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Review essay
Power, culture and method in comparative law

Comparative Law: A Handbook
Edited by Esin Örücü and David Nelken, Oxford: Hart Publishing, 2007. 469 pp.

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Abstract

This review essay draws on a recently edited handbook by Esin Örücü and David Nelken to reflect on the methodological concerns and challenges of comparative law and sociolegal research. It argues that the contextualisation of laws should be regarded as the indispensable methodological characteristic of all comparative studies of law that aspire to transcend the understanding of law as a body of rules and doctrine. It further argues that although the cultural perspective facilitates contextualisation of the law, a cultural understanding is neither a precondition for undertaking comparative legal research nor necessarily the correct approach under all circumstances; for certain aspects of law and legal behaviour need not be conceptualised in cultural terms. The essay concludes by proposing that the combination of top-down and bottom-up approaches could provide a meta-methodological framework within which specific comparative techniques can be employed. Such a framework will enable comparatists and sociolegal researchers to account for how law interacts with, and simultaneously manifests itself at, the macro-, micro- and the intermediary meso-levels of society over time.

Introduction

Comparing laws is hardly a new exercise among philosophers and jurists who have for centuries gained insights into how legal systems work by contrasting the 'familiar' against the 'foreign' ways of using law.[2] Law-makers and businessmen have also engaged in comparing their own law-ways with foreign laws, but they have done so for purely practical reasons. Commercial transactions, for example, are very old and have always crossed national borders and geographical boundaries, compelling traders and rule-makers alike 'to look beyond their own city, country, rules and laws' (Hopt, 2006, p. 1162). In its modern form, comparative law is often 'dated back to the nineteenth century and to the promulgation of the great European codes' and to the efforts to locate and explore the universal core of all civilised legal systems (Donahue, 2006, p. 3). This new search for the universal essence of all laws was conducted not so much in the speculative tradition of natural law, but in the spirit of positivism, which located *the* source of law in empirically verifiable 'social

1 I am grateful to John Flood for his comments on a draft of this essay and to the anonymous referees of the IJLC for their comments.

2 Donahue (2006) traces the roots of comparative law back to Aristotle's *Politics*.

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facts' such as the command of the sovereign. As Roger Cotterrell explains, the epistemological roots of the search for a unifying foundation of law reveal the unease with a concept of law and legal knowledge that 'is true (valid) in one town but invalid in another, a few miles away across the border' (*CLH*, p. 134).[3] After all, 'what kind of moral force can law have if here it says one thing about rights and wrongs, and there it says something else (perhaps the opposite)?' (p. 134). Thus, natural law philosophers' labours to improve man-made laws by identifying and exploring the universal core of law in terms of the nature or the divine reason came to be partly replaced by the comparatists' studies of foreign legal systems aimed at 'improving laws by harmonisation . . . or unification' (p. 134). Hence, the search for the harmonisation and unification of laws came to dominate the emergence of comparative law in the twentieth century.

In the beginning of the twenty-first century, comparative law appears to be enjoying the wind in its sails. From being considered only a few decades ago a topic 'for those who were curious of mind', it has moved on to become one of the core subjects in the curricula of many European law faculties (Van Erp, *CLH*, p. 399).[4] This change of fortune is documented by the number of new journals, research monographs and textbooks generated over the last few years to introduce and explore the various branches of comparative studies of law.[5] This increased interest is partly a result of 'the changing role and practical importance of knowledge of foreign legal systems' (p. 399), partly due to the profound effects of the globalisation processes 'on the practice and the organisation of law' (Flood and Sosa, 2008, p. 1), and partly a result of the realisation that comparative law has, after all, practical applications and can be used by judges, lawyers and legislators in search of legal solutions, legal reform and the harmonisation of private law across borders. Within the European Union, we find a number of projects that aim at harmonising and unifying the various aspects of private law in order to eliminate 'differences across national private laws that are perceived [by the promoters of these projects] to be obstructing the optimal functioning of the European Market' and 'to redress incoherences caused by fragmentary EU directives' (Glanert, 2008, p. 161). With the renewed interest in comparative legal studies comes also an enhanced awareness of the need to reconsider the assumptions, concepts, ideas and methodologies which have traditionally constituted these studies. For example, the idea of the harmonisation and unification of private law, which motivates much of the work carried out by comparatists, is being questioned by some scholars who doubt its practical feasibility and moral desirability (Smits, *CLH*, pp. 227–29; Cotterrell, *CLH*; Legrand, 1996; 1997). Instead of *constructing* similarities intended to harmonise and unify legal systems across time and space, we need to recognise the differences distinguishing them from each other in time and space; for the *difference* is what endows two things, events or phenomena with their specific properties

3 In the following I shall use *CLH* to refer to Örücü and Nelken's *Comparative Law: A Handbook*.

4 Siems (2007) does not share this optimistic view and claims that comparative law is ignored by courts in the US and elsewhere, is academically on the decline and is either too complicated, esoteric and theoretical or too simplistic, rendering it useless for practitioners. The issues raised by Siems can be taken seriously only once we disregard the role of comparative law in law reform and apply a set of truth-values belonging to traditional legal scholarship to evaluate the usefulness and relevance of comparative law. Taking the traditional legal scholarship's notion of what is true, useful and relevant as the yardstick for assessing comparative law's diverse approaches is a misleading exercise, for comparative studies were developed partly to bring to law ideas and insights that traditional scholarship could not provide.

5 Besides *Comparative Law: A Handbook*, edited by Örücü and Nelken, which is the focus of this essay, we find two other impressive collections: *The Oxford Handbook of Comparative Law*, edited by Reimann and Zimmermann (2006) and *Elgar Encyclopedia of Comparative Law* edited by Jan Smits (2006). Together with earlier work such as *Comparative Legal Studies: Traditions and Transitions* (2003) edited by Pierre Legrand and Roderick Munday, *Comparative Law in a Global Context* by Werner Menski (2000, second edition 2006), *Legal Traditions of the World* by H. Patrick Glenn (2000), and *Comparative Law in a Changing World* by Peter de Cruz (2007, 1st edn 1995), these new publications lay a solid foundation for comparative legal studies for many years to come.

