Envisioning a World Law

Reflections on the *Congrès international de droit comparé* (1900) and the Latent Underpinnings of Comparative Legal Practice

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Constructing a world law through legal practice?

This chapter discusses the jurisprudential vision of world law. Since the end of the 19th century, jurisprudence has been advocating its own thesis on the globalization of law. According to popular belief, legal practice drives the harmonization of national legal systems. By quoting and borrowing from foreign courts and legislations, judges introduce foreign law into domestic jurisdiction and thus pave the way for harmonizing different legal systems. In what follows, the cosmopolitan dreams of Comparative Law will be dampened. Responding to the scepticism towards universalistic globalization narratives underlying the contributions to this volume, this chapter challenges the narrative popular among legal scholars according to which legal practice possesses the normative potential to unify the different national legal systems. To this end, the idea that legal practice gradually realizes a world law will be historically contextualized. Current debates on the legal borrowing of foreign law, which are mainly conducted in the field of Constitutional Law, are examined against the background of the first International Conference on Comparative Law, which took place in Paris in 1900. Similar to contemporary debates in constitutional law, prominent participants in this conference, which was mostly dominated by issues of private law, placed great hopes in legal practice for the gradual realization of a uniform world law. Around 1900, the figure of the judge already embodied the cosmopolitan projections of eminent comparative lawyers. These projections will be dissected as part of the 'second order approach' described in the Introduction to this volume. Instead of tak-

ing the legal idea of a world law for granted, I will scrutinize the discursive context in which the world became the analytical scope of comparative law. The field-specific dynamics underlying the discursive 'construction' of a global legal space will come under the spotlight. The following sections will examine the visible and latent motives and strategies behind current and early-20th-century Comparative Law's preoccupation with world law. Taking up the research question of this volume, I will pursue the field-immanent motives and problems that historically brought about the 'projective inclusion' (Stichweh 2000: 234) of the world in comparative law literature.

Two conflicting hypotheses on law's contribution to globalization

The belief in law's potential to normatively integrate world society continues unabated among a great many legal scholars. This belief is often underpinned by an activist tonality and an ostentatious commitment to normative universalism. Particularly in the field of Constitutional Law, there are visible efforts to promote the harmonization of different national legal systems. Remarkably, the hopes of many cosmopolitically oriented lawyers are directed towards legal *practice*. As often stressed by progressive constitutional lawyers, national courts assume a crucial role in gradually implementing a transnational legal sphere by quoting from foreign legal systems, thus enriching domestic law by external legal experiences. The (progressive) judge enjoys the utmost trust in these intellectual circles. Anne-Marie Slaughter (2004: 65, 69), for instance, charges constitutional judges with the task of constructing a 'global legal system' through 'constitutional cross-fertilization'. The globalization of law is envisioned as a process taking place in domestic court rooms, cutting across national parliaments and international or global institutions.

Current developments seem to support such hopes and predictions as today there is indeed a 'growing horizontal communication between constitutional systems' (Halmai 2012: 1346). In many jurisdictions, judges quote foreign law to decide domestic legal issues, especially in the realm of constitutional adjudication. Judicial 'legal borrowing' or 'legal transplants' are no longer a taboo, if they ever were one.[1] This legal trend seems to refute an older thesis of globalization research. Niklas Luhmann (1991 [1971]: 63) suggested that worldwide interaction is primarily established in areas of society that maintain a style of *cognitive* as opposed to *normative* expectation. Cognitive expectations are characterized by a willingness to adapt in the event of

disappointment. This style of expectation prevails, for example, in the fields of science and economy where involved actors are prepared to modify their expectations in response to economic market fluctuations or scientific progress. By contrast, normative expectations are sustained in the event of disappointment. In the domain of law, for instance, the violation of a statute usually does not lead to its amendment, but to its implementation. Now, the suggestion that law as a field based on a normative style of expectation is less susceptible to globalized modes of interaction seems to be refuted by the continuously growing entanglement of constitutional and ordinary courts. Legal practice appears to be a driving force of globalization.

In order to take sides in this controversy on law's contribution to globalization, I will take a step back and examine the function that comparative law fulfils in cosmopolitical legal literature. To this end, the next section outlines the current debate on legal borrowing in Comparative Constitutional Law. This debate will then be linked to the First International Conference on Comparative Law (1900). Three contributions to this conference, which are strongly committed to the cosmopolitan cause, will be examined in more detail. As I will argue, there are two motives which led these early legal cosmopolitans to the field of Comparative Law. First, the method of comparative law is openly praised as a necessary means for the realization of world law. Behind this ostensible motive, however, hides a second function of comparative law, which the presenters at the conference mostly kept latent but which can, nonetheless, be distilled from their contributions. According to this, comparative law provides assistance for teleological decision-making in court. At the turn of the 20th century, reform-oriented lawyers of Western jurisdictions established the view that, in the event of legal gaps, the judge should first and foremost consider the consequences of the decision when reaching a verdict. In the context of this teleological conception of judicial decision-making, comparisons to experiences in other jurisdictions may provide a welcome orientation to better assessing the consequences of certain decisions. Remarkably, many legal scholars who preach a normative universalism simultaneously advocate a teleological model of judicial interpretation; this is the case both for Comparative Law around 1900 and for today's literature. This impulse to engage with comparative law undermines the cosmopolitan pleas for world law voiced at the international conference.

