tiresome and expensive that 'Title Insurance Companies' have sprung up in the United States. These are private insurance companies which guarantee the insured against any loss he may suffer should a third person's rights diminish the value of his property. Companies will enter such an insurance contract only when they have checked their own sources and have established that the risk of the emergence of any conflicting interest is slight. These companies often have a monopoly in their locality and they have often been in business since the turn of the century, so the evidence they possess is virtually complete. In fact the function performed by the German land register is performed in the United States by the files and books of Title Insurance Companies. For details of 'conveyancing' and 'Title Insurance Companies', see the comparative study of v. HOFFMANN, *Das Recht des Grundstückskaufs* (1982).

The examples we have given point to a conclusion which the comparatist so often reaches that one can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation. It is true that there are many areas of social life which are impressed by especially strong moral and ethical feelings, rooted in the particularities of the prevailing religion, in historical tradition, in cultural development, or in the character of the people. These factors differ so much from one people to another that one cannot expect the rules which govern such areas of life to be congruent. Should freedom of testation be curtailed in the interests of a decedent's widow and family? Under what conditions should divorce be possible? Should same-sex marriages be permitted, or some comparable legal regime be on offer? Should unmarried persons be allowed to adopt? Different legal systems answer these questions quite differently, and the answers they give are sometimes maintained with such fervour that when

courts have occasion, thanks to a rule of conflicts law, to apply the rule of a foreign country, they tend to ask whether that different rule is consistent with the *ordre public* of their own jurisdiction. So there are areas in comparative law where judgment must be suspended, where the student simply cannot say which solution is better.

Thus for more than a decade the European Union has been trying to create a European company ('societas Europea') which would operate under the same conditions in all member states. It has not succeeded. The principal obstacle has been that states have quite different views on how, if at all, workers should participate in decision-making within the company.—Again, while one should not exaggerate the differences between England and the continent in matters of civil procedure, many of them do reflect old-established ideas ingrained in their legal culture; for example, English lawyers are convinced that the only way to reach a decision is by 'trial', by a single continuous concentrated oral proceeding in which all the parties produce their whole case at one sitting—factual assertions, evidence, legal argument—before a judge who renders his decision on the spot (see below p. 271 f.).

But if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively 'unpolitical', we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way. Indeed it almost amounts to a '*praesumptio similitudinis*', a presumption that the practical results are similar. As a working rule this is very useful, and useful in two ways. At the outset of a comparative study it serves as a heuristic principle—it tells us where to look in the law and legal life of the foreign system in order to discover similarities and substitutes. And at the end of the study the same presumption acts as a means of checking our results: the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.

IV

The question how the comparatist should set out and how far he should go in his search for material is intimately related to the meaning and purpose of comparative law, to its very methods of thought. That is why we have already dealt with it, concluding that he should go as deep as possible into his chosen systems. But there is an anterior question, namely which legal systems he should choose to compare in the first place. Here sober self-restraint is in order, not so much because it is hard to take account of everything as because experience shows that as soon as one tries to cover a wide range of legal systems the law of diminishing returns operates. There are good reasons for this. Mature legal systems are often adopted or extensively imitated by others; as long as these other so-called 'affiliated' legal systems maintain the style of the parent system, they usually do not possess to the same degree that blend of originality and balanced maturity in solving problems which characterizes the 'significant' legal system. While they are at this stage of development, the comparatist may ignore the affiliate and concentrate on the parent system. This proposition, however, is more of a working rule than a firm conclusion of comparative methodology, since in fact the matter is rather subtle and complex.

To show what delicacy is required, take the case of the scholar in private law who wants to include the Romanistic systems in his comparative study. In addition to France, the parent system, he must also consider Italy where, behind a façade prevailing in the early stages, one finds an impressive wealth of ideas on private law matters, stimulated, perhaps, by the codification of 1942. The legal systems of Spain and Portugal, on the other hand, do not often call for or justify very intensive investigation.

Much the same can be said of the Common Law family. The eighteenth-century comparatist could safely have concentrated on the law of England and ignored North America. Today the situation is quite different, if not the other way round. Though England is unquestionably the parent system, the law of the United States, while staying in the family, has developed so distinctive a style (see below Ch. 17) that a comparatist would fall into error if he drew only on English, to the exclusion of American, law.

It is difficult to speak generally of how the comparatist should limit his field of inquiry, since it all depends on the precise topic of his research. If he is comparing the style of different families of law, rather than particular institutions or solutions of particular problems, then he can generally limit himself to the parent systems of the great legal families. If, on the other hand, he is dealing with particular questions, the following rule of thumb may be suggested. Some problems of private law, especially in the law of contract, tort, and property, are 'classical'. For these it will normally be sufficient to study English and American law in the Anglo-Saxon family, French and Italian law in the Romanistic family, and, in the Germanic systems, Germany and Switzerland (though here perhaps the native lawyer stands too close to see properly). It is worth while to bring in the law of Denmark and Sweden of the Nordic systems, despite the language difficulties, because of their refreshing lack of dogma. For questions of a more specific nature, outside the heartlands of private law already mentioned, a different principle of selection applies, but even here it is rarely safe to ignore the

parent systems. To give just a few examples: questions of anti-trust law will find more answers in the United States than in France; the limitation of liability of trading concerns is distinctively, though perhaps not best, treated in Liechtenstein; fairness of trial has received more attention in England than elsewhere. Finally there may be quite topical legal problems with which legislators and judges all over the world are currently grappling. Here the comparatist may often have to consider the solutions offered by quite small jurisdictions. Thus *England* has had many more cases involving carriage by sea than any other country; *Sweden* has found quite original ways to protect consumers who take out insurance or rent dwellings; the Canadian Province of *Quebec* has replaced tort law by accident insurance to compensate victims of highway accidents, and *New Zealand* has extended this to *all* accidents (see Ch. 42 VI below). In family law there is much to be learnt from the legislation of the *Scandinavian* countries. It is clear, therefore, that the rule proposed is simply a rule of thumb, and no substitute for the experience and flair which a comparatist urgently needs if he is to make a proper choice of legal systems to study.

DROBNIG (above p. 32) has doubted whether in principle the comparatist need study only the great 'parent' systems. He points out that these systems have no monopoly of legal inventiveness and that therefore the comparatist should invoke all the legal systems of the world which might make any contribution to the problem being studied. After such a world-wide investigation the comparatist should present, in the form it takes in a representative system, each of the different types of solution which are to be found. DROBNIG developed this view in the context of the *International Encyclopedia of Comparative Law*—an undertaking backed by enormous financial resources, in which hundreds of comparatists from all over the world participate. In the case of wholesale research like this (see ZWEIGERT, *RabelsZ* 31 (1967) 539), it is possible and justifiable to accede to DROBNIG's exacting demands, since provision was made for each of the participating scholars to visit libraries and question expert colleagues in almost every country, in order to obtain a complete picture of the world's legal systems. In such a situation there was no need to exclude a priori and without detailed investigation any legal system at all, even if it had no great legal experience and had not therefore been able to test by case-law and try by scholarly criticism the solutions adopted. But most comparative research is not done by international teams with world-wide coverage, and it might not be desirable if it were. Comparative law is still useful and necessary when undertaken by an individual, and the comparison of individual systems, as opposed to those of the whole world, is important, indeed indispensable. So although making a selection may be painful, it is unavoidable on practical grounds. If a selection must be made, a criterion of selection must be adopted, and for this purpose the rules of thumb outlined above—for they are no more than that—still seem to offer a useful point of departure.

V

As one researches the chosen legal systems one makes comparisons the whole time, often quite unconsciously: comparison, indeed, stimulates the enterprise and determines the choice of materials. But as a creative activity going beyond the mere actual absorption of the data, the process of comparison proper starts only when the reports on the different legal systems have been completed. To present such reports before the comparison proper begins is an established method of research and a proven way of constructing works on comparative law. Separate reports should be offered for each legal system or family of legal systems, and they should be objective, that is, free from any critical evaluation, though containing all significant qualifications or modifications. Whoever reads or uses a work on comparative law must be made familiar with the basic material, or he will be in no position to make the necessary comparisons, but in any case it is useful to give jurists access to legal systems hitherto unfamiliar to them. Occasionally an unusual topic will demand a different method of treatment, for example, where the problem under scrutiny involves several different sub-questions or crops up in cases of different types: then it may be desirable to devote separate treatment to each sub-question or type of case, and provide a country report on each.

But merely to juxtapose without comment the law of the various jurisdictions is not comparative law: it is just a preliminary step. The actual comparison which then begins is the most difficult part of any work in comparative law, and the process is so much affected by the peculiarities of the particular problem and of its solutions in the different systems that it is impossible to lay down any firm rules about it. One can only tentatively state some basic generalities.