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setting them apart from each other (see Legrand, 2003). Comparative law is also questioned for its Eurocentric assumptions: 'colonial hubris and the "white" supremacist presuppositions that went with it' (Menski, *CLH*, p. 191). These are some of the issues and debates that are explored in a new handbook of comparative law edited by Esin Örücü and David Nelken.

The following is divided into two parts. Part I starts by introducing the aim and the layout of the handbook before examining the comparative approaches adopted in various chapters. This examination provides a basis for arguing that the contextualisation of law should be regarded as the indispensable methodological characteristic of all comparative studies of law that aspire to transcend the understanding of law as a body of rules and doctrine. The method of contextualisation situates legal action, behaviour, institution, tradition, text and discourse in specific time and socio-legal space, thus, revealing law's embeddedness in societal relations, structures, developments and processes. I shall, however, make no attempt to summarise or discuss each chapter separately and instead use the handbook in an ad hoc fashion to reflect on the development, theoretical concerns and methodological debates within comparative law. Part II presents the central concern of this essay in relation to legal theory, sociolegal research and comparative law by proposing a combination of the top-down and bottom-up perspectives as a meta-methodological framework within which specific comparative techniques can be employed. The essay concludes with some general comments on the overall contribution of the handbook to sociolegal scholarship and its suitability as a textbook in comparative law.

Part I: Contextualisation

The objective and the layout of the handbook

Örücü and Nelken's handbook aims at assisting undergraduate and postgraduate students in familiarising themselves with the classical as well as contemporary topics, materials, methods, issues and debates in comparative legal studies. The handbook promises, however, to be no ordinary textbook in the subject for it sets out to 'fill the gap in comparative law teaching and study' (the editors, *CLH*, p. v), a gap brought on by the increased complexity and the changing role of law at national and transnational levels. In order to fill this gap, the handbook provides 'coverage not only of traditional private law topics but also public law matters including comparative constitutionalism and the increasingly important types of transnational legal processes such as criminal law and human rights law' (Nelken, *CLH*, p. 4). Besides being methodologically innovative, the handbook also seeks to look beyond the scope of traditional comparative law in order to bring into focus non-Western legal traditions and systems.

The handbook consists of nineteen chapters authored by a group of scholars with a vested interest in comparative law, legal cultures or globalisation and divided into three sections devoted to the methodological, theoretical and substantive aspects of comparative studies of law. Section One, entitled 'Comparative Law at a Crossroads', consists of two chapters by Nelken and Örücü and provides an overview of the collection, an introduction to the common themes and concerns that run through the chapters, and a taste of some of the central debates of the field. Section Two, entitled 'New Directions for Comparative Law', introduces some of the theoretical issues and conceptual debates that preoccupy contemporary comparative law and studies of legal cultures. This section contains contributions by William Twining, Patrick Glenn, David Nelken, Roger Cotterrell, Anthony Ogus and Werner Menski. In the third and the longest section, entitled 'New Territories for Comparative Law', the editors group together a number of chapters that deal with substantive issues such as private law, family law, administrative law, constitutional law, human rights and commercial law. In this section, we find chapters by Jan Smits, Masha Antokolskaia, Nicholas Foster, John Bell, Andrew Harding and Peter Leyland, Paul Roberts, Christopher McCrudden, Sjef Van Erp, and two chapters by Esin Örücü.

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Contextualising laws

A simple, but latently subversive, methodological message unifies most of the chapters and debates in this handbook. Most chapters state implicitly or explicitly that the scope of comparative studies of law must transcend the notion of law as a body of rules in order to include the dynamic institutional processes and practices which produce and reproduce the normative structures of legal systems. This overall methodology reveals the kinship between the handbook, on the one hand, and the sociology of law, legal anthropology and legal history, on the other, and explains the consistent efforts made by its authors to *contextualise* comparative legal research by taking into account the social, cultural, historical, economic and political factors that are in constant interaction with law and legal institutions.[6] Different chapters engage with contextualisation in different ways and to different degrees. John Bell, for example, whose chapter is more concerned with providing a descriptive account of administrative law in different jurisdictions than offering an in-depth contextualised discussion, nevertheless admits that certain aspects of law such as 'the use of bill of rights . . . raises issues of how far the enactment of a legal text has an impact on the way in which the legal system works and what is required to ensure that a culture of respect for fundamental values is embedded' (*CLH*, p. 301). To answer these issues, Bell informs us that we need 'legal sociology', yet to perform his immediate task he appears to be satisfied with the 'clues' he finds in the way the legal system 'has adapted to the new culture of rights' (p. 301). In contrast, McCrudden gives a more thorough explanation of the gap between the rules and principles expressed in the text of law, on the one hand, and how these are unfolded in legal practice, on the other. In his chapter on human rights, McCrudden distinguishes between 'theories supporting human rights – including the *general principles* of human rights – and their *application* in specific situations' (*CLH*, p. 372). There is, admittedly, much agreement on the principles of human rights, but little consensus on why, how and where these principles should be applied. As a result:

> 'All that is left is an empty shell of principle and when principle comes to be applied, the appearance of commonality disappears, and human rights are exposed as culturally relative, deeply contingent on local politics and values.' (McCrudden, *CLH*, p. 372)

Paul Roberts also takes his discussions of international criminal justice research beyond the mere legal rules and principles by highlighting the role of institutions and hybrid tribunals charged with developing and implementing the rules of international criminal justice. In his chapter, he explores 'international criminal justice through a series of seven "concentric" circles starting with the core activities of international criminal tribunals and fanning out into the hinterlands of transnational legal cooperation, national trials of international criminality, and related . . . scholarly commentaries and research' (*CLH*, p. 364). Similarly, Harding and Leyland argue in their chapter that when comparing the role of constitutions in the political processes of more than one nation, we must remember that there is a 'gulf between the formal constitution and the manner in which government is actually conducted' (*CLH*, p. 323). We must, therefore, look beyond the written texts or designs of constitutions to examine how constitutional rights and principles are implemented. Constitution is evidently a 'political' construct, so it is not difficult to argue that besides considering the text of the constitution, we also need to pay attention to the institutional arrangements and practices that are put in place to realise the rights, policy objectives and aspirations expressed in the constitution. However, in this handbook, even comparative studies of areas such as commercial law, which have not been laden with specific political values or programmes, require gazing beyond the letter of the law. Commercial law has been traditionally presented and taught by commercial lawyers as a mere technical instrument for facilitating trade, which is in turn usually assumed to be 'an

6 For a discussion on the relationship between comparative law and the sociology of law see Cotterrell (2006).

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activity not affected by cultural values' (Foster, *CLH*, p. 267). Yet Nicholas Foster shows in his chapter that the application and development of commercial law is, nonetheless, influenced by differences in cultural attitude to commerce; differences which are historically determined (p. 267). These ideas, arguably 'old hat' in sociolegal theory and law and society research (see, for example, Ehrlich, 1936; Pound, 1943), are nonetheless expressed in the handbook with clarity of thought and intention by scholars, many of whom are versed in various substantive areas of law.