The current constitutional debate on legal borrowing in court

Among many constitutional courts, it is a widespread practice to turn to foreign jurisprudence and foreign law in order to resolve domestic legal issues. Since the 2000s, this practice has attracted a lot of attention within the discipline of (Comparative) Constitutional Law. Particularly in the US, triggered by two Supreme Court decisions in which the Court's majority partly relied on foreign legal sources to settle delicate human rights issues, a fierce debate over the legitimacy of turning to foreign law to resolve domestic legal disputes has evolved. Some courts and judges have been fiercely attacked for relying on foreign legal material.[2] Among constitutional scholars, there is an intense debate over the epistemic status these foreign sources assume in domestic courts.

Next to the case *Lawrence v. Texas* (2003), the decision rendered by the US Supreme Court in *Roper vs. Simmons* (2005) has fuelled this debate. In *Roper*, the Court declared it unconstitutional to impose the death penalty on offenders who were under the age of eighteen when their crimes were committed. Justice Kennedy, who delivered the majority opinion, drew criticism from countless constitutional lawyers for backing the ruling with international treaties that the American government had explicitly declined to adopt.[3] The majority's strategy of building on treaties that had not been ratified by the US constituted the main point of contention. In a dissenting opinion, Justice Scalia attacked the majority's line of reasoning from a separation of powers perspective by pointing to the legally non-binding nature of the legal sources invoked by Justice Kennedy: 'Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favours, rather than refutes, its position' (*Roper v. Simmons*, 2005).

Even though constitutional scholars had already encountered the issue of comparative constitutional interpretation on an earlier occasion (Choudhry 1999), the *Roper* case spurred on the controversy over the legitimacy of legal borrowing in court. What is interesting here, is the fact that in legal scholarship this issue has been construed as a debate between normative universalism and normative particularism. For instance, it is customary to distinguish *particularist* constitutional cultures such, as that in the US whose courts traditionally are rather reluctant to turn to foreign case law and literature, from those pursuing an open-minded or *universalist* approach, such as the highest courts in Canada, Israel and South Africa, which seek judicial guidance from

foreign legal experiences on a regular basis (Choudhry 1999; Markesinis and Fedtke 2006). Similarly, the normative question of the *legitimacy* of legal borrowing in court is raised in identical terms. Among proponents of practised legal comparison, universalism is invoked as a normative argument. Defending the Supreme Court's outreach to foreign legal material, constitutional scholar Vicky Jackson (2005: 118) claims that 'foreign or international legal sources may illuminate "suprapositive" dimensions of constitutional rights', thus highlighting their universal nature. She argues that the resistance to drawing on foreign law in constitutional adjudication cannot be justified in light of the 'universalist components' (ibid.: 122) of the US Constitution. In a similar spirit, Sujit Choudhry identifies a judicial style of 'universalist interpretation' and stresses that 'the constant use of foreign jurisprudence will serve to remind not only courts, but other actors in the legal system as well – governments, legal counsel, and private litigants – that a nation's particular constitutional guarantees are shared with other countries' (Choudhry 1999: 888).

Conversely, legal scholars taking a critical stance towards transnational legal borrowing pursue the same conceptual approach. Richard Posner (2005: 85) resents the normative universalism on which Justice Kennedy's judgments were allegedly based:

> I do not think the citation of these foreign decisions is an accident, or that it is unrelated to moral vanguardism. It marks Justice Kennedy […] as a natural lawyer. The basic idea of natural law is that there are universal principles of law that inform – and constrain – positive law. If they are indeed universal, they should be visible in foreign legal systems and so it is 'natural' to look to the decisions of foreign courts for evidence of universality.

This is an attitude that Posner describes as unacceptable. Normative universalism is rejected as the theoretical manifestation of a bygone era, that is, the era of natural law. The debate thus amounts to a dispute over normative convictions. Both opponents and supporters of using comparative law as a source in court conceive of this debate in identical terms, namely as an argument between universalism and particularism. Likewise, neutral observers like Mark Tushnet or Jeremy Waldron construe this debate as the fight of constitutional patriotism against normative universalism (Tushnet 2006) or as the alternative of 'law as will' and 'law as reason' (Waldron 2005: 146).

It is perfectly understandable to present this issue in these terms. However, universalist lawyers must have noticed by now that judicial borrow-

ing is not just a cosmopolitical success story. The Hungarian Constitutional Court, which played an inglorious role in underpinning Orban's path to illiberal democracy, invoked, whether justifiably or not, a ruling by the German Federal Constitutional Court when defending the 'constitutional identity' of Hungary against European impositions (Halmai 2017). Some critics of this legal borrowing in court have recognized that the cosmopolitan promises of many constitutional lawyers and judges may conceal other motives, most importantly personal 'political preferences' (Posner 2005: 85). In a conversation with Justice Stephen Breyer, Justice Antonin Scalia dispelled the universalistic claim of his opponents. Mockingly, Scalia put himself in the shoes of a judge who looks for legal sources all over the world to solve a domestic legal dispute:

> I as a judge am not looking for the original meaning of the Constitution, nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world. (Dorsen et al. 2005: 526)

According to Scalia, the political inclination of the judge rather than a normative interest in a globally shared legal framework forms the basis of practised legal borrowing. Scalia recognizes that another dimension is hidden behind the displayed universalism. The constitutional judge applying comparative law does not try to *interpret* the domestic constitutional framework, but to find an answer to a particular social question. According to Scalia, the different approaches to legal borrowing stem from different conceptions of the judge. Behind the dispute between constitutional particularism and universalism – this is also recognized by the progressive side – lie different images of judicial decision-making.