It goes without saying that a comparative analysis will bring out the differences between the actual solutions. It is, indeed, the feeling of surprise that such differences exist which first prompts us to undertake comparative researches. But one does not gain much by simply listing the similarities and differences one discovers: this is really just to repeat in a clearer form what is already contained in the reports on each jurisdiction. This may be sufficient where each of the jurisdictions gives a clear and easily comprehensible solution to the problem in question, but things are not often as easy as this, as our examples have shown. Furthermore, it is precisely the more taxing legal questions which justify comparative treatment. The process of comparison at this stage involves adopting a new point of view from which to consider all the different solutions. The objective report which sets out the law of a particular jurisdiction will give a comprehensive portrayal of its legal solution to a practical problem, but it does so 'on its own terms', with its particular statutory rules or decisions, its characteristic conceptual form,

and in its systematic context: the significance of this has been brought out above. But when the process of comparison begins, each of the solutions must be freed from the context of its own system and, before evaluation can take place, set in the context of all the solutions from the other jurisdictions under investigation. Here too we must follow the principle of functionality: the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. If we find that different countries meet the same need in different ways, we must ask why. This is a particularly demanding task, since the reasons may lie anywhere in the whole realm of social life, and one may have to venture into the domains of other social sciences, such as economics, sociology or political science (see above p. 10 f.).

VI

The next step in the process of comparison is to build a system. For this one needs to develop a special syntax and vocabulary, which are also in fact necessary for comparative researches on particular topics. The system must be very flexible, and have concepts large enough to embrace the quite heterogeneous legal institutions which are functionally comparable. To give an example: all legal systems have somehow to distinguish those expressions of a person's will which have a binding effect from those which do not, but the legal techniques they use for this purpose are very different. One way is to insist on purely objective requirements (formality, typicality of object, quid pro quo), while at a more developed stage it may be left to the judge as a matter of pure interpretation. Thus a system of comparative law must have a category which includes 'form', 'causa' (in one of its protean meanings) and 'consideration', and which also suggests that it is concerned with distinguishing the legally binding expression of will from the merely social utterance: perhaps 'indicia of earnestness' would do.

To take another example. It has been said that the principle that an unjust enrichment must be restored is 'ubiquitous' (ESSER, above p. 32, p. 367). So it is, but it appears in various guises and serves very various functions. What in one system is seen as a claim for restitution appears in another as a claim in tort and in a third as a claim for rescission of contract. A system of comparative law must here find a higher concept related to the function common to all these claims, or several different higher concepts, one for each of the different functions of restitutionary claims and capable of including claims of a different cast but similar practical object: perhaps one might have 'restitution of payments gone wrong', 'restitution for appropriating the property of others', 'restitution for unjustifiably using another's thing',

and so on (see v. CAEMMERER, 'Bereicherung und unerlaubte Handlung', *Festschrift Rabel* I (1954) 333). There are simpler examples: we should talk of 'breach of contract' rather than '*Unmöglichkeit*' [impossibility], 'liability for others' is a better expression than 'liability for assistants', 'liability for servants' or 'respondeat superior'; 'strict liability' is more comprehensive than '*Gefährdungshaftung*' or '*théorie du risque*', and so on.

A system of comparative law will thus seem to be rather a loose structure. The component concepts cast a wider net than those of national systems: this is because the functional approach of comparative law concentrates on the real live problem which often lurks unseen behind the concepts of the national systems. The system produced by comparative law is, however, functionally coherent: its concepts identify the demands that a particular slice of life poses for the law in all systems where the social and economic conditions are similar and provide a realistic context within which to compare and contrast the various solutions, however much they may differ technically or substantially. DROBNIG has shown that the wider the international coverage of a comparative work is, the more necessary, though the more problematical, the development of such structural concepts is (above p. 32, at pp. 228 ff.). The task is not, however, different in nature from that of the librarian who needs a supranational system of concepts if he is to arrange his foreign materials in topical categories rather than simply in national groupings.

It now becomes unmistakably clear that an international legal science is possible. After a period of national legal developments, producing academically and doctrinally sophisticated structures, each apparently peculiar and incomparable, private law can once again become, as it was in the era of natural law, a proper object for international research, without losing its claim to scientific exactitude and objectivity. To this recognition of the fact that law, and especially private law, may properly be studied outside national boundaries, comparative law has greatly contributed, though other legal disciplines also have long been pointing the way. The jurisprudence of interests, the *Freirechtsschule*, the sociology of law, legal realism—all these have played a part by criticizing purely national conceptualism, deprecating scholarship which is territorially limited, and emphasizing that legal science should study the actual problems of life rather than the conceptual constructs which seek to solve them. Law is 'social engineering' and legal science is a social science. Comparative lawyers recognize this: it is, indeed, the intellectual and methodological starting-point of their discipline. Comparative law is thus closely in tune with current trends in legal science when it asks what the function of legal institutions in different countries may be, rather than what their doctrinal structure is, and when it orders the solutions of the various systems upon a realistic basis by testing them for their responsiveness to the social needs they seek to fill. It adds the international dimension and generates a supply of material beyond the imagination of even the cleverest stay-at-home

lawyer. The vision of a universal comparative legal science is already sketched in the preface to JHERING's *Geist des römischen Rechts*:

'. . . legal science has degenerated into the jurisprudence of states, limited like them by political boundaries—a discouraging and unseemly posture for a science! But it is up to legal science itself to cast away these chains and to rediscover for all time that quality of universality which it long enjoyed: this it will do in the different form of comparative law. It will have a distinct method, a wider vision, a riper judgment, a less constrained manner of treating its material: the apparent loss [of the formal community of Roman law] will in reality prove a great gain, by raising law to a higher level of scientific activity.' (JHERING, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part I (7th/8th edn., 1924) p. 15.)

JHERING's vision is on the point of becoming reality, and comparative law has greatly helped to bring this about. If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar. Every legal system in the world is open to the same questions and subject to the same standards, even countries of different social structures or different stages of development. Our universal legal science must have a structure and all the conceptual apparatus for ordering, organizing, and transmitting its material; we have shown above what form these must take. These cannot be laid down a priori, but only achieved inductively through continuing experiments in comparative law. In doing this comparative law will itself begin to be truly international. Though great progress has been made, most German work in comparative law even today still starts from a particular question or legal institution in German law, proceeds to treat it comparatively, and ends, after evaluating the discoveries made, by drawing conclusions—proposals for reform, new interpretations—for German law alone. The same is doubtless true of comparative studies in other countries. This activity could be called national comparative law. What we must aim for is a truly international comparative law which could form the basis for a universal legal science. This new legal science could provide the scholar with new methods of thought, new systematic concepts, new methods of posing questions, new material discoveries, and new standards of criticism: his scientific scope would be increased to include the experience of all the legal science in the world, and he would be provided with the means to deal with them. It would facilitate the mutual comprehension of jurists of different nationalities and allay the misunderstandings which come from the prejudices, constraints, and diverse vocabularies of the different systems.

VII

After doing his research the comparatist must proceed to a critical evaluation of what he has discovered. Sometimes one of the solutions will appear

'better' or 'worse' for the reasons given above (see p. 39). Often, however, he will find that the different solutions are equally valid, or that, as RABEL said, 'a reasoned choice is hard to make' (*RabelsZ* 16 (1951) 357). Often he will find that one solution is clearly superior. Finally, he may be able to fashion a new solution, superior to all others, out of parts of the different national solutions. The comparatist must consider all this, and be explicit about it. It is true that RABEL wanted to distinguish such evaluation on policy grounds from comparative law properly so-called, as being a 'distinct activity . . . because, though neither task is free from subjectivity, the pure comparison of laws can in general claim for its conclusions and theoretical pronouncements a greater degree of general validity than can value-judgements and conclusions directed to practical matters like legislative policy . . .' ('Fachgebiete', above p. 32, at p. 186). Much could be said on the question whether the critical evaluation of law is a legitimate scientific activity; it raises the famous dispute over KELSEN's pure theory of law, and this is not the place to give a final answer. The fact is, as RABEL said: 'Lawyers who are used to criticism and are animated by the desire to improve the law can hardly prevent themselves from seeing and commenting upon the better practical rule.'

In fact the comparatist is in the best position to follow his comparative researches with a critical evaluation. If he does not, no one else will do it, and if no one does it, comparative law will deserve BINDER's sour description of 'piling up blocks of stone that no one will build with'. The comparatist uses just the same criteria as any other lawyer who has to decide which of the possible solutions is most suitable and just. The comparatist is no more adept at this than the lawyer who remains rooted in the law of his homeland, but he does have more material at his disposal, he is aware of solutions which would not occur to the homespun lawyer, however imaginative, and he is not blinded by faith in the superiority of his own system. If it is objected that evaluation is inevitably subjective, we can turn again to RABEL for rebuttal: 'If the picture presented by a scholar is coloured by his background or education, international collaboration will correct it' (*RabelsZ* 16 (1951) 359).

4

The History of Comparative Law

ANCEL, 'Les grandes étapes de la recherche comparative au XX^e siècle', in: *Studi in memoria di Andrea Torrente* (1968) 21.

——, 'Cent ans de droit comparé en France', in: *Livre du centenaire de la Société de législation comparée* (1969) 3.

BROWN, 'A Century of Comparative Law in England: 1869–1969', 19 *Am. J. Comp. L.* 232 (1971).

CONSTANTINESCO, *Rechtsvergleichung* I (1971), Part 2.

——, 'Les Débuts du droit comparé en Allemagne', in: *Miscellanea W. J. Ganshof van der Meersch* II (1972) 737.

