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World Picture of Comparative Law: "The Courage of Your Convictions"

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If we assume that comparative law is an autonomous discipline and not something else, it has to be called *comparative jurisprudence* as first happened in English as early as 1827 in England[1] and by 1829 in United States,[2] following the original German concept of *vergleichende Jurisprudenz* / *vergleichende Rechtswissenschaft* (1800). But let us leave this issue aside. Assuming that comparative law is a separate discipline means it has not only practical functions (if at all) and descriptive capabilities, but also the aim of deeper cognitive significance. This aim of comparative law is the construction of an own special comparative-legal picture of the world. To be sure, legal philosophy, legal history, legal theory, and legal sociology each offer their own pictures of the world and to some extent using comparative methodology. But who is to decide that their pictures are more adequate or precise than those fashioned by comparative jurisprudence?

If we assess the analogies and differences between various legal orders with a predominantly cognitive aim, and do this repeatedly or constantly – do we acquire a body of knowledge that could lead us to a system of knowledge with own

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[1] "Abolition of the Code Napoleon in the Rhenish Provinces", *The Jurist, or Quarterly Journal of Jurisprudence and Legislation*, I (1827), pp. 252-253: "It is well known that the art of surgery has, of late years, been indebted, for great improvement, to the advances which have been made in the science of *comparative* anatomy. The principle of improving our knowledge, by extending our researches into subjects analogous and collateral to the immediate object of our inquiries, may be successfully applied to the science of jurisprudence. We have arrived at an epoch when we should no longer hesitate to break down the absurd barriers opposed to the progress of knowledge, by prejudices erroneously called national. The people of different nations should mutually study and compare existing institutions: and when the public opinion of each nation, enlightened by the efforts of philanthropic jurists, the founders of *comparative* jurisprudence, shall have obtained institutions adapted to the national manners, and the national wants, we may begin to hope that justice will be established upon firm and permanent foundations".

[2] "The Civil Law", *The American Jurist, and Law Magazine*, II, no. 3 (1829), pp. 59-60: "Our statesmen at home, therefore, our diplomatic agents abroad, and our practicing lawyers of eminence, who are daily called to the examination of important questions more or less intimately connected with the rights and duties of foreign nations, must make themselves in some degree acquainted with foreign laws; and for this purpose a knowledge of the civil law is indispensable. We might add to these considerations, that in a liberal course of professional studies, general or *comparative jurisprudence* must be a constituent part; and in this point of view the Roman law is of far greater importance than that of any other nation". Ibid, p. 416 (Index): "… importance of the study of *comparative jurisprudence*". Also published as a separate brochure: *Remarks on the Study of the Civil Law* (Boston: Freeman & Bolles, 1829), pp. 23-24. The author was John Pickering (1777-1846), a noted jurist and philologist, and close friend of Stephen du Ponceau (1760-1844), the Philadelphia international and comparative lawyer. Pickering was "… one of the few Americans deeply interested in Roman Law". Quoted from Morris L. Cohen, *Bibliography of Early American Law* (1998), I, 1650.

theory and philosophy? Or should comparatists pass the knowledge obtained to someone else, regarding themselves as field agents for wiser theoreticians and philosophers? If we are to critically and intellectually elevate ourselves collectively, does this engage the autonomous formation of the foundations of comparative legal studies?

Does the "official" mantle of "philosopher" make a person wiser than others? If we return to a philosophical approach to comparative jurisprudence as a predominantly inductive discipline dealing with positive law and other social phenomena cognized with empirical research, is it possible to also imply the traditional metaphysical (with a concealed natural law base) and speculative/deductive philosophy merely with an improved conception of law? Or should we venture to speak about another type of philosophy?

Even if we do not assume the task to construct our own special picture of the world for comparative jurisprudence, it has done this successfully for more than two centuries. This special picture of the world, as the major and most generalized aim of the discipline, is the clearest sign that the last exists in its own right.

PHILOSOPHY OF COMPARATIVE JURISPRUDENCE

The possibility and necessity for comparative law to construct an own special world picture flows from the philosophical level of cognition. Questions arise: has comparative law ever achieved and, if not, can it now achieve this level? Are the philosophical grounds of comparative law somehow special, or are they identical with those of the metaphysical philosophy of law?

Inductive philosophy?

Might, according to epistemology, a predominantly empirical and inductive discipline form its own philosophy by generalizing and questioning the knowledge it obtains, and immerse itself in metaphysical reasoning? There are different views. Robert Audi notes that empirical, sensory experience becomes knowledge only when in combination with analytic propositions, including purely logical truths. Rationalists believe these truths have an *a priori* character; empiricists believe the logic of these truths is grounded in experience. Moreover, rationalists maintain that, in addition to logical truths, synthetic *a priori* truths exist, so all knowledge is deductive and grounded in reason.[3]

Alexander Bird advances the idea of inductive knowledge primacy. Results of inductions become the premises for the next inductive inferences, mediating the reasoning from the observed to the unobserved. Contrary to deduction, inductive inferences are ampliative, "where the conclusion 'goes beyond' the premises". Bird believes that in reality premises are not fully inductive; they appeal to some sort of externalist epistemology, so the inferences are not fully detached and contingent, but to some extent could be subject to apriorism.[4]

[3] Robert Audi, *Epistemology: A Contemporary Introduction to the Theory of Knowledge* (3d ed.; 2011), pp. 116-117.

[4] Alexander Bird, "Inductive Knowledge", in Sven Bernecker and Duncan Pritchard (eds.), *The Routledge Companion to Epistemology* (2011), pp. 271-272, 282.

William Alston emphasizes the autonomy of perceptual knowledge which has an own *prima facie* justification, albeit defeasible, not absolute.[5] This means that perception can be just empirical and the results of perceptual knowledge may form the primary premises for the inductive generalizations.

The truth lies in between: some initial externalist epistemology elements in the inductive comparative legal research are unavoidable, but major premises are themselves the results of previous inductions. The logic of research is ampliative, which presupposes the possibility of critical assessment of any involved externalist epistemology to avoid deductive inferences. In this way comparative law may form an own philosophical discourse independently from the metaphysical philosophy of law.

Early philosophy of comparative jurisprudence: Feuerbach

From the very beginning comparative jurisprudence as a mode of scientific reasoning and disciplinary project included the philosophical level of comprehension of the plurality of legal orders and presupposed a type of philosophizing other than that of a newborn brother and *alter ego* – metaphysical legal philosophy. Disregarding numerous grandfathers for the moment, we concentrate on the ideas of the father of comparative jurisprudence (who did not predict the future strange creation of comparative law), Paul Johann Anselm von Feuerbach.

Feuerbach wrote about the inadequacy of legal theorizing built, explicitly or implicitly, on the generalization of Roman law. The substance and wisdom of the latter should be the impetus for the scientific legal thought of "enlightened peoples" and not a body of predictable and ultimately ossified results that deny contemporary realities and make progress impossible. The conflict between the right unreal Ought and the wrong real Is was not amenable to solutions; theory and practice in law became isolated and despised one another. Theorizing is dominant in its separate seemingly scientific imagined world, elevating the ideal of isolation from real life. And the legal practitioner became indifferent to the imagined theoretical world as empty and unfruitful.[6]

> From other side, the practice too often presented the means as the only and final end, hoarded whole treasures and left them unused, or lifted up whole layers and left the pearls found in place, magnified the letter but killed the spirit, brought stones to the pile and constantly polished them without a thought as to what should come out of it[7].

[5] Willliam Alston, "Perceptual Knowledge", in John Greco and Ernest Sosa (eds.), *The Blackwell Guide to Epistemology* (1999), pp. 223-225.

[6] Paul Johann Anselm von Feuerbach, "Vorrede. Blick auf die teutsche Rechtswissenschaft", in Carl August Dominik Unterholzner. *Juristische Abhandlungen* (1810). Herein we use the Ukrainian translation. Feuerbach, «Погляд на німецьке правознавство», transl. Olena Shabliy; ed. Oleksiy V. Kresin, in Порівняльне правознавство [Comparative Jurisprudence], no. 1-2 (2012), pp. 283-284; Kresin, «Формування теоретико-методологічних засад порівняльного правознавства у працях Пауля Йоганна Анзельма фон Фейєрбаха» [Formation of Theoretical and Philosophical Bases of Comparative Jurisprudence in the works of Paul Johann Anselm von Feuerbach], in Yuriy Shemshuchenko, Ivan Hrytsenko, and Oleksandr Marin (eds.), Порівн1яльне правознавство: сучасний стан і перспективи розвитку: Збірник наукових праць [Comparative Jurisprudence: Contemporary State and Prospects for Development] (2011), pp. 30-52.

[7] Feuerbach, note 6 above, p. 284.

Feuerbach wrote that philosophy first "tried to gain a foothold on the ground of jurisprudence" only during the time of Christian Wolf, in the first half of the eighteenth century. Even the attempts of philosophy to evaluate and conceptually organize jurisprudence according to mathematical logic, leaving aside experience and historical peculiarities "had very bad consequences": "What it displayed was nothing more than a flimsy web of concepts that neither shed light on new truths, nor cemented old ones", translated living truths "in a distorted and restricted form". This metaphysical and speculative philosophy failed, but returned in a "Kantian revolution" with more ill-founded pretensions.[8]

One embodiment of metaphysical philosophy is natural law teaching, modified by the philosophy of pure reason. It clearly distinguished between morals and law, so decisive for legal order, and certain key legal concepts (albeit not all adequate). But such a philosophy is ungrounded, empty, pure speculative, formalistic, and geometric; its main concepts are erroneous and harmful for the development of positive law. The only contribution of such a philosophy is the negative definition of law:

> The pure form of law, no matter how understood, is always negative. Nothing positive can be created from it, and therefore it is devoid of any content and serves as a criterion for determining the extent to which current and future laws are acceptable from a legal point of view. However, it is not the element from which the content of any legislation could develop.[9]

According to Feuerbach, philosophy in the sphere of law (just as in the sphere of any positive science) cannot be a creator or principal, but merely a teacher and companion; it cannot change the existing *materia* and legislate, but merely propose forms and ideas. There is no source, not even "eternal reason", for the authority of legal philosophy. It has no power over real positive law and no basis for despising it; philosophy can merely analyze and comment on existing law.[10]

Feuerbach mercilessly criticized the metaphysical, substantial, *a priori*, subjective philosophy as the irreconcilable enemy of science. But he was convinced that the philosophical level of comprehension has to be an integral part of jurisprudence in indissoluble connection with the "historical" (inductive study of positive law) level. Following Gustav Hugo (1764-1844), he proposed the other non-metaphysical inductive philosophy – the philosophy of positive law. In 1810 he wrote about a general jurisprudence in which the base has to be comparative jurisprudence and the top has to be the positive philosophy of law or "philosophy of the laws". The last "derives the General from the Individual and reduces everything to a large and meaningful Whole".[11]

In his later work Feuerbach defined both general jurisprudence and comparative jurisprudence as the "science about the State and history of law in human society as such", noting that: "Science as such consists in knowing the General and regular in their relation to the Individual and accidental. And only

[8] Ibid, p. 285.

[9] Ibid, pp. 288-289.

[10] Ibid, pp. 285, 290.

[11] Ibid., pp. 285-287, 289.

a comparison of different research subjects can bring us closer to this level of knowledge".[12]

In this work Feuerbach declared that this general or comparative jurisprudence has to provide legal disciplines or areas of legal research with scientific grounds. Whereas Kant presupposed the possible autonomic from the metaphysical philosophy existence of positive legal science, but suggested this would be a headless body, Feuerbach viewed comparative jurisprudence as this head.

Feuerbach believed that metaphysical philosophy is false and empty, and virtually unnecessary, just as any idea of law's substantiality is discredited. Moreover, the philosophy of natural law, seemingly built on consistent speculative "pure reason", conceals its true nature as merely the generalization of European legal orders (foremost Roman law). A true philosophy of law (or philosophy of legislation) and legal theory should be based on comparative legal studies attentive to both similarities and differences, presuming the equality of different peoples' experiences and able to comprehend their values. Universal human elements should be comprehended with the comparative study of nations as individuals; homogenous universal similarity being impossible, the General is the "movement to achieve maximum unity with the existence of the greatest possible diversity". The philosophical study of the values, spirit, and senses of positive law is seen here as a part of general or comparative jurisprudence: "General positive legal science (universal legal science) … if, thanks to the comparative analysis of various laws and legal systems, it will be able to rise to the level of science, then it will be called comparative jurisprudence".[13]

Generally speaking and taking the Kantian terminology (the key consistency here, paradoxically at first sight, is Feuerbach taking some Kantian terms while rejecting his metaphysics), it can be said that Feuerbach doubts the reality and the need for the philosophy of pure reason as metaphysics continuing to predominate the sciences, including jurisprudence. Pure reason cannot determine the philosophical discourse in law. On the contrary, philosophical senses, or "universal wisdom", should be formed from below; not from the generalization and idealization of one nation's experience, but on the base of the comparative study of positive national legal orders. Comparative jurisprudence here stands as a dominant among general legal disciplines and as a multi-tiered project presupposing its own philosophical discourse.

These ideas of the philosophy of positive law of Gustav Hugo and of the own philosophical discourse or dimension of comparative jurisprudence of Feuerbach had extensive dissemination and influence and were reproduced by others, sometimes almost literally and without references. As a brief example: in his lectures at London University (now University College London) as the Professor of Jurisprudence and the Law of Nations from 1827 to 1832, John Austin (1790-1859) distinguished within the "province of jurisprudence" general jurisprudence or the philosophy of positive law (their identical content

[12] Feuerbach, "Idee und Notwendigkeit einer Universal-jurisprudenz", in Paul Johann Anselm von Feuerbach, *Biographisher Nachlass* (1853), pp. 378-401. Herein is used the Ukrainian translation. Feuerbach, "Ідея та необхідність універсальної юридичної науки. Природне право, філософія права, загальне правознавство", transl. Olena Shabliy; ed. Oleksiy Kresin, in Порівняльне правознавство [Comparative Jurisprudence], nos. 3-4 (2012), p. 329. See a similar thought on p. 338, with a substitution of "regular" with "necessary".

[13] Feuerbach, note 12 above, p. 328-334, 337-339.

was repeatedly stressed) from the particular jurisprudence or the complexes of knowledge of individual national legal orders. Expressly basing himself on Hugo and implicitly reproducing key theses of Feuerbach, Austin viewed general jurisprudence / philosophy of positive law as

> concerned directly with principles and distinctions which are common to various systems of particular and [sic!] positive law; and which each of those various systems inevitably involves, let it be worthy of praise or blame, or let it accord or not with an assumed measure or test. …is concerned with law as it necessarily *is*, rather than with law as it *ought* to be: with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*.[14]

In the second, posthumous edition of Austin's work it was noted:

> the ampler and maturer systems of refined communities are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems (or the various analogies obtaining between them), are the subject of an extensive science: which science (as contradistinguished to national or particular jurisprudence on one side, and, on another, to the science of legislation) has been named General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law.[15]

Thus, John Austin proclaimed the identity of the spheres of general jurisprudence, comparative jurisprudence, and the philosophy of positive law, being opposed simultaneously to the metaphysical philosophy of law (including natural law teaching), science of legislation (embracing legal encyclopedia, legal deontology and ethics, legal technics etc.) and "particular jurisprudences".

We do not integrate here the rich material about the development of the philosophy of comparative law and present Feuerbach's views merely as an example, albeit a fundamental one.

Contemporary philosophy of comparative law and the issue of its world picture

And what of the contemporary vision of the philosophical discourse of comparative law? This is addressed by many distinguished scholars writing about the theoretical and philosophical aims/goals of comparative law, something deeper than description and taxonomies, and rising to an own world picture conceptualization.

Max Rheinstein in his various works stated that comparative law has not just to describe legal systems and present the analytical legal geography as the result of such activities, but also is "concerned with law as a supra-national phenomenon", can in the future construct the general morphology of law, and form the general teaching on law. Legal concepts should be formed not

[14] John Austin, *The Province of Jurisprudence Determined* (1832), p. iii.

[15] Austin, *The Province of Jurisprudence Determined* (2d ed.; 1861), II, p. 1107.

from intellectual speculations, but be a result of comparative induction and generalization of the real law.[16]

Stephen Hicks suggested the shift in the perspectives of comparative law from the instrumental and evaluative to the interpretative one, being the only one legal discipline offering a "total overview" of legal phenomena and processes on the base of the experience of law. The widening of the scope of the discipline should include inductive forming of "the notion of the whole legal world and its intellectual development", in which every real form and mode acquires its meaningfulness.[17]

Petro Martynenko in 1990 stated that comparative-typological cognition is based on the spatial dimension of law, "spatial feasibility of law as the implemented state of the totality of its systems", being on an equal footing with historical and theoretical dimensions. It presupposes generalization and "produces new comparative knowledge about law on the base of typical models thereof and comparative study of legal systems and their elements", their interactions, applying the comparative-typological approach.[18]

Martynenko proposed a precise conceptualization of a special picture of the world in comparative-legal studies. Although the subject-matter of comparative jurisprudence is legal geography (legal map of the world), the highest aim is the construction of a picture of the world. The essence of this picture is the dialectics of the General, Special, and Individual elements (institutionalized as legal orders or not) in legal development, where the interrelation of the General and the Individual is mediated by the Special.[19]

Tikhomirov relegated to a "picture of the general legal development in the world community": the nature of legal diversity and differences in law, the character and peculiarities of "legal formations" or legal complexes (national legal systems, legal families, branches of law, legal corpuses of inter-State associations, international law), the interaction thereof, and general and regional trends in the development of law.[20] Vladimir Ilich Lafitsky (1957-2023) stated without further details that the main aim of comparative law is the "creation of the universal picture of law in the all diversity of its manifestations".[21]

[16] Max Rheinstein, "Comparative Law – Its Functions, Methods and Usages", *Arkansas Law Review and Bar Association Journal*, XXII, no 3 (1968), p. 415; Макс Рейнстайн, "Предмет и задачи сравнительного правоведения" [The Subject and Tasks of Comparative Jurisprudence], in Vladimir Tumanov (ed.), Очерки сравнительного права [Essays on Comparative Law], (1981), pp. 93-94, 97.

[17] Stephen C. Hicks, "The Jurisprudence of Comparative Legal Systems", *Loyola of Los Angeles International and Comparative Law Review*, VI (1983), p. 92.