This two-dimensionality has accompanied Comparative Law since its institutional foundation. The following sections historically retrace the current constitutional debate by analysing key contributions to the first International Conference on Comparative Law in 1900. The historical comparison will reveal that today's advocates of world law reproduce commonplaces that were already firmly anchored in Comparative Law around 1900. During that time, prominent legal scholars used similar arguments in their pursuit of a world law realized through legal practice. As will be demonstrated, the pioneers of modern comparative law have not only excelled in normative universalism. Rather, these authors stand for a general change of mentality within legal methodology, which has been decisive for the emergence of practices of legal

borrowing. Contextualizing current debates on practised comparative law in historical terms will reinforce the suspicion of some critics that today's partisans of legal borrowing are driven by more than cosmopolitan motives.

Visible and latent motives of early Comparative Law: The *Congrès international de droit comparé* (1900)

Throughout the 19th century, jurists of the Western legal sphere were on the lookout for legal developments in other countries. The departure from natural law towards the end of the 18th century created the necessary epistemic leeway for the discipline of Comparative Law. While in the pre-modern period the problem of legal comparison in the narrower sense did not arise because of the absolute claims of religiously or rationalistically grounded natural law, the early 19th century experienced the complete implementation of a voluntarist understanding of law, which made the comparison of different legal systems of equal status possible in the first place. As early as the first half of the 19th century, the first journals dealing with foreign and comparative law were founded (Gordley 2006: 760; Zweigert and Kötz 1998: 55). In the greater part of the 19th century, during which national jurisprudences established themselves as scientific disciplines in the modern sense, perspectives on foreign law were typically taken in order to foster the systematization and autonomization of a *national* jurisprudence rather than to promote the assimilation of different legal orders (Steinmetz 2005: 38). Even though from the early 19th century jurists were inspired by the legal trends of other countries, the national legal sciences maintained the idea of a national legal system tied to conceptual entities such as the *Volksgeist*, the *Code Napoléon* or the *American* Common Law.

In the second half of the 19th century, the discipline of Comparative Law became increasingly institutionalized through the founding of learned societies, professorial chairs and further journals, particularly in France (Zweigert et al. 1998: 58). The discipline took a decisive step forward in 1900, when the *Congrès international de droit comparé* was organized on the occasion of the World Exhibition, thus assembling jurists from all over the (Western) world in Paris (Frankenberg 2018: 44). The great interest in comparative law originated primarily from the field of private law, owing to intensified trade and the ensuing problem of international legal harmonization. As can be seen from the 1888 treatise *Die Anfänge eines Weltverkehrsrechts* by Georg Cohn – an important

author for early comparative law – international trade relations established the need for global unification of railway law, maritime law, copyright law and many other legal domains. In the context of this diagnosis, Cohn advocated the idea of a 'world law' [*Weltrecht*] for the domain of traffic law (Cohn 1888: 137). At the turn of the 20th century, legal scholarship distanced itself from the national conceptual foundations of 19th-century jurisprudence. The great projects of the classical era of modern jurisprudence – for instance James Kent's *Commentaries on American Law* (since 1830), Savigny's *System des heutigen römischen Rechts* (since 1840) and Charles Aubry and Charles Rau's *Cours de droit civil français* (1839) – had been written with the intention of giving a solid jurisprudential basis to national legal systems. Towards the end of the 19th century, new talking points emerged.

Visible function of comparative law: Realizing a common law of mankind

This conceptual reorientation is also noticeable at the Paris Conference. Some of the lectures given at this conference will now be examined in more detail. A glance at these contributions reveals that it is not a new strategy to rely on comparative law in order to drive forward the project of normative universalism. The main protagonists at the conference, not least the organizers Édouard Lambert and Raymond Saleilles, opted for exactly this strategy. The participants were aware that the conference was a milestone for their discipline. Therefore, many speakers used their lectures to elaborate on the function of comparative law for jurisprudence and society in a programmatic fashion. The vision of a global legal system plays a special role in this context. As demanded by Saleilles, the discipline of Comparative Law must ultimately contribute 'to the formation of a common law of civilized humanity' (Saleilles 1905 [1900]: 181).[4] Similarly, Lambert embarked on an activist agenda. He distanced himself from a purely scientific way of treating comparative law, which he labels as the sociological path and proposes a legal approach which construes 'comparative law as an instrument of action on the progress of law' (Lambert 1905 [1900]: 46). Lambert charged this variant of comparative law with nothing less than the approximation of different legal systems by 'gradually eliminating the differences between legislations governing peoples of the same civilization' (ibid.: 38). According to Lambert, who evokes Cohn's notion of *Weltrecht* (ibid.: 34), comparative law fulfils the same function as the ancient *jus commune*, for instance the *Deutsche Gemeinrecht*, did in the premodern period by transcending the legal patchwork stemming from the plu-

rality of sovereign political powers (ibid.: 39). Comparative law may thus assist in creating a new kind of transnational 'common legislative law' [*droit commun législatif*] (ibid.: 39) that is capable of aligning the different legal systems of similarly developed nations. The contributions of both Saleilles and Lambert at the Conference conjure up the cosmopolitan utopia of 'a common law of mankind' (Zweigert and Kötz 1998: 3).