DAVID, *Droit civil comparé* (1950) 397–429.

DÖLLE, 'Der Beitrag der Rechtsvergleichung zum deutschen Recht', in: *Hundert Jahre deutsches Rechtsleben, Festschrift zum 100jährigen Bestehen des Deutschen Juristentages* II (1960) 19.

GORLA, 'Prolegomeni ad una storia de diritto comparato europeo', *Foro it.* 103 (1980) V 11.

HUG, 'The History of Comparative Law', 45 *Harv. L. Rev.* 1027 (1932).

JESCHECK, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955).

KADEN, 'Rechtsvergleichung', in: *Rechtsvergleichendes Handwörterbuch* VI (ed. Schlegelberger, 1938) 9.

v. MEHREN, 'An Academic Tradition for Comparative Law?', 19 *Am. J. Comp. L.* 624 (1971).

MOLINA PASQUEL, 'Veinticinco años de evolución del derecho comparado: 1940–1965', *Bol. Mex. der. comp. NS* 2 (1969) 57.

POLLOCK, 'The History of Comparative Jurisprudence', 5 *J. Soc. Comp. Leg.* (2nd ser.) 74 (1903).

POUND, 'Comparative Law in the Formation of American Common Law', in: *Acta academiae universalis iurisprudentiae comparativae* I (1928) 183.

——, 'The Revival of Comparative Law', 5 *Tul. L. Rev.* 1 (1930).

RABEL, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (1925), reprinted in: Rabel, *Gesammelte Aufsätze* III (ed. Leser, 1967) 1.

——, 'Die Fachgebiete des Kaiser Wilhelm-Instituts für ausländisches und internationales Privatrecht', in: *25 Jahre Kaiser Wilhelm-Gesellschaft zur Förderung der Wissenschaften* III (1937) 77, reprinted in: Rabel, *Gesammelte Aufsätze* III (ed. Leser, 1967) 180.

RHEINSTEIN, *Einführung in die Rechtsvergleichung* (2nd edn. 1987) Chs. 5–7.

SARFATTI, 'Les premiers pas du droit comparé', in: *Mélanges Maury* II (1960) 237.

STURM, 'Geschichte, Methode und Ziel der Rechtsvergleichung', *JR* (1975) 231.

ZAJTAY, 'Réflexions sur l'évolution du droit comparé', *Festschrift Zweigert* (1981) 595.

ZWEIGERT, 'Die Gestalt Joseph Storys', *ZgesStW* 105 (1949) 590.

——, 'Jherings Bedeutung für die Entwicklung der rechtsvergleichenden Methode', in: *Jherings Erbe, Göttinger Symposion zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering* (1970) 240. Extended version in English: ZWEIGERT/SIEHR, 'Jhering's Influence on the Development of Comparative Legal Method', 19 *Am. J. Comp. L.* 215 (1971).

I

IT is in *Greece*, owing to the characteristic interest of Greek thinkers in political structures, that we find the earliest comparative researches. In his *Laws*, PLATO makes a comparison of the laws of the Greek city-states; he not only describes them, but also tests them against the ideal constitution he constructs out of them. Prior to writing his *Politics*, ARISTOTLE also examined the constitutions of no less than 153 city-states, though only the portion devoted to Athens has come down to us. This work can be described as philosophical speculation on the basis of comparative law. The only trace of comparative private law is in a fragment of THEOPHRASTUS's 'On Laws': so far as we can tell, THEOPHRASTUS's approach is quite modern, for he tries to discover the general principles in the various Greek legal systems, and then, in another chapter, to set against these principles the deviant particular rules—the very method used more recently by OTTO VON GIERKE in his presentation of German private law, and most spectacularly by EUGEN HUBER in his portrayal of the private laws of the Swiss cantons.

The *Roman Empire* offers no examples of efforts in comparative law. The Roman jurists, like those of England in later times, were too convinced of the superiority of their legal and political system to pay much attention to foreign laws. CICERO described all non-Roman law as 'confused and quite absurd'. The occasional references to foreign rules of law are just historical footnotes or theoretical amusements. But an interesting work of comparative law comes from the post-classical era, say from the third or fourth century AD. This is the *Collatio legum Mosaicarum et Romanarum*, in which excerpts from the classical Roman jurists are set against the laws of Moses, presumably with the aim of furthering Christian belief by showing that Roman and biblical law were similar.

At the beginning of the *Middle Ages* legal skill was at a low ebb, and thereafter canon and Roman law acquired such authority that no other kind of law had any interest for scholars. Furthermore the warrior chiefs believed that the conqueror could impose his law on the peoples he conquered—a coarse idea inimical to comparative law. But if writings on comparative

law are not to be found on the Continent, there are two works by FORTESCUE (died 1485) in England, *De Laudibus legum Angliae* and *The Governance of England*. In these we have comparison of English and French law; it is not, however, an objective analysis, but is obviously designed to demonstrate the superiority of English law.

In the *Age of Humanism*, when lawyers were interested in *elegantia juris*, there were more serious attempts at comparative legal analysis. Special mention should be made of STRUVE and STRYCK in the late seventeenth century, for their comparisons of Roman and German private law. The first representatives of the *Age of Enlightenment and Natural Law*, scholars like WOLF and NETTELBLADT, were very little likely to help comparative law on its way. For them, natural law was an intellectual construct to be produced by speculation a priori without reference to any empirically discovered material, though one is entitled to wonder whether behind their supposedly a priori system there does not lurk some 'concealed comparative law'. Yet two leading spirits of the age, BACON and LEIBNIZ, emphatically advanced the cause of comparative law without actually practising it. In his essay *De dignitate et augmentis scientiarum* (1623) BACON stated that the lawyer must free himself from the 'vincula' of his national system before he can estimate its true worth: the object of judgment (the national law) cannot be the standard of judgment. This perception, as valid now as ever, justifies all comparative researches. For his part, LEIBNIZ endorses comparative law from the standpoint of universal history: his plan for a 'Theatrum legale' involved a comparative portrayal of the laws of all peoples, places, and times. Nothing immediately came of these writings, but we find that subsequent natural lawyers such as GROTIUS, PUFENDORF, and MONTESQUIEU expressly used the method of comparative law to give empirical support to the teachings of natural law. The contribution of this age, therefore, is less the systematic practice of comparative law than the recognition of the theoretical value of its methods. Mention must also be made of SAVIGNY's predecessor at Göttingen, HUGO (died 1844), who aimed to produce an empirical natural law by making a comparison of all existing positive laws.

SAVIGNY's *historical school of jurisprudence*, on the other hand, had a particularly repressive effect on the development of comparative law. At first sight this is not easy to understand, since comparative law might (though it also might not) have produced some support for their view that all law is a product of the *Volksgeist*. But SAVIGNY and his followers rejected the study of any but Roman and German law: 'It is the history of our own laws—the Germanic laws, Roman law and canon law—which is and will remain the most important' ('Stimmen für und wider neue Gesetzbücher', *SavZ* 3 (1816) 5 f.).

II

Comparative law, as it is practised today, has two quite distinct roots: 'legislative comparative law', when foreign laws are invoked in the process of drafting new national laws, and 'scientific or theoretical comparative law', when the comparison of different legal systems is undertaken simply in order to improve our legal knowledge.

Legislative comparative law has the longer and more continuous history—though still not a very long one—and its methods raise fewer problems. In Germany it starts in the mid-nineteenth century. The older codes—the Prussian General Land Law of 1794 and the Austrian General Civil Code of 1811—are based more on natural law thinking than on extended comparative studies of foreign law. The same is true of the most influential code of the eighteenth century, the French Civil Code of 1804. This elegant practitioners' work, beautifully drafted, was produced in an astonishingly short time, with the principal aim—so far as it was comparative at all—of amalgamating the Roman *droit écrit* of Southern France with the principally Germanic *coutumes* of the North (compare below pp. 77 f.).

Legislative comparative law in Germany grew with the movement for the codification and unification of law within Germany. It started in that area of law where unification is most urgently called for—commercial law. The General German Negotiable Instruments Law of 1848 and the General German Commercial Code of 1861 were both based on comparative studies, not only of the laws of the different regions of Germany, which included in the Rhineland the French Commercial Code, but also of other European commercial codes, especially the Dutch Commercial Code (*Wetboek van Koophandel*) of 1838. Proof of this is to be found in the Prussian 'Entwurf eines Handelsgesetzbuches für die Preussischen Staaten nebst Motiven' (Berlin 1857) which laid the basis for the German Commercial Code of 1861 and the 'Protokolle der Kommission zur Beratung eines allgemeinen Deutschen Handelsgesetzbuches' (1857 ff.). The company law reforms contained in the Novellen of 1870 and 1884 were also based on extensive comparative researches which are preserved in the Parliamentary papers and contain a veritable treasure-house of material for the comparative history of European company law. All subsequent reforms of company law, up to the reforms of the law relating to corporate securities of the 1930s and the great reform of 1965, have also been based on wide-ranging comparative studies and affected at critical points by discussion of the foreign solutions.