[18] Petro F. Martynenko, «Целостность мира и сравнительное правоведение» [Integrity of the World and Comparative Jurisprudence], in O. V. Kresin (ed.), Порівняльне правознавство: Антологія української компаративистики XIX-XX століть [Comparative Jurisprudence: Anthology of Ukrainian Comparativistics XIX-XX Centuries] (Kyiv, 2008), pp. 295, 297.

[19] Ibid., pp. 282-283, 288, 298, 301, 303, 306.

[20] Iu. A. Tikhomirov, Курс сравнительного правоведения [Course of Comparative Jurisprudence] (1996), pp. 2, 6-14, 16, 19-20, 247-248.

[21] Vladimir I. Lafitsky, "О предмете сравнительного правоведения и методологии его исследования" [On the Subject-Matter of Comparative Jurisprudence and Methodology of Its Study], in Iu. A. Tikhomirov (ed.), Методология сравнительного правоведения: материалы конференции [Methodology of Comparative Jurisprudence: Materials of the Conference] (2012), p. 44.

Samuel declared that the object of scientific thought, including in comparative law, is not "the facts of the social world", but the model in which and in relation to which every concrete fact obtains a sense.[22] Later he argued this thesis in detail. In search of an aim of comparative law as a scientific discipline he points on the need to clearly distinguish between ontological and epistemological dimensions of legal disciplines, the same as between science and the object of science. Researchers are studying empirical phenomena, but they reacting to existing facts by construing abstracted conceptual models of the reality, and the last become the object of science. The model, and not empirical facts themselves, "produce explanations and predictions", and scientific theories.[23]

The model is valid/credible when it has no visible contradictions with reality, is formally coherent internally, is consensual/conventional (accepted/agreed by "members of a specified community"), and these three requirements are at the same time the ways of verifying a model. The first two factors seem to be most important, but the decisive factor in discarding and replacing the model with another is the loss of conventionality.[24] Therefore models, Samuel stated, are "more or less *indirectly* connected to empirical phenomena": "Science is about the construction of schemes and models and empirical reality is understood not so much by imposing the model onto this reality but by schematizing an empirical phenomenon and inserting it into a system of concepts where it gains its scientific and referential sense".[25]

Models in legal science mediate between law and reality.[26]. Samuel repeatedly noted the significance of developing theory and methodology of comparative law, the inadequacy of works on legal philosophy for comparatists, the potential and even naturalness of the deductive and axiomatic stages of development for every science that begins with description and induction. But for him there is only one conceptual model of reality interpretation for legal science. He prefers comparative law to play a central role in the development of this single model which could become "post-axiomatic".[27]

Rodolfo Sacco (1923-2022) believed that "science does not need to borrow its justification from practical needs" and saw the principal/essential/chief goal of comparative law as "to access and understand the differences that exist between divergent laws and to discover the attendant benefits of these differences", "weigh the analogies and differences existing between the legal systems that they study".[28] William Ewald wrote about the "jettisoning of philosophy" from

[22] Geoffrey Samuel, Comparative Law, in C.B. Gray (ed.), *The Philosophy of Law. An Encyclopedia* (1999), p. 207.

[23] Geoffrey Samuel, Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences, in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (2004), pp. 36-38, 43.

[24] Ibid., p. 44.

[25] Ibid.

[26] Ibid., p. 46.

[27] Ibid., pp. 35-36, 54-56; Geoffrey Samuel, Law of Obligations & Legal Remedies (London, 2001). See also: Horatia Muir Watt, "New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?", in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (2004), p. 273.

[28] Rodolfo Sacco, "One Hundred Years of Comparative Law", *Tulane Law Review*, LXXV (2000-

comparative law, leaving "the dry skeleton of the law", and proposed to return to a philosophical approach "based on a richer and more defensible conception of law" which presuppose a new deeper subject-matter for the discipline transformed into comparative jurisprudence.[29]

Pierre Legrand called for the "lucid theoretical undergirding of comparative legal studies and for methodological humility"; that presupposes moving upwards from description and compiling to the previously repressed "more vital roles such as critic and intellectual".[30] He defines the whole enterprise of the comparatist and comparativistic reasoning as a philosophy:

> The task of the comparatist is to lift himself out of his mundane existence and to attempt an 'appropriation of the foreign', to confront the enigmatical as he discerns it in other legal cultures in the full knowledge that the study of different lifewords will tax his empathic powers. Beyond the challenge to the foundational assumptions by which he leads his legal life within his local community, the comparatist must engage in the hermeneutical act that will allow him, through his intrusion into alien forms of discourse, to decipher and explicate a range of phenomena that appear inhospitable to interpretation … The comparatist aims to demonstrate that the discursive practices and the mental representations operating within a legal culture, often at a level beneath consciousness, are able to serve as a focus for speculative inquiry into significance in that they can communicate the specific legal and cultural sensibility of a given interpretative community.[31]

Perhaps paradoxically, Legrand at the same time argued that no methods, including the said "hermeneutical act", could cross the boundaries of an own legal tradition for the comparatist, and calls this situation "epistemological incommensurability". But he uses the available comparative methodological instrument for other purposes including the understanding of own legal tradition, the impossibility of interchanging "here" and "elsewhere", and of the imposition and distorting of foreign law, which "deserves to be elucidated, as much as possible, *on its own terms*".[32]

Jaakko Husa distinguishes dogmatic and non-dogmatic disciplines in general legal studies. Legal theory is maximally close to national legal dogmatics. Comparative law is also close to legal dogmatics methodologically, but is different in ontological and epistemological issues, for it has not a national, but a supranational character. At the same time, comparative law is close to legal philosophy from the view of its issues and objects of study, epistemological supra-national prospects, but differs in its ways of argumentation and research tradition.[33]

2001), pp. 1162, 1170.

[29] William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?", *University of Pennsylvania Law Review*, CXLIII (1995), pp. 1953, 2114, 2145.

[30] Pierre Legrand, "The Return of the Repressed: Moving Comparative Legal Studies Beyond Pleasure", *Tulane Law Review*, LXXV (2000-2001), pp. 1034-1035.

[31] Legrand, "Alterity: About Rules, For Example", in P. Birks and A. Preto (eds.), *Themes in Comparative Law. In Honour of Bernard Rudden* (2002), p. 21.

[32] Ibid., pp. 22, 32.

[33] Jaakko Husa, "Nicht nur juristische Auslandsforschung: Rechtsvergleichung als

Husa considered that the ontology of law lay in the research sphere of comparative law just as in the philosophy of law, and that a division of labor exists. Husa supports the idea that the highest existential aim of comparative law is mostly the same as those of legal theory and legal philosophy – the production of a theory of law independent from the differences of legal systems. Legal philosophy transcends legal science, whereas the philosophical discourse of comparative law operates inside it. But within legal science, legal theory and legal philosophy have no monopoly on the philosophical comprehension of law, and "comparative law is at least for the same degree philosophical as legal theory" dealing with the ontology and epistemology of law.[34]

Husa observed that all branches of jurisprudence with an object transcending national boundaries, and especially comparative law, raise theoretical and philosophical questions. And underlying these questions are "fundamental theoretical assumptions laying under the surface" of comparative law that could be cognized without own ontological and epistemological discourse.[35]

Esin Örücü noted that comparative law has its own philosophy – "the understanding of another". That is why comparison as comprehension, mode of thought, and lifestyle to be genuine cannot confine itself to empirical comparison, but "must end in explanations, answering the question: why?" These inductive explanations lead to "three essential gems of comparative law": "theories of methodology; theories of legal families; and theories of transfrontier mobility of laws".[36] In earlier work, however, Örücü saw comparative law as a branch of social science based on positive observation that anyway "must exist with symbiosis" with the philosophy of law, for the latter is not merely speculative and really acquires a "true knowledge of law".[37]

Mehman Damirli and Iryna Kryvtsova suggested to consider the legal map of the world as a special scientific picture of the world of comparative jurisprudence.[38] In their view, the forming of the legal map of the world should be perceived as a scientific research program of comparative jurisprudence. This view would appear to confuse interconnected, but essentially different, phenomena: the objective forming of the legal map of the world, the doctrine on the legal map of the world, and the doctrine on fundamental objects and processes in the sphere of law as the foundation of the legal picture of the world.

Rechtsphilosophie", *Rechtstheorie*, XL (2009), pp. 3-5, 8; Jaakko Husa, *Interdisciplinary Comparative Law. Rubbing Shoulders with the Neighbors or Standing Alone in a Crowd*, (2022), pp. 3, 6.

[34] Husa, note 33 above (2009), pp. 7-8, 17-18.

[35] Ibid., pp. 18-20.

[36] Esin Örücü, "Comparative Motley: Offerings from a Comparative Lawyer", *Critical Analysis of Law*, VIII, no. 2 (2021), pp. 9-10, 13.

[37] Örücü, *The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century* (2004), p. 14.

[38] Mehman Damirli, "Предметне поле порівняльного правознавства: комплексне бачення" [Subject-Matter Field of Comparative Jurisprudence: The Complex Vision], Порівняльне правознавство [Comparative Jurisprudence], no. 1-2 (2012), pp. 79-80, 86; Iryna S. Kryvtsova, "Научная картина мира, картина мира правовых наук, правовая карта мира (юридическая география мира): от общего к частному (некоторые размышления)" [Scientific Picture of the World, Picture of the World of Legal Sciences, Legal Map of the World (Legal Geography of the World): From the General to the Special (Some Reflections)], Правова держава [Rule-of-Law State], no. 27 (2016), pp. 439, 442-443.

Aleksei Egorov said that comparison becomes scientific only when it rises to the theoretical and philosophical levels, creating a theory of its objects with the model of their comparative relations – a special comparative world picture of law.[39]

Oleksandr Tykhomyrov distinguished three main components of the bases of comparative jurisprudence: ideals and norms; special scientific picture of the world; philosophical bases. They are mutually dependent, but each has its own sense and performs certain functions.[40] He noted that the philosophical bases of comparative jurisprudence are similar to, but not identical with, those of legal philosophy, just as philosophy and science are close but not the same. Comparative jurisprudence is "choosing and adapting the philosophical-legal knowledge to its nature and necessities through their concretization, clarification, adaptation, filling with new senses".[41] These philosophical bases of comparative jurisprudence

> reflecting it as a form of culture, on the worldview level determining its ideals and norms, scientific picture of the world, providing for a mutual relation of science and worldview, culture, social practices in temporal and spatial contexts, i.e. in certain historical epoch and in certain space … The comparative mode of thinking to some extend is specifying itself in the philosophy of post-postmodern – transmodernism, transversal philosophy, including the philosophy of comparativism, and as not a substantive philosophy, but a mode of philosophizing.[42]

According to Tykhomyrov, the philosophy of comparativism by rational means eliminates universality and uniqueness, determinacy and spontaneity, chaos and order, is "based on their relativity, supplementarity, on the cyclicity and accidentality of mutual transformations, and through them it is optimizes, harmonizes modernism and postmodernism, comprehends the world as pluralistic, multidimensional, multipolar".[43]

Fundamental for the philosophy of comparativism is the dialectics of One, Another, and the Other and its comprehension is based on the categories of common and different, proportionality, necessity and accidentality, constancy and changeability, on the philosophies of identicality, difference, and existence.[44]

Tykhomyrov views the special scientific picture of the world of comparative jurisprudence as a fragment of juridical (legal) and comparative

[39] Aleksei Egorov, «Философия правового сравнения» [Philosophy of Legal Comparison], in Oleksiy V. Kresin (ed.) Філософія порівняльного правознавства: Збірник наукових праць [Philosophy of Comparative Jurisprudence: Collected Articles] (2015), pp. 189-191.

[40] Oleksandr Tykhomyrov, «Філософські засади порівняльного правознавства» [Philosophic Bases of Comparative Jurisprudence], in Oleksiy V. Kresin (ed.) Філософія порівняльного правознавства: Збірник наукових праць [Philosophy of Comparative Jurisprudence: Collected Articles] (2015), pp. 129.

[41] Tykhomyrov, «Філософсько-наукознавчі засади юридичної компаративістики» [Philosophic and Science of Science Bases of Juridical Comparativistics], Порівняльне правознавство [Comparative Jurisprudence], no. 1-2 (2012), p. 28.

[42] Tykhomyrov, note 40 above, pp. 129-130, 138.

[43] Ibid., pp. 138-139.

[44] Ibid., p. 139.

(glocal, civilizational, cultural) scientific pictures of the world. Its role is the systematization of scientific knowledge of legal and regulative reality and to determine the tasks of comparative legal studies and the choice of the means of their realization. Whereas scientific facts reflect the images of the common and different in the fragments of reality, the picture of the world is the ordered image of reality in the specifical for comparative jurisprudence mode – through General, Special and Unique.[45]

Oleksandr Tkachenko based his philosophy of comparative jurisprudence on the delocalization of philosophy – "the impossibility of its existence as systemic, *a priori*, transcendental, unitary, timeless, and single horizon of philosophical senses".[46] Comparative jurisprudence, Tkachenko noted, had been not freed from metaphysics. The metaphysics symmetry in legal philosophy is the opposition between the jusnaturalist tradition, as its legitimation, and positivism. The autonomic metaphysical symmetry in comparative jurisprudence, which "is not a simple translation of philosophical problematics onto new subject-matter, and, in addition, deforms and dismantles legal philosophy", is the opposition between universalization and singularization of legal traditions.[47]

A new perception of intellectual space is underway through the overcoming of metaphysics, a change in the construction of thinking from the vertical to horizontal: "philosophy is possible only as the way of processualization of thinking within concrete disciplinary discourses, and not in some supradisciplinary, metadygmal space". The philosophical comprehension of law does not transcend the confines of legal science, is immanent, and constitutes as autonomous philosophical discourse. Comparative jurisprudence no longer has the aim of abstracting conclusions from cultural historicity to be used on an imagined higher level of legal philosophy, and no longer applies the ontological and epistemological axiomatic truths of legal philosophy; it becomes post-metaphysical. Existence could not be deprived of languages, and the mathematical principle of thinking is inadequate. Comparative jurisprudence in the context of post-nonclassical scientific rationality is constructing an own gnoseological framework and becomes an autonomous sphere of philosophical and methodological reflection: "philosophical senses could not be brought into comparative jurisprudence, but could be only produced by the latter, in particular by autonomous rebuilding of phenomenological or hermeneutical approaches to the world".[48]

Post-metaphysical comparative legal thinking perceives the place and the language not as the surface that hides a deeper sense, but as parts of the latter, so any singular unity and substantiality of law are abandoned. But the content of these

[45] Tykhomyrov, note 41 above, pp. 27.

[46] Tkachenko, "Постметафізична інтерпретація tertium comparationis — конституант права-як-філософії" [Postmetaphysical Interpretation of Tertium Comparationis – Constituent of Law-as-Philosophy], Порівняльне правознавство [Comparative Jurisprudence], nos. 3-4 (2012), pp. 423-424.

[47] Tkachenko, "Негативний простір юридичних конструкцій – територія правового порівняння як правової філософії" [Negative Space of Legal Constructions – Territory of Legal Comparison as Legal Philosophy], in Kresin (ed.) Філософія порівняльного правознавства: Збірник наукових праць [Philosophy of Comparative Jurisprudence: Collected Articles] (Kyiv, Lviv, 2015), pp. 233-234.

[48] Tkachenko, note 46 above, pp. 423-424.

local senses, embodied especially in national legal orders, is not self-sufficient; it is hetero-*materia*, applicable to other legal orders, and the comprehension of these processes has the speculative effect of producing "disciplinary philosophical senses". The comparison of law becomes philosophical and a "special procedure of processualization of legal thinking embodied in the discursive form with the legal deconstruction of own law".[49]

Tkachenko argues that – in the situation of inability of universality-singularity opposition to be an orientator for the philosophical identity of legal science – post-metaphysical construction of comparison becomes "the conceptual space of law-as-philosophy": "Positive space of legal constructions is the only sphere of legal senses existence. Its ontologization means that legal sense cannot be metajuridical, it is always immanent for materia of law".[50]

The specifics of legal reality and the special style of legal thinking, according to Tkachenko, are embodied exclusively in legal dogmatic constructions. They are not and cannot be the sphere of philosophical discourse, for the truth cannot be deduced from the existent – it is a stepping out of sense. That is why philosophy is localized in the negative space of legal constructions – the appeal to another law being the "nothing" of own law providing the sense of the last in the motion. "Foreign law is not an ontological phenomenon, but the gnoseological construction of own law comprehension", and awareness of own law's non-self-sufficiency leads to the procedure of comparison being a philosophy.[51]

Anastasia Saparova clarified such theses by noting that "law is itself a culture, and not just something existing in its confines, is simultaneously a process and a result of constant movement of senses, their mixing and combination". The comprehension of the constant legal transplantation processes should be a central subject of philosophical and methodological discourse providing the denial of both universalization and singularization of law.[52]

Of relevance are the present writer's thoughts expressed in earlier publications.[53] Legal philosophy studies ideal primary bases of law, objective and universal regularities of the origin, structure, functioning and development of law, and the specific features of the manifestation in law of regularities inherent in nature and social phenomena. Legal philosophy forms the doctrine on extra-legal grounds of law and its ideal primary bases, that is, natural (or reasonable, philosophical) law. Positive law as such is not within the subject-

[49] Ibid., pp. 425-427.

[50] Tkachenko, note 47 above, p. 236.

[51] Ibid., pp. 236-238.

[52] Anastasia Saparova, "Переосмислення правових трансплантантів як механізм оновлення філософії правознавства" [Rethinking Legal Transplants as the Mechanism of Legal Philosophy Renewal], in Kresin (ed.) Філософія порівняльного правознавства: Збірник наукових праць [Philosophy of Comparative Jurisprudence: Collected Articles] (2015), pp. 386-393.