Similarly, Ernst Zitelmann and Josef Kohler, two important representatives of German civil law, appealed to the goal of global legal unification in their contributions to the conference. Mirroring the stance taken by Lambert, Zitelmann (1905 [1900]: 194) considered the discipline of Comparative Law as the most powerful means of preparing for the unification of different national systems of private law. Kohler's speech (1905 [1900]: 227) takes a similar direction while not lacking a peculiar universalist pathos:

> The science of comparative law is a product of modern legal science; it goes beyond the fields of local law and is at the forefront of world law, the law of all peoples. Each jurist, while maintaining a sense of his or her own nationality, at the same time feels as a citizen of humanity and perceives in his or her heart the pulsations common to all peoples.

It is thus a proven strategy to emphasize the cosmopolitan underpinnings of comparative law. In contrast to classical foundations of legal provisions in nationalist concepts such as the *Volksgeist* or the *Code Civil*, comparative private law in the late 19th century takes an angle towards the global. Among the above-mentioned participants in the conference, comparative law is regarded as the most promising instrument for the realization of a globally shared legal space.

But on what assumptions is this universalism based? As will now be shown, the contributions made by the above-mentioned participants at the International Conference evince very specific ideas about the nature of judicial decision-making. The next section produces evidence that late-19th-century discourse in comparative law is partly sustained by a latent motive that may undermine its universalist aspirations.

Latent function of comparative law: Assisting teleological decision-making in court

The authors previously considered draw on comparative law for another purpose besides its claimed contribution to realizing world law. This purpose is

not apparent but remains latent. There are two conspicuous aspects which lead me to the assumption that the pursuit of a world law is not the only driving force for the comparative lawyers under investigation. First, it is striking that major protagonists of the International Conference were affiliated to a very similar movement of reform in late-19th-century jurisprudence. This movement was transnational in nature, but operated domestically in the critiques of jurists targeting their respective national legal traditions. From the late 19th century on, Lambert, Saleilles, Kohler and Zitelmann, among other participants at the conference excelled in criticizing the legal methodologies of their domestic legal traditions.

At the turn of the century, the French and German legal discourses cultivated the derogatory terms 'conceptual jurisprudence' [*Begriffsjurisprudenz*] and 'exegetic school' [*école de l'exégèse*] in order to disparage the classical period of 19th-century jurisprudence. First and foremost, the transnational uprising revolved around the theory of judicial interpretation. The central question is how the judge should act in cases of legal lacunae (Gängel and Mollnau 1992: 299). In essence, reform-oriented jurists campaigned for the teleological nature of judicial decision-making to be acknowledged. According to this spirit of reform, the evaluation of the possible consequences of a verdict must become an explicit and determining factor in the process of judicial interpretation. In reformed legal methodology, teleological concepts such as the *purpose* of the law or individual and social *interest* assume a prominent status. Legal reformers from the late 19th century were the first to elaborate the notion of functional or teleological judicial decision-making (Schelsky 1980: 173; Zweigert 1970: 244). As mentioned above, many of the participants of the Conference on Comparative Law in Paris embraced this reformist mindset too.

The second striking feature, related to the first one, is that none of the above-mentioned participants involved in the conference advocated an understanding of comparative law dedicated exclusively to the comparison of different national *statutory* frameworks. It is important to realize that there are different ways of practising comparative law. One very obvious way is to compare the laws of different jurisdictions. A cosmopolitan legal vision could then be expressed through proposals for legislative reform. In the lectures that were given, the comparison of different domestic legislation and the possible influence exerted by comparative lawyers on parliaments is only recognized as a minor task of comparative law. This task is accompanied and completely outshone by another. As contended by eminent participants at the Confer-

ence, *comparative law must be practised in court by providing assistance in the process of judicial decision-making*. Not the legislature, but the judge was in the foreground of the contributions to the conference.

The fact that the lecturers advocated the reform of judicial interpretation in similar fashion and dedicated their contributions mainly to the judge indicates, in my opinion, an interest in comparative law which was not primarily based on the objective of realizing a world law. Subliminally, but nevertheless visibly, the authors defended the stance that comparative law mainly assists in findings answers to certain domestic problems. According to this view, comparative law is an effective instrument for filling legal gaps, not a cosmopolitan end in itself. The understanding of comparative law as a useful element for judicial interpretation was the product of the legal reform movement of the late 19th century. Zweigert and Siehr (1971: 220) credit Rudolf von Jhering with the insight that comparative law and renewed judicial methodology were interconnected:

> his idea that the judge, in his law-applying functions, does not always act like a machine but plays an actively creative role, opened the way for comparative law to aid in interpreting statutes, and even more in finding the law in areas which are void of established legal rules.