But legislative comparative law was used elsewhere than in commercial law. Comparative studies preceded almost all the most important pieces of legislation, which this is not the place to list or itemize. Mention must, however, be made of the prolonged reforms of criminal law, for one of the early

monuments of German comparative law is the fifteen volumes of the *Vergleichende Darstellung des deutschen und des ausländischen Strafrechts* (1905–09); on this and subsequent developments in comparative criminal law, see JESCHECK, above p. 48, pp. 13 ff.).

Mention must be made of one final instance of the successful use of comparative law in legislation, for it culminated in the German Civil Code, which unified the private law of Germany as from 1 January 1900. In the preparation of this Code, careful consideration was given to the solutions accepted in all the systems then in force in the various parts of Germany. These included the *Gemeines Recht*, the Prussian Law, and the French Civil Code which was in force in the Rhineland and also, in a modified form, in Baden. Furthermore, on nearly all the more important questions, the comparative research was extended to include Austrian and Swiss law. Now one might have expected that, in the theoretical and scientific task of expounding the Code, German legal scholars would have used this comparative method which had proved so useful in creating it. Nothing of the sort occurred. They focused exclusively on the wording of the new texts, and if these seemed to need construction, they had recourse to the conceptual apparatus of the *ius commune*. Once the work of legislation was over, comparative law faded into the background and ceased to have any effect.

III

Scholarly comparative law has had a very different development from legislative comparative law: while the latter has developed continuously, the history of the former is marked by hesitations and rejections followed by periods of exaggerated optimism.

1. It took comparative law a very long time to obtain recognition in Germany where lawyers had long been attacked for their parochialism. FEUERBACH was one of the first to reproach German legal scholars when he said in 1810 that 'all their scholarship was devoted exclusively to what was native or naturalised'.

> 'Anatomists have their comparative anatomy, so why do jurists not have comparative law? There is no more fertile source of discoveries in any practical science than comparison and combination. A thing has to be contrasted with many other things before it can become really clear, and its particularity and essential nature can be revealed only by showing how it is similar and how different. Just as the science of linguistics comes from comparing languages, so if universal jurisprudence (indeed, legal scholarship *tout court*) is to vitalise and vindicate particular forms of legal scholarship it needs to compare the laws and legal practices of other nations at all times and places, the most like and the most different.' One must 'look to other peoples and scrutinise their laws and practices in order to sharpen one's perception of one's own law and see it in a new light, or even enrich it with new matter' (ANSELM VON FEUERBACH, 'Blick auf die teutsche Rechtswissenschaft', in Feuerbach, *Kleine Schriften vermischten Inhalts* (1833) 152, 162 f.). For more detail see MOHNHAUPT, 'Universalgeschichte, Universal-Jurisprudenz und rechtsvergleichende Methode im Werk P. J. A. Feuerbachs', in Mohnhaupt (ed.), *Rechtsgeschichte in den beiden deutschen Staaten (1988–1990)* (1991) 97.

FEUERBACH's demand for comprehensive comparative law as the basis of universal legal science set him on a collision course with SAVIGNY and the Historical School. He rejected as too narrow SAVIGNY's view that one should focus only on German (= Roman) law. He sided with THIBAUT in his famous quarrel with SAVIGNY over whether codification were possible and desirable, and agreed with him that

> 'ten lively lectures on the Persian or Chinese conception of law would do more to stimulate true juristic intelligence than a hundred addresses on the pitiful bunglings of the law of intestate succession between Augustus and Justinian' (THIBAUT, 'Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland', in Thibaut, *Civilistische Abhandlungen* (1814) 433).

FEUERBACH's charges were echoed a few decades later when JHERING lamented how legal science had degenerated into the law of political states—'a discouraging and unseemly posture for a science!' (see the full quotation above, p. 46). JHERING was no more a comparatist than FEUERBACH, though there are a number of references to foreign laws scattered through his works, but had it not been for his successful struggle on behalf of a teleological approach to law in the context of real life comparative law could not have developed in the way it has. (For details, see ZWEIGERT, 'Jherings Bedeutung' (above p. 49) *passim*).

Neither the historical school of jurisprudence, with its equation—more dogmatic than historical—of the *Volksgeist* with Roman Law, nor the conceptual jurisprudence of the pandectists, nor yet the legal positivism of the turn of the century provided conditions in which comparative law could flourish: indeed, it had no recognized place in legal science. BIERLING may be taken as typical of the positivists: comparative law is 'of little or no use for learning the principles of law' (*Juristische Prinzipienlehre* I (1894) 33). Even when, in the early twentieth century, positivism yielded to the neo-Kantian search for 'just law', the attitude adopted towards comparative law remained ambiguous. STAMMLER unequivocally discountenanced comparative law as a means of discovering the just law: the comparison of laws which were factually conditioned could never lead to the perception of those unconditionally valid modes of thought which were needed for any scientific study of law (*Lehrbuch der Rechtsphilosophie* (1922) 11 f.). Even RADBRUCH, in an essay 'On Comparative Legal Method' (*Monatschrift für Kriminalpsychologie und Strafrechtsreform* 2 (1902/1906) 422), denied that comparative law

had any significance for the underlying idea of law, though he powerfully defended its value for the legislator as 'a useful means of obtaining the widest possible view of actual law'. No amount of study of actual systems could teach us anything about just law, for the notion of just law is arrived at not empirically, but a priori (id., 423). In a later work he denied comparative law any place in the 'proper dogmatic and systematic' science of law, and classed it along with legal history and sociology of law as 'the social theory of law' (*Rechtsphilosophie* (4th edn. Wolf, 1950) 210).

It will be clear even from this brief sketch of the prevailing attitudes among German legal scholars how much opposition comparative law had to overcome in order to establish itself as a legal discipline. Its history may seem to show a steady development, but it was long regarded by most legal scholars all over the world as simply an esoteric game for a handful of outsiders. This attitude may be attributed to the fact that in their everyday activities lawyers have to deal mainly with the law of their own country, but it has been greatly reinforced during this period by the prejudices of positivism and of national legal cultures, and we cannot in good conscience say that this attitude has wholly disappeared. Even now comparative law is not yet regarded as an indispensable international component of a *culture juridique*.

2. Even if conscious antipathy to comparative law was not expressed so strongly and dogmatically elsewhere as it was in Germany, the picture was not very different; scholars were not much readier to busy themselves with other peoples' law; national prejudices were very widespread. In the same breath in which he attacked the introversion of German lawyers, RABEL felt bound to inveigh against the equally poor standing of comparative law in other countries (*Aufgabe* (above p. 48) at 12 ff.). It is against this background that we must see the successful development of comparative law.

3. There is an astonishing similarity in the way different countries in the early nineteenth century embarked on the purposive and systematic comparison of different legal systems, that is, modern comparative law. Its intellectual origins are also similar. The purposes are practical, namely reform and improvement of the law at home, rather than theoretical, philosophical, or speculative; but a part was played also by natural curiosity about other peoples' law and by the impartial feeling that perhaps those others had something to offer—a contrast with the haughty concentration of legal scholars on their own newly codified systems. ZACHARIÄ used quite characteristic language in the first issue of the world's first periodical devoted to comparative law—the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (no. 1 (1829) 25 f.):

'If, after this survey of the present extent of exchange between European peoples in literary matters, and of the previous situation with regard to law, we may conclude that legislative or jurisprudential developments in any European country will be of some interest in other European countries, the idea behind this periodical, namely to familiarize the German public with foreign laws and legal writings, requires no justification.'

In Germany special mention must be made of ZACHARIÄ's co-founder and co-editor, MITTERMAIER. He was professor at Heidelberg and the leader of a group of jurists, mainly from Southern Germany, who were interested in the practical uses of foreign and comparative law, probably, as HUG says (above p. 48, at p. 1056) under the stimulus of the recent introduction of the Code Napoléon in the Rhineland and in Baden. This did not limit the interests of the group, however, which extended to all modern legal systems, and it is especially noteworthy that this was the first time that European jurists demonstrated a deep understanding of the Common Law of England and the United States. The 28 volumes of the *Kritische Zeitschrift*, as WARNKÖNIG was to say (*KritZ* 28 (1856) 391), offer a nearly complete view of three decades of legislation and legal science abroad. It is true that the mere discovery and portrayal of foreign law is not comparative law, but the contributors almost always drew comparisons with their own legal systems.

MITTERMAIER was the first to practise comparative law by systematically juxtaposing, comparing, and evaluating the law of various systems, and he did it on the grand scale. It is true that his aim was primarily practical—the reform of criminal procedure in the *Gemeines Recht*—but that does not in the least diminish his achievement in producing a series of scientific works which withstand all criticism. MITTERMAIER's comparisons of particular areas of law or of legal institutions were both comprehensive and detailed. He did not stop at the statutory texts, but went into the reality of law as practised in the courts, and even into its factual, political, and social background.