[53] Kresin, "Філософія права і філософія порівняльного правознавства: деякі міркування" [Philosophy of Law and Philosophy of Comparative Jurisprudence: Some Considerations], in Iu. S. Shemshuchenko and Ia. V. Lazur (eds.), Сучасні проблеми порівняльного правознавства: Збірник наукових праць [Contemporary Problems of Comparative Jurisprudence: Collection of Scientific Works] (2015); Kresin, "Зрозуміти Патрика Гленна" [Understanding Patrick Glenn], Порівняльно-правові дослідження [Comparative-Legal Studies], no. 2 (2014); Kresin, *Comparative Legal Studies: 1750 to 1835. Approaches to Conceptualization*, ed. and transl. William Elliott Butler (2019).

matter of the legal philosophy, and is of interest only in correlation with the ideal natural law (even if it is not called such). Such a legal philosophy: has a regional character, is not universal; does not directly correlate with the development of positive law and legal culture in concrete societies and States at certain stages of their development. This is not a shortcoming of legal philosophy, but a limitation thereof, an assumption of the existence of its limits. It cannot claim to a disciplinary monopoly in the sphere of a connection between philosophy and jurisprudence and in the sphere of the philosophical contemplation of law – especially if we refer to a contemplation of law in force.

At the same time, the philosophy of positive law formed during the second half of the eighteenth to the early nineteenth century is necessarily empirical and social. It provides for the non-incidentalness and rationality of the existence of the diversity of legal systems. And irrespective of whether the General in law is drawn from them inductively or is ascribed externally and deductively by the philosophy of natural law in the form of final reasonableness, the philosophy of natural law does not absorb temporary rationality, just as philosophy does not absorb jurisprudence.

A comparativistic legal worldview (or comparativistic elements of a worldview) became a generalization of the philosophy of positive law, in essence being non-monist, non-metaphysical, non-deductive, but pluralist, social, and inductive. Thanks to it and the comparative-legal approach and the complex of comparative-legal disciplines generated by it, the unity of the system of legal knowledge was established – from practically-oriented studies of national law to a determination of the universal in legal development. The philosophy of positive law in the works of Anselm von Feuerbach and his followers in essence became comparative, and the comparative jurisprudence designed and identified by him finally absorbed such a philosophy and should have produced knowledge about law at the highest possible level of generalization. The entire system of legal knowledge and disciplines, according to Feuerbach, was permeated with comparativism. This comprised the first system of the philosophy of comparativism.

The philosophy of comparativism is in constant development, is pluralist, and is difficult to systematize. The very identity thereof is plural. Martynenko, for example, considered this problem more within comparative jurisprudence, and Glenn and Tykhomyrov – within legal science as a whole.[54]

An opposition exists between traditional legal philosophy as one reflecting an *a priori* and metaphysical, universalist, and monist worldview and the philosophy of comparativism and comparative jurisprudence as reflecting an empirically oriented, historical, social, pluralist, spatial worldview. The philosophy of comparativism is a philosophy of the Individual, Particular (Special), and General being sited horizontally relative to one another, in mutual linkage, and mediated by time, space, and social development. Therefore, on one hand, comparative jurisprudence needs an own philosophy and creates this, using own experience and the achievements of various sciences, and, on

[54] For Patrick Glenn's views, see his entry in: Elisabeth Zoller, George A. Bermann, Patrick Glenn, Kim Lane Scheppele, Amr Shalakany, and David V. Snyder, "Comparative Law: Problems and Prospects", *American University International Law Review*, XXVI, no. 4 (2011); Kresin, "Зрозуміти Патрика Гленна", note 53 above, pp. 59-68.

the other – comparativism and its philosophy never can be embodied in a single discipline.

The philosophy of comparativism, just as legal philosophy, has to do with ideas concerning law, including various law-comprehensions. But it considers and evaluates them not in individual or group personalized, but in social existence, as elements of a legal worldview of concrete societies, dominating law-comprehension. It considers these law-comprehensions not as absolute, not as emanations of pure reason, but as pluralist and relative, localized in time and space.

Categorical propositions of a legal philosophy *a priori* in essence and abstract in orientation act for the philosophy of comparativism merely as hypotheses and ways of thinking, and also one of many variants which may be topical or not topical with regard to a concrete time and place. But comparativism does not coincide also with materialist philosophy; it provides an indirect link between material conditions and sphere of law (positive law, legal culture, legal consciousness) because the autonomy is recognized of the last and the possibility of various variants of the development of law in similar material conditions. Legal philosophy, claiming the perpetuity of truth in law, is in its essence, materialized. The philosophy of comparativism is always uncompleted, for the objects of comparative jurisprudence are dynamic, and therefore it is to a greater degree processual.

WHAT IS THE SCIENTIFIC PICTURE OF THE WORLD?

The scientific picture of the world as a concept can be analyzed from different vantage points, among them: philosophy of science, science of science, and history of sciences.

Philosophy of science

We begin with Immanuel Kant (1724-1804), whose ideas were key for the transformation and institutionalization of the social sciences two centuries ago. In his concise article "What is Enlightenment" in 1784[55] he insisted the humans rise from "self-imposed nonage", blaming the inability to form own understanding without the guidance of an imposed metaphysics of theology and philosophy. A new model of thought, stepping away from indecision, "the courage of your convictions", "dare to know!", is the essence of Enlightenment. This could not be achieved at once; it is a slow process of freeing from prejudices, a process of conscious and consistent use of practical reason.

In the Kantian vision this use has to be scholarly and public (sharing and discussing the obtained knowledge), and be realized in practice (for example, in the civil service). This scholarly quest leads to the formation of an order, both an intellectual scheme and its realization, that is not absolute and eternal, but relative and temporary, to be changed subsequently with a new order in the never-ending process of intellectual progress ("progress in enlightenment"). Moreover, this order is to some extent conventional because it rests on the

[55] Immanuel Kant, *What Is Enlightenment?*, transl. Mary C. Smith (available online).

convention of the majority of scholars, but does not eliminate the dissenting views of a scientific and non-scientific character.[56]

The essence of the conventional intellectual order was subjectivized in the ideas of scientific worldview and world picture of a number of philosophers of science, among them Wilhelm Dilthey (1833-1911) and Karl Jaspers (1883-1969). Dilthey in 1911 claimed that every worldview "is historically conditioned and therefore limited, relative", separated from other worldviews by its "inner law". And at the same time, every worldview is "grounded in the nature of the universe and the relation of the finite knowing mind to it" and so "each of them expresses one side of the universe within the limits of our thought", being one-sided true while "it is not granted to us to see these sides all at once". So, "the pure light of truth can be seen by us only in variously broken rays".[57]

The key conclusion of Dilthey is that the cognition of the world is only one among important moments in worldview formation. These moments result from reasoning, pre-position, pre-experience, all our psychological integrity, and so could be destroyed by mere factual or logical argument.[58]

Dilthey wrote that the worldview could be not only personal, but also characteristic for some climate, race, nation, and conditioned by particular history, influence of State order, life conditions, interactions between peoples, being at the same time typical in essence for an epoch of general history. Just as living beings are struggling for territories, different worldviews are struggling for souls. Worldviews better able to explain themselves win out and become long-living and stable, developing themselves organically and becoming more systematic.[59]

The substantial changes in life conditions, state of science, interaction of peoples, and major political events create new combinations of living experience and orientations, which together influence the power of certain ideas and evaluation of the importance of problems. These new integral intellective complexes contradict the settled and conventional worldview, and this may lead to the transformation or creation of a new worldview.[60]

Three grand types of worldview are distinguished by Dilthey, historically consecutive but co-existing: naturalistic (nature influencing humans), subjective idealism (human spirit influencing nature), objective idealism (harmony between humans and nature).[61]

Dilthey used the notion of world picture / *Weltbildes* (connected with, but separate from worldview / *Weltanschauung*) as being the system and the result of

[56] A contemporary scholar has observed that the concept "worldview" (Weltanschauung), important in principle for understanding the world picture as a sub-concept, appeared first in Kant's *Critique of Judgement* (1790). See David Naugle, *Worldview: The History of a Concept* (2002).

[57] Dilthey's fragments are presented in David Naugle, *The Age of the "World Picture": Hermeneutics and Weltanschauung Theory*, pp. 29-30 (available online).

[58] Wilhelm Dilthey. Типы мировоззрений и обнаружение их в метафизических системах [Types of Worldviews and their Appearance in Metaphysical Systems], in Культурология. XX век. Антология [Culturology. 20th Century. Anthology] (1995), pp. 216-229.

[59] Ibid., pp. 216-229.

[60] Ibid., pp. 216-229.

[61] Ibid.

the consistent cognition which summarizes and interprets perceived objects and their relations with other objects and with us, moving from the known and from our values to the as yet unknown. Then in turn the world picture becomes the base for the evaluation of particular objects and filling them with sense.[62]

An insightful analysis of Dilthey's views on the subject is presented by Eric Nelson. First, the worldview in the theory of Dilthey is not a passive meditation, but the "interpretive perception or picturing [anschauen] of a world": "A historically situated and self-reflexive life interpretively pictures and forms a world for itself and expresses and communicates this world in myriad ways throughout its life".[63] So the *Weltanschauung* means the active appropriation, conceptualization, modelling, construction; the world picture is a necessary and inalienable function of a worldview. Second, the individual forms his/her world picture not "through the self-intuition or self-assertion", but in relation to other individuals in a certain surrounding, and so this world picture is always necessarily concrete social-cultural, belonging to some "social-historical worlds".[64] Third, social sciences produce their own world pictures based on the aspects of social reality they study. These world pictures are empirically-based within their subject-matter and at the same time may be metaphysical in conceptualizing matters that are involved, but external.[65] Fourth, the only world picture for all times, "social-historical worlds", and sciences is impossible, and so the idea of the unity of the world, speculation, metaphysics, and ontology give way to "non-reductive or pluralistic empiricism in relation to knowledge", relativism, and "comparative coordinating strategy".[66] Fifth, philosophical reduction of the multiplicity of world pictures is futile, "leads to aporias and downfall", because every world picture is not fully rational, but self-interpretive and connected with concrete social experience; and reduction is dangerous because it "leaves us with an impoverished thinking that is only calculation and an instrument of domination … The resolution of the antinomy in a projected systematic totality is to suppress the differences constitutive of life". Every world picture is based on the consciousness of real external world and not losing the link with Is while constructing its model. It follows, and this is important, that "the historicity of worldviews entails that there is no master worldview from which to neutrally rank others, even one that appeals to an ontological principle of difference".[67] Sixth, instead of previous statements, it is possible to speak of world picture of generation or age, but as "dominant yet no single unified tendency of an age, as anarchic possibilities of the creative, new, and otherwise — which contest the hegemony of the dominant worldview — emerge and defy control".[68]

[62] Ibid.

[63] Eric S. Nelson, "The World Picture and its Conflict in Dilthey and Heidegger", *Humana.Mente Journal of Philosophical Studies*, XVIII (2011), p. 19.

[64] Ibid., pp. 19-20.

[65] Ibid, pp. 20-21.

[66] Ibid., pp. 21-24.

[67] Ibid., pp. 24-28, 31, 33-34.

[68] Ibid, p. 28.

Jaspers in his work of 1919 used the notion of world picture and provided its psychologically-oriented vision. But he also wrote that individual world pictures are essentially close in some socio-historical context and could be seen as a point of view, variant or a fragment of the regional, historical, national world pictures, and assumed also the existence of the absolute universal world picture. Worldviews and world pictures are subjective, but they become also objective when they penetrate the world and are the part of the process of appropriation of thus understood/interpreted world.[69]

A more comprehensive philosophical vision of world pictures was elaborated by Martin Heidegger. In 1938 Heidegger delivered a lecture "Die Zeit des Weltbildes", that was published in 1950 in German. The lecture was translated into English at least four times with the titles "The Age of the World View" (1951) and "The Age of the World Picture" (1977, 2002, 2009).[70] Both the meaning of the title in translation and the time of the finalization of the author's ideas[71] have significance, but we analyze here the 1977 translation.

In Heidegger's view, research in the social and humanitarian sciences consists in principle in the criticism of sources and in the "comparing of everything with everything", making facts comparable and in this way intelligible, tracing them to laws and rules in order to reconstruct (and in fact to construct) "the ground plan of history".[72] This process, if it is "ongoing activity" with own methodology, is related and mutually reinforced with specialization and institutionalization, thus developing scholarly disciplines. The representing of the being by these disciplines means its objectification ("truth has been transformed into the certainty of representation") rising from the particular fact to the world (including the world of thought) in its entirety, not copying, but constructing the world picture as a system for each such discipline. These pictures of the world are temporal, for they are the pictures we are ready to see and understand now.[73]

Heidegger wrote that in the Middle Ages the world had been perceived as God's creation and so "to know is not to search out; rather it is to understand rightly the authoritative Word and the authorities proclaiming it". The world had been understood as objective, thought and being are the same (Heidegger used the citation from Parmenides), there is no place for the subjective perception and representation of reality.[74]

The time of the first scholarly world picture construction became the Modern Age. The representation in the Modern Age (Heidegger pointed more precisely

[69] Karl Jaspers, "Психология мировоззрений" [Psychology of Worldviews], transl. Cyril Golikov, in Философская антропология [Philosophical Anthropology], VII, no. 1 (2021), p. 120.

[70] Miles Groth, *A Bibliography of English Translations of the Writings of Martin Heidegger (1949-2011)*, p. 17 (available online).

[71] As the Sidonie Kellerer suggests, the original content of the lecture had been modified for publication, at least for reputational purposes (to show Heidegger's "inner resistance" to the Nazi regime in 1930s). Sidonie Kellerer, "Rewording the Past: The Postwar Publication of a 1938 Lecture by Martin Heidegger", *Modern Intellectual History*, XI, no. 3 (2014), pp. 575-602. So, one may suppose other changes could have been made as well.

[72] Martin Heidegger, "The Age of the World Picture", transl. and ed. William Lovitt, in: Martin Heidegger, *The Question Concerning Technology and Other Essays* (1977), pp. 121-122.

[73] Ibid., pp. 122-128.

[74] Ibid., pp. 121, 129-130, 140.

to the end of the eighteenth century) means the relation of the something with oneself as "something standing over against" and creation of the conceptual model of this something while putting oneself in this model. Man intentionally stands in the center of the model of the new world he constructed and thus becomes a *subjectum* as "I am" and "We are", being a part of the concrete society and humanity, and the model becomes anthropological. "The word "picture" now means the structured image that is the creature of man's producing which represents and sets before".[75]

Science as research, and not a philosophy, becomes necessary for the construction of this world picture. Ordering knowledge and building an uncontroversial system of representation are essential for this picture. Research is a continuous and open process; if "the original power of the projecting is lacking" at a certain stage of picture development, it could degenerate into "the superficiality of a system that has merely been fabricated and pieced together".[76] "Original power" here may be understood as a reflection of a certain value and scholarly paradigm capable of adequately representing legal reality. It is always possible for a new world picture construction to exist, gaining conventionality and domination.

Some general grounds explaining Heidegger's notion of world picture could be found in his hermeneutic phenomenological ontology, namely in the concept of the fore-understanding. The last consists of fore-having, a fore-sight, and a fore-conception. The interpretation is conditioned not only by objective reality, but also by pre-assumptions and point of view on reality by the interpreter. Fore-having means that the interpreter presupposes to put the new interpreted object in a context of her/his previous experience of understood / interpreted objects. Fore-sight means the description of the new object with categories taken from previous interpretations. Fore-conception means the readiness of the interpreter to conceptualize the object with all he/she fore-has and fore-sees.[77]

Science of science

The concept "scientific picture of the world" has long since been recognized, extensively used, and researched in the science of science.[78] Viacheslav Stepin defined the scientific picture of the world as an "integral image of the subject-matter of a scientific study in its chief systemic-structural characteristics formed by means of fundamental concepts, representations, and principles of science at each stage of its historical development".[79]

[75] Ibid., pp. 130-133, 151.

[76] Ibid., pp. 134, 139-141.

[77] This is the present writer's interpretation of Heidegger's fragments in Naugle, note 57 above, pp. 16-17.

[78] See, for example: Oksana Basalaeva, "Функция понимания в частнонаучной картине мира" [Function of Understanding in Special Scientific Picture of World], Вестник Кемеровского государственного университета культуры и искусств [Herald of Kemerovo State University of Culture and Arts], no. 18 (2012), p. 215; Raphail Nurullin, "Метафизические основания научной картины мира" [Metaphysical Grounds of Scientific Picture of World], Вестник Оренбургского государственного университета [Herald of Orenburg State University], no. 7 (2011), pp. 186, 191.

[79] Viacheslav Stepin, "Научная картина мира" [Scientific Picture of the World], in Ilia Kasavin (ed.), Энциклопедия эпистемологии и философии науки [Encyclopedia of Epistemology

Oleksandr Petryshyn relegated the scientific picture of the world to types of perception of the environment which are formed at each stage of the development of society and science. It determines the development of methodology as "progress of cognitive possibilities of man and society".[80]

General scientific, socio-historical, natural science, and special (disciplinary, individual scientific) pictures of the world could be singled out.[81] The existence of such a special picture is the evidence of the generalized vision of the subject-matter of research, constituting a certain domain of scientific knowledge in the form of a separate science.[82] Some authors, however, doubt the possibility of a general-scientific picture of the world, it being impossible to observe the world as a whole, and here there is place for a philosophical (worldview) picture of the world.[83]

Notions of "fundamental objects from which presumably all other objects are structured which are studied by respective science", typologies of objects, peculiarities of their interaction, and spatial-temporal structure of reality are involved in the scientific picture of the world.[84] The scientific picture of the

and Philosophy of Science] (2009), p. 581. Also see Tatiana Kubanova, "Картина мира как философское понятие и мировоззренческая система взглядов: история и перспективы изучения" [Picture of the World as Philosophical Concept and Worldview System of Views: History and Prospects of Study], Общество. Среда. Развитие [Society. Environment. Development], no. 1 (2011), p. 190; Svetlana Chernova, "Научная картина мира как форма развития знания о реальности" [Scientific Picture of the World as Form of Development of Knowledge about Reality], Вестник Вятского государственного гуманитарного университета [Herald of Viatka State Humanities University], IV, no. 4 (2010), p. 27; Mikhail Soroka and Igor Bulychev, "Проблема структуры научной картины мира" [Problem of Structure of Scientific Picture of World], Вестник Пермского университета. Философия. Психология. Социология [Herald of Perm University. Philosophy. Psychology. Sociology], no. 3 (2015), p. 33.

[80] Oleksandr Petryshyn, "Проблеми соціалізації права та соціологізації правової науки" [Problems of the Socialization of Law and Sociologization of Legal Science], Право України [Law of Ukraine], no. 8 (2011), p. 135.