Comparative law may provide support in a judicial judgement which is explicitly oriented towards criteria of usefulness. It was particularly reform-oriented legal scholars around 1900 who turned against the stereotypical image of the judge as a mere subsumption machine. Comparative law, among other tools, is then seen as a valuable instrument for solving certain social problems that arise due to gaps in the legal system. In this way of addressing comparative law, the idea of a world law has no conceptual place. This latent aspect of comparative law can be extracted from the lectures given by Kohler, Lambert and Saleilles.[5]

As Kohler (1905 [1900]: 234) emphasized, current developments in the field of international law evoke new duties for the legal profession:

> We recognize that we contribute to the improvement of civilization [...]; moreover, we know that we can hold ourselves, by our intelligence and thoughtful action, the flag of progress; we also know that we can find in foreign law important materials that can benefit our people and render considerable services to the development of law. We now recognize that the jurist is not only a researcher of law, but also a politician of law, that his

> experiences can be put to good use for the advancement of law; in particular, the jurist who practises comparative law is able to refer to foreign law, and thereby indicate the most appropriate means to benefit our own law and the nation to which we belong.

This passage is interesting for two reasons. First, Kohler takes up central topoi of the movement to reform judicial interpretation. This is particularly evident in his conception of the jurist as a legal politician. In this context, he distances himself from traditional jurisprudence which 'denied the jurist the competence to engage in legal politics and considered that his only business was to honour and worship positive law without taking into account its value or merit' (ibid.: 234). Hereby, Kohler reproduces a widely disseminated preconception of legal reformists regarding traditional 19th-century jurisprudence. At the International Conference, Kohler did not explicitly refer to the tasks of the *judge*, but elaborated on the general duties of jurisprudence. However, reading these statements against the backdrop of his own doctrine of judicial interpretation, in which he defends the notion of judge-made law (Kohler 1886: 60), we may assume that his general expectations of the jurist announced at the conference were addressed mainly to the judge. Echoing a general sentiment around 1900, Kohler resisted a rigid notion of separation of powers by highlighting the political responsibility of judicial decision-making. The value of comparative law is connected to a new understanding of the judge. If the judge is released from his role as a legal scientist and recognized as a politician, comparative law assumes major importance. As described by Kohler, comparative law becomes a powerful tool in the context of such political considerations of expediency, which ought also to be practised by judges.

Second, Kohler's speech reveals that comparative law is first and foremost an instrument for solving national problems. It is true that human civilization as a whole is said to benefit from it, but comparative law is meant to directly promote the advancement of 'our people' and 'our own law'. Kohler thus sets a new focus: comparative law is not, as pretended, conceived in terms of the goal of a world law, but rather serves as a means of progressing domestic law and society. A look abroad may help the jurist, or the judge, to implement better legal solutions in his own legal system.

In the lecture by Lambert, the conceptual linking of comparative law and reformed judicial methodology becomes more obvious. As described above, Lambert considers the approximation and gradual unification of different legal systems to be the main task of comparative law. How is this 'common leg-

islative law' [*droit commun législatif*] (Lambert 1905 [1900]: 39) to be realized? Lambert puts all his hopes in the judge. As argued, the harmonization of different legal systems must be achieved by means of judicial interpretation.

> Just as common customary law and the *Deutsches Privatrecht* were applied by the courts in the silence of local customs and particular laws, common legislative law may be introduced in each country through the gaps of domestic case law. It will not only be used by the courts as evidence of written reason, but as an expression of the common understanding of domestic and parental law. The work of interpretation continually brought the provisions of our old customs closer to those of customary common law, which seemed to better reflect the present spirit of the whole of these customs; at the same time, it slowly brought the provisions of the Landrechte closer to the rules of *Deutsches Privatrecht* (ibid.: 45).

Lambert connects the general theme of comparative law with the issue of legal lacunae, the linchpin of legal reform literature. Against this background, it is instructive to compare Lambert's lecture with an article he published in the same year. In this article, he approaches comparative law starting from the problem of judicial interpretation rather than from the perspective of world law. Reform-oriented legal scholars around 1900 pursued different methodological agendas to solve the problem of legal gaps. Francois Gény, for example, countered the 'traditional method', which he attributed to 19th-century jurisprudence, with '*libre recherche scientifique*', by which the judge further advances the legal system in a socially and morally beneficial way. Lambert, by contrast, draws on comparative law as an methodological alternative for Gény's *libre recherche scientifique* (Jamin 2010: 382), proclaiming: 'Where will we find the directions, the indispensable points of support to guide the course of case law in this way? In the science of comparative civil law' (Lambert 1900: 240). Within the conceptual framework of teleological decision-making, comparative law provides the orientation that many of Lambert's contemporaries (for instance, Roscoe Pound, Raymond Saleilles, Eugen Ehrlich and Ernst Fuchs) saw in sociology. The consequences of a legal decision, as assumed by Lambert, can be better assessed through the experience that other jurisdictions have had in dealing with similar problems. Thus, in this article, the line of argumentation is reversed compared to his lecture at the International Conference. Comparative law does not primarily serve to establish a world law. Rather, it is intended to assist in interpreting an incomplete body

of laws and thus to provide illustrative material for the resolution of certain social problems.