It was clearly MITTERMAIER's example which led FOELIX to found the *Revue étrangère de législation* in *France* in 1834. His avowed aim was to help French jurists improve their knowledge of foreign laws, as well as to promote the improvement of French law. This must have seemed a most unpromising undertaking at a time when French jurists regarded their Civil Code with an awe bordering on superstition, and after a few issues the journal, which kept changing its name, had to devote more and more space to purely French law. The portion devoted to foreign law, to which FOELIX as editor was restricted, kept shrinking, and in 1850 the *Revue* ceased to appear. Even so, FOELIX seems to have had more success in establishing comparative law as an independent discipline in France than MITTERMAIER and his group had in Germany, for the collapse of comparative law studies in France in the face of positivism was much less marked. A chair of comparative legal history was founded at the Collège de France in 1831, and after holding courses in comparative criminal law from 1838, the Faculty of Law at Paris founded a chair in that subject in 1846. Although FOELIX did not see the fulfilment

of his wish to have courses given in comparative private law, it is fair to say that it was his initiative, and in particular his starting the *Revue*, which gave the first impetus to the development of comparative legal studies in France.

In England the Privy Council, as the highest court of the Empire, had to apply the law of several different foreign systems; this led to a need for 'a more ready access to the sources from whence an acquaintance might be derived with those systems of foreign jurisprudence' (BURGE, *Commentaries on Colonial and Foreign Laws* (1838) p. v). It was the aim of BURGE to satisfy this need with his *Commentaries on Colonial and Foreign Laws, generally, and in their conflict with each other, and with the Law of England* (1838). According to BURGE himself (id., vi) these included: the 'civil law' (as the English used to call Roman law); the law of Holland before the introduction of the French Civil Code; Spanish law; the *coutumes* of Paris and Normandy; the French law then in force; Scots law; English law; the local laws of the colonies in the West Indies and North America; the laws of the United States of America. BURGE's work had three aims: first, to give a comprehensive survey of the sources and rules of law in all the systems in force in the British Empire, secondly, to compare their family law, their law of persons, property, and succession, and thirdly, to show the principles of conflict of laws in the various topics. The book was highly regarded both on the Continent and in the United States as a basic work of comparative law (see HUG (above p. 48) at 1065), and in 1924 the exigent RABEL himself stated that though the work was designed for the use of the Privy Council, 'the range of material and quality of treatment make it useful as a substitute for a primer of comparative private law' (*Aufgabe* (above p. 48) at p. 12, no. 12).

A similarly practical aim, namely to satisfy the need of English tradesmen for information about the commercial law of other peoples, underlay the other notable first-fruit of English comparative law. This is LEONE LEVI's *Commercial Law of the World; or, the Mercantile Law of the United Kingdom, compared with the Codes and Laws of Commerce of the following Mercantile Countries* [58 are listed], *and the Institutes of Justinian* (1854). LEVI compared English commercial law with the trade laws of almost every country in the world. Each of his topical subdivisions begins with a short description of the relevant English law; then follows a statement of the foreign rules of law—concentrating on statutory texts and dealing rather superficially with judicial practice—and finally an 'analysis of the law' in which he indicates the similarities and differences between the various legal systems. It is worth noting that LEVI was so impressed by the success of the German General Ordinance on Bills of Exchange of 1848 that he put forward the idea of an international unified code of commercial law: this was to be achieved by international conferences, and his work was to be a basic document (see LEVI, id., vol. I, p. xv). Thus LEVI was the first to propose the international unification of a whole area of law on the basis of comprehensive comparative law.

The period 1800–50 saw an early flowering of comparative law in the United States of America as well. American law at this stage was far from being merely the child of English law, whose traditionalism ill suited the economic, social, and political conditions of a new land only just occupied and not yet developed. Furthermore the War of Independence and the later war of 1812 had left a distaste for England and everything English. It was therefore with full consciousness that, whenever new and more suitable rules had to be developed, the most famous and influential American jurists of this period reached for Roman and European law, especially for French doctrine. This was true of both JOSEPH STORY and JAMES KENT, of the former, perhaps, to an even more marked degree. Nor was this recourse to foreign legal sources just a matter of theory. The works of KENT and STORY had a great effect on the practice of the courts as well as on legal teaching; indeed KENT's *Commentaries* formed the essential basis of American law at this time. Furthermore, both writers were themselves judges and so, as never before to such an extent in any country in the Anglo-American legal family, we find a series of judicial decisions, many of them well known, which are openly and explicitly based on the Civil Law. (See, for details, POUND (above p. 48; POUND, 'The Influence of French Law in America', 3 *Ill. L. Rev.* 354 (1909).) This open interest in foreign law was not, as in other countries, the prerogative of a few scholars; it was part of the contemporary American legal scene. In 1829, the anonymous reviewer of two books on Roman law said that 'in the liberal course of professional studies general or comparative jurisprudence must be a constituent part' (2 *Am. Jurist* 60 (1829)). The syllabus and reading-list of the Harvard Law School contained a section on Civil Law which recommended JUSTINIAN's *Institutes*, POTHIER's *Law of Obligations*, and DOMAT's *Loix civiles* among others (4 *Am. Jurist* 217, 220 (1830)). There was also at this time a great demand for a Chair of Civil Law at Harvard (see, in general, HUG (above p. 48), 1068 n. 176). This interest in Civil Law is attributable in great part to the natural law thinking of the American Independence movement; by the middle of the century it had greatly diminished, and by the time of the Civil War it had quite disappeared.

A similar, though less dramatic, decline in comparative law is observable in other countries, and we must agree with HUG (above p. 48, at pp. 1069 f.) that after the middle of the nineteenth century people lost almost all interest in comparative law as a method of discovering law and of putting the discoveries to practical use.

4. The idea of 'comparative law' remained alive, however, though it came gradually to refer to a pursuit which we have earlier (above pp. 9 f.) distinguished from modern comparative law, namely 'legal ethnology' or 'universal legal history'. This species of 'comparative legal science' as it was known in Germany, became the practice of a veritable school, often influenced by

significant trends of philosophical thought. In Germany the idea of development contained in HEGEL's philosophy of history, though not his dialectic, was the admitted source of the works of GANS (*Das Erbrecht in weltgeschichtlicher Entwicklung* I (1824), especially the Preface at p. XXXIX), of UNGER (*Die Ehe in ihrer welthistorischen Entwicklung* (1850)), of POST (for example, *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichendethnologischer Grundlage* I (1880)), of KOHLER (especially *Einleitung in die vergleichende Rechtswissenschaft* (1885)), and many others. In France LERMINIER's *Introduction générale à l'histoire du droit* (1829) was clearly influenced by GANS, and in Italy AMARI's *Critica di una scienza delle legislazione comparate* (1857) was written under the influence of VICO's philosophy (see in detail ROTONDI, above p. 48). The leading work of the English school is HENRY MAINE's *Ancient Law* (1861).

5. This school of (historical) comparative legal science played a great part in the revitalization of modern comparative law towards the end of the nineteenth century, marked by a sudden growth of institutions, such as learned societies, periodicals, and professorial chairs. This occurred first and most strongly in France. POLLOCK (above p. 48) points to 1869 as the year in which comparative law gained full recognition as a new branch of legal science. That year saw the founding of the 'Société de législation comparée' which, along with its periodical, now called the *Revue internationale de droit comparé*, is still in existence today. In 1876 an 'Office de législation étrangère et de droit international' was set up in the French Ministry of Justice. But it is its acceptance into the university curriculum which marks the final recognition of comparative law as a new scholarly discipline. The founding in Paris in 1846—in the first flowering of comparative law—of a Chair in comparative criminal law has already been mentioned. In 1892 a Chair of comparative maritime and commercial law was established, a Chair of comparative constitutional law in 1895, and finally, in 1902, a Chair of comparative private law, held by SALEILLES and LÉVY-ULLMANN among others (see DAVID (above p. 48) at 408 f.).

Almost nothing similar was happening in Germany at this time. The *Zeitschrift für vergleichende Rechtswissenschaft*, founded by BERNHÖFT and COHN in 1878, was primarily devoted to comparative legal history. Germany had to wait until the foundation of the Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre in 1894 in order to obtain a society analogous to the Société de législation comparée in France. The Vereinigung was the brainchild of FELIX MEYER, *Kammergerichtsrat* in Berlin, and although it had very considerable fame and success, and survives to this day as the Gesellschaft für Rechtsvergleichung, full recognition of comparative law as a scholarly discipline was not achieved, as it was in France, by incorporation into the university syllabus before the Great War.

England at this time was also still heavily influenced by the historical school. Even in 1903 FREDERICK POLLOCK could still say, 'It makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law' (above p. 48, at p. 76). The early institutions in England must be considered in the light of this observation. HENRY MAINE became the first Professor of 'Historical and Comparative Jurisprudence' at Oxford in 1869, and in 1894 a Chair of 'History of Law and Comparative Law' was founded at University College in London, thanks to a bequest of £10,000 by the High Court judge SIR RICHARD QUAIN. But 1894 also saw the foundation of the 'Society of Comparative Legislation' on the French model, which gave modern comparative law a home in England. The Society has remained in existence up to the present day, as has its journal, now entitled the *International and Comparative Law Quarterly*.

