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Volume No.4

21世纪比较法

Comparative Law in the 21st Century

（影印本）

[英] 安德鲁·哈丁 (Andrew Harding)
[土耳其] 埃辛·奥赫绪 (Esin Örücü) / 编著

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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%–10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

Comparative Law in the 21st Century

PREFACE

1. Origins and Purposes

This book emanates from the W.G. Hart Legal Workshop, held at the Institute of Advanced Legal Studies, University of London, on 4–6 July 2000 under the title 'Comparative Law in the 21st Century'.[1] This Workshop had itself been conceived following an earlier seminar (December 1997) at the British Institute of International and Comparative Law, at which an interesting discovery was made. The seminar had brought together representatives of what appeared to be two different, even fundamentally opposed, traditions in comparative law: Glasgow University Law School's tradition based largely on comparing civil and common law; and SOAS Law Department's tradition of studying the laws and legal cultures of Asia and Africa.

This encounter, which was more in the nature of a 'friendly' as opposed to a 'cup tie', led those present, and especially the present editors, to think that there was more of a consensus about the new tasks of comparative lawyers and the nature of our subject than we had previously thought; and that what had been taken to be the prevailing orthodoxies had perhaps in fact ceased to prevail. Bearing in mind the impending millennium, and the IALS' need to determine the topics for the W.G. Hart Workshops for the next few years, it seemed an unrivalled opportunity to mark the new millennium by looking at contemporary scholarship, in the UK law schools and more widely, in the context of new tasks or new definitions for comparative law. The W.G. Hart Workshop has always been a forum for the airing of work by younger colleagues in UK law schools, and we felt that there was probably more comparative law actually taking place than had been realised, and we were interested to know how much and of what kind. If comparative law for the next century was in the hands of younger colleagues (as it must be), then the time was clearly ripe for a discussion of comparative law in the 21st century. The year 2000 was also the centenary of the First International Congress of Comparative Law, held in Paris in 1900, which had set the agenda of comparative law for most of the 20th century. To quote from our Call for Papers (1999):

> Although for most of the 20th century it appeared as if the ambitious project of legal unification set out in Paris was retreating from view as the world was torn apart by deep ideological conflicts, the last few years have seen a remarkable turnaround. Not only did the principal object of European legal unification make very significant advances from 1972: global economic and political

[1] For details, see <www.soas.ac.uk/law/wghart>.

> conditions after the end of the Cold War (1945–89) made comparative law more immediately important and more worthwhile globally. The 1990s saw many positive developments in legal science and legal reform on every continent and advances in international norms. As Lord Goff of Chieveley wrote recently: "Comparative law may have been the hobby of yesterday but is destined to become the science of tomorrow".[2]
>
> These developments have called into question the fundamental orientation and assumptions of comparative law. It seems appropriate at the centenary of the Paris Congress to take a fresh look at the subject and decide where it should be directed during the 21st century. For example, what kind of substantive areas should comparative law research now concern itself with? Should comparative law compare rules, or the contexts or cultures in which rules operate? How 'global' can the subject be? The object of this W.G. Hart Workshop is therefore to reexamine the main propositions of comparative law in a critical perspective in the light of changing socio-legal and other conditions in the world in 2000

Lord Goff, the keynote speaker on the occasion of our Workshop, called comparative law the 'flavour of the next century', but also advocated caution, especially in the comparative study of substantive law, and proposed instead the reform of civil *procedure* by looking at other systems. He did not support European Codes or European Principles or unification by any other means: conversation and marriage, he warned us, are not the same thing. Cross-fertilization however was inevitable and useful.

The Workshop was organised under four consecutive panels, as follows:

(1) *Comparative law and the "religious systems of law"*, convened by Andrew Huxley (SOAS).