Not surprisingly, many of the theoretical and methodological approaches we find in the handbook subvert the state-orientated positivistic methodology of traditional legal scholarship. Most contributors agree that comparative studies must be historically informed, acknowledge the plurality of forms of law, and recognise 'the various forms of non-state law, especially different kinds of religious and customary law that fall outside the "Westphalian duo"'[7] (Twining, *CLH*, p. 76; also see the chapters by Menski and Cotterrell in *CLH*). Comparative law must accommodate not only top-down approaches to the study of law, which treat the state as the source of law and normative ordering par excellence, but also bottom-up analyses of the various processes of harmonisation and unification of laws, which take into account how various actors and institutions experience and cope with legal change. In addition, comparative law should not, as it is often the case, focus either on the macro-level (e.g. global legal networks, EU law and international law) or micro-level (e.g. local municipal law and private law doctrine). Instead, it needs to take into account the numerous intermediary layers of legal institutions such as the NGOs and international tribunals that play an important role in connecting the micro- and macro-realities of law (Twining, *CLH*, pp. 70–73). In order to achieve these objectives, a comparative study of law has to become empirical, for the type of institutional knowledge it seeks cannot be obtained only by conceptual analysis of legal rules, doctrine and principles. Finally, it has to broaden its scope of investigation by refusing to limit its general approach to the methodological and theoretical constraints of one single discipline. Thus, comparative legal research must be conducted in an interdisciplinary, and perhaps even multi-disciplinary, manner.

Rethinking comparative law

As mentioned above, comparative law has reached the stage in its development when it needs to reconsider some of its central ideas and assumptions such as legal family, harmonisation of laws, and the relationship between law and the state. The notion of legal family was originally developed using ideal types of Western legal traditions in order to classify and make sense of the legal systems of the world. Legal families were defined in terms of 'law as rules' and evaluated and classified with the help of criteria such as substance, style, method, ideology, structure and sources belonging to common law, civil law and socialist law. This approach, which has dominated much of comparative law, has been criticised for being too concerned with the study of private law relations at the expense of other areas such as family, public and criminal law and for promoting a Eurocentric approach. Beyond Europe, as Menski notes, law is often culturally embedded, pluralistic and, in some cases, not geared to the state. In such a pluralistic context, harmonisation is neither meaningful nor necessary or desirable:

> 'Law is therefore not just about rules and their codified rule systems, but about a plurality of voices and values, and thus negotiations of difference and diversity at many different levels, and at all times. The book of law is never closed. Any form of law, even God-given Islamic law, is philosophically and practically perceived and applied as inherently dynamic and interactive.' (Menski, *CLH*, p. 195)

7 'Westphalian duo' refers to the assumption that law consists of the state law and public international law of sovereign states which, in turn, do not recognise any superior authority.

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Even within the EU, where regulations and directives hammer into the member states the desirability of the harmonisation of private law and the unification of codes – a process aimed at creating a common European market and identity – we continue to find a great deal of diversity. It is unclear, Jan Smits writes, 'if harmonisation of private law really promotes the internal common market' (*CLH*, p. 222) and, as it is often claimed, will substantially reduce the costs of trans-frontier contracts. He also believes that even the unified private law of the EU 'will continue to suffer an inevitable fragmentation' (p. 227) for, ultimately, any unified private law has to be offered as an optional alternative to, and remain organisationally dependent on, the existing national legal systems. At a micro-level, the differences in legal reasoning will persist: civilian lawyers and common law lawyers will continue to think and reason differently. The only way one can promote convergence of the private laws of EU member states and create a system which resembles the *ius commune* of the seventeenth and the eighteenth centuries, is by adopting a 'non-centralist method' (p. 229), for example, by devising a bottom-up perspective which starts with the Europeanisation of legal science and education. This means educating lawyers belonging to different jurisdictions to share a common legal training, speak the same language and think in European terms. Admittedly, this will be a slow and difficult process, and will further reinforce the assumption that only 'lawyer's law' is worth treating as the law proper; however, it is perhaps the only realistic method of bringing about a genuine European legal culture.[8] The comparison with *ius commune* is an important one, for it reminds us of the importance of a common background and a shared language. In the discussions of harmonisation and legal cultures, which are presented in this handbook, there is a tendency not to highlight the role of language (with the exception of passing remarks in Van Erp's chapter on the process of law reform).[9]

Focusing on the possibility and desirability of the harmonisation and unification of private law in Europe, we easily lose sight of what lies beyond Europe. Besides common law and civil law, there are other 'ancestors' such as Chthonic, Talmudic, Islamic and Asian laws (Örücü, *CLH*, p. 174; also see Glenn, 2000), to mention just a few, which need to be taken into account when discussing legal families and traditions. More importantly, we need to acknowledge that there are no pure legal families, and recognise that legal systems in certain geographical areas such as Europe, the Middle East or South America overlap, which, in turn, implies that all legal systems are to different degrees hybrids, i.e. cultural and legal mixtures consisting of various elements borrowed from different legal traditions and customs. It also means that legal systems and traditions are continuously changing and evolving through cross-fertilisation, fusion and borrowing from one another. Attempts to apply a fixed set of standards for evaluating legal families and legal systems of the world are bound to reify the otherwise dynamic social and cultural processes that produce and reproduce legal systems and traditions over time.