Nevertheless, Lambert's contribution to the International Conference was also marked by features that run counter to his ostentatious cosmopolitanism. The great importance Lambert attached to the dimension of legal practice in this lecture reflects his idea that comparative law provides an answer to the problem of legal lacunae. The relevance of *this* motive is also expressed in the fact that Lambert instructs the comparative lawyer to consult foreign law in order to find the best 'solution' to certain social 'problems' (Lambert 1905 [1900]: 50ff.). This functionalist language is indicative of his actual concern. The main function of comparative law is to provide the judge with instructive templates for solving certain problems. In this context, world law forfeits its absolute claim: 'When, with the help of these instruments, the comparatist sees the definite superiority of one of these solutions – and only then – will he lend it the character of a provision of common legislative law' (ibid.: 52). Approaching comparative law in functionalist terms, common legislative law, Lambert's expression for world law, is simply defined as the *best* possible solution to a particular problem. In his lecture at the conference, world law is not pursued as an end in itself. The cosmopolitan charisma vanishes in this instrumental definition of world law. By defining the function of comparative law as a means of providing illustrative material for the solution of certain (domestic) problems, the discipline as a whole is placed in the hands of domestic factors.

Saleilles's contribution to the International Conference pursues a similar line of reasoning. By analogy with Lambert, he sets an activist tone stating that comparative law must not be limited to a purely historical and sociological role, it ought rather to pave the way for 'legal politics' (*politique juridique*) (Saleilles 1905 [1900]: 177). While the diversity of legal cultures is to be respected, the objective of the political initiative advocated by Saleilles is to propel the unification of different legal systems (ibid.: 178). Comparative law is supposed to assume a pioneering role in this process: 'Jurisprudence [*droit*] studies the existing law, comparative law seeks to deduce the law that ought to be [*la loi qui doit être*]' (ibid.: 179).

Saleilles's idea of *politique juridique*, as described above, envisages the ideal of a common law of mankind (ibid.: 181). Even though he distinguishes three mechanisms by which this ideal state may be accomplished, namely legislation, scientific doctrine and judicial interpretation (ibid.: 182), his greatest interest by far is in the mechanism of legal interpretation. Here too, the project

of comparative law is linked to the issue of legal gaps. Comparative law, he contends, assumes a crucial function in supplementing the gaps in the legal system. Most importantly, foreign law thus becomes a significant tool in *teleological* interpretatory practice:

> The idea that must prevail in this case, where the law no longer applies formally, is that the interpretation must be made in the sense of the practical, economic and social purpose of the law, in accordance with all the legal principles on which it is based. Now, the practical, economic and social purpose of a law becomes increasingly apparent to the extent that it concerns institutions responding to general and permanent needs, thus moving away from the narrowness of locally applied law in order to draw inspiration from the progress achieved throughout the civilized world. This is particularly true when it comes to remedying ills or inconveniences of a public nature, or to satisfying needs that meet a principle of superior morality (ibid.: 183f.).

The teleological language betrays that comparative law is not simply placed in the service of a world law, the judge must be concerned with finding answers to certain 'needs' and realizing the 'purposes' of certain laws. As with Lambert, looking at the legal experiences of other jurisdictions is not an end in itself. Comparative law is a source of 'inspiration' for the domestic legal system. Legal comparison thus provides valuable assistance to the process of outcome-oriented judicial decision-making. Like many conference participants, Saleilles set himself apart from the traditional methodological notion of judicial interpretation and propagated the ideal of a policy-driven judiciary. Comparative law thus turns into an instrument to judicially 'loosen the law' (ibid.: 187). The variety of foreign legal sources provides the judge with a wide range of material that allows him to take the 'organic initiative' (ibid.: 187) for the further development of the legal system.

Like Lambert and Kohler, Saleilles represents a model of purposive judicial interpretation. Judicial decision-making must be guided and founded upon considerations of social expediency. In Saleilles's lecture, too, this understanding is echoed by functionalist terminology. Discussing the mechanism of judicial interpretation, he does not instruct the judge to transcend the national legal horizon in order to access an area of transnationally shared legal norms, but to find *solutions* to certain social *problems*:

> The question is [...] whether the interpretation of national law must and can be carried out in accordance with the guidance provided by comparative law,

> and therefore in line with the solutions which, at a given moment in history, constitute the ideal type of legal progress. (ibid.: 182)

Taking up a fundamental trope of the late-19th-century legal reform movement, it is a general trait of the conference lectures examined here to embed law and judicial interpretation in a functionalist conceptual framework (next to Lambert, see also Zitelmann 1905 [1900]: 193). It is crucial to note that this functional/teleological understanding of law is not limited to the sphere of the legislature, but refers to the process of judicial decision-making. The proliferation of functionalist terminology at the Conference on Comparative Law may be read as the manifestation of a newly established mentality in judicial methodology. Comparative Law then becomes a crucial factor in the context of a theory of interpretation according to which the judge may or must openly profess a policy-oriented attitude in the process of applying the law.

Deceptive universalism

In the three lectures, two distinct problems are blended together. Firstly, the authors claim to pursue the normative goal of a universalist world law. Secondly, this goal is repeatedly flanked by the completely different issue of judicial interpretation. This second question puts the cosmopolitan vision of a universal world law into perspective. It is one thing to pursue the goal of a common law of mankind as an end in itself; another to consult comparative law as part of an attractive teleological mechanism for filling legal gaps. In the latter case, comparative law and with it the idea of a world law are harnessed as resources for policy-oriented modes of judicial decision-making in the absence of a clear legislative basis. *The utopia of a common law of mankind, to which the comparative lawyers of the International Conference seem to be committed, is at odds with an understanding of comparative jurisprudence that serves to provide illustrative material for resolving certain social problems.* The great attention paid to legal practice as opposed to statutory law, especially in the case of Saleilles and Lambert, is self-exposing in this regard. If the normative goal of a world law were driving these authors, then we would not be witnessing a one-sided fixation on the judge. This feeds the suspicion that the normative universalism often propagated in comparative law at the turn of the 20th century was oblique. At the conference, the authors discussed above advocated a certain idea of judicial decision-making that had not primarily evolved out of a ju-

risprudential interest in comparative or world law. Their contributions indirectly served another jurisprudential cause, which, in turn, had an impact on their cosmopolitan aspirations.