Most comparative law textbooks introduce their subject by allocating the world's legal systems into families of law, which typically concentrate on western law and its present influence. Some use a genus 'religious systems' to contain non-European and pre-20th century legal traditions. Asian law is regarded as either wholly western/modern (Japan, China) or wholly religious/pre-modern (Hindu, Islamic, Jewish, Buddhist). The panel looked at Christianity, Judaism, Hinduism, Buddhism, Roman law, Islamic law, Chinese law and Canon law. Three linked questions were considered: Is it useful to classify the world's legal phenomena into families? If so, should one of the families be labelled 'religious systems'? If so, which of the world's legal cultures should be included here? Not only is it difficult to regard all the presented 'isms' as being of the same genus, but some are not legal systems; 'belief systems' and religious laws are not the same thing. Religious systems do not belong to a family and it is difficult to define a religious legal system. At a time when the theory of legal families is under attack and is not regarded as useful except as a

[2] Lord Goff, 'The Future of the Common Law' (1997) 46 *International and Comparative Law Quarterly* 745, pp. 747–8.

teaching device, comparatists in the 21st Century will no longer talk of a 'religious legal family' and have to recognise the very specialist nature of these studies. Yet the non-black-letter-law approach that is developing among comparatists, will regard religion as part of the underlying deeply seated processes that influence the evolving shape of law.

(2) *Comparative public law*, convened by Andrew Harding (SOAS).

Comparative law in the 20th century omitted almost entirely to deal with public law topics such as constitutional law, administrative law, and even criminal law. Many scholars doubted the possibility of meaningful comparative law scholarship in these areas. This panel examined public law concepts and institutions comparatively in the new climate of a global shift towards democracy and human rights. It was once more pointed out that in the construction of legal systems, especially of the developing world, legal transplants play a very important part and that this is not just a historical, but also a contemporary, phenomenon. This is now most evident in public law. South East Asia and Southern Africa, examples elaborated in the panel, are witness to this. The future of comparative law also involves regional studies and further conversation between regional comparatists, as institutions, rules, the external and internal dynamics and the underlying structures and processes must all be appreciated.

In the area of comparative constitutional law perhaps there is little room for divergences, and hands-on assistance for law reform will prove useful in the coming years, though the importance of differences of legal and political culture have to be kept in mind by comparatists. The comparative approach has a renewed legitimacy. Constitutionalism, human rights and administrative accountability are areas that will attract the attention of comparatists in the years to come.

(3) *Transmigrations and transferability of legal ideas and institutions*, convened by Esin Örücü (Glasgow).

One of the major tasks of comparative law in the 21st century will be to analyse and to aid the transfer of legal ideas and institutions. Reciprocal influence will have a central role in the reshaping of not only evolving systems in transition but all legal systems. The process is not without its problems. This panel contributed to the development of theory in the field and thereby enriched the theoretical matrix by looking at recent examples of transmigration of law, ranging from Hungary to South Africa, and assessing the factors involved in the transferability of law. The relationship between models and recipients and ways of resolving tensions between legal-cultural and/or socio-cultural diversity were also considered through examples. Speakers referred to the works of Watson, Kahn-Freund, the Seidmans, Legrand and Teubner as paradigmatic theories of legal transplantation. New directions in this field were suggested, for example the role of the comparatist for the future was shown to be that of making knowledge available for the growth of legal systems through competition of legal rules as spontaneous orders. It was also pointed out that while the 20th Century looked at similarities between legal systems from the exportation perspective, in the 21st Century we should also look for differences from

the importation perspective. The importance of deep-seated epistemic processes was emphasised in assessing why legal transplants succeed or fail. Evolution from within is preferred, nevertheless globalization means that an emerging cosmopolitan elite will have a significant impact on the future of legal systems and the ways in which they develop. Assimilating and fitting of the models into the domestic milieu needs further analysis. Reforming the law will inevitably lead to more transpositions and analysis of contexts.

We were warned against generalizations and asked to test theories and undertake more empirical work to determine instances of anti-transplant or areas of resistance to transplants. Degrees of receptivity and bijurality of laws and legal systems were discussed. Transmigration is however here to stay. It requires both conceptual and analytical refinement – and in many fields hitherto regarded as resistant to transplants.