The politics of difference

There is no single definition of comparative law and no consensus on its academic status, i.e. if it is a field of research, a discipline or just a method. On the one hand, we find black letter lawyers who use comparative law as a method for finding and juxtaposing two sets of legal rules and doctrines belonging to two different legal systems. On the other hand, we find scholars such as the contributors

8 In the following pages, the concept of legal culture refers to 'relatively stable patterns of legally-oriented social behaviour and attitudes', and as such is regarded as a subcategory of the concept of culture (Nelken, 2004, p. 1). Legal culture is a relatively new concept which, according to David Nelken, can be traced to 'terms like *legal tradition* or *legal style*, which have a much longer history in comparative law or in early political science. It presupposes and invites us to explore the existence of systematic variations in patterns in "law in the books" and "law in action", and, above all, in the relation between them' (Nelken, 2007, pp. 369–70).

9 David Nelken has, however, discussed the significance of language in the study of legal cultures elsewhere (see Nelken, 2000).

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to this handbook, most of whom compare laws in their sociocultural and historical contexts. The main body of comparative research lies between these two positions; some studies are more sensitive to the empirical aspects of law and less concerned with the normative analysis of rules, whilst others are more concerned with comparing legal rules and doctrine and less concerned with law's institutional make-up and cultural properties. There are, therefore, different ways of actioning comparative law and different conceptions of what 'comparing' laws amounts to and aims to achieve.[10]

In his chapter, Patrick Glenn argues that the Latin roots of 'com-paring' suggest 'bringing together and keeping together, of equals, which are presumed to endure, throughout and beyond the process of com-paring' (*CLH*, p. 92). Thus, according to Glenn, the logic of comparing is not that of separation, but 'living together in harmony and in a way respectful of difference' in what amounts to 'an enduring *process* of peaceful coexistence' (p. 92). Although Glenn makes no reference to Habermas, his argument that the process of comparison is intrinsically and unavoidably driven towards mutual co-existence, which in turn requires gaining greater understanding of the legal system of the 'other', is reminiscent of Habermas's communicative action according to which the use of language is orientated towards mutual understanding, even when the participants in the communication are acting instrumentally (Habermas, 1984). However, when Glenn refers to the legal history of colonialism and argues that 'the common laws [of the colonialists] yielded to local particularity, when local particularity so required', and that 'lawyers in the colonised world . . . engaged in an active process of reconciliation of law from the fifteenth century' (*CLH*, p. 102), unintentional as it might be, he draws our attention away from the imbalance of power which defined the relationship between the colonialists and their lawyers, on the one hand, and the colonised natives, their cultures and laws, on the other. It is, indeed, true that common law had to take notice of local variations and even accommodate 'alien' norms and practices in order to operate in colonised settings, but this did not imply the *recognition* of the natives' laws or cultures as equal to that of the colonialists. It did not, in other words, amount to transcending one's own laws in order to discursively engage with and understand the laws of the 'other'.[11] As Cotterrell shows in his chapter, no mutual understanding or respect of the 'other' can be reached where one party uses its politically and/or culturally dominant position to control intercultural communications and dictate the terms and conditions of intercultural interactions.

In societies where the relationship between ethnic and cultural groups is defined by an imbalance of power in favour of one group, those who represent the politically dominant culture often demand that the politically less influential cultural groups assimilate themselves. This type of assimilation requires the politically weaker cultures to submit to, and internalise, the values and worldviews of the politically dominant culture. In many cases, the internalisation of the value system of the prevailing culture can amount to denouncing one's own cultural identity. Similarly, the politics of the difference in comparative law demands that politically less powerful legal systems

10 In this respect, comparative law is similar to the sociology of law. Both are fields of research on the margins of mainstream legal scholarship, both contain diverse perspectives on law and legal research, some of which promote a concept of law different from that of legal positivism, and both see studies of law in interdisciplinary terms. Being theoretically and methodologically diverse, both appear as fragmented discourses lacking an all-encompassing theoretical framework which could assist them in confronting the ideology of legal positivism (which we shall discuss in more detail below). However, in this very weakness lies their intellectual strength: since they do not restrict their studies theoretically or methodologically, they remain a dynamic field of study where new ideas (that do not comply with the concerns or assumptions of mainstream legal studies) are allowed, discussed and considered, and where innovative projects are given academic space to grow. For a detailed discussion see Banakar, 2009.

11 Drawing on Alan Norrie (2005), justice can be regarded as 'the ethical form of judgement that lies beyond the scope of positive law' (Banakar, 2008a, p. 211). Thus, to step beyond one's own laws to understand the 'other' is a step taken towards justice. Interestingly enough, it can also amount to recognising the plurality of forms of law.

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harmonise their rules and institutions with those of the leading legal systems. The harmonisation and unification of laws brought about in this way is morally questionable, often blind to the sociocultural mechanisms and historical context of law and its institutions, and represents a form of domination. At the same time, many of the assumptions regarding the practicality and usefulness of harmonisation and unification remain unproven. One of these assumptions is that by making different legal systems similar, one automatically enhances the communications between systems, moves them towards convergence and, at least in the European context, towards political and social unification. However, as Legrand (1996; 1997) has argued, the harmonisation of legal rules does not necessarily lead to the emergence of a common legal understanding or the unification of legal practices, and can take on different meanings in different legal systems. In Cotterrell's words:

> 'The same rule interpreted in two different national legal cultures will actually mean something different in each of them. So, legal harmonisation is illusory. There might be the standardisation of the letter of the rules but there will not be harmonisation of their meaning as law.' (Cotterrell, *CLH*, p. 141).

Similarly, the assumption that by harmonising legal rules one enhances law's system efficiency, thus significantly reducing cost factors, is based on 'anecdotal evidence' and remains in want of empirical confirmation (a similar point is also made by Jan Smits in the context of the convergence of private law in Europe in Chapter 10). Perhaps more importantly, we should not forget that communication between legal systems and cultures can, and does, take place whenever the willingness and mutual respect for others' autonomy and dignity exist among the participants (a point also made by Glenn). Differences can, admittedly, be to one's disadvantage when they are used as a basis for negative discrimination and exclusion. Being different is, Cotterrell argues, not bad in itself, and definitely not a handicap when the differences are acknowledged with respect. Productive integration does not require assimilation, but mutual understanding, acceptance and respect. Some comparatists thus argue that 'comparative law should shift its focus from seeking similarities (via harmonisation and unification) towards appreciating the virtues of legal diversity' (Cotterrell, *CLH*, pp. 136–37).