It is a matter for speculation to what causes we should attribute this rebirth of interest in comparing the rules of foreign systems actually in force. No doubt the most important cause was the increase in economic and commercial contacts which called for a better knowledge of foreign rules or even for unified rules. The re-emergence of comparative law coincides with the first great efforts of international co-operation and unification of law, such as the treaties on copyright and trade-marks, the Universal Postal Union, and the first Hague Convention on Private Law. But the characteristic high-point of this stage of comparative law was the Paris Congress of Comparative Law of 1900. The aim set for comparative law by this Congress, so far as one can formulate it in view of the large number of contributors, was to discover the 'droit commun législatif' (SALEILLES) or the common 'stock of solutions' (ZITELMANN), and thus to bring the different systems of law closer together. The Paris Congress not only identified the aims of comparative law, as it then was; it also stamped its character with its optimistic and progressive pursuit of world unity, yet limited its scope, for its assumption that only similar things could be compared led to rather a narrow concentration on statutory law and on the legal systems of Continental Europe. MARC ANCEL's summing-up is quite accurate:

> 'At this stage in methodology, the principal aim and object of comparison is to create a rational science of law which could permit the formulation of norms appropriate to nineteenth century society in Continental Europe' ('Les grandes étapes' (above p. 48) at p. 26).

6. After the First World War the picture changes somewhat. German jurists were forced out of their 'remarkable introversion' (RABEL, *Aufgabe* (above p. 48) at 17) by Article X of the Treaty of Versailles which sought to regulate the pre-war legal relationships between nationals of combatant states. At first 'they naively supposed with their pre-war assumptions that

German concepts and methods would largely suffice to interpret and apply the Treaty of Versailles' (H. ISAY, quoted by RABEL, *Aufgabe* (above p. 48) at 19). But 'the Treaty was drafted in foreign languages, the German translation not being authentic, and it was the legal systems and perspectives of the victor nations, namely England and France, which provided the mode of drafting, the conceptual apparatus, the rules of interpretation, and the style. In such a situation there was no alternative but to investigate those systems . . .' (DÖLLE (above p. 48) at 20, citing references to works on the Treaty of Versailles). The comparative law thus required was admittedly a tool of advocacy designed to promote particular interests in litigation rather than objective scholarship, but the practical necessity of investigating so many cases produced results of value for science. It fell to RABEL, who himself had to interpret the Treaty as a member of the mixed Italian–German court of Arbitration, to free comparative law from this merely ancillary role. He saw comparative law as an independent juristic discipline whose practical usefulness to those applying the Treaty of Versailles was, scientifically speaking, contingent and collateral, even if it produced interesting data. Indeed, when, in his first basic book, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (1925), he states the arguments for comparative law, the Treaty of Versailles and the other consequences of the war are given only a passing mention (*Aufgabe* (above p. 48) at 18 ff.).

The fact that other countries also experienced it shows that this upsurge of interest in comparative law in Germany is not wholly attributable to the confrontation with other systems necessitated by the Treaty of Versailles. According to ANCEL ('Les Grandes Étapes' (above p. 48) at 26), the second phase of twentieth-century comparative law begins at the end of the First World War. In this phase the institutions are consolidated, individual research is devoted to concrete and realistic problems, and the limitation to Continental Europe is overcome. The foundation of the 'major' institutes for comparative law was not simply an advantage for technicians, but was of deep and substantial importance: the kind of work in comparative law which was just beginning urgently needed research institutes which united teams of experts and specialized libraries; the development of comparative law from that period up to the present day would have been impossible without them. Even during the War, in 1916, an Institute for Comparative Law was founded in the University of Munich, at RABEL's instigation, and several other German universities followed suit after the War was over. Then in 1926 the Kaiser-Wilhelm-Gesellschaft founded in Berlin the Kaiser-Wilhelm Institute of Foreign and International Private Law, under RABEL, at the same time as it founded the companion Institute for Public Law, Foreign and International, under VIKTOR BRUNS. The Institute very quickly became the centre of comparative legal studies in Germany and one of the most important research institutes in the world. It is now in Hamburg, under

the name of the Max-Planck-Institut für ausländisches und internationales Privatrecht.

In France the Institut de droit comparé was founded in 1920 by ÉDOUARD LAMBERT in Lyons. This was followed in 1932 by the Institut de droit comparé of Paris University, founded by LÉVY-ULLMANN who was also its first director. At the international level, the Académie internationale de droit comparé emerged in 1924, and has since held periodic International Congresses of Comparative Law which have proved very useful. Nor must one underestimate the significance for comparative law of the founding in 1926, by the League of Nations at SCIALOJA's instigation, of the Institut international pour l'unification du droit privé (UNIDROIT) in Rome, although its aims are not purely comparative.

Gradually the accent shifted from the discussion of fundamental questions—what are the aims and uses of comparative law, and what is its place in legal science generally?—which had obsessed the Paris Congress of 1900 to individual studies of particular factual problems, so-called 'recherche concrète' (ANCEL, 'Les grandes étapes' (above p. 48) at 27). As RABEL said in 1924 (*Aufgabe* (above p. 48) at 22) 'the principal task for scholars is to work on the detailed questions with all the care and exactitude at our command'. Eleven years later he could report as a fact what he had proposed as a plan: people had realized that there was so much juristic material to be studied, so many insights to be won, that it would unduly limit comparative law to determine in advance what its goals should be or what place in the system it should adopt. 'In fact comparative law has as many different aims as legal science itself; it would be impossible to enumerate them, and we need not attempt it' (RABEL, 'Fachgebiete' (above p. 48) at 79).

As research became concrete its scope expanded. The Paris Congress sought to find its 'droit commun législatif' in the positive legislation of Continental Europe; it compared codes and texts. At the 'second stage' of comparative law in the twentieth century this limitation was definitively overcome: comparative law moved on to the comparison of the legal solutions which 'are given to the same actual problems by the legal systems of different countries seen as a complete whole' (RABEL, 'Fachgebiete' (above p. 48) at 82). So far as method is concerned, this second stage is still with us: the method taught and practised today comes from the research which RABEL evolved and perfected.

There is a clear connection between the shift of focus from purely statutory law and the 'discovery' of the Common Law. RABEL and LAMBERT both recommended an intensive investigation of the Common Law when particular problems were being dealt with. The exclusive concentration of comparative law on the Romanistic and Germanic systems had already met with some opposition on the ground of the national and doctrinal constraints this imposed, but the extension to the Common Law was a step into the

unknown. A handful of experts had some familiarity with a few special areas of law with an international flavour (for example, maritime law) but, apart from this, the Common Law was quite unknown to the jurists of Continental Europe. Admittedly work had started before the First World War on a project to produce a German commentary on English private law, undertaken by FELIX MEYER's Internationale Vereinigung für vergleichende Rechtswissenschaft, with financial support from the Berlin Chamber of Commerce and the Senates of Hamburg and Bremen, but the War had put an end to it. The gap between the Common Law and the Continental systems in history, structure, and method must have seemed unbridgeable; to cross it was a challenge to comparative law, but it was a challenge which let scholars see that if one poses one's questions properly, that is, in terms of function, and if one investigates a legal system in its entirety, such differences are really immaterial. At the turn of the century the axiom 'only comparables can be compared' was taken to mean that comparison was possible only between systems whose structures and concepts were comparable. This construction of the theoretical axiom was belied by the success of the practical 'Experiment' of RABEL's and LAMBERT's institutes, for in the 1920s and 1930s they produced a stream of first-rate works. This extension of comparative legal studies to include the Common Law along with Romanistic and Continental European systems definitively broke the bounds set by the Paris Congress of 1900; after the necessary abandonment of the view that only systems with comparable systematic structures offered a basis for comparison, it was shown to be profitable and useful to compare systems which were entirely different, and that the true basis for comparison was *similarity of function and of social need*, the means of satisfying which may be conceptually very different. This provided comparative law with a methodologically sound starting-point and also, to a large extent, a tool for the investigation of extremely different legal systems.

Many causes have contributed to the modern form of comparative law—the extension of scope from European statutory law to areas not bounded by nationality, the adoption of a method which investigates a legal system in all its aspects but always with an eye to particular function, the establishment of special institutes, fully equipped with the personnel and plant needed for sustained work, and finally the representation of comparatists from all countries in the Association internationale des sciences juridiques. The methods of RABEL and his contemporaries at home and abroad have won through. The problems they identified and the programmes they established constitute the tasks of comparative law today.

26

Offer and Acceptance

AUBERT, *Notion et rôle de l'offre et de l'acceptation dans la formation du contrat* (1970).

BRAUCHER, 'Offer and Acceptance in the Second Restatement', 74 *Yale LJ* 302 (1964).

COHEN, *Des contrats par correspondance en droit français, en droit anglais et en droit anglo-américain* (1921).

DILGER, 'Das Zustandekommen von Kaufverträgen im Außenhandel nach internationalem Einheitsrecht und nationalem Sonderrecht', *RabelsZ* 45 (1981) 169.

FARNSWORTH, 'Formation of International Sales Contracts: Three Attempts at Unification', 110 *U. Pa. L. Rev.* 305 (1961–2).

KAHN, 'Some Mysteries of Offer and Acceptance', 72 *S. Afr. LJ* 246 (1955).

KEYES, 'Consideration Reconsidered: The Problem of the Withdrawn Bid', 10 *Stan. L. Rev.* 441 (1958).