[81] Stepin, note 79 above, p. 581; Sergei Khizhniak, "Национальная культура как фактор формирования языковой и концептуальной картин мира (на примере научной картины мира юриспруденции)" [National Culture as Factor of Forming Linguistic and Conceptual Pictures of World (Example of Scientific Picture of World of Jurisprudence)], Известия Саратовского университета. Новая серия. Серия: Филология. Журналистика [News of Saratov University. New Series. Series: Philology. Journalistics], XVI, no. 2 (2016), p. 130.

[82] Stepin, note 79 above, p. 581; Tykhomyrov, note 41 above, pp. 27; Nikolai Sharov, "Природа научной конвенциональности: когнитивно-языковой аспект" [Nature of Scientific Conventionality: Cognitive-Linguistic Aspect], Вектор науки [Vector of Science], no. 1 (2013), p. 270; Chernova, note 79 above, p. 27.

[83] Pavel Kopnin, Гносеологические и логические основы науки [Gnoseological and Logical Foundations of Science] (1974), pp. 384-388, quoted from P. S. Dyshlevyi and L. V. Iatsenko, "Научная картина мира и мир культуры" [Scientific Picture of the World and the World of Culture], in Dyshlevyi and Luk'ianets (eds.), Научная картина мира: логико-гносеологический аспект [Scientific Picture of the World: Logical-Gnoseological Aspect] (1983), p. 8; Soroka and Bulychev, note 79 above, p. 33; V. V. Kyzyma, "Научная картина мира в культурно-историческом контексте" [Scientific Picture of the World in the Cultural-Historical Context], in Dyshlevyi and Luk'ianets (eds.), Научная картина мира: логико-гносеологический аспект [Scientific Picture of the World: Logical-Gnoseological Aspect] (1983), p. 78.

[84] Stepin, note 79 above, p. 581; Tykhomyrov, note 41 above, p. 27; S. K. Buldakov, "Научные, философские и методологические основания классической науки" [Scientific, Philosophical, and Methodological Grounds of Classical Science], Вестник Костромского государственного университета им. Н. А. Некрасова [Herald of Kostroma N. A. Nekrasov State University], no. 2 (2013), p. 69.

world may be integral or be reflected in the form of competing notions which, nonetheless, have unified theoretical grounds conventional in character.[85]

Each scientific picture of the world is concrete-historical and over time is replaced by another. Moreover, the possibility of universal pictures of the world, especially in the socio-historical sphere, is doubtful because of the influence of culture on them.[86] Some scholars point to the obligatory presence of value socio-cultural orientations, a certain attitude towards the phenomena and processes of reality in the scientific picture of the world.[87] Thus, the scientific picture of the world has localization in space and time, and also transcends purely scientific limits.

The scientific picture of the world is a type of theoretical knowledge, is the most general theoretical model of reality, functionally acts as a research program, and is the basis of a certain strategy for the investigation and structuring of theories within a scientific discipline, "advancing hypotheses concerning the nature of phenomena discovered in experience" (link with culture and worldview).[88] With regard to knowledge already received, the scientific picture of the world acts as a theory thereof, and with regard to receiving new knowledge performs a methodological function.[89]

At the same time, the scientific picture of the world itself represents a system of theories, and therefore changes when a significant part of the last ceased to correspond to accumulated empirical knowledge, or when changes in worldview, or in reality being researched occur.[90] As Chernova noted, the history of science as a result appears as a continuously-interrupted process, and the transition from one picture of the world to another acts as a qualitative transformation of theoretical principles of science, that is, as a scientific revolution. A new

[85] L. A. Mykeshyna, "Научная картина мира как мировоззренческая форма знания" [Scientific Picture of the World as Worldview Form of Knowledge], in Dyshlevyi and Luk'ianets, note 83 above, p. 63.

[86] Sergei Khizhniak, "Национальная культура как фактор формирования языковой и концептуальной картин мира (на примере научной картины мира юриспруденции)" [National Culture as Factor of Forming Linguistic and Conceptual Pictures of World (Example of Scientific Picture of World of Jurisprudence)], Известия Саратовского университета. Новая серия. Серия: Филология. Журналистика [News of Saratov University. New Series. Series: Philology. Journalistics], XVI, no. 2 (2016), pp. 130-132; Chernova, note 79 above, pp. 27-28.

[87] Kubanova, note 79 above, p. 190; Soroka and Bulychev, note 79 above, p. 33.

[88] Viacheslav Stepin, note 79 above, pp. 581-583; I. A. Gorkovenko and V. I. Strel'chenko, "Идея научной картины мира: постклассическая рациональность" [Idea of Scientific Picture of the World: Post-Classical Rationality], Вестник Ленинградского государственного университета им. А. С. Пушкина [Herald of Leningrad A. S. Pushkin State University], no. 2 (2010), p. 133; Kubanova, note 79 above, p. 189; Chernova, note 79 above, p. 29; G. M. Purynycheva and Iu. P. Kul'kov, "Научная картина мира как мировоззренчески-информационный концепт" [Scientific Picture of the World as Worldview Information Concept], Вестник Чувашского университета [Herald of Chuvash University], no. 1 (2006), p. 10.

[89] A. F. Kudriashev and O. I. Elkhova, "Общенаучная картина мира: старое в новом одеянии" [General Scientific Picture of the World: The Old in New Dress], Вестник Башкирского университета [Herald of Bashkir University], XVIII, no. 4 (2013), pp. 1255-1256; Iu. V. Dzhulai, "Научная картина мира и условия познания" [Scientific Picture of the World and Conditions of Cognition], in Dyshlevyi and Luk'ianets (eds.), note 83 above, pp. 59-61.

[90] Sharov, note 82 above, pp. 270-271; E. E. Sokolova and R. V. Gurina, "О соотношении языковой и научной картин мира" [On the Correlation of Linguistic and Scientific Pictures of the World], Знание. Понимание. Умение [Knowledge, Understanding. Skill], no. 3 (2010), pp. 83-84.

picture of the world from the outset is advanced as a hypothesis which passing through stage of substantiation and may for a long time coexist side by side with the previous picture. Most often it is confirmed as a result of verification by experience of the principles and use of these principles for new theories.[91]

History of sciences

The emergence of scientific pictures of the world was preceded by mythological, religious, and philosophical ones. In the sixteenth and seventeenth centuries a natural-philosophical picture of the world was formed. It was connected with the development of religious doctrines and philosophy and with the progress of the natural and technical sciences and development of a new cultural-historical picture of the world. Researchers asserted the presence in scientific works of the concept of a picture of the world from the early eighteenth century,[92] but in its essence it was created for the first time in the natural sciences in the seventeenth century by René Descartes and other scholars and completed and named by Sir Isaac Newton (1642-1727) the "synthesis of the system of the world" in the second half of seventeenth century, which often is pointed to as the date of the ultimate completion of the natural sciences and the emergence of science as an autonomous social system.[93]

Isaac Newton in 1685 wrote *De mundi Systemate* (*System of the World*), that two years later in revised form became a part (Book III) of his fundamental treatise *Philosophiæ Naturalis Principia Mathematica*. He argued that the system of the world could be comprehended as something purely objective, with mechanical/mathematical principles of reasoning (of philosophy) free from metaphysics.[94] At the same time, he was conscious of limiting his subject, speaking on behalf not of all sciences, but of "the science of Mechanics". He implicitly presupposed the possibility of another (biological, social, humanitarian) world picture: "Our design not respecting arts but philosophy, and our subject, not manual but natural powers".[95]

The sharpest criticism of Newton, albeit latent, was the theology grounded on metaphysics, but his formal negative accent is on metaphysical philosophy. What is not sensible or technically observed and cannot be verified, cannot be

[91] Chernova, note 79 above, p. 29.

[92] Kubanova, note 79 above, p. 189.

[93] Buldakov, note 84 above, pp. 69-70; A. V. Shutaleva, "Классическая естественно-научная картина мира: особенности формирования новоевропейской науки и трансформация принципов античной рациональности" [Classical Natural-Science Picture of World: Peculiarities of Forming New European Science and Transformation of Principles of Antique Rationality], Вестник Ленинградского государственного университета им. А. С. Пушкина [Herald of Leningrad A. S. Pushkin State University], II, no. 2 (2011), p. 128; Stepin, note 79 above, p. 583; Dyshlevyi and Iatsenko, note 83 above, p. 36; A. M. Rubanets, О категориальной структуре научной картины мира [On the Categorial Structure of the Scientific Picture of the World], in Dyshlevyi and Luk'ianets (eds.), note 83 above, p. 57; Kyzyma, note 83 above, pp. 75-76.

[94] Isaac Newton, *A Treatise of the System of the World*, transl. into English (2d corr. ed.; London, 1731), pp. v, vi; Newton, *The Mathematical Principles of Natural Philosophy*, transl. A. Motte (London, 1729), I, p. 3.

[95] Newton, note 94 above (1729), I, p. 3, 5.

the subject-matter of science: "which forces being unknown, Philosophers have hitherto attempted the search of Nature in vain".[96]

Newton did not believe in fate (in fact – in the non-comprehendible God's plan for the world) as blind necessity, "which is certainly the same always and everywhere, could produce no variety of things".[97] And he did not believe in God Who was independent from people and not a living being:

> For God is a relative word and refers to the living: and Deity is the dominion of God not in his own body, but in his servants. God is the supreme Being, eternal, infinite, absolutely perfect; but a Being, however perfect, without dominion, is not the Lord God... The word God occasionally means Lord, but every Lord is not God. The dominion of a spiritual Being establishes God, truths truth, the highest supreme, fictions fiction. And from the dominion of truths it follows, that the true God is living, intelligent, and powerful; to be the highest or the most perfect of the rest of the perfections.[98]

For Newton, God has to be understood as living most perfect being and part of nature. All we know about God comes from the "appearance of things" and from "the ways of mankind". So, God should be cognized as natural phenomena; this knowledge "belongs to Natural Philosophy".[99]

Newton's way of reasoning (experimental or natural philosophy) and comprehension of the system of the world, his methodological principles ("General Scholium" and the "Rules of Reasoning") are observation and inductive generalization from particular to universal (rule III), using reliable and sufficient empirical data collection (rule IV), experimental verification (rule I), and analogy (rule II):

> … whatever is not deduced from the phenomena, is to be called a hypothesis; and hypotheses, whether metaphysical or physical, whether of occult qualities or mechanical, have no place in experimental philosophy. In this philosophy particular propositions are inferred from the phenomena, and afterwards rendered general by induction … But these are things that cannot be explained in few words, nor are we furnished with that sufficiency of experiments which is required to an accurate determination and demonstration of the laws by which this electric and elastic spirit operates.[100]

Specialists define such a scientific picture of the world as classical (and correlative to the classical type of rationality) and single out such principles and provisions thereof: (1) determinism (unequivocal causal links of natural phenomena); (2) pure objectivity and absolute truth of scientific knowledge; (3) universality of the scientific method; (4) unity of truth and existence of one conception about one subject-matter; (5) progressive, continuous, gradual

[96] Ibid., I, p. 6; II, p. 203.

[97] Ibid., II, p. 391; Newton, *Philosophiae naturalis principia mathematica* (2d ed.; 1713), p. 483.

[98] Ibid., p. 482.

[99] Newton, note 94 above (1729), II, p. 388-389, 391-392; Newton, note 97 above, p. 483.

[100] Newton, note 94 above (1729), II, pp. 392-393, 387, 202-205; Newton, note 97 above, p. 484.

development of science.[101] Such a universalist, ahistorical, objectivist (identity of thought and existence), mechanical-mathematical, and out-of-value picture of the world might be and was solely natural-technical, not taking into account the peculiarities of the socio-humanitarian world.

As Shutaleva noted, "nature was regarded as a material *universum*, as the sole true reality from which the spiritual component was eliminated".[102] The last was logical, for this picture of the world reflected the aspiration of the natural sciences to get out from under the dominance of theology and philosophy, but in this way it became one-sided, although it claimed a general scientific character.[103]

The emergence of special scientific pictures of the world specialists link with the development of the discipline-organized science at the end of the eighteenth and early nineteenth centuries.[104] Theoretically this was thought out with respect to biology and comparative linguistics by the brothers Friedrich Wilhelm Heinrich Alexander von Humboldt (1769-1859) and Wilhelm von Humboldt (1767-1835), and Kant emancipated and separated out the non-mechanical sphere of the sciences on the spirit (humanities and social sciences) from the natural sciences.[105]

Alexander von Humboldt in his influential *Essai sur la géographie des plantes* (1805), on the basis of a geographical approach to botany successively studied the dissemination of plants in the world (science of the geography of plants) and proposed the concept of the empirical scientific picture of the world and concrete picture of nature. The methods of the structure thereof he named as fixation, verification, identification, quantitative measurement, localization, correlation, and juxtaposition of all observed phenomena within the framework of the subject-matter of research, determining their mutual links, typology – purely empirical and without "delving into the nature of things" (all categorization outside the citation is added – ок). Moreover, he asserted the possibility of forming on this basis a nature-philosophical picture of the world of a "much higher order", especially on the basis of the philosophy of Friedrich Wilhelm Joseph von Schelling (1775-1854), but noted that both pictures of the world were self-sufficient and had a different character.[106]

As Vul'f noted, "the thought of the linkage of all physical-geographical phenomena with live nature in one unbreakable chain" runs like a red thread through Humboldt's works. Humboldt attempted to "comprehend the world of flora on earth not from the standpoint of descriptive botany, which aspires only to identify species, but in all the diversity of its manifestation", and on the basis

[101] Shutaleva, note 93 above, pp. 122-123, 128; Buldakov, note 84 above, p. 70.

[102] Shutaleva, note 93 above, p. 125.

[103] Buldakov, note 84 above, p. 69.

[104] Stepin, note 79 above, p. 583; Buldakov, note 84 above, p 70.

[105] Sokolova and Gurina, note 90 above, p. 83; E. K. Pogorskii, «Картина мира» [Picture of the World], Знание. Понимание. Умение [Knowledge. Understanding. Skill], no. 4 (2012), p. 322; Buldakov, note 84 above, p. 71.

[106] A. Humboldt, *География растений* [Geography of Plants] (Moscow-Leningrad, 1936), pp. 51-52, 55-56. For the English-language edition, see A. von Humboldt, *Essay on the Geography of Plants*, transl. Sylvie Romanowski (2009).

thereof the "linkage of the geography of plants not only with space, but with time" is identified.[107]

In his first important work on the comparative study of languages with regard to different eras of their development (1820) Wilhelm von Humboldt proposed not ultimately differentiated doctrine concerning a linguistic picture of the world and a scientific picture of the world of linguistics.[108] In this theoretical complex one may single out ideas relating to: the nationality of languages (and the impossibility of a universal world language), the historicity and conditionality of their development by spiritual-social factors, the processes of the interaction of languages (differentiation, mixing, and others), classification of languages (idea of linguistic families – by analogy with families of plants – as the Particular (Special) in linguistic development, between the Individual and the General), universal linguistic development as the sum of evolution and interaction of all languages, comparison as the method of building not only comparative but also historical linguistics.[109]

With regard to the language family, Wilhelm von Humboldt noted:

> The form of individual genetically related languages should be found to be in accordance with the form of the entire family. There cannot be that which would be not consistent with the general form; moreover, each of their peculiarities, as a rule, is conditioned by this general form in one or another way. In each family languages exist which more purely and completely than others have preserved the initial form.[110]

These ideas were developed in a later work.[111]

The doctrine on a scientific picture of the world as an integral notion concerning subject-matter was activated in the mid-twentieth century by physicists Max Planck, Albert Einstein, and others, and later also developed, with specific meaning, by philosophers, representatives of the humanities and social sciences.[112]

[107] Evgenii V. Vul'f, "Значение работ Гумбольдта для географии растений" [Significance of Humboldt's Works for the Geography of Plants], in A. Humboldt, География растений [Geography of Plants] (1936), p. 8.

[108] W. von Humboldt, "О сравнительном изучении языков применительно к различным эпохам их развития" [On the Comparative Study of Languages Applied to Different Epochs of their Development", in V. A. Zvegintsev, История языкознания XIX – XX веков в очерках и извлечениях [History of Linguistics of 19th – 20th Centuries in Sketches and Fragments] (3d ed., 1964), I, pp. 91, 101.

[109] Ibid., pp. 75-79, 81, 83, 87, 91, 94-95.

[110] Ibid., p. 95.

[111] W. von Humboldt, Über die Verschiedenheit des menschlichen Sprachbaus und ihren Einfluss auf die geistige Entwicklung des Menschengeschlechts (1836), available in English as: W. von Humboldt, *On Language. On the Diversity of Human Language Construction and its Influence on the Mental Development of the Human Species* (2d rev. ed; 1999).

[112] Soroka and Bulychev, note 79 above, p. 33; Kubanova, note 79 above, p. 189. Also see B. G. Kuznetsov, Эволюция картины мира [Evolution of the Picture of the World] (1958); Serhiy Kryms'kyi, «Зміст та функції природничо-наукової картини світу» [Content and Functions of Natural Science Picture of the World], Філософська думка [Philosophical Thought], no. 2 (1976); Dyshlevyi and Iatsenko, note 83 above, p. 7; Basalaeva, note 78 above, p. 215; Pogorskii, note 105 above, p. 322.

SPECIAL WORLD PICTURES OF GENERAL LEGAL DISCIPLINES

Even branch legal disciplines form their own special pictures of the world. They are to some extent compatible, to some extent conflicting, as between civil and labor law. The pictures of the world of the so-called general legal sciences differ even more, mutually complementary and competing in the explanation of the processes and their results, the whole reality of the world of law. Comparative law (comparative jurisprudence) has real advantages in this competition, working with real phenomena using the inductive methodology and not so deeply infected with deductive speculations. Konstantinos Kerameus meant essentially this when wrote: "In a world which is slowly but undoubtedly converging, comparative law is best structured and better adapted than any other legal discipline to respond to the challenges and make a legal contribution to resolving the problems of society and life as a whole."[113]

Is it possible that one disciplinary picture of the world may dominate, may win in the competition? Yes, of course. Metaphysical and speculative visions are dominant in the science of law. Above the practical comparative legal enterprise and description, the building of comparative jurisprudence (or comparative law) in the views of the larger part of comparatists is not finished. Some scholars doubt that it needs to be finished.