Not everything is culturally determined

Most of the contributors to this handbook pay special attention to the cultural context of law.[12] However, not all legal phenomena are necessarily cultural. This point is addressed by Nelken, who in reference to studies of the rate of litigation in the Netherlands and how the Japanese use the court system, shows that what is often taken as cultural behaviour can also be due to institutional infrastructures of the legal system in different countries (*CLH*, p. 113). For example, the Japanese 'make relatively little use of the courts', not necessarily because of their 'Confucian-shaped culture that emphasises harmonious and hierarchical relations' (p. 113), but perhaps because 'the limited number of legal professionals and courts represents institutional barriers maintained by government bureaucracies and business elite' (p. 113). Nelken is suggesting in only a tentative manner that an equally valid explanation may be applicable here. Yet his example reveals that culture is one among many lenses we may employ to view, explore and interpret various social and legal phenomena. Taking this point further, I argue here that it would be wrong to suggest that all aspects of law are culturally embedded and should be studied in terms of culture. Admittedly, all manifestations of law are – if not directly at least indirectly – connected with collective social psychological mechanisms and taken-for-granted patterns of thought and action. This cannot be a sufficient basis for treating

12 Patrick Glenn is the only one who does not subscribe to the notion of legal culture and continues to use 'legal traditions[o]'; others such as Menski use the word 'culture' frequently, but do not generally adopt the term 'legal culture' as the basis for their analysis.

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all aspects of law as culturally *embedded*, for we can use the same type of reasoning to argue that all aspects of law are also historically, politically, linguistically and even perhaps economically embedded.

The standpoint that a cultural perspective does not necessarily offer a satisfactory understanding of all manifestations of law is further demonstrated by Anthony Ogus, who in his chapter draws attention to the link between the development of various legal systems and economic growth. Ogus shows that the willingness, or reluctance as the case might be, to open up one's jurisdiction to external influences by borrowing legal rules, ideas and institutions from another jurisdiction, and thus harmonising one's own laws with those of that jurisdiction, might be the outcome of cost—benefit calculations of the legal profession. The legal profession belonging to one or both jurisdictions might expect that the harmonisation of their laws results in an increase or decrease in demand for their services. The fact that the reluctance of lawyers might be expressed by overstating, sometimes even constructing, the legal and cultural differences separating the two jurisdictions is another matter entirely, which has very little to do with the intrinsic cultural properties (i.e. properties that are reproduced through taken-for-granted values, attitudes and practices) of different legal systems and laws. In short, there are reasons to believe that the decision to refuse opening up one's legal system to external influences is not necessarily a cultural decision, a point which we shall miss once we regard all sociolegal action as culturally embedded.[13] Despite the insight that not everything legal is necessarily cultural, the significance of culture in comparative studies looms large in the handbook, and not even Ogus, whose chapter might otherwise be seen as providing the antithesis to the emerging cultural approach in legal studies, seems to be able or willing to avoid making use of the concept of 'legal culture'.

Part II: towards a meta-methodological framework

Culture

There are, admittedly, many ways of defining the notion of culture (see, for example, Rosen, 2006; Cotterrell, 2006), yet social scientists generally frame their definitions in terms of socially constructed and transmitted symbols, values, attitudes, perceptions, worldviews, conventions, customary practices and shared historical experiences (which are, at times, imaginary). Despite the agreement among many sociolegal scholars as to the cultural significance of law, it remains unclear *how* we are to introduce cultural understanding into a broader comparative law project that includes legal families and traditions. This uncertainty is partly due to the 'unbounded' and 'contested' character of the concept of culture, which is also geared to power relations (Merry, 2003, quoted by Nelken, *CLH*, p. 114), and partly a result of the incompatibility of the cultural perspective with the definitions of the legal system which only recognises the 'positive law' of the Western European legal traditions as the law proper and dismisses non-European systems and unofficial forms of law.

Culture is a multidimensional and interpretive notion which is hard to operationalise in concrete and unambiguous terms. Sociologists and social anthropologists often define it in terms

13 The idea of social action as culturally embedded can be traced back to the classical writings within sociology, but it was first in the works of sociologists such as Raymond Williams (1982) and Pierre Bourdieu (1977) that it came to be treated as a specific perspective on the study of society. Bourdieu's notion of 'cultural capital' and 'habitus' are good examples of the culturalisation of social structures and human action. However, the 'cultural turn' should also be seen as a methodological measure deemed necessary by some sociologists to conceptualise the missing link between structure and agency (or the macro- and micro-levels of social analysis). The search for the missing link implicitly informs also some of the recent works in comparative legal cultures (see, for example, Hodgson, 2000) and sociolegal research on globalisation (see, for example, Dezalay and Garth, 1996) where actions of individual actors such as prosecutors, judges or arbitrators are explored in relation to collective (structural or macro-) cultural entities. For an overview of the 'cultural turn' in sociology see Sztompka (1999).

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of 'meaning', or the dynamic *processes* that make social life meaningful and help individuals and whole communities to develop their own particular worldviews. Expressed differently, culture refers to the process of the reproduction of beliefs and attitudes that people hold about the world surrounding them (Wuthnow, 1987). These beliefs and attitudes help the individual to interpret, create and recreate social reality within his/her own universe of meaning, while forming patterns of behaviour by manifesting themselves as the intersubjectively shared *values* of a community. Thus, the notion of meaning gains cultural significance when it becomes intersubjective. It is also at this stage that intersubjectively shared values contribute to the social integration of groups, communities and whole societies. Culture is not, however, an entirely subjective phenomenon, for its various value formations possess observable 'objective' properties (it can also refer to artefacts, which for lack of space has to be omitted from this discussion). Although these formations are products of human consciousness, they are by no means confined to the individual actor's subjective inner life. Values are externalised through symbolic and non-symbolic social interaction and given an objective status which, in turn, helps to create and maintain patterns of behaviour. Language, which is one of the most basic expressions of any culture, provides the best example of how the subjective and objective aspects of a cultural process are linked. Language is subjectively created by sharing and reproducing symbols, rules and conventions, and is objectively manifested in writing and speech, making it independent of any individual actor's personal usage of the language. Expressed differently, language does not determine what is communicated (the content of the communication is decided by the individual actor's interest and the context of the interaction), but because of its objective characteristics it determines *how* the communication takes place. This also suggests that the objective features of a culture are to be observed by focusing on the *mode* of symbolic communication, rather than on the content of such communication.[14]