LITVINOFF, 'Offer and Acceptance in Louisiana Law: A Comparative Analysis', 28 *La. L. Rev.* 1, 153 (1969).

MACNEIL, 'Time of Acceptance: Too Many Problems for a Single Rule', 112 *U. Pa. L. Rev.* 947 (1964).

VON MEHREN, 'The Formation of Contracts', *Int. Enc. Comp. L.* VII Ch. 9 (1992).

NEUMAYER, Der Vertragsschluß nach dem Recht des internationalen Warenkaufs (Wiener Übereinkommen von 1980), *Festschrift für W. Lorenz* (1991) 747.

NUSSBAUM, 'Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine', 36 *Colum. L. Rev.* 920 (1936).

OWSIA, 'Silence: Efficacy in Contract Formation, A Comparative Review of French and English Law', 40 *ICLQ* 784 (1991).

RODIÈRE (ed.), *La Formation du contrat* (1976).

SCHLESINGER *et al.*, *Formation of Contracts, A Study of the Common Core of Legal Systems*, 2 vols. (1968).

SCHMIDT, *Négociation et conclusion de contrats* (1982).

WINFIELD, 'Some Aspects of Offer and Acceptance', 55 *LQ. Rev.* 499 (1939).

I

ALL over the world students are taught that the way to make a contract is for one party to issue an 'offer' and the other an 'acceptance'. In many cases, however, this is not what happens. When a conveyance drafted by a notary is signed simultaneously by both parties, it is hard to say that one of them is making an offer and the other accepting it, and where parties finally reach agreement after a long period of negotiation during which each has made

proposals and counterproposals to the other, 'offer' and 'acceptance' hardly fit the situation at all. In 'distance contracts', on the other hand, where the contract is made by an exchange of letters or other documents between parties some way apart, messages are indeed despatched sequentially and the question arises whether the offeror is bound by his offer or can revoke it, and if so, under what conditions and for how long. We deal with this question first.

The problem of the binding nature of an offer has produced three different solutions: the offeror is least bound in the Anglo-Saxon legal family and most strongly bound in the German systems, the Romanistic legal family adopting an intermediate position.

There exists a two-volume work which contains a comprehensive comparative treatment of all the problems connected with 'offer and acceptance'. This is *Formation of Contracts*, produced by a team of nine comparatists from all over the world under the leadership of SCHLESINGER. The general topic of 'offer and acceptance' is broken down into more than twenty complexes of problems, for each of which the contributors have produced national reports; these are then worked into general reports which show the areas of agreement and divergence. For an extensive description of this interesting method of comparative research see SCHLESINGER, 'The Common Core of Legal Systems—An Emerging Subject of Comparative Study', in: *Twentieth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema* (1961) 65.

II

In Anglo-American law an offer empowers its addressee to accept it and so conclude a contract; it remains capable of acceptance from the time it arrives until it lapses through the expiry of a period fixed by the offeror or determined in accordance with the circumstances. Until the offer has been accepted, however, the offeror remains free to withdraw it at any time and even if he has declared his readiness to be bound to his offer for a stated period he is legally free quite capriciously to withdraw it before that period elapses.

The reason why the Common Law will impose no obligation on the offeror is to be found in the doctrine of consideration, that is, the principle of Anglo-American contract law whereby a promise, unless contained in a special document (deed), generates a binding obligation only if the promisee has rendered or promised a counterperformance (see below Ch. 29). Offers are normally made without any counterperformance by the addressee and they are hardly ever put in a deed, so normally the offeror is not bound by his offer.

The basic rule of the Common Law can cause hardship to an offeree who has not paid the offeror not to withdraw his offer (option contract) for he may have entered

engagements or incurred expenditure in reliance on the continuation of the offer which the offeror now revokes. In such cases American courts tend to hold that the offer may not be withdrawn, notwithstanding the doctrine of consideration. If a general contractor bases a tender on the price quoted by a subcontractor and his tender is accepted, the subcontractor is not entitled forthwith to withdraw his offer and so throw out all the general contractor's calculations. Where the subcontractor knew and intended that the main contractor would rely on his offer in calculating his bid the courts, with varying reasonings, hold that the offer may not be withdrawn: see *Northwestern Engineering Co.* v. *Ellermann*, 69 SD 397, 10 NW 2d 879 (1943); *Drennan* v. *Star Paving Co.*, 51 Cal. 2d 409, 333 P. 2d 757 (1958); and also 59 Colum. L. Rev. 355 (1959); but see also *James Baird Co.* v. *Gimbel Bros., Inc.*, 64 F. 2d 344 (2d Cir. 1933), noted in 20 Va. L. Rev. 214 (1933). This development in the courts has been followed by Restatement (Second) of Contracts (1981) where §87 par. 2 lays down that an offer is to be regarded as irrevocable if, as the offeror should reasonably have expected, it induces action or forbearance of a substantial character on the part of the offeree. In such a case, however, the offer is to be regarded as binding only 'to the extent necessary to avoid injustice'. The need to attribute some binding effect to offers is especially strongly felt in commerce. The Uniform Commercial Code lays down that if written offers to buy and sell commercially are stated to be binding, they may not be withdrawn during the prescribed period or, if no period is prescribed, for a reasonable period not exceeding three months (§2–205). In England the Law Revision Committee proposed in 1937 (Cmd. 5449) than 'an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration' but no action has yet been taken. The whole subject is covered in SCHLESINGER/MACNEIL (above p. 356) 747 ff., 1393 ff.

In the absence of any statutory regulation the basic principle still applies that offers may be freely withdrawn at any time until they have been accepted by the offeree. But the hardship of this rule is somewhat modified by the special rule of the Common Law regarding the time when acceptance makes the contract binding. This rule goes back to the famous leading case of *Adams* v. *Lindsell*, (1818) 1 B. & Ald. 681, 106 Eng. Rep. 250, the source of the 'mailbox' theory. According to this rule it is not when the acceptance reaches the offeror that the contract is formed but at the earlier time when the offeree despatches it, that is, puts it in the mailbox or otherwise entrusts it to the Post Office. The 'mailbox' theory was originally attributed to the view that the offeror implicitly authorized the Post Office to act as his agent for the receipt of acceptances, so that the contract was formed on posting just as if the declaration of acceptance has been handed to the offeror in person. This construction is now seen to be unrealistic and unpersuasive. The real reason for the rule was the need to minimize the period during which the offeror could withdraw his offer; to put it another way, the offeree had to be relieved of the risk of the offer's being withdrawn as from the moment when he posted his acceptance rather than the later moment when it arrived.

Foreign observers may find it hard to reconcile the 'mailbox' theory with the consensual nature of contract. Even in the Common Law all other declarations (offers, withdrawal of offers, the giving of notice, and so on) must reach the addressee before they are effective, yet a *contract* can come into existence without the offeror's knowledge. A valid contract arises even if the acceptance is lost in the post, though of course the offeree must be able to prove that he really did post his acceptance.

The 'mailbox' theory is also difficult to reconcile with the fact that postal rules everywhere allow a letter to be withdrawn even in transit. This fact induced the American Court of Claims to abandon the 'mailbox' theory; see *Dick* v. *United States*, 82 F. Supp. 326 (Ct. Cl. 1949); *Rhode Island Tool Co.* v. *United States*, 128 F. Supp. 417 (Ct. Cl. 1955). Writers generally oppose it as well. See 34 *Cornell LQ* 632 (1949); 62 *Harv. L. Rev.* 1231 (1949); 59 *Yale LJ* 374 (1950); 54 *Mich. L. Rev.* 557 (1956). The traditional rule is however retained in Restatement (Second) of Contracts (1981) §63: 'An acceptance made in a manner and by a medium invited by an offer is operative . . . as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror.'

In such discussions one should always remember that the practical importance of the question whether acceptance takes effect on posting or on arrival keeps diminishing as modern techniques of data transmission enable despatch and arrival to be simultaneous, even when the parties are far apart.

III

In the *Romanistic* legal systems the binding force of offers is rather stronger. In France, after many fluctuations, the principle whereby any offer can be withdrawn until it has been accepted by the offeree has been greatly modified by the courts. If the offeror has set a given period for acceptance the offer can be withdrawn before this period has expired but the withdrawal renders the offeror liable in damages (Civ. 10 May 1968, Bull. civ. 1968. III. 162). As the courts do not require that any particular period be expressed the same is usually true of offers which contain no set period for acceptance: it is sufficient if it appears from the circumstances of the individual case or from normal trade usage that the offer was to be open for acceptance for a 'délai raisonnable'. What period for acceptance, if any, is to be regarded as implicitly agreed is decided as a matter of fact by the trial court in the light of the particular circumstances of the case (Civ. 10 May 1972, Bull. civ. 1972. III. 214). If an offer is revoked before this period elapses, the offeree, while unable to form the contract *strictosensu* by purporting to accept, can nevertheless claim compensation for the loss which the premature revocation causes him.