(4) *Comparative Law: the European Dimension*, convened by Noreen Burrows (Glasgow).

The comparative law method has been adapted to suit the needs of the European Community (Union) both in harmonizing and approximating the economic and commercial laws of its members and in facilitating the countries of Eastern Europe in their modernization programmes, often with the goal of membership of the European Union. This panel assessed the measure of success in the attainment of common laws in Eastern and Western Europe. Individual attempts were viewed in the context of the debate on the possibility and desirability of a new European *ius commune* for the 21st century. Some of the papers reiterated the point that comparative lawyers must work with colleagues from other disciplines and that although there are cultural similarities in the western world, responses to ethical and social issues differ greatly. European experts are working as consultants in Central and Eastern Europe and their crucial role will be enhanced by an understanding of the role of comparative law in such ventures and the realisation that the study of economic and social background should become part of comparative legal studies. Nevertheless Europe is a new market for comparative law studies and comparatists are needed for political processes.

The closing session summed up the comparative law agenda set by the Workshop, reflecting on socio-legal change and the metaphors of legal adaptation. In the following discussion concepts such as eurocentrism, ethnocentrism, fragmentation, legal pluralism, legal anthropology, social engineering, language, channels of transplants, versions of comparative studies and construction of theoretical models, came to the fore. We were left with the questions, are we expecting too much from comparative law? and, more importantly, are we expecting too much from comparative lawyers?

2. Organization of the Book

This book comprises papers from the last three of the four panels and the closing session. The papers from the first panel are published in a parallel volume.[3] They form a nucleus convenient for separate publication.

It was decided not to retain the original order of the papers, but rather to arrange them in such a way as to bring out the narrative or organic progression that they created naturally. Nonetheless they do fall roughly into four sections. The first three papers (Örücü, Nelken and Cotterrell) are general, introductory and also in some ways summatory. The next four (Foster, Raffenne, de Cruz and Thomas) deal with specific examples of comparative study from different areas of law: commercial, private and public – leading to the next four papers (Smits, van Gerven, Banakas, and McDonald), which deal with European legal integration. The last of these, which raises the question of a European constitution, leads seamlessly into a general discussion of public law in the next four papers (Leyland, Bell, Harding, Du Pré) which also range over several geographical regions. The book finishes with a paper (Carey-Miller) that seems to exemplify practically all the themes under discussion in the problematical but promising jurisdiction of South Africa.

It was also decided to introduce each chapter of the book with an editorial linking passage to create a threaded discussion leading the reader through the various themes raised by the authors, and providing continuity of thought.

At the end of the book readers will find a Bibliography, which will hopefully assist in studying and teaching comparative law in the 21st century.

3. Concerning the Scope of Comparative Law

So what is the tenor of current discussion about comparative law against which the contributors have prepared these papers?

Discussions about comparative law tend these days to be concerned less with 'justifying its practical utility', 'making its subject matter manageable', and 'avoiding superficiality',[4] than with emphasizing that it is a 'big tent, encompassing lots of different types of scholarship'[5] or something which 'there seems little point in trying to specify',[6] and which discovers the inadequacy of the discipline's 'tools, classifications and teaching techniques' for 'the analysis of modern legal problems'.[7]

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3 A. Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (Curzon, Richmond, 2002, forthcoming).

4 W. Twining, 'Comparative Law and Legal Theory: the Country and Western Tradition' in Edge, I.D. (ed), *Comparative Law in Global Context* (2000), p. 51.

5 D. Kennedy, "The Politics and Methods of Comparative Law", in P. Legrand and R. Munday (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2002, forthcoming).

6 Roger Cotterrell's piece in this volume.

7 Markesinis (1998), below n. 10, at p. 36.

Twining even says that 'few experienced comparatists compare – and for good reason'.[8]

Many comparatists actually regard the articulation of foreign legal systems in their own particular contexts as the most important task of comparative law. Others again will say that this is insufficient, and that the object is to decide which rule or principle is best. This is all hardly surprising in view of the globalization of, or at least the realisation of the global significance of markets, of the problems of human society