A "nature of law", "legitimate reserved territory", and the ambition of legal theory

Here we turn to discussions in the theory of law about its character, its encounters with metaphysics, and the pretense of the theory of law to present an only world picture suitable for use by all other legal disciplines and legal practice.

Joseph Raz (1939-2022) has stated that the sense of the theory of law is "an explanation of the nature of law", and this is "central to philosophical reflection about the law throughout its history". To be successful, a theory of law should consist simultaneously of the Ought ("propositions about the law which are *necessarily* true" … "wherever and whenever it is to be found") and the Is (but only in the explanation by the Ought). The first element and its comprehension are primary, the second is secondary and supplementary to the first. But when stating that "a theory consists of necessary truths, for only necessary truths about the law reveal the nature of the law" Raz meant that the theory of law never reaches the Is.[114]

The objective nature of law is part of the nature of things, it contains "essential properties" of law ("which make law into what it is"), is universal, eternal, and always the same, not depending on human understanding. The different and mutable positive law is mediated by its nature through concepts – various "local"

[113] K. D. Kerameus, "Message from the President of the International Academy of Comparative Law", in Ежегодник сравнительного правоведения [Yearbook of Comparative Law], (2001), p. 268. Let us leave aside the issue about the reality, scope, and fate of convergence.

[114] Joseph Raz, "Can There Be a Theory of Law?", in Martin Golding and William Edmundson (eds.), *Blackwell Guide to Philosophy of Law and Legal Theory* (2004), pp. 324, 328.

social understandings of the nature of law. Only "nonessential properties" of law are subject to change, which is reflected in a concept of law there and now.[115]

> More specifically, what counts is not the common understanding of expressions like ''the nature of law,'' nor even the fact that the concept of law changes over time. What counts is the nature of the institution which the concept of law (i.e., the one we currently have and use) designates. To make its case the objection has to show that our concept of law (as it is at the moment) does not allow for the application of the (philosophical) notion of essential properties to the law, that is, that the law has no essential properties.[116]

When we are studying the nature of law, we are improving our concept of law. Law in different concepts is law because it is referential to the one nature of law. Although law is a social phenomenon, the views of humans and their societies on the nature of law are not important; law and legal system can exist and function even in a society without any concept of law. And the theory of law is so universal, unnational, and unlocated that it can be a disinterested and objective denominator for what law is in every society even if this society does not recognize this something to be law.[117]

The theory of law is concerned with the universal nature of law and, subsidiarily, with the relation of concepts of law to its nature, but not with positive law. Moreover, the study of the latter has little academic value. Raz considered the comprehension of alien legal systems in principle possible only in relation to our culture (so, it is subjective) and in practice imprecise because of the incommensurability of concepts of law: "So our understanding of their cultures differs from their own understanding of their own cultures, and cannot be altogether objective, or perfect, or something like that". The only possible objective, albeit "blinkered", understanding of law outside own country is theoretical, provided by theory of law, for "understanding consists in knowing important relations among the essential properties of the things the concepts apply to, and among them and some other properties".[118]

A critic of Raz, Paula Gaido, claimed from the position of non-individualistic conceptual relativism that "the properties associated with law are contingent in the sense that the necessary character of these properties is restricted to the conceptual scheme at stake. Thus the concept of law cannot have a pattern of correctness extrinsic to the practice that constitutes it".[119]

The nature of law, eternal (or semi-eternal) and independent from the culture and the will of society as well as from particular social conceptualizations is a fantasy ("non-realistic ontological conception"), a concept of law is concrete and belonging to a concrete society in a certain time, and every theory of law studies one of these concepts. "Natural" and "essential" are what they are in the view

[115] Ibid., pp. 325, 327-331, 334, 340.

[116] Ibid., p. 329.

[117] Ibid., pp. 331-332, 334-335, 337-338.

[118] Ibid., pp. 338-340.

[119] Paula Gaido, "The Purpose of Legal Theory: Some Problems with Joseph Raz's View", *Law and Philosophy*, XXX, no. 6 (2011), p. 688.

of the community. No theorized "nature" could be "the pattern of correctness of the concept of law" and "no ontological space for the nature of law" exist. And law cannot function in a society and have any "defining properties" without a concept of law:[120]

> Concepts understood as cultural products establish the necessary properties of an object for the concept to apply to it. Concepts are what establish the defining properties that outline the world, and given that concepts depend on the thoughts of a group of people, they are subject to the variations these thoughts impose. Therefore, conceptual correctness or incorrectness cannot be asserted in absolute terms.[121]

Gaido concluded that the only theoretical task of the legal theory is "to articulate the essential properties that our concepts highlight".[122]

William Twining (and he is not alone) proposed that the "theoretical part of law as a discipline" (claiming to embrace any "activity of theorizing" and all "general questions relating to the subject-matters of law as a discipline"), with the inclusion of legal philosophy (as "the most abstract part" of legal theory and not a co-extensive discipline) and all "heritage" in legal science, be called general jurisprudence. In Twining's opinion, the latter should be viewed, *inter alia*, as an ideology presenting the world picture ("links one's beliefs about law to one's more general beliefs about the world —whether or not they are systematic", "whole views or total pictures", "picture of law in the world", "obvious trilogy of global, regional, and nation-state").[123] Twining believes that one research objective of legal science should be the "aspiration to build up an accurate and sophisticated total picture (or series of pictures) of law in the world", geographical and temporal, mentioning also the different levels of law (local, sub-global and global).[124]

Twining sees general jurisprudence as cosmopolitan and relativistic, overcoming Western centrism, statism, and unempirical character. He stresses that traditionally legal theory was and is mostly the theory of national / municipal law, and predominantly of the theorist's own legal system:[125]

> In the present context, an important implication of this is that nearly all of our stock of concepts and theories has similarly been relatively local, or at least geared to a single legal tradition. Indeed, nearly all legal concepts, including many "fundamental legal conceptions", that have been the focus of attention of analytical jurists are "folk concepts".[126]

[120] Ibid., pp. 686-688, 691, 693, 697.

[121] Ibid., p. 688.

[122] Ibid., pp. 689, 691, 697.

[123] William Twining, "General Jurisprudence", *Anales de la Cátedra Francisco Suárez*, XXXIX (2005), pp. 646-648, 651, 653, 656-657, 664, 675.

[124] Twining, "Globalisation and Comparative Law", in Esin Örücü and David Nelken (eds.) *Comparative Law: A Handbook* (2007), pp. 70, 72, 79.

[125] Twining, note 123 above, pp. 647, 650, 652-653.

[126] Ibid., p. 652.

Twining (and not only him, of course) proposes a quite contradictory view. He understands that a theory of law is either "folk" knowledge unjustly applied to any law and so, if self-critical, necessarily becomes more reductionist when encountering reality; or pure abstraction and ignorant of reality. He states that the present theory of law is the theory of national law: "none of our stock of theories of municipal law can provide an adequate theoretical basis for a cosmopolitan and reasonably inclusive discipline of law". He sees the way out in empirical comparative legal studies – "particular inquiries" and generalizing projects like "Glenn's account of legal traditions", but paradoxically calls them "examples of the synthesizing function of legal theory".[127] So the theory of law to be "cosmopolitan", "adopt a global perspective", "thinking in terms of total pictures", cease its "collective ignorance" of reality and living "by abstractions alone", should become comparative law, or the theory of comparative law, or even comparative theory of law, and abandon the essence and heritage of the theory of law. Even John Austin's idea of "general jurisprudence" is understood by Twining (and, maybe, taken just for this reason) as the general theory of law[128] and not just as a synonym of comparative jurisprudence – as it was in original.

It is likely that Twining understood the shortcomings of such logic when he proposed a vision of general jurisprudence as the "theoretical study of two or more legal traditions, cultures, or orders", which has to encompass "all levels of legal ordering, not just municipal and public international law", "broaden its geographical reach to take more account of non-Western legal traditions, a broader range of legal phenomena, and different levels of normative and legal relations and ordering".[129] But this is the fragment of the definition of comparative law – without the word "theoretical". Because for comparative law the generalizing, including theorizing, is the result of the empirical inquiry and induction. So is general jurisprudence in the Twining view theoretical comparative law? But he consistently ignored comparative law as a discipline in his article. Why? Perhaps because Twining believes that only now "the discipline of law becomes more cosmopolitan".[130]

Twining proposed to "de-centre the state" in the world picture of law ("without denying that it is for most purposes the most, powerful, complex, and sophisticated form of law around"), giving a place to public international law, religious legal traditions, and customary legal orders; this would help the reduce the marginalization of non-Western legal traditions. In this context he speaks about "comparison and generalization across legal traditions, cultures and other boundaries", but within the framework of theoretical jurisprudence.[131] Twining in fact rejected comparative law as a discipline or research subject,[132], so too its experience of generalizing the empirical studies of all the said legal phenomena.

[127] Ibid., pp. 653-654, 658.

[128] Ibid., pp. 654-656, 664.

[129] Ibid., pp. 655-656, 660.

[130] Ibid., pp. 660.

[131] Ibid., pp. 664-666, 669.

[132] But he once mentioned comparative law as being among the "specialized areas" or "transnational fields" that obtained "greater prominence" thanks to globalization processes, and produced some "assumptions and discoveries" for the critical scrutiny and appraisal by legal theoretician. See: Ibid., p. 680.

He further denied the theoretical essence of the theory of law, seemingly suggesting that the latter become empirical, inductive, and comparative to conceptualize an adequate world picture of law. He rejected the ability of legal theory to perform this task on its own, only "on the back of specialized areas of legal scholarship" producing middle order theories to serve as subject-matter for critical scrutiny and appraisal by legal theory as the "heading" discipline.[133]

The insufficiency of comparative law was addressed by Horatia Muir Watt. Even the title makes it clear that comparative scholarship is helping legal theory, and not working for itself. Watt states that legal theory (including international private and public law theory, quite contradictory simplification) and legal philosophy (named here casually and more as the metaphysical bases of legal theory) are patently inadequate in explaining changes in contemporary legal phenomena and cannot "accept diversity and acknowledge commensurability"; Watt points to the need for "new forms of knowledge capable of embracing complexity". Within this framework, "pieces of comparative legal scholarship" provide the inspiration for a renewal of legal theory, giving new insights when involved in interdisciplinary dialogue, and help to "develop more sophisticated models with which to understand the interdependencies and multiple identities which undermine traditional categories". It seems that Watt may consider comparative law to be a discipline (albeit not so named), but existing at a lower level of data processing than legal theory, and thus supplies the latter with semi-finished products. Apparently another model is provided by Watt – the "trans-disciplinary crossfertilisation of ideas" that could help construct a "post-axiomatic" model of knowledge about law (after Geoffrey Samuel) single model for all legal disciplines to replace the existing "flat schemes issuing from present legal theory". But this would also lead, in Watt's vision, merely to "structural changes in present legal theory".[134]

Having mentioned "comparative theory", Watt points to the "comparative scholarship reflection on commensurability and the acknowledgement of the Other", but observes that the level of formulating paradigms and conceptual models belongs to the discipline of legal theory.[135] In the present writer's view, the proposed changes mean that the essence of legal theory would be crushed and replaced by comparative law: "International legal theory therefore should turn its back on the metaphysics of conformity, on the ethics of a center and a periphery and aim to build a relational, pluralistic model, open to dialogue and mediation and allowing for constant readjustment". But Watt does not acknowledge this and believes it is merely a "rewriting of the metaphysical narrative".[136]

There always were seemingly more realist views. Mark Van Hoecke and Francois Ost were not the first to observe that the theory of law truly originated no earlier than the mid-nineteenth century in response to the needs of European societies. They noted the deep identity crisis of legal doctrine and all legal science in the first half of nineteenth century caused by codification in comparison with

[133] Ibid., pp. 680-681.

[134] Watt, note 27 above, pp. 271-274.

[135] Ibid., pp. 282-283.

[136] Ibid., p. 283.

successes of "positive science" (authors meant the so-called exact sciences). Van Hoecke and Ost note that "It is readily understandable that in this climate several jurists should from the middle of the century start to question the scientific nature of their discipline", which led to the creation of the legal theory as the "empirical natural law", so based on empirical methods, "in a comparative legal perspective".[137]

These assertions by Van Hoecke and Ost are ambiguous. It is important that they, unlike many, understand that legal theory has a proper disciplinary beginning and has not existed from times immemorial. But they, like most legal theoreticians, seem to believe this discipline has a unique given place in the system of knowledge about law that was intentionally left free. They are not ready to see that the said ways to overcome the crisis in legal science (positivization, empiricization, comparativization) were proposed a half of century earlier by the philosophy of positive law and comparative jurisprudence. They were extensively popularized and integrated into legal education in some countries.

This means that the approaches proposed by scholars in the mid-nineteenth century were not new, not "the ambition", but just adapted from other well-grounded legal disciplines to create a new one – "general theory of law". But were these approaches introduced with the intention to create a discipline "running counter to any speculative approach of a metaphysical type", an "ideological alternative" to a metaphysical philosophy of law",[138] or just its succession? The question remains open.

In the view of Van Hoecke and Ost the theory of law should prioritize global approaches (leading to a world picture drawing), which gives the discipline a special place in a triad with "traditional jurisprudence" and the philosophy of law. The key here is the comparative approach, helping the theory of law to overcome "limiting itself to some intellectual construction and/or criticism based on a kind of self-created reality". But Van Hoecke and Ost conclude that reaching "more general valid results" than a theory of law within the limits of some legal culture, at most a "Western" one, is not possible "at this moment".[139] Thus, the theory of law is pretending to an integrative and higher position among legal disciplines (giving primacy only to the philosophy of law), ignoring comparative law as a discipline and separate way of reasoning and theorizing, reducing the latter to an approach within its own framework. And it seeks to draw an own and the only world legal picture, but is unable to do so.

Paradoxical it may seem, but preferable is the position of Watt which mercilessly criticizes the real abilities of legal theory to develop a world picture. Using human rights ideology as an example, "presented as having universal, objective validity", she shows its "flattening effect of abstraction" and fundamentalism, leading to the negation of peoples' history and reduction of diversity, "refusal of otherness", "reducing the Other to one's own image", cultural imperialism. The prescribed *tertium comparationis* here is "a projection of a purely European axiological model". The metaphysical ideas about the "essence of the human being" provide here the false universal legitimacy for abasement and erasing

[137] Mark Van Hoecke and Francois Ost, "Epistemological Perspectives in Legal Theory", *Ratio Juris*, VI, no. 1 (1993), pp. 30-32.

[138] Ibid., p. 32.

[139] Ibid., pp. 44-45.

the vast plurality of experiences.[140] But, while understanding the depth of the problems raised by the example, Watt nonetheless calls not for the rejection of metaphysical narrative, but for rewriting it.

Forever infantile comparative law with "walk-on role"?

The widely-shared ignorance of the true historical path of comparative jurisprudence has far-reaching implications for understanding its character and potential for presenting an own picture of the world. What creates the illusion that the theory of law heading all legal studies, concentrating the entire heritage of general legal studies, has the right to speak in the name of all jurisprudence, being "an integrative discipline able to coordinate and systematize the approaches and the results of these disciplines on an interdisciplinary base"[141] and to propose the only possible world legal picture suitable for all peoples, all legal disciplines, and even for all social sciences?[142] One reason is the long-imposed pretense that legal theory as a discipline has ancient origins and non-existence or relatively late origin of comparative jurisprudence (comparative law).

Many believe, consciously or unconsciously, that legal philosophy and legal theory have existed from the time immemorial. And comparative law is believed to have emerged for primarily practical reasons in recent times as a weak movement. Comparative law in this scenario appears late, relies on the philosophical and theoretical foundations of other well-established legal disciplines, and performs a function for those disciplines, supplying crude or partially processed materials?

To some extent the notion of the recent or late development of comparative law was supported by iconic comparativists. David in his treatise written in 1950s claimed that the importance of comparative law as "an independent science" came to be recognized, and its method and aims were systematically studied no earlier than in the second half of the nineteenth century with positivization and nationalization in the science of law.[143] To be clear, David is not stating that comparative law is an offspring of other legal discipline, but the words "late" and "recent" mean that some other legal disciplines have an earlier origin. He views legal history, philosophy of law, and general legal theory as given parts of legal science or cluster of legal sciences with "reserved territory", and comparative law gets its justification and recognition from them as their subsidiary discipline, supplying field materials for their consideration, and being thus useful or even very useful. Words like "utility", "benefit", "profitable", "help", "promote", "assistance", "draw attention" are used here. In this perception, the discipline has merely a service role, is not self-sufficient, and no existence in its own right. Comparative law is rather a way of gathering legal information without a "reserved territory", although it could be seen as "an autonomous branch of legal knowledge". Legal comparatists are needed just for preparing the ground for other legal scholars and practitioners. Other proclamations in David's book

[140] Watt, note 27 above, pp. 282-283.

[141] Van Hoecke and Ost, note 137 above, p. 33.

[142] Ibid., p. 44.

[143] René David and John E. C. Brierley, *Major Legal Systems in the World Today: Introduction to the Comparative Study of Law*, (3d ed.; 1985), pp. 2-3.

like "comparative law has a primary role to play in the science of law" and in the progress of law[144] look purely rhetorical in comparison with the service role; or the word "primary" has to be understood as the "lowest level". What one can expect from other authors?

But in the introductory chapter for the *International Encyclopedia of Comparative Law*, written in 1972 and published in 1976, David focused not on legal systems, but on conceptions of law and, more widely, on conceptions of normative regulation of relations in society. He avoided entering into a discussion of a single nature of law, but in fact showed the inadequacy of the discussion and dedicated most of his attention to the historical-cultural conditionality of every conception of law. He proclaimed the "overcoming any scruples about excessive widening of the field of comparison" and advocated the individual empirical search for norms, principles, and doctrines that are working and are legal in every particular society and become subjects for comparison between societies. David named this work both comparative and theoretical and made not a single reference to the theory of law. He did refer to the philosophy of law, stating that comparative law should pass results of own research to it, for "this is legitimate". But at the same time he claimed that the comparative lawyer can, if he wishes, become a philosopher of law or sociologist of law and modify attitudes of these disciplines by declaring there could be no universally accepted conception of law, merely conceptions historically predominant in a particular country. He himself proposed "philosophical considerations" of certain important issues, such as equity or subjective rights, from the pluralist and relativist positions of the comparative lawyer and not the legal philosopher.[145]

Based on sociological concepts, David stated that law should be treated not as an ideal, but as a "makeshift" – something that is man-made, suitable for particular time and place, and subject to further change, as well as only a part (and in some instances not the most just or effective one) of a concept of social order created by particular society, with its tradition, popular feelings, beliefs, and intellectual doctrines. Finally, all the latter elements that cannot be transferred from the subject of comparative law to legal philosophy even though they are not "the rules which are in fact enforced". Global comparison necessarily transcends "a strictly legal level" and engages the sociological level.[146]

In a later text, written in 1981 and published in 1984, David harshly criticized the theory of law for "divorce from reality" (and even "complete distortion of reality"), "based on an outdated ideology" whose formulas could be satisfied only with fictions. This is historically rooted in European and Islamic university legal education, which taught ideal theoretical-philosophical law instead of the real one. Nothing changed in principle with modern scientific approaches because of the impossibility to come theoretically and philosophically to any "agreement on what the law is" and of the strong wish "to force the hand of fate by stating principles which did not correspond to the truth of things at the time". General legal philosophy abstract concepts have nothing in common

[144] Ibid., pp. 4-17.

[145] David, "Introduction", in *International Encyclopedia of Comparative Law. Vol. II. The Legal Systems of the World. Their Comparison and Unification. Chapter 1. The Different Conceptions of the Law* (1976), pp. 3-5, 7, 12.

[146] Ibid., pp. 4-13.

with what really happens in a particular society at a particular time. In this situation, coupling the approaches of comparative law and sociology of law have the merit of considering whether dormant rules are law and whether rules never recognized but obeyed by the members of community may be called legal norms. And generally, what concept is working in the particular society?[147] After publication of his treatise, the concepts of David substantially evolved to an understanding of comparative law as a self-sufficient legal discipline with own theoretical and philosophical inferences different from the disciplines of legal theory and legal philosophy because of different scholarly premises and different methods of acquiring knowledge.

Konrad Zweigert and Hein Kötz in their iconic treatise reiterated as something obviously known that comparative law as a science, field or "at any rate" comparative method "started in Paris in 1900" and was unequivocally oriented towards the universal unification of law. It was always practically useful in spite of changing approaches, but has no "immediate aim", just "the ultimate goal of discovering the truth". But Zweigert and Kötz did not provide for comparative law any sufficient and final cognitive goal, reducing it to enriching legal knowledge, and to the auxiliary role of method and approach ("the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma", "to afford a glimpse", "permit us to catch sight", "deepen our belief", "refresh and enrich", "let one see", "it can help"). They assumed, following Edouard Lambert (1866-1947), that any legal study to become "truly scientific" should "rise above the actual rules of any national system". Finally, comparative lawyers, in the view of Zweigert and Kötz, just "compare the legal systems of different nations" and provide their reflections for "the proper policy for the law to adopt", because the real accent of the authors is not on "discovering the truth", but on social engineering as an aim of legal science and comparative law in particular. To be precise, Zweigert and Kötz believe that this "may involve a reinterpretation of his [comparatist] own system", enhance critical thinking skills, and cultivate attitudes of tolerance.[148]

Zweigert and Kötz believe in the objective system of "branches of legal sciences" whose subject-matter is clearly distinguishable. Some deal with foreign law, in particular, pure sciences: legal history, legal ethnology, sociology of law, and comparative law. They are distinct, but interact. For example, Zweigert and Kötz point to two versions or forms of comparative law, "applied" and "theoretical-descriptive". The principal aim of the latter is "to say how and why certain legal systems are different or alike", rising above proper comparison. But to do this comparative law uses both "theoretical models and empirical data produced by the sociology of law". Zweigert and Kötz borrowed functionalistic dogmas from sociology of the 1970s without doubts or discussion. Paradoxically, after laying down strict imperatives to some extent predicting a result of any comparative inquiry (presumption of similarity, and others), Zweigert and Kötz alleged comparative law to be inductive and an experimental "basis for a universal legal science". But the upper limit for comparative law in their view is a "critical evaluation" of which law among those compared is "most suitable

[147] David, "Sources of Law", in *International Encyclopedia of Comparative Law. Vol. II. The Legal Systems of the World. Their Comparison and Unification. Chapter 3* (1984), pp. 201-202, 204.

[148] Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law*, transl. by Tony Weir, (3rd rev. ed.; 2011), pp. 2-4, 6, 15-16, 21, 34, 45.

and just". "Scientific or theoretical comparative law" is also possible, but just "to improve our legal knowledge"; comparative law pursues utilitarian aims, and anything beyond is a discrete and ambiguous movement with "no recognized place in legal science".[149]

Let us consider some examples of less classical recent literature. For Jaakko Husa, as for many others, comparative law was born in 1900 at the Paris congress. Its history since that day is quite discrete. It was "fashionable" once, looking "again promising", "second coming", "splintering … into different branches and schools of thought", "passing … into a phase of scholarly disintegration". At a certain stage during the twentieth century it achieved an idealistic "understanding of its goals, approaches and theories", then "shattered into pieces and fragments", now exists "in a state of scholarly crisis", and never had a "truly uniform self-image of what it was itself". For Husa, only now we can begin to consciously construct the "sharp theoretical" disciplinary view of comparative law, but even this "bears the birthmark of a serious paranoia".[150]

The doctrinal study of law, which Husa considers to be a separate scientific discipline, but mostly identifies with legal theory, has "a strong footing in the legal academia" and is "the mother discipline of all legal disciplines", whereas comparative law has no stable footing and possesses "a kind of a walk-on role", lacking any outside intellectual support (as philosophy is for legal philosophy), appeared late, lacks sufficient recognition, its status in the family of legal disciplines is unclear, marginal, and doomed to eternally "searching for itself", "repeatedly questioning its own role, approaches, and legitimacy".[151]

It seems that for Husa comparative law is not and never has been a clearly established project of research and discipline like legal philosophy or legal theory; it is just a more or less (of course, less) successful movement. If we see no initial paradigm embodied in a world picture, and believe in the superficiality and semi-marginal character of comparative jurisprudence / comparative law that never rises above creating some theoretical observations (never been uniform, always fragmentary and conflicting), then any new trend or school appears to be the discipline's new birth, or principal transformation, or death.

In another article Husa addressed the hidden epistemic model ("primary epistemic foundation for legal understanding", "implicit mono-epistemology", "mono-epistemic platform", "one-system-centered provincialism", "mono-system thinking") stimulated by traditional legal education focused (at least at the initial stage) on a domestic legal system. The last began to be viewed as the standard reference point for evaluating law, and this makes difficult the impartial, distanced appreciation of different models and approaches, especially of "transnational pluralism". This type of teaching / learning seeks to form an axiomatic ("certain invisible theoretical commitments") base of thinking about law. While doing so, the hidden epistemic curriculum "offers a representation of the inner order of the world of law" ("world-of-law representation", "the picture", "shared comprehensive mental image of world of law in general",

[149] Ibid., pp. 6-12, 32-47, 51-53.

[150] Jaakko Husa, "The Tip of the Iceberg or What Lies Beneath the Surface of Comparative Law (Review Essay of: Mark Van Hoecke (ed.), Epistemology and Methodology of Comparative Law)", *Maastricht Journal of European and Comparative Law*, XVI (2005), pp. 73-94.

[151] Husa, note 33 above (2022), pp. 3-6.

"shared legal world view"), being both conceptualization and cognitive pattern, that is, national law and domestic legal system centered and in which "foreign and comparative material … does not appear legally relevant".[152]

Husa contends that legal education should start with "general legal questions", implying (here one might add "*inter alia*", but nothing else was found) the addition of international law and comparative law as "subject areas", because law students "learn law well when they construct their own legal understanding from multiple sources". Excellent, and what, and what it for? For knowing "different foreign approaches to similar types of questions" as a "valuable tool for the construction of a primary pluralistic legal mind", to enable "the cultivation of a kind of legal Anschauung that would make it cognitively easier for future lawyers to adapt in pluralistic global and transnational law". Apparently far-reaching, but the final aim is to have "competing legal discourses alongside one's own national law", "to build a legal mind that starts from many possible solutions, instead of one legal base", and "to try to make students to actually attempt to use the laws of systems that differ from their own". Comparative law and foreign law courses have to be taught in the second or third year of legal studies because the first "should be reserved for such basic skills as … general legal studies and/or legal theory".[153]

Husa leaves the construction of the legal picture of the world to general legal studies and/or legal theory. Comparative law is not "general"; it does not provide general knowledge; it is merely a practically oriented subject intended to find solutions for domestic problems in foreign experience and to provide an understanding of foreign and international law interacting with own national law.

Another example. Helge Dedek sees the origin of comparative law in the general trend of the nineteenth century to form disciplines on the base of the comparative method. The latter was permeated with imperialism and engaged with colonial differences and the unification movement. Any other contexts of the origin of comparative law are "ahistorical" and invented later; if original comparative law is deprived of its colonial context, it appears to be a "strange outlier" in European legal thought.[154]

In the view of Dedek, the first world picture of comparative law was imperial, based on "perfidious dialectics of Western universalism and exclusion by comparison", to some extent inherited from the universalism of the Enlightenment and filled with racial and evolutional or developmental theories, where law itself was an instrument of domination:[155]

> The scope of European empires and their power allowed Europeans to view the world as a totality and an object of study. It was not a mere coincidence that such a comparative epistemology rose to prominence

[152] Husa, "Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind", *German Law Journal*, X, no. 7 (2009), pp. 914-919.

[153] Ibid., pp. 914-918, 923-925.

[154] Helge Dedek, "The Tradition of Comparative Law: Comparison and its Colonial Legacies", in Mathias Siems and Po Jen Yap (eds.), *The Cambridge Handbook of Comparative Law* (2d ed., 2023), pp. 13, 15-16, 18, 22-23.

[155] Ibid., pp. 19-22.

> in the exact same period as the most extreme expressions of empire and colonial expansion. On the contrary: the very project of colonialism necessitates, inescapably, a world view structured by the 'colonial difference' (Mignolo) between the coloniser and the colonised, which must and can only be established through comparison. Comparison, in this sense, is not meant to 'bring together peers', to reconcile, or to point out commonalities; rather, it establishes a ranking, a hierarchy.[156]

The only truth here is that the original "label" and historical context of origin with the original epistemology matter in principle for understanding a discipline trajectory of development, but Dedek's view of comparative jurisprudence is incorrect precisely because of this argument – the discipline appeared earlier, in other contexts, and drew quite a different world legal picture. The evaluation of comparative law as an "undertheorised field of study" that only recently formed its "intellectual ambition" of transforming comparison from method to subject[157] – is, of course, also not correct.

Not all believe in the close-to-marginal or subsidiary status of comparative law, but the tendency is strong. However, first, every discipline has its proper disciplinary beginning, even legal philosophy and legal theory, although they pretend to be the only legitimate heirs of all teachings about law from ancient times to the present. Legal philosophy as the discipline with its scope, name, and "scientific research program" (the term of Imre Lakatos)[158] appeared at the turn of the eighteenth and nineteenth centuries. Legal theory as a discipline appeared later.[159] To be sure, they are based on a massive corpus of earlier legal teachings, just as any other contemporary legal discipline. But their structured, systematized, relatively uncontroversial visions of the legal world, or world pictures, were formed two hundred years ago. Second, comparative jurisprudence (but not comparative law) was formed in the same period as legal philosophy. This is not the place to exhibit all the sources of this statement. But many share this view.[160]

[156] Ibid., p. 19.

[157] Ibid., pp. 6, 23.

[158] Imre Lakatos, *The Methodology of Scientific Research Programs. Philosophical Papers*, ed. John Worral and Gregory Currie (1978), I.

[159] See for example: Ewald, note 29 above, pp. 2118-2119.

[160] For example: E. Amari, *Critica di una scienza delle legislazioni comparate* (1857); G. Rolin-Jaequemyns, "De l'etude de la legislation comparée et du droit international", *Revue de droit international et de législation comparé*, I, no. 1 (1869); G. Hamza, *Comparative Law and Antiquity* (1991); Ewald, note 29 above; Ch. Donahue, "Comparative Law Before the Code Napoleon", in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, (2006); H. Mohnhaupt, "Vergleichung in Zeiten des Naturrechts der Aufklarung als Erkenntnismethode", in O. V. Kresin and I. M. Sytar (eds.), Історія порівняльного правознавства як сфера наукових досліджень: Зб. наук. праць [History of Comparative Jurisprudence as the Sphere of Scholarly Studies: Collected Scientific Articles] (2015); Kresin, note 53 above.

FIRST SPECIAL PICTURE OF THE WORLD OF COMPARATIVE JURISPRUDENCE[161]

Comparative legal thinking and origin of comparative legal disciplines

A result of the three centuries of the development of social thought in Europe (sixteenth through eighteenth centuries) was the destruction of the idea of a theo-centric hierarchical world and confirmation of a new social worldview – secular, horizontal, pluralist, and comparativist in essence, the principal subjects of which became the social associations formed on the basis of a rational or irrational will of people – societies, nations, States. The monist and total world gradually dissolved into petty volitional monads – individuals, and a new world was constructed on its ruins – world of social political and legal totalities, equal and sovereign by virtue of being endowed with equal and sovereign will through a positive social contract (society, State) and social consciousness (nation).

A world was born of peculiarities and differences which could not be cognized by metaphysical philosophy, natural law, or dogmatic legal thought. The methodologies based on the approaches of theosophy, philosophy, and natural and technical sciences proved to be inadequate to cognize this new social (including socio-legal) positive reality, which finally materialized after the French Revolution and Napoleonic wars). This cognitive crisis led to the forming (or fundamental transformation) of positivist social sciences as a whole and confirmation of the transformed jurisprudence as a positivist social science in particular.[162] One constitutive element which might have ensured its unity given the bankruptcy of philosophical monism should have been comparative-legal knowledge.

Comparative jurisprudence was defined for the first time as a theoretical-methodological approach in 1800, and as a scientific discipline – in 1810, and consciously elaborated during the early nineteenth century, primarily by Germans, but also by other European legal scholars – Italian, French, Polish, Ukrainian, English, and others. Comparative jurisprudence was regarded as one of the basic general legal disciplines (together with history, encyclopedia, and philosophy of law), subject-matter of which are national legal orders and the processes of their interaction, and the object – the trends of the development thereof, and the determination of the Individual, Particular (Special), and General in the elements thereof. This is the basis for forming a general doctrine on law, concepts, and the creation of theoretical-methodological grounds for branch legal sciences and country-based legal disciplines.

The rise of the comparative (universal) history of law is linked with the claim of legal scholars of the early nineteenth century to universalize the subject-matter of the history of law, actively being formed at that time, and with the gradual separation of the politico-legal field within the framework of universal (worldwide) history. Contemporary levels of processing the sources enables the emergence of this discipline to be dated no later than 1818. The comparative history of law in its conceptualizations of that time was defined as a separate

[161] This paragraph is based on Kresin, note 53 above.

[162] We do not analyze here various definitions of the term "positivistic jurisprudence". The first positivism in legal science was properly created and firmly established between the late 1780-s to 1830, starting with post-critical Kant, Gaetano Filangieri, and Gustav Hugo, was sociological in its essence, and not as legalistic or normativist as some better known later teachings.

legal (and also comparative and historical) science formed at the juncture of the history of law and comparative jurisprudence, which should accumulate and generalize, particularly on the basis of comparative and chronological analysis, knowledge about history and the contemporary state of law and legal thought of various peoples. This material would serve as the basis for clarifying concepts and cognition of the essence of legal phenomena.

An analysis of a significantly broader range of sources than those used previously by legal scholars gives ground to assert the existence in the first third of nineteenth century, despite lengthy discussions of clarification, of uniform theoretical foundations of comparative-legal thinking which rested on a significant corpus of comparative-legal studies, logic, and motivations of legal scholars relating to the organization of comparative-legal knowledge in both comparative-legal disciplines. The most important manifestation of comparative-legal thinking of legal scholars, irrespective of its being embedded as a particular scientific discipline, was the formation against the background of the bankruptcy of universalist legal ideologies of that time of a non-metaphysical scientific picture of the world – the Individual, Particular (Special), and General in legal development.

National legal orders and their distinctiveness

The basis of this scientific picture became the conceptualization of a legal map of the world formed solely from national-State legal orders as individual units, territorial and total in their scope. During the period here considered, two theories of national-State law were elaborated – the socio-volitional and the organic, which in material moments coincided as the formal and substantive aspects of a single doctrine and simultaneously correlated with the theory on the distinctiveness of the Individual in law.

The socio-volitional theory of national-State law was based on the requirement that the territorial-subject legal order conform to a civil society, nation, and State, and their identity relative to the contemporary development of law, despite their historical and functional differences. Thanks to the State, national law acquires a final and expressive institutional form and territoriality. The territoriality of national-State legal orders enables the legal map of the world to be constructed solely from them. The sociality of will and statehood enables the legal order to be objectified and the individual to be removed as a subject of law and the subjective right thereof, and transforms national law into the individual unit of legal development. The socio-volitional nature of law also enabled the identity to be proclaimed of the Is with the Ought, which meant the self-sufficiency and exclusiveness of a positivist legal order. The requirement of statehood for the national legal order finally separated law from other social regulators. The consideration of national-State legal orders as based on social will enabled them to be viewed as of equal value.

The organic theory of national law also considered the State to be a unit of legal development, a totality removing the individual and the subjective right thereof. It was based on a consideration of the nation/people as a natural population, simultaneously endowed with a number of social and ethno-cultural characteristics and socio-psychological unity. Within the framework of such a vision, lawmaking is part of the life of a nation and constantly accompanies its development irrespective of State-building, although the last is considered as an

indicator of its maturity. This does not deny the idea of social will, but makes the last derivative and determined, one of the manifestations and a consequence of the life activity of a nation, and not its constituent, refuses the social will and State to be a value in themselves, and subordinates the State to the nation. The organic theory more consistently created the grounds for consideration of national legal experiences as equal in character and individuality, and respective national legal orders – as non-incidental and phenomena of considerable duration. At the same time, the organic theory to a greater degree provided not only for formal autonomy, but also for substantive non-repetitiveness of national legal experience, considered such experience in inextricable unity with the spiritual and cultural calling and development of the nation.

The formal separateness of a national legal order, determined, on one hand, by the will of the national society and, on the other, by international law, did not explain the substantive non-identicalness of legal orders – because they might be regarded as purely utilitarian, functional branches of law general to all people (irrespective of the origin and character thereof – divine, natural, reason). The question arose as to the substantive distinctiveness of each national legal order – its unique elements and the specifics of its common elements (found in more than one legal order).

The notion of the distinctiveness of national law rested especially on the organic theory of national law and was derivative therefrom, emphasizing the material role of self-development in the evolution of a people. During the first third of the nineteenth century, legal scholars advanced the thesis of the non-self-sufficiency of the influence of immutable climatic conditions and, to significant degree, of the requirements and economies of peoples derivative from them. They acted as the frameworks of the possible in the process of the development of a people whose culture and self-awareness cognize these limitations and juxtapose them. Social life was considered as free and self-determined, and law as an integral element thereof within the framework of a cultural tradition and manifestation of its awareness and contemplation.

The grounds in principle of understanding distinctiveness in law by legal scholars of that period were: historicity of peculiar elements in national law which are determined by social development in concrete conditions while completely or basically rejecting these distinctive elements in substantiality; impossibility, at least with respect to their societies and States, of the existence of absolute autochthonic law in the contemporary world; non-self-sufficiency of the distinctive elements, and also in principle the openness of legal orders to interaction; dependence of the expansion or narrowing of the sphere of distinctive elements in national law on the will of society and other factors, possibility of alternative variants of the development of this sphere; impossibility of the complete deprivation of national law of its distinctive elements without the termination of its existence, the necessity of these elements.

General in law, Special in law, and interaction of legal orders

The determination by legal scholars of the second half of the eighteenth and first third of the nineteenth centuries of the exclusiveness of the Individuals (national legal orders) on the legal picture of the world was accompanied by the rethinking in principle of the essence and role of the General in law.

The bankruptcy of ideas concerning the possibility of the formalization of any General in law in the form of a single legal order was realized by many legal scholars of that period, who pointed to the absence of normative space for this given the recognition of the territoriality and sovereignty of States, and also to its unsuitability – for each concrete nation this speculatively constructed legal order would prove to be nil and alien simultaneously. This had been reflected in the evaluations of the possibility of an extra-national legal order which emerged in views on the nature of international law and dominance of some peoples over others. Legal scholars concluded that the formalization of the General in law was impossible outside the framework of national legal orders: the dominance was always in essence territorially and socially limited, leading to limited substantive changes, but could not overcome the Individual without the complete destruction thereof; and international law acts as an external confirmation of the national-State legal order and has only a concrete-national material expression. The General in law, in the view of legal scholars of the period, should have been embedded inside the national-State legal orders, and outside them could exist only as a characteristic of a process.

Given the general understanding of legal scholars of that time relating to the insuperability and totality of the form of the Individual (national legal order), quests for the General in law were manifested in attempts to determine the substantive similarities in the development of legal orders through ideas of their substantive identity or relative substantive similarity. During the period here considered, legal scholars concluded that the substantive identity of legal orders was impossible, as was single invariable progress in the legal sphere, which always is affected primarily by a number of peculiarities and factors of concrete societies at a concrete time. Accordingly, there was not and could not be a universally suitable positive law which might be accepted by all legal orders.

Less radical than uniformity and more acceptable for legal scholars at the time was the idea of the relative substantive similarity of legal orders. Given the multiplicity and non-coordination of the content of national legal orders, is the material unity and stadiality of world development of the principles of positive law possible? Legal scholars have acknowledged the limited suitability and relativity of the idea of such development – as one of the immanent trends towards doctrinal convergence (together with the trend towards the preservation and deepening of individuality), and critiqued its possible teleological implications. The grounds for such a vision were the notions that the General in law, which has no own form, correlated only with the distinctive within the framework of the Individual (national law), and the transmission of social legal experience is historical and concrete – from one Individual to another.

Another approach to the study of the General in law during the period here considered was the doctrine of the dialogue of legal systems. Legal scholars singled out two inter-connected, but distinct, spheres of this dialogue: within and between national legal systems. The internal dialogue, relying on the idea of the non-self-sufficiency of distinctive elements of national law in the world of that time, consists of singling out, identifying, and being aware of certain elements as in essence General (and their form always is national-distinctive). Moreover, the aggregate of the general and distinctive elements of national law is not the simple sum thereof, but represents a struggle and a balance, and the result and the components thereof may, consequently, be determined only *a posteriori*. The dialogue became an internal interaction of singled out and aware

distinctive and general elements, and legal scholars or lawmakers, depending on their position, might make a choice in favor of the priority development of the first, second, or both – understanding the inevitability of internal pluralism of any national legal order.

The conception of an external dialogue of legal orders provided for the generalization of the processes of similarities arising in law as a result of borrowing, correlation, and competition of legal orders. Although the general element may emanate from the unity of biological, physical, and anthropological nature of man, it, unlike this nature, is transformed in the process of human interaction in society and between societies. Legal scholars agreed that during the interaction of Individuals between themselves they act as wholes (unities of the general and distinctive elements), and the result of such interaction will be an increased role and volume of the common elements (disseminated in more than one Individual), which nonetheless do not lose their immanent character in national legal orders. The Common in the concept of external dialogue ceases to be perceived as General and unavertable, but is perceived as concrete-social (disseminated within a certain limited group of legal orders) and mutable, as a variable aggregate of interactions which primarily is not material, but a procedural reality, and may be materialized outside national legal orders only in a scientific text – as an analytical unity. At the same time, the idea had been developed of the procedural character of national distinctiveness in law as peculiarities of the dialogue with others and of participation in the creation of an era.

Acknowledgement by legal scholars of the inevitability of national diversity and non-total, non-transcendental, non-material, procedural, and immanent character of the social General in law placed their own national law in dialogue with others. This dialogue might have primarily a positive (exchange of experience) or negative (the other is a negative identificatory of one's own) character. But the emphases and stresses did not change acknowledgement of the fact that there are not two dialogues, but merely two aspects of one dialogue, the result of which is the perception by the parties (lawmakers and legal scholars) of some elements or principles of law – the General is conventional.

During the period here considered, a general theory of the interaction of legal systems was formulated. The grounds of the conceptions in this sphere were compatible, and the most principled of them coincided: an understanding of contemporary legal orders as open, recognition of the inevitability of their interaction and greater or lesser use from this; acknowledgement of the existence of similar problems in different legal orders and, respectively, an assumption of the existence of more perfected models for resolving them which may be borrowed; allowing the possibility of carrying over elements of law from one legal order to another without the loss of the content thereof; the idea of voluntary and limited reception emanating from realized requirements of the recipient society and compatibility of the legal orders; requirement of adaptation of the form of borrowed elements and correlation of their content for ensuring conformity to the conditions of the recipient society; presumption of the formation of the immanent General in law as a result of historical, concrete, and constant interaction of legal orders. Moreover, the coordinated complex of stable basic concepts in this sphere was elaborated.

During the second half of the eighteenth and first third of the nineteenth centuries, the idea was elaborated for the first time of the social Special (Particular) in law as an element of the comparativistic picture of the world. It arose from the contradiction between the *a priori* proclamation of the universality of legal development and studies of concrete mechanisms of the interaction of legal orders, and also from the contradictoriness of determination of the limits of ethno-cultural traditions of peoples not coincident with the boundaries of States and the identification of links not of equal value between different national legal orders.

The theory was developed of the families of legal systems as a middle and, simultaneously, maximum possible objective entity between a national legal order and universal legal development, an internally-linked phenomenon whose existence is materialized in the form of special immanent elements within national law. This Special in law, according to legal scholars of the first third of nineteenth century, may be defined as the sum of material elements and interactions formed historically and being common to certain groups of legal orders. The problem field of the Special in law and the classification of legal orders by a number of scholars already had been singled out as a sphere of scientific knowledge.

The most elaborate approach to the definition and classification of the Special in law was linguistic-cultural, the grounds of which were: the presumption of the conformity of linguistic-communicative, spiritual-cultural, and legal development, on the basis of which the theory of linguistic families was carried over to legal science as the theory of legal families; the consideration of the legal family as a unit of legal development, according to characteristics approximating a national legal order; confirmation of the forming of a legal family as a result of the division of a single people with its single law at a certain stage of historical development, preservation of its basic characteristics and a vector of development by peoples derivative from it and their legal orders; the notion of a legal family as a relatively cultural solitary space of constant internal legal interaction (mutual borrowing, convergence, coordination) not growing into an integral national legal order.

In addition to the linguistic-cultural approach, other criteria underlay the identification of the Special in law, but the respective ideas discovered their own inconsistency, and also subsidiarity with regard to the theory of legal families – each was supported only by some legal scholars, they did not have sufficiently developed and relatively uncontradictory theoretical foundations, and always were put forward in the works of legal scholars together with the division into legal families. These ideas are united by a quest for a unit of legal development broader than the legal family, which during the first third of the nineteenth century was not successful.

CONTEMPORARY MOSAIC OF WORLD PICTURE RECONSIDERED IN COMPARATIVE LAW

5.1. Attempts to find and not to lose

The first world picture of comparative law did not remain unchanged. For example, serious influential factors were a social crisis and the suppression of European revolutions in the 1830s that cast doubt on a nation's ability to contain within itself most interests of society, as well as to be a key actor of State-building. Another serious factor became the transformation of international law from the 1940s. But mostly the original world picture remained the same, with some changes of emphasis and non-conceptualized additions. We continue to face to a major extent an obsolete and inadequate model that require reconsideration.

There is a serious difference between the uncommon suggestion to reconsider the world picture in comparative law and massive efforts to rethink its different elements because of the substantial changes in the composition, importance, functions and interactions of different legal orders that occurred during last two centuries. Examples are given below to understand the scope and directions of such searches.

The idea of reconsidering the world picture of comparative law without losing the discipline as a historically continuous project is timely. For example, Dedek believes that generally comparative law is "an arguably undertheorized field of study" and sees a place for a "new intellectual ambition" in the theoretical contemplation of the subject. Comparison should become rather the subject-matter, than the method of the discipline. One problem is that a newly conceptualized (albeit known from times immemorial) phenomena such as transnational law are seen by many as subject-matter of its own, outside of comparative law, "calling the very future of Comparative Law as a discipline into question". Dedek considers that this and other examples demonstrate that every discipline has its historical and continuous "ideological matrix"; that is why it is regarded as not adequate for contemplating new subject-matter. Dedek thinks that the initial matrix of comparative law, including the comparative method mode, is colonialism, but presupposes decolonialization as a change of the matrix is possible.[163] Dedek, following Patrick Glenn (1940-2014), has stressed the "necessity to challenge the methodological nationalism in law that is such a strange anachronism in our global age".[164]

An attempt to theorize the whole issue of world picture change in comparative scholarship is connected with the juxtaposition of premodern, modern, and postmodern legal worldviews, in which postmodern is resolving inherent and developed inadequacies of modern based on to some extent reconsidered and refined potential of the premodern worldview. Anne Peters and Heiner Schwenke observe that postmodernist thought "considers as basic the experience of plurality and difference", "welcomes these heterogenous positions and find their discordance absolute", "protests against the totalizing monopolization of certain types of rationality and against universalist concepts that raise false allegations of absoluteness". In comparative law postmodernism

[163] Dedek, note 154 above, pp. 6, 10, 16, 19, 22-23.

[164] Dedek, Mindful of the World: "A Cosmopolitan Jurisprudence", in *ASCL Blog* (available online).

points to different contexts, especially "cultural frameworks", of law and legal thought developments. These contexts are to some extent incommensurable and the frameworks are non-transcendable, which casts doubt on the very comparison.[165]

Nico Krisch noted two competing "imaginations of law": "modern" (orderly and systematic) and "postmodern" (complex and multivalent, "an order of multiplicity"), and said with respect to modern national law: "This image – the systemic, hierarchical and exclusive one – may well constitute the exception rather than the rule … The legal order as such can then no longer be understood without an account of the ways in which its different parts are entangled".[166]

Some interconnected areas or grounds where ideas of the postmodern world legal picture were unwittingly or consciously formulated are: deconstruction of legal systems, legal pluralism, interactions of legal orders, and the cultural turn in theory and methods of comparative law. All these areas or grounds are connected with the denial of the possibility of aprioristic theoretical construction of what is law's nature and what should be the legal order. The issue of the special nature of law is artificial; it is always a concrete concept, created and accepted by certain individuals or stable groups as society. As Niklas Luhmann put it, "even the most detailed legal propositions happen to emerge in society and society alone".[167]

Mireille Delmas-Marty observes that the world legal landscape is characterized by disorder and fragmentation from the structural point of view and rash unification (and even "totalization") by means of hegemonic integration. Potential legal unity is utopian, complete autonomy of national legal orders no longer exists, and the actual task for jurists should be bringing order to pluralism, building a globally "ordered legal area". Delmas-Marty proposes that jurists not insert facts into pre-established and inadequate categories of legal systems, but instead "adapt categories to shifting realities" – a non-Euclidean or postmodern situation. The national legal system is challenged from within and without; "new legal ensembles" have difficult natures, and the concept of legal order may be replaced with interconnected and interdependent "normative areas" structuring "normative masses".[168]

Deconstruction of national and international law

An influential deconstruction of the national legal system was presented by Rodolfo Sacco (1923-2022) in his legal formants theory. He characterized the systems approach as inadequate, noting that the hierarchy principle does not explain the real existence of interacting and conflicting legal formants instead of a single norm for each issue. The real comparative study of legal orders (not only national ones) has to be the fundamental cognitive goal of comparative

[165] Anne Peters and Heiner Schwenke, "Comparative Law beyond Post-Modernism", *The International and Comparative Law Quarterly*, LI (2000), pp. 801-802.

[166] Nico Krisch, "Framing Entangled Legalities beyond the State", in Nico Krisch (ed.) *Entangled Legalities Beyond the State* (2021), p. 31.

[167] Niklas Luhmann, *Law as a Social System*, transl. Klaus A. Ziegert (2004), p. vii.

[168] Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2009), pp. 1-2, 5, 8-9, 12-16, 149-151.

law. The vision of legal theory for "proper law" contemplates reduction and interpretative engineering rather than the interpretative reconstruction of real law.[169] Some development of these ideas can be seen, for example, in the idea of molecular federalism of legal norms advanced by David Snyder.[170]

Several legal scholars considered the effects of legal transplants, a concept of Alan Watson (1933-2018),[171] within the receiving national legal system. That exercise was far-removed from the original intent of Watson and from the traditional systems approach to national law, deconstructing the latter and presenting its anatomy to be more complex and unpredictable and determined more by cultural processes than by normative algorithms. Gunther Teubner formed a new theory of legal irritants as imposed legal norms: these irritate law's binding arrangements with other social sectors and provoke fundamental change in the internal context of national law.[172] William Ewald proposed the mutual influences of legal systems to be a new subject-matter of comparative law.[173] Esin Örücü proclaimed the migration (transposition) of norms and their acculturation to be a major factor in legal development.[174] Valentine Vernon Palmer and others generalized both conceptually and geographically the concept of mixed legal system and proposed that every legal system is complex and plural because of the constant mixing.[175] Pierre Legrand wrote about the impossibility of legal transplants as meaningful constructions because of their embeddedness in socio-cultural and other contexts in home jurisdictions.[176]

No less important a deconstruction was proposed for international law by William Butler. He categorically confirms that the search for universals in international law is a useless undertaking. International law merely pretends to universality, but is not. The assumption of the universality of international law he considers to be dangerous and "originated in the absence of positive empirical evidence". Dangerous because the advisability of a universal legal system is doubtful. The reason for international lawyers proclaiming international law to be unique and universal Butler believes to be their aspiration that international law should be deemed to be a real legal system, and also the dream of a worldwide ordering of society and inter-society relations, the creation of a global community. Historically, international law has never been universal "except in the aspirations of its proponents (scientific works)". A multiplicity

[169] Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)", *The American Journal of Comparative Law*, XXXIX, no. 1 (1991).

[170] David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking* (2007) (Comparative Law and Political Economy Research Papers No. 1/2007).

[171] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

[172] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies", *Modern Law Review*, LXI, no. 1 (1998).

[173] William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", *American Journal of Comparative Law*, XLIII, 1995.

[174] Esin Örücü, "Law as Transposition", *International and Comparative Law Quarterly*, LI, no. 2 (2002).

[175] Vernon Valentine Palmer, "Two Rival Theories of Mixed Legal Systems", *Journal of Comparative Law*, III, no. 1 (2008).

[176] Pierre Legrand, "The Impossibility of «Legal Transplants»", *Maastricht Journal of European and Comparative Law*, IV (1997).

of "international systems" had coexisted (regional treaty, customary-law, doctrinal-ideological legal regimes and spheres), and there has never been an agreed concept of a universal international law and, the more so, such a law has never existed, at least down to the present. Moreover, historically, international-legal regimes had not recognized a hierarchy among themselves; they considered themselves to be superior in respect to other such regimes, if indeed they had any knowledge of others.[177]

And even at present, one may speak only of a "fictitious unity and wholeness of international law" and the real adversarial competition of centrifugal and centripetal forces in this domain, despite the fact that a hierarchy between international-legal regimes is supposedly established in part. The reason multiple international-legal regimes have arisen is the need to order and regulate concrete interactions between specific societies. And such interactions are growing. This does not threaten the development and operation of international law, but merely rejects its universal character. The perception of such a real state of affairs by international lawyers, Butler notes, is rather complex. Therefore, it is important to distinguish the real from the desired, an analysis of the state of affairs based on State practice and the doctrine of international law. One should speak not of the fragmentation of international law, but of its fragmentary nature or alternativity, which historically and now is a normal phenomenon and assumes the existence of "sub-systems or legal regimes of various types at various levels … with a changeable degree of autonomy". Such regimes simultaneously may conflict, partially coincide and overlap, reinforce one another, or simply operate in parallel. Under this approach, Butler demonstrates, the opposition between international and national legal systems disappears; they become links of a universal, mutually-connected and partially structured aggregate of legal regimes of different types.[178]

A web of global legal pluralism

A cornucopia of scholarly works for some decades have been dedicated to the contemplation of global legal pluralism. Boaventura De Sousa Santos writes about three different legal spaces – local, national, and world – and three corresponding forms of law. Socio-legal life is constituted and simultaneously operating on different levels, so legal spaces constantly interact, and this creates interlaw and interlegality. This way of thinking Santos considers to be "a sociological attempt towards a postmodern conception of law".[179]

Santos considers legal pluralism to be the key concept of a postmodern view of law, albeit not a pluralism of separate entities in coexistence, but a pluralism of their interaction and of an awareness of such interaction, of "porous legality or of legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings", and thus of interlegality with mixtures of legal semiotic codes, and with polycentrism, fragmentation, particularisms. In this

[177] William E. Butler (ed.), *International Law in Comparative Perspective* (1980); Oleksiy Kresin, Iryna Kresina, and Yuriy Shemshuchenko, "The Wisdom of Comparative Law: On the Contributions of William Butler", *Revue internationale de droit comparé*, no. 3 (2020).