Where the owner of a plot of land made an offer to sell it to an interested party and agreed that the premises might be viewed on a particular day, there was an implicit

agreement that the offer would remain open until the day of viewing, and the previous withdrawal of the offer rendered the owner liable in damages; instead of money damages, there may be 'réparation en nature', which in such a case takes the form of requiring the offeror to perform the terms of the offer (see Civ. 17 Dec. 1958, D. 1959, 33; Civ. 10 May 1968, Bull. civ. 1968. III. 162).

There is some dispute about the legal basis for the offeror's liability in damages. Many writers see the offeror as being liable in tort under art. 1382 Code civil: while there may be a right to withdraw an offer its withdrawal may in certain circumstances constitute a 'faute' for which the offeror is liable (see below pp. 619 ff.). On another view, the offeror offers to enter not only the principal transaction but also a preliminary contract which binds him to keep the principal offer open for a certain time. This preliminary contract, being purely advantageous for the offeree, is concluded by tacit acceptance. If the offeror then withdraws the offer to enter the principal transaction, he is liable in damages for breach of the preliminary contract. (See GHESTIN no. 210 ff.; SCHMIDT (above p. 356) no. 223 ff.)

This was the theory used by the Court of Appeal at Colmar in a case where a subcontractor who had based his offer on an error of calculation had withdrawn it after the offeree had used it as the basis for a successful tender. The court held that an offer was binding 'dès lors qu'il résulte d'un accord exprès ou tacite, mais indiscutable, qu'elle a été formulée pour être maintenue pendant un délai déterminé', but found that in the case before it no such agreement was proved: when the offeror made his offer he did not know that the offeree was intending to use it as a basis for making a tender (Colmar, 4 Feb. 1936, DH 1936, 187).

This construction is obviously very forced: it is a sheer fiction to say that the parties have made a special preliminary contract to the effect that the offer should remain open.

It is difficult to tell from the cases what amount of damages, if any, may be ordered against an offeror who has withdrawn his offer. This is attributable in part to these theoretical differences but in part also to the fact that when it comes to determining the quantum of damages French judges have a very considerable room for discretion, not subject to the control of the Cour de Cassation. Decisions based on art. 1382 Code civil normally allow the disappointed offeree only the equivalent of the expenses he incurred in reliance on the offer's remaining open (see Bordeaux, 17 Jan. 1870, S. 1870. 2. 219); yet the offeror can also be required by way of damages to put the offeree in the position he would have enjoyed had the contract come to fruition (compare PLANIOL/RIPERT VI no. 132, and, in great detail, SCHLESINGER/BONNASSIES (above p. 356) 769 ff.).

The Commission charged with the reform of the French Code civil proposed a rule whereby offers stated to be open for a certain period could not be withdrawn until that period elapsed unless the withdrawal reached

the offeree before the offer; the same was to apply when a period during which the offer was to remain open could be inferred from the circumstances (art. 11 of the avant-projet of 'Sources and Formation of Obligations'). Art. 2 of the Franco-Italian Draft Law of Obligations, never enacted, was to the same effect.

The new Italian Codice civile proceeds on this modern path in arts. 1328 f. An offer cannot be withdrawn before the expiry of any specified period. If no period is specified in the offer it can be withdrawn until acceptance, but if the offeree has relied on the offer in good faith he has a claim for damages for the loss he suffered in preparing to perform.

Just as in the Common Law, the problem in the Romanistic systems can only be seen as a whole if one asks at what moment acceptance concludes the contract.

On the various doctrinal views see, for example, PLANIOL/RIPERT VI nos. 158 ff.— Of course this moment determines when an offer ceases to be revocable but it is important in practice for other reasons too: since the purchaser of specific goods becomes owner of them at the moment when the contract is concluded, he bears the risk of their accidental loss from that time (see art. 1138, 1583 Code civil); and the place where the contract is concluded may determine which court has territorial jurisdiction over any disputes which arise (see art. 420 Code de procédure civile).

The French Cour de Cassation has constantly held that the time of effective acceptance depends on the circumstances of the individual case, especially on the intention of the parties, and is therefore not a proper question for the highest court. This attitude of the Cour de Cassation is quite incomprehensible to lawyers from countries where this matter is regulated by statute. It is not very helpful to be told to interpret the will of the parties since frequently one has to determine whether the parties ever reached any agreement at all. Nevertheless the French trial courts seem to reach equitable results with the power afforded to them by the Cour de Cassation. (For details see GHESTIN no. 243 ff.)

According to art. 1326, 1335 Codice civile a contract comes into being as soon as the offeror knows of the acceptance; such knowledge is presumed as soon as the declaration of acceptance arrives at the offeror's normal address unless he can prove that his ignorance is not attributable to negligence.

IV

In Germany the offeror is 'bound' by his offer (§145 BGB) in the sense that he cannot withdraw it for the period of time he specifies or, if he specifies no period, for a reasonable time: rather than giving rise to liability in damages, a purported withdrawal simply has no legal effect at all. This is true also in

Switzerland (art. 3, 5 OR), Austria (§862 sent. 2 ABGB), Greece (art. 185 f. Civil Code), and Portugal (art. 250 Civil Code).

The offeror can prevent his offer's having binding force by using express phrases designed to have that effect ('freibleibend', 'ohne Obligo'). Normally a declaration so qualified is not an offer in the legal sense but simply an invitation to make offers: the declaration of the other party becomes the offer which in its turn requires acceptance, but in fact the German courts tend to hold that the necessary acceptance has been given if the original uncommitted proposer remains silent; good faith in the circumstances would require him to reject the offer expressly and his failure to do so counts as assent.

The BGB has no special rule for the question when *acceptance* is effective; quite rightly it sees this as simply an instance of a general problem which calls for comprehensive regulation since it affects all communicable declarations. The real problem is to divide the risks of transit fairly between the person sending the declaration and the person he sends it to. In §130 the BGB strikes a middle course between the rival theories of the old *Gemeines Recht*, traces of which may still be seen in French law. Every declaration of will, including the acceptance of an offer to contract, is effective as soon as it 'arrives', that is, as soon as it comes into the sphere of influence of the addressee. This effects a sound apportionment of the risks of transit. The person who sends off a declaration chooses the medium and route of communication and consequently must bear the attendant risks, but the risks incident to the addressee's own zone of influence must be borne by the addressee himself: if a bird-lover, to take an old school example, chooses not to empty the letter-box in his garden for fear of affrighting the tomtits within, the declaration is treated as having arrived.

V

This comparative survey has shown that the three different systems attach different legal consequences to the issuance of an offer. In the Common Law an offer has no binding force at all and is not even a ground for liability in damages. In the Romanistic legal systems the premature withdrawal of an offer leads to liability in damages, always in the case of offers with fixed periods, usually for offers without such periods attached. In German law every offer is irrevocable; a purported withdrawal has no legal effect whatever unless the offeror has excluded the binding effect of his proposal.

The critic is forced to conclude that on this point the German system is best. It is true that in practice the differences between the German system and the Common Law are slighter than might at first glance appear. Even in German law an offer may be withdrawn until it reaches the offeree, and in the Common Law an offer becomes irrevocable once the offeree has

put his acceptance in the hands of the carrier. This means that in the Common Law the offeree bears the risk of revocation only for the extra period between the arrival of the offer and the despatch of the acceptance, the period during which he is considering whether to accept or not; unless the offer is stated to be open for a certain time this period is normally very short. Even so, the German system is superior. Experience shows that its results are practical and equitable; the offeree can act with assurance in the knowledge that his acceptance will bring about a contract. It also makes sense to put the risk of any changes in supplies and prices on the offeror: it is he who takes the initiative, it is he who invokes the offeree's reliance, and so it must be for him to exclude or limit the binding nature of his offer, failing which it is only fair to hold him bound.

The apostle of unification of the law on this problem would find it difficult to convert the Anglo-American lawyers. Although it may seem odd to the Continental jurist that an offeror cannot bind himself even if he wants to do so unless he goes to the unusual trouble of entering a remunerated option contract, the doctrine of consideration which is deeply rooted in their contract law is strongly opposed to the binding force of offers. Nevertheless there is a clear trend in state legislation in the United States towards making offers binding and there are also extralegal factors which limit the capricious withdrawal of offers: withdrawal may be legally permissible but it is recognized to be unfair and commercial men consequently avoid it.

The critical comparatist who approves of the German solution to the problem of the binding nature of offers will also approve of the rule of the BGB that a declaration of intention *inter absentes* becomes effective when it arrives with the addressee. The 'mailbox' theory leads to unsatisfactory results if it is taken to mean that a contract is concluded even if the acceptance is lost in the post or is withdrawn by a telegram which the offeror receives earlier than the letter. But the principal objection to the 'mailbox' theory is that it is inconsistent with all the postal regulations which allow those who send letters to recall them until they reach the addressee. The older theory on the Continent was that a declaration became effective at the moment its addressee became aware of it, but this was also unsatisfactory in that it made the issue turn on an internal event, something which a legal order should try to avoid because of difficulties of proof. German law makes the question turn on *arrival*, that is, the entry of the declaration into the addressee's zone of influence. This is not a special rule for the acceptance of contractual offers but applies to all declarations of will which need to be communicated; it not only allocates the risk of transmission as between sender and addressee in a fair manner but also makes the outcome turn on an ascertainable and provable event.