In short, culture refers to both the subjective/interpretive qualities of social life (and in legal studies to the underbelly of law and legal practice), which are produced and reproduced through the taken-for-granted norms, values and attitudes in face-to-face interaction and to the objective/ 'factual' properties of society (and in legal research to law's institutional properties). The concept of culture is, therefore, sensitive to different levels of social action (lifeworld/system, agency/structure or micro-/macro-levels), compatible with the combination of top-down and bottom-up methods of enquiry and, thus, can lend itself to the contextualisation of various types of social behaviour and institutional practices; hence the attraction of employing cultural perspectives in comparative studies that aim to get beyond legal rules and highlight the connection between law and its context. Having said that, we must remember, as we saw above, that the cultural perspective is not a necessary prerequisite for undertaking comparative studies of law contextually, and there are aspects of law and legal behaviour which could be discussed in non-cultural terms. Anything *of* or *about* law can be interpreted in cultural terms, but it is perhaps our interpretation and not necessarily the law and its various expressions that are culturally formed. The cultural approach to the study of law, i.e. when we describe and analyse law as a cultural expression, becomes problematic if it leads us to treat culture as both the cause and effect of an event at the same time. The use of a culture as a method also becomes potentially misleading in cases where law is used as a site of cultural struggle in order to promote group-specific, non-cultural (i.e. political or economic) goals, e.g. when references to cultural differences are used instrumentally by lawyers who do not wish for the harmonisation of their private law for fear of losing their clients. The concept of culture is useful in comparative studies but needs to be applied with great discrimination, especially when it is employed as an

14 I have elsewhere (see Banakar, 1994) drawn on Van Dijk's study of discourse analysis (1992) to explore the *mode* of symbolic communication. In this study, Van Dijk shows how racist ideas can be disseminated by a form of public debate which avoids using overt racist language, but retains the mode of racist discourse.

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explanatory tool to conceptualise what is already defined and interpreted in cultural terms by the participants in law's processes (Nelken, *CLH*, p. 115).

Nelken does not dismiss the criticism directed at the concept of legal culture, but relates the conceptual and empirical shortcomings of legal culture to 'the complexities of what needs to be explained' (*CLH*, p. 117). On balance, the final test of the validity and applicability of the notion of legal culture lies in the possibility of its operationalisation, i.e. if it can be broken down into a set of concrete, observable entities which can serve empirical investigations. Here, too, there are no straightforward answers, for Nelken readily admits that there are many reasons to be wary of where and how we use the term 'culture'.

The other reason for the uncertainty surrounding the application of a culturally contextualised concept of law is in relation to the continuing prevalence of the ideology of legal positivism.[15] Legally positivistic descriptions are part of law's *self-descriptions*, i.e. law's communications about itself, of how legal systems *ought* to be constructed and how law ought to operate. Law's self-descriptions exert a powerful normative influence over how law is perceived and conceptualised by all those who participate in legal processes (e.g. judges, lawyers, juries and defendants) and those who describe it (e.g. academics and journalists). These descriptions uphold an ideal of law as an autonomous system (independent of political, economic, cultural, religious, racial or gender interests) capable of operating as an instrument of regulation and as an impartial arbiter of disputes. Legal positivism is an ideologically powerful instrument for a range of other reasons, for example, being born out of the processes of rationalisation that define modernity. In addition, by sharply distinguishing between law, morality and other culturally determined value systems, legal positivism serves the disciplinary aims of doctrinal scholars who treat law as a normatively sealed system which, according to them, should be studied and analysed on its own terms alone. That is why the legal systems of Africa and Asia, which accommodate many voices and are sensitive to cultural practices and customs, have often been ignored in comparative law. That is also why the idea of 'living law' has been dismissed by legal positivists from the outset.[16] In short, the approach to the study of law, which is shaped by different schools of legal positivism, is incompatible with the social-scientifically defined notion of law as culturally embedded forms of social organisations that do not *necessarily* have the state as their source.

Much confusion is caused by applying criteria belonging to legal positivism – criteria such as the sovereign (indicating positive law's relationship with the state), autonomy (positive law's independence from politics, morality and religion), coherence (positive law's rational architecture) and objectivity (positive law's ability to pass judgment based on law alone) – to evaluate the validity of the social-scientifically constructed pluralistic theories of law which do not define law in terms of the state or as an autonomous sphere of action. Those who try to use cultural insights within the traditional framework of legal positivism often 'reify' culture, for only an immutable concept of culture devoid of its dynamic processual properties can be reconciled with the traditional assumptions of legal positivism, which conceptually divorces law from extra-legal norms and practices. They also disregard the bottom-up perspective, which shows how law also emerges out of the needs of social organisations or how it is used and experienced by ordinary citizens and officials, at the expense of a top-down state-oriented view of the sources of law.

15 Legal positivism is not a homogeneous approach and contains different schools which emphasise the autonomy of law in different degrees and discuss the separation between positive law and morality in different terms. For a discussion see Banakar (2008a).

16 I have elsewhere discussed the clash between Hans Kelsen and Eugen Ehrlich. See Banakar (2008b) and Van Klink (2006).

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Limits of the top-down approach