[178] Kresin, et al., note 177 above.

[179] Boaventura De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", *Journal of Law and Society*, XIV, no. 3 (1987), pp. 287-288, 297.

postmodern living and interacting network of legal orders "the centrality of the state law, though increasingly shaken, is still a decisive factor".[180]

Mauro Bussani suggests a general justification for departure from absolute State-centrism in law ("legal monotheism") and for more pluralist approaches, including unofficial laws. The matrix of absolute clear State law was for some centuries justified by historically construed notions, but finally has to be acknowledged. For this, the abstract "battle of definitions" of law should be avoided in favor of concrete empirical studies of the real frameworks in which law is embedded.[181]

Ralf Michaels, developing earlier ideas of Gunther Teubner, has directed attention to global legal pluralism that challenges "a perceived monopoly of the state in making and administering law", as well as law's "social embeddedness", and focuses on autopoiesis of law on the base of discourses, "autonomous global functional subsystems of world society" which coupled with different legal orders form internally differentiated global law. With this ignorance of supranational, international, and non-State law, as well as the focus on national legal systems and their classification, comparative law looks obsolete and inadequate.[182]

Michaels, to be sure, sees some slow changes in this sphere: new classification attempts are more anthropological and not centered on state law, and "internal heteronomy of legal systems" is acknowledged. The latter is realized, *inter alia*, in the mixed legal systems theory version stating that every legal system is mixed, and this version is closely linked to the theory of global legal pluralism. Some issues remain open in connection with these changes, especially a distinction between law and other normative orders. Michaels proposes that "The definition of law becomes a task neither for autonomous communities nor for neutral observers but instead for interpersonal and intercommunal negotiation and recognition", albeit with special recognition of the role of the State. The most adequate way of ordering the plurality of legal orders, in the vision of Michaels, is a new "general theory of interlegality" understood as global mutual recognition and conflict of laws teaching.[183]

Tamanaha's understanding of global legal pluralism is formulated as a sphere of considering a new world legal picture:

> Global legal pluralism apparently purports to encompass all legal orders in the world – local, state, transnational, customary, religious, non-state, etc. – considered together in a vast bottomless bucket. If the assertion is that all legal orders in the world in the aggregate constitutes legal pluralism, it is a true but empty claim; if the claim is that their framework applies to all legal orders in the world considered together or whenever legal multiplicities of any kind arise, it is an audacious claim.[184]

[180] Ibid., pp. 297-299.

[181] Mauro Bussani, "Legal Monotheism and Its Discontents", *AJCL Blog*. 25 January 2023 (available online)

[182] Ralf Michaels, "Global Legal Pluralism", *Annual Review of Law & Social Science*, V, 2009, pp. 3, 7-8.

[183] Ibid., pp. 8-9, 13-16, 21-23.

[184] Brian Tamanaha, "A Reconstruction of Transnational Legal Pluralism and Law's Foundations", in Krisch, note 166 above, p. 456.

Tamanaha is conscious that transnational legal pluralism is "constructing a wholly new paradigm" to address not only traditional, but also new forms of law. His generally seemingly theoretical view in fact presupposes pure empirical approach: law is something that is recognized by a certain community to be law:[185] "To know what law is for the purposes of legal pluralism does not require an abstract concept or definition of law stating essential or defining features – instead one must inquire into what people in a given social arena collectively (conventionally) identify as law".[186]

He proclaimed the denial of pure legal theory:

> … transnational legal pluralists should not attempt to build on an abstract concept or definition of law (implicitly or explicitly). Not only is a concept of law unnecessary and superfluous…, but engaging in this theoretical project is a roadblock to progress. Theorists who attempt to base transnational legal pluralism on a definition of law will go in circles with other similarly engaged theorists and no prospect of resolution.[187]

Instead of "unnecessarily grand theories" trying to encompass everything and leading astray, it should be "modest, tailored theorizing that fits the matters at hand".[188] The abstract issue of law's nature is removed, and the task of researcher is to describe, compare, classify, generalize, and so on.

Tamanaha's article is a good example of the discussion and juxtaposition of "transnational and regulatory pluralist" against the principle that the legitimation of a particular legal order necessarily requires recognition from State(s), thereby presupposing the basic character of national legal orders. Tamanaha proposed three types of legal orders – community law, regime law, and cross-polity law (all three somewhere contained within national legal systems, somewhere not, somewhere even clashing) – and stresses that "these categories are inductively derived generalizations, not analytically derived":[189]

> Community law encompasses basic laws and institutions of social intercourse within communities addressing property, personal injuries, marriage, divorce, sexual restrictions, inheritance, debts and obligations and others; the body of rules through which people arrange their daily affairs. Every society has rules addressing these matters, which vary greatly across societies and change over time. Many existing systems of customary and religious law involve the lengthy continuation of fundamental rules of social intercourse going back many centuries, predating the establishment of state legal systems and evolving to adjust to the presence of the state (and the state to them). Regime laws are laws tied to ruling polities. They constitute, support and enforce the power of the governing regime, including taxation and customs fees, forced labour and military service, laws against sedition, border controls and much more, with governing regimes frequently nested within or encompassing

185 Ibid., pp. 456, 469, 475-476.

186 Ibid., p. 471.

187 Ibid., p. 475.

188 Ibid., p. 477.

189 Ibid., pp. 462-464, 469, 472-476.

> in whole or part other subregimes. Cross-polity laws deal with matters between and across organized polities, consisting of national law (including conflicts of law), international law, transnational law and non-state forms of law that extend across states (like fatwa).[190]

Anne Peters developed a theory of the competition of legal orders within the framework of the legal pluralism paradigm and considers law to be the product of merchandise: "Just like a raw material, law seems to be a pre-product for the actual production of goods. This raw material is offered on the law-market". Under conditions of globalization, the State loses its monopoly for providing law because of choice of law options, the increasing role of international and supranational organizations, regional and local authorities, and non-governmental actors, and competition with other national legal systems. A vertical and horizontal territorial and de-territorialized competition has its place between national law and other legal orders. Rules for choice of law and of correlation of legal orders together form "the meta order of legal systems competition".[191]

Krisch sees law as an entangled web rather than an integrated and coherent system, as depicted in the Western "standard image of law". He "shifts the focus to the ways in which actors create connections and distance between different legalities in domestic, transnational and international law". The identity of each legal order and the character of the whole can be understood only if we consider legal norms and legal systems not as "selfstanding entities", but as "tied up in relationships with others", not being separate and not integrated. Law is the product of these relations, and we face a challenge "when trying to square such practices into the frame of unitary, well-ordered legal systems". And these relations are not predefined, but "remain to be determined through the social interplay of actors". In "an order of multiplicity" of law there are temporary accommodations and inconsistences, and they should be rather "processed and navigated" than eliminated or neglected.[192]

Krisch notes that such an entanglement had been an essential feature of legal development before the consolidation of the modern national State, with its aspiration to become the only type of legal order. But many "pockets of entanglement" have survived. Now "increasing societal diversity" and the "rise of transnational and international legalities" is revitalizing entanglement as the realization of legal pluralism. Krisch suggested that a new post-national entangled law is close to pre-national legal orders.[193]

Dana Burchardt posited the norm-centered rather than system-centered transnational legal sphere formed by the intertwinement of legal spaces. The latter are understood as "the systemic structure formed by a group of legal norms" of various origin. Burchardt stresses here the path from norms (with their interaction) to order and not *vice versa.*[194] Legal order is traditionally understood

[190] Ibid., pp. 472-473.

[191] Anne Peters, "The Competition between Legal Orders", *International Law Research*, III, no. 1 (2014), pp. 48, 52, 63.

[192] Krisch, "Preface", in Krisch, note 166 above, pp. i, xi-xii, 1, 10, 28, 30.

[193] Krisch, note 166 above, pp. 7-10, 32.

[194] Dana Burchardt, "Intertwinement of Legal Spaces in the Transnational Legal Sphere", *Leiden*

as a "normatively closed system", but, in the vision of Burchardt, is no longer an exclusive "point of reference for the creation and application of norms"; its role weakened because of interrelations of norms blurring the frameworks of legal orders ("more openly designed model"), different norm-creating entities operating in parallel, and the emergence of transnational normativity.[195] Unlike certain other scholars, Burchardt is aware that her searches do not resolve "the normative question of legitimacy" of forms of coexistence and interaction of legal orders.[196]

Simon Roberts (1941-2014) defined the positive essence of legal pluralism movement as: "Law could no longer be treated as unproblematically determinative of social forms; nor could 'order' be claimed as the exclusive product of a top-down, centre towards periphery movement, the skilled achievement of those in power".[197] Roberts saw three major problems in legal pluralism: definitions of different normative orders (especially what is legal and what is not, and the unified concept of law becomes hardly possible), conceptualizing of their relations, and "the very nature of the comparative project": "Whatever the specific objective, its execution must involve a self-conscious attempt at the impossible – the establishment of a framework of analysis distinct from the 'cultures' compared".[198]

Gad Barzilai offered a critique of legal pluralism theories. Although legal pluralism is based on such strong grounds as the decentralization of State law and cultural relativism, it is missing a key concept of political power in asymmetrical legal reality. Roberts believed that States themselves are promoting and legalizing a sort of legal pluralism for better control over their constitutive parts and "non-ruling communities", preventing them from challenging the legitimacy of these States. Globalization to some extent has weakened the role of State regulation in some regions of the world, but not decisively transferred it to international and transnational actors. The State still strategizes and regulates local and global levels of legal pluralism: "At the outset of the 21st century, nation-states have not become obsolete, nor are they overwhelmingly dwindling; rather, they are transforming some of their power through local and global agents". Law is thus "transformative law", which is created by different local, national, and global agents to regulate relations of individuals and these actors.[199]

CONCLUSIONS

When a scholarly image is formed from certain fragments of reality as one interconnected complex phenomenon, a science or scientific discipline is being born. The root of this image is a certain paradigm, and the generalized image

Journal of International Law, XXX (2017), pp. 305-310, 321.

[195] Ibid., pp. 308, 321-323.

[196] Ibid., pp. 307, 326.

[197] Simon Roberts, "Against Legal Pluralism", *The Journal of Legal Pluralism and Unofficial Law*, XXX (1998), p. 96.

[198] Ibid., pp. 97, 100-101, 105.

[199] Gad Barzilai, "Beyond Relativism: Where Is Political Power in Legal Pluralism?", *Theoretical Inquiries in Law*, IX, no. 2 (2008), pp. 395-397, 402, 409-411, 414-416.

could be perceived as a subject of contemplation. In fact, there are different subject-matter or a part of the subject-matter of another science, and the very imaging of these parts of reality as a single phenomenon is the process of a new science or discipline subject-matter creation. To be sure, the real subject-matter exists independently from a researcher, whereas others are created or developed with researcher participation. Uniting (necessarily grounded in a certain paradigm) them in one interconnected complex phenomenon is itself the fundamental object rather than a subject. The consciousness of this activity of conceptualizing subject-matter in a certain way and modelling their connections, interactions, and, finally, their unity as an autonomic facet of reality – this is the genuine creation of a science.

This modelled image, already containing some paradigm – should it have a name? One possible name, quite deeply and consistently conceptualized, is the "world picture". Numerous arguments in favor of this vision of a subject-matter, object, origin of a science, and the very name of this modelled image are provided by the philosophy of science, science of science, and the history of sciences.

The ultimate aim of every autonomous general law discourse pretending to be a scholarly legal discipline is to construct and realize its vision and mission as a special world picture – a conceptualized and structured model of an aspect or fragment of reality accessible with its paradigm, research program, and methods. Depending on different modes of scientific rationality, this world picture can be seen as the object, subject-matter, or aim of the scientific discipline, but still remains its core issue, even if not so formulated.

The pretension to the right to construct an own world picture as autonomic and at the same time general for all legal discourses actually has been the point of competition and dominance among legal philosophy, legal theory, and comparative jurisprudence (comparative law) for at least the last two centuries.

In the vision of many colleagues, comparative law is subsidiary scholarly discipline or even not a discipline at all, but a set of tools and a kind of activity. That is why a philosophical and theoretical legal picture of the world is taught during the first year of university studies as basic, dominating, and even the only possible view, whereas comparative law is available only on the master's level as predominantly a practical subject or general introduction to practical subjects. All is logical and clear.

Likewise logical and clear is that the essentials and the mode of thinking implied in the world picture, almost exclusively presented in the legal sciences by legal philosophy and legal theory, have consequences for the development of the legal consciousness of lawyers and for legal practice. The picture with an implied proclamation of the "nature of law" has an axiomatic character and represents a mixture of metaphysics of the Ought and speculative abstractions of the somewhere (own domestic law or some Western legal systems) or nowhere existing Is. The real experience of every concrete legal order, and especially non-Western, non-secular, non-State-centered, becomes with this picture wrongful, anomalous, exotic, or obsolete.

Moreover, the structure and elements of this world picture invisibly permeate comparative law and pervert its essence: the mode of questioning law and the *tertium comparationis* do not follow from previous research experience and conclusions, but are prescribed by this speculative construction. In many

cases laws and regulatory elements are not compared with one another, but with implicit prescribed etalons. Comparative jurisprudence becomes comparative law: instead of cognition, we get ideology and means for the westernization and unification of law, a toolbox for erasing the senses.[200]

But is comparative jurisprudence (the precise and historically substantiated proper name for a later unconsciously and partly consciously distorted "comparative law") able to be not a faithful servant of other general legal discourses, branch legal studies, or practical needs, but a self-sufficient scholarly discourse with an own purely cognitive aim, own theoretical and philosophical levels? Yes, this has been so for over two centuries and remains so today.

Comparative jurisprudence did not originate as a derivative from legal philosophy and legal theory and is not their faithful servant. It was self-sufficient discipline that formed an own picture of the world once and then, so we can seek to comprehend a concise contemporary comparative-legal picture of the world now. This vision of a predominantly inductively built picture is more vital and closer to reality, worthy of further conceptualization, rethinking, and transformation, and deserving of learning and teaching in a course on comparative law as a cornerstone of legal education capable of improving the traditional semi-marginal, subsidiary, derivative status of the discipline.

The traditional and still dominant world picture of comparative law is national- and State-centered. During past centuries the long struggle to realize this in practice to some extent canonized the paradigm. This in essence modernist paradigm provided for total coverage of national-State legal orders (Individual in law), correlated in form and partly in content by international law (as General in law), and also in content by legal families, or cultures, or traditions (as Special or Particular in law).

New visions, fragmentary, but to high degree conventional and mutually corresponding to one another, of a special world picture in comparative jurisprudence (comparative law) make provision especially for: the deconstruction of national and international law, doubting the systematicity and totality of the first and the integrality of the second; and a global legal pluralism of legal orders, regimes, and their elements having different social and communicative origin. Some comparatists consider this new complex, dynamic, and highly procedural (more than material) vision of the worldbeat to be postmodern.

Only an awareness of own fundamental experience, continuity or succession, present ability, and valuable advantages in the construction of a world picture by comparative jurisprudence (comparative law) may remove it from the semi-marginal to a deserved central status among general legal disciplines in academia and the instructional curriculum. Moreover, a realistic and predominantly inductive world picture of comparative law is better placed to consider and model existing and potential profound challenges in legal development.

[200] Similar thoughts have been expressed in various works. Among those not reducing the issue to culturalist theses is Tkachenko, note 46 above.

CONTENTS

Special Issue: The Worldview of Comparative Law

Edited by O. V. KRESIN

W. E. BUTLER O. V. KRESIN	**Introduction**
O. V. KRESIN	**World Picture of Comparative Law: "The Courage of Your Convictions"**
M. A. DAMIRLI	**The Concept of Legal World Picture**
M. NICOLINI	**"Writing the Earth and Representing the World": The Cartographical Ambitions of Comparative Law**
O. HALABUDENKO	**Basic Transformation of Legal Pictures: Purpose and Method of Comparative Law**
J. GORDLEY	**Comparative Law and its Aspirations**
O. D. TYKHOMYROV D. O. TYKHOMYROV	**Comparativism, Philosophy of Law, and Comparative Jurisprudence**
O. V. TKACHENKO	**After the "Picture of Law": Legal Comparison as the Discourse of the Existence of Law**
A. SAIDOV	**National Legal Systems in the Context of Comparative Law**
A. V. EGOROV	**National, Transnational, and Global Law: Trends of Development and Interaction**
H. BEHRUZ	**The Impact of Religions on Law-Making and Classification of Legal Systems (Islamic Law)**
S. P. RABINOVYCH	**Conception of Human Rights as Component of Religious Legal System (Contemporary Catholicism)**
W. E. BUTLER	**Universality and Non-Universality in International Law: Comparative Reflections and Implications**
E. O. KHARYTONOV O. I. KHARYTONOVA	**The Private and Public Law Dichotomy as the Paradigm of Global Law: Reality or Myth?**
M. GUTAN	**The Concept of "Imitation" and its Epistemological Relevance in Comparative Law and Comparative Legal History**
C. M. DE IULIIS	**The Business Judgment Rule in Anglo-American and Civil Law Systems: An Underlying Worldview**
G. SAMUEL	**Can Methods from the Social and Human Sciences be of Value in Understanding Comparative Law Methodology?**
A. MERCESCU	**Units of Comparison Beyond (National) Law**
M. GRAZIADEI M. GIRAUDO	**Contested Economic Maps of Legal Systems**
C. VARGA	**Legal Images and Understandings of Law: Juristic Assumptions and Results, Student Evaluations and Choices**
C. VALCKE	**Comparative Common Law Teaching: Why it is so Hard**
W. E. BUTLER	**Recently Appeared**

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