In order to understand the peculiarity of combining these two motives, one should be aware of alternative approaches to comparative law. As described above, modern jurisprudence had already encountered the idea of comparative law before the late 19th century. Rudolf von Jhering, for example, in his early period of writing during which he had not yet polemicized against the classical methodology of so-called 'conceptual jurisprudence' [*Begriffsjurisprudenz*], had already called for lawyers to look abroad to solve domestic legal issues. His motto, announced in 1866, has become a frequently quoted topos in the field of Comparative Law:

> The question of the reception of foreign legal institutions is not a question of nationality, but simply one of expediency, of need. No one will fetch a thing from abroad when he has as good or better at home; but only a fool will reject the bark of the cinchona because it did not grow in his vegetable garden. (Jhering 1866: 8f.)[6]

In contrast to the legal discourse around 1900, however, the young Jhering did not understand comparative legal research as a mandate for the judge. Jhering's remarks may be read as an appeal to the legislature to look abroad before passing a law. Although this approach to legal comparison reveals a utilitarian understanding of law it is not a plea to base judicial decision-making on teleological considerations. There is a crucial difference between conceptualizing law in general in teleological terms and doing the same for judicial decision-making, a difference usually neglected in historical research on legal thought (for instance Kennedy 2006: 22). Only the late 19th century saw a teleological theory of interpretation emerging which, as described in the last section, was strongly represented at the International Conference in Paris.

Strikingly, the discipline of Comparative Law was institutionalized at a historical juncture in which jurisprudence established a new image of the judge and judicial decision-making. Traditional legal theory conceived judicial interpretation as a process in which legal norms were either directly applied or, in the case of legal lacunae, in which the legal system was further developed from within on the basis of existing legal principles and in accordance with scientific standards. From the late 19th century, by contrast, the *political* dimension of judicial decision-making came to the fore. The judge was increasingly perceived as a figure responsible for solving certain social

problems and who, for this purpose, ought to take appropriate policy considerations into account. The scope of applying comparative law thus noticeably widened for reform-minded legal scholars of late 19th century. Legal comparison appears to be of particular interest for jurisprudence in the context of a legal theory that grants judges the opportunity to build on foreign legal experiences in order to pursue certain policies. This does not imply that consulting comparative law as a source of inspiration for the domestic *legislature* disappeared at the end of the 19th century. Christophe Jamin claims that most French legal scholars of the early 20th century continued to practise comparative law along these conventional lines, Lambert and Saleilles being the exception (Jamin 2010).

Undisputedly, the global emerges as a central category in the discourse of comparative law around 1900, for instance in the shape of a *Weltrecht* or the *droit commun de l'humanité*. Central actors at the *Congrès international de droit comparé*, which in 1900 brought renowned jurists from all over the world together in Paris, transcended classical national legal conceptions by placing comparative law at the service of envisioning a global horizon of law. However, the normative universalism frequently displayed among comparative lawyers disintegrated due to their idea of teleological interpretation, as the cosmopolitan potential of the underlying theory of judicial interpretation is limited. The spirit of legal reform takes as its starting point the alleged inability of classical legal methodology to meet social problems, for instance in the field of labour law, in a satisfactory manner. The dispute between traditional and reformed jurisprudence was conducted within a national frame of reference despite the international entanglements of the involved jurists. In response to the problem of legal lacunae, legal reformers have developed different agendas to achieve specific social objectives through the courts. The world or the global did not play a role here. The evocation of a world law occurring at the International Conference is thus accompanied by a concept that was fashioned for unrelated purposes. This unrelatedness is reflected in the twofold recourse to comparative law in the lectures. On the one hand, comparative law is used as a path to world law. On the other, it is drawn upon as a useful tool for judicial decision-making.

In the conference lectures examined above, the notion of world law is built on unstable ground. The globalist vision of a world law degenerates into a normative appeal addressed to the judge. As stipulated, it is incumbent upon the judiciary to gradually enforce universal world law. Even leaving aside questions of *global* law, there is already enough reason to doubt whether the high

level of trust placed in the socio-political capacity of the judiciary by reform-oriented jurists around 1900 was justified. The cult of the judge, however, was completely exaggerated when comparative lawyers around 1900 placed their hopes in the judicature to ensure the harmonization of different national legal frameworks. Empirically, confidence in a cosmopolitan cause pursued by the judiciary was refuted. National Socialist jurisprudence demonstrated how the achievements of the legal reform movement could be harnessed for its own purposes. Instead of paving the way for a world law, German jurisprudence of the 1930s took advantage of the insight into the political nature of judicial decision-making to exempt domestic courts from the formal pressure exerted by the legal system and let them openly pursue fascist policies (Schröder 1985: 114ff.). The comparative lawyers of the late 19th century tied the project of a global law to prerequisites that potentially led astray from their universalistic inclinations.

World law: The bad conscience of the progressive lawyer?

Putting the constitutional debate on comparative legal practice into a historical context, we may register that the current issues dealt with in the field of Comparative *Constitutional* Law are basically repetitions of issues that have been present in Comparative Law since the late 19th century, particularly in the field of Civil Law. The differences between civil and constitutional law can be neglected here. For the purposes of this chapter, it is irrelevant whether the comparative lawyer turns to foreign legal sources in order to examine problems of copyright law or to verify the constitutionality of criminal law in dealing with minor offenders. Both at the International Conference around 1900, which took place under the auspices of private law, and in the constitutional debate on legal borrowing carried on since the 2000s universalist and teleological motives have run side by side. In my estimation, for both time periods it can be stated that especially advocates of a teleological interpretation preach a normative universalism.[7] It is certainly no coincidence that the constitutional lawyer Aharon Barak, who drives forward the agenda of practised legal comparison as few others do, at the same time stands out as a central author of reference for a contemporary model of a 'Purposive Interpretation in Law' (Barak 2005).

If this speculation holds up, how could the connection between the two motives be explained? Why do jurists who support a teleological model of ju-

dicial interpretation in particular tend to solemnly declare their commitment to world law? To give a speculative answer to this question, let us resume Luhmann's above-mentioned thesis that globalization is particularly prevalent in fields with cognitive as opposed to normative styles of expectation. Judging by the self-description of numerous comparative lawyers, this thesis is untenable, since their discipline holds the potential to normatively integrate world society. Rephrasing their stance in Luhmannian terms, one could say that comparative law practitioners implement normative expectations on a global scale by horizontally connecting the legal systems of different countries and opening up a global legal space.

However, the evidence gathered in this chapter supports rather than undermines the thesis advanced by Luhmann. The preceding analysis dispels the claim of comparative law to establish a universal, disappointment-proof style of expectation. Many advocates of a world law are associated with a reformist agenda that has vehemently challenged the dominance of normative expectation structures in the judiciary. At the turn of the 20th century, countless reformist legal scholars campaigned for an open and adaptive judicial methodology or, in Luhmann's terms, for opening up the process of judicial interpretation in favour of a style of *cognitive* expectation. In its most radical manifestations, for example among some representatives of the living law doctrine [*Freirechtsdoktrin*], a doctrine of interpretation is being propagated by legal reformists in which the normative expectation stipulated by law must be occasionally ignored or virtually rewritten so that the judge can reach a socially desired goal (Fuchs 1970 [1910]: 464). But even the less radical representatives of the reform movement are making selective efforts to change the style of expectation prevalent in law. Legal scholars who, like the participants in the Parisian Conference discussed above, instruct the judge to look abroad for legal solutions to certain problems, are not advocating a normative but a cognitive style of expectation.

In my view, it is no coincidence that Comparative Law embraced the idea of a universal law of mankind at a historical juncture when an influential reform movement tried to establish a cognitive expectation style in jurisprudence alongside the traditional structure of normative expectation. Such demands represent a departure from the traditional promise of law in general, namely to ensure reliability of expectations. Policy-oriented decision-making in court transcends the normative style of expectation by which law as a field is generally characterized. The emphatic advocacy of world law is the normative compensation for this rupture. The concept of world law then serves to legit-

imize the contestable model of purposive legal interpretation. Breaking with the expectation structure peculiar to law is cushioned by the metaphysical assumption that the teleological orientation of the judge is normatively secured by an existing world law. The normative universalism proclaimed by many comparative lawyers is a proven discursive strategy to semantically stabilize the newly developed political understanding of judicial decision-making. The fact that the model of teleological interpretation is concealed by an ostentatious commitment to a common law of mankind may explain the intensity of the reactions to the transnational expeditions of the American Supreme Court. Against this backdrop, the concerns of Scalia and other critical judges and legal scholars cannot be dismissed. Behind the promise of a world law hides the bad conscience of the politicized judge.

Notes

1 In comparative law literature, there are numerous metaphors and terminologies to describe the process of transferring foreign law into a domestic legal system. I am aware of the weaknesses of the term 'legal borrowing' and I realize that it carries other connotations compared to the term 'legal transplants'. Terminological debates of this kind will not be resumed or addressed here. The following analysis takes some terminological liberties by providing an external perspective on current debates in comparative (constitutional) law. For an informative overview of the diverse terminologies, see Perju (2012: 1306ff.).

2 The majority's reliance on foreign legal sources has been heavily criticized going so far that conservative politicians proposed a bill in Congress which would prohibit the use of foreign law in American Courts. In this context, even calls for impeaching the liberal Justices have been issued.

3 Justice Kennedy invoked the *Convention on the Rights of the Child* which has never been ratified by the US and the *International Covenant on Civil and Political Rights* which has been ratified by the US, *however* under the condition that the US may reserve the right to impose capital punishment on minors.

4 The translations of all passages taken from contributions to the *Congrès* are provided by the author.

5 Unfortunately, Zitelmann's contribution is too short to dare a substantial analysis.
6 For the translation, see Zweigert and Siehr (1971: 215).
7 This presumption needs to be examined more closely, for example by analysing contributions to the international conference that do not subscribe to the teleological method of interpretation.