The importance of combining top-down and bottom-up perspectives is revealed in Masha Antokolskaia's chapter, where she tries to show that a degree of harmonisation has been achieved in the field of family law through the doctrinal and interpretive techniques of the European Court of Human Rights (ECtHR), i.e. by applying a top-down method. Antokolskaia recognises that European societies have radically transformed their attitudes to marriage, family formation and sexual relationships since the 1960s. Although much of this transformation can be attributed to the recognition of the plurality of family and marital values at the sociocultural level, on the one hand, and the success of the women's rights movement in overcoming 'the centuries-long dominance of the man within the family', on the other, she nonetheless regards the ECtHR as *the* driving force behind the transformation of family law (*CLH*, pp. 241–42). She recognises that attitudes towards many aspects of family formation, marriage, divorce, cohabitation and, to a lesser extent, transsexual marriage became *first* socially relaxed, and then normalised, before being legally recognised. Yet, she somehow sees law and social development as two separate but parallel processes, suggesting that the process containing social conditions is mysteriously 'reflected' in the legal process (p. 243). Antokolskaia thus appears to be suggesting that the ECtHR decided on its own accord (i.e. without any input from social movements that mobilise public opinion and exert pressure on European governments) to 'reflect' social conditions by applying 'the so-called "dynamic interpretation of the Convention"', to 'involve factors external to the Convention' and to use the doctrine of the 'margin of appreciation' to develop and extend the scope of the protection of family rights (p. 242). It is true that law, being inherently conservative, often lags behind social and technological developments, 'reflecting' rather than leading them, but this does not happen automatically or passively, and law does not 'mirror' every sociocultural development in the same way and to the same extent. The 'mirroring' effect, therefore, has a social mechanism that needs to be addressed here – a mechanism that interconnects the top-down and the bottom-up processes.[17]

The type of analysis we find in Antokolskaia is, admittedly, not devoid of merit, for it describes the inner workings of the ECtHR and shows that legal instruments can become a *vehicle* for consolidating progressive ideas. Nevertheless, at least in the field of family law, progressive ideas emerge first in the society at large and are recognised and incorporated into law as a result of the pressure exerted by various social movements or for purely pragmatic reasons (for example, for resolving income tax or inheritance problems). The missing link in Antokolskaia's analysis is the role played by grass-roots participation in this process, i.e. by women's and gay and lesbian movements in different countries across Europe in mobilising public and political opinion in support of an extension of family rights.[18] A study of grass-roots and social movements cannot be carried out by focusing on the ECtHR's methods of interpretation or doctrinal innovation, but by applying a bottom-up perspective which brings into focus the formation of demands for the extension of family protection rights at the sociocultural level.

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17 The idea of law 'mirroring' or 'reflecting' social developments is, at best, based on a problematic metaphor, for it fails to capture the dialectical nature of the relationship between law and society. 'Mirroring' always suggests passivity and emphasises the separateness of law and society rather than the ongoing *interaction* between them.

18 In a study of anti-discrimination laws in Sweden, I have argued that rights that are introduced from above, such as the rights expressed in the Swedish Act Against Ethnic Discrimination, and work their way top-down by introducing new non-discriminatory values which are not already embedded in the majority culture, are at best only partially effective. Their partial effectiveness depends on the extent to which these values are already shared by employers and decision-makers. In contrast, rights that are generated at the grass-roots level first, such as those expressed in the Swedish Equal Opportunity Act, which aims at protecting and promoting the position of women in employment and the labour market, are relatively effective. The values underpinning women's rights emerged through women's movements, and thus enjoyed widespread political support among sections of society long before they become a basis for legislation. See Banakar (2004).

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Combining the top-down and bottom-up perspectives

As the authors of the handbook demonstrate, each aspect or area of law has its own specific context and, subsequently, interacts with society in its own specific way. Constitutional law, for example, has a more pronounced political dimension than, say, commercial law, which is, in turn, more intimately linked to the economic make-up of society than, for instance, family law. However, most chapters in this handbook either place an emphasis on culture, i.e. irrespective of the substantive area, they tend to subscribe to the standpoint of 'law as culture', or make use of the word (legal) 'culture'. This could mislead us into regarding the cultural approach as a reliable general method of contextualising law. The cultural perspective, despite its conceptual fuzziness has, as mentioned above, a number of important reflexive properties that can facilitate contextualisation. When used dynamically to study ongoing societal processes, culture becomes sensitive to historical developments, power relationships and various levels of legal reality. In comparative studies, culture helps us to describe and explain the hybrid character of legal families and to explore how legal transplants grow and change in their new sociolegal environments. We also see that not all forms of law and legal behaviour are culturally determined and/or should be studied in cultural terms. Although the focus on the cultural constitution of law, which can incidentally mean many different things (see Nelken's introductory chapter), will continue to offer a powerful general method of contextualising law and legal instruments, it does not provide a universally valid guideline for contextually studying law. A general guideline might, instead, be found in the combination of the top-down and bottom-up approaches which situate law at the macro-level of legal systems, at the intermediary level of legal implementation and enforcement, and at the micro-level of citizenry where law is used to underpin expectations and organise everyday collaborative activities and relationships.

One way to integrate these three levels is by starting with legal rules at the macro-level, working our way down the legal system through the layers of formal and informal institutional practices of the law, to the level of social interaction. Starting at the level of legal systems, we analyse how legal rules are employed to bring about an interaction between the normative structures of law and society. Rules in general, whether social or legal, are standards that guide action in a specific way, and against which action can be assessed and judged (Galligan, 2006, p. 50). Since they are expressed in language, they have an open texture, which allows outside factors to affect their interpretation and application. Thus, even clear and precise rules are contextual and contingent upon the surrounding considerations. The recognition that all rules need to be interpreted before they make an impact on social life is of little value if it fails to consider the full extent and significance of the contextual contingencies of rules. Social and legal rules often signal that 'a certain kind of deliberative process has to be gone through, a process of which the rule is a vital but not conclusive part' (p. 57). Deliberations are required to determine if a specific rule is applicable in a particular situation, and if it is, what it means. For example, 'it may require consideration of related rules, the weighing of presumptions, and the consideration of factors to take into account' (p. 57). In short, rules are the starting point of deliberations and, as such, neither fully dictate what action should be taken, 'nor exhaust the range of actions that may be properly taken' (p. 57).

What happens to legal rules, whether they are adopted, enforced, alternatively modified or marginalised, depends to a great extent on the institutional settings in which they are used. Institutions consist not only of rules but also of values, standards, dispositions, etc., which are created spontaneously once people join together in a collaborative attempt over time (Galligan, 2006 p. 106).[19] Galligan explains that, 'where an activity is itself created by legal rules, as in the case of administrative agencies, say, informal rules often emerge in order to interpret the legal rules, or even to modify or marginalise them' (p. 108). Understanding these informal rules and how they interact

19 See Selznick (1949). This type of reasoning is deeply rooted in the sociology of law and can be easily traced back to Roscoe Pound and Eugen Ehrlich.

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with formal rules requires the application of the bottom-up perspective using qualitative methods of social enquiry sensitive to the social psychological mechanisms of face-to-face interaction. The unit of such analyses cannot be rules, whether legal or social, but the communicative mechanisms through which rules are generated and mediated within the lifeworld. The focus of micro-analysis will differ depending on the object of our study – in one study it will be the conception, perceptions and usages of businessmen, in another study those of the lawyers or officials of law, and in yet another study those of the ordinary citizens. The point is to confront and merge the micro-usages and perceptions of law with the macro-applications of the law at the level of legal systems or international law. Such a combination will, in many situations, lead to a recognition of the diversity of sources and forms of law within the same social space (legal pluralism) or within the same legal system (legal polycentricity).

In the approach sketched above, we started our analysis at the level of legal systems and used legal rules to capture the interaction between law and society at the macro-level. Such a starting point has certain methodological ramifications – unwillingly, as it might be, we endorse some of the assumptions of legal positivism, e.g. treating the state as the primary source of law. We can alternatively start our analysis at the micro-level, i.e. how law is used to organise relationships in everyday life, working our way up the legal system, thus emphasising the formation of law at the level of social interaction rather than the level of nation state or international law. The choice of the starting point will have an impact on the outcome of our studies which, due to lack of space, I have to omit from discussions here. The point made here is that irrespective of the starting point, we need to consider the three levels of social action in order to contextualise laws and legal systems.

A combination of top-down and bottom-up perspectives might not find a positive reception within projects of law reform funded by international agencies interested in spreading Western models of trade, politics and democracy in different parts of the world. Leaving aside the moral issues discussed above in connection with the harmonisation of private law, those who carry out such projects need much more than knowledge of the legal institution that is to be 'transplanted'. They need not only the knowledge of the recipient legal system, but also how law operates in relation to various social institutions in the receiving country. Thus, it is not enough to draft a new constitution, or even set up a new court system and train a new judiciary in order to democratise countries such as Iraq or Afghanistan. Any attempt to reform the legal systems of such countries by importing legal ideas and institutions from outside needs to recognise their political history and incorporate in the new institutions the sense of law and justice which is embedded in the existing social and economic structures of their societies; a sense of justice which, incidentally, might be at variance with the Western notion of democracy. Legal transplants undergo meaning transformation once they are implanted into a new legal system.[20] Despite the relative autonomy of law and the legal profession (which might prefer transplants to constructing legal institutions from scratch), transplants are reconstructed by the internal culture of their 'host' and transformed by the new context of the legal system as they determine and define their functions in a new social environment (see Teubner, 1998).

To sum up, to capture the complexity of these transformations and reconstructions, one needs to study law at different levels and from different perspectives simultaneously. Thus, top-down and bottom-up approaches need to be integrated into one single methodological framework that contextualises legal instruments, legal ideas or legal institutions at three levels of analysis: (1) at the macro-level of the legal system asking how law, as a body of rules, interacts with society; (2) at the level of intermediary legal institutions asking how legal rules are interpreted by officials

20 Legal transplant is another misleading metaphor. It suggests the possibility of transplanting a legal institution belonging to one legal system into the body of another legal system, without it (i.e. the transplanted institution) undergoing fundamental functional and legal identity change.

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and implemented and enforced by courts, tribunals and other agencies; and (3) at the level of social action asking how law is identified, employed and experienced by ordinary citizens as part of their attempt to organise social relationships. To address these three points in research, we have to step out of law's domain of authority and into social theory in order to reflexively explore law's taken-for-granted values and assumptions. This is where studies of law have to merge with the studies of social institutions and behaviour, i.e. with the forms of knowledge generated by sociology, social anthropology, history, psychology, political science, economics and so on. This means that contextualisation cannot be confined to paying lip service to social theory by recognising in passing the social forces that interact with law and its institutions. It must, instead, apply an empirically informed conceptual framework that helps us to explore these social factors as an integral part of the way law manifests itself. Thus, the focus of our study is neither the law nor the social forces underpinning it, but the ongoing *interaction* between them. The central unit of our analysis can neither be legal rules nor social norms of organisation, but the communicative actions which make the production and reproduction of norms and rules, whether social, cultural or legal, possible.[21]

Concluding remarks: a student handbook or a voice of resistance?

The handbook attempts to 'fill the gap in comparative law teaching' (the editors, *CLH*, p. v), while catering for students studying the subject. Each chapter ends with a number of questions to assist students in discussing and revising the content of what they have read. The handbook is undoubtedly an invaluable addition to the teaching arsenal of comparative law, and does go a long way to fill 'the gap' in teaching the subject, but cannot serve as the main textbook for teaching comparative law. First, students with no previous exposure to comparative law and/or sociolegal research might find reading through the first two sections, where mainly theoretical and methodological issues are aired, a daunting experience. Second, although most papers in the third section of the handbook, where substantive issues are discussed, briefly provide basic introductions to their subject area, the handbook on the whole cannot be regarded (and was not intended by its editors) as an introduction to comparative law. The emphasis of most chapters lies not so much on describing various topics in comparative law, but on analysing, reconsidering or deconstructing them.

The collection may be better described as an expression of *resistance* to academic orthodoxy within comparative law and legal studies in general. Simply put, it is more concerned with critically debating the methodological issues of comparative research and testing the boundaries of established positions in comparative law and legal studies, than introducing the differences and similarities between, say, tort in common law and delict in continental civil law systems, which is arguably what students new to the subject may need to begin with. Having said that, I also submit that it is healthy for law students to be exposed to slightly more challenging interdisciplinary texts, and this handbook can work well in teaching comparative law once it is used in combination with more traditional and descriptive texts, of which there are already many in circulation.

We fail, however, to appreciate the main contribution of this collection to legal research if we treat it only as a handbook in comparative law. This collection of papers is as much an introduction to the challenges facing comparative law today as it is an introduction to what it means to engage in interdisciplinary legal research. Furthermore, by including chapters which draw attention to those whose voices are often excluded from traditional studies of comparative law, it shows that comparative law can be as much an instrument for consolidating the dominance of Western legal traditions and cultures, as a site of resistance to Western legal hegemony.

21 For an earlier comparative work where law is considered as a communicative phenomenon see Anthony Allott (1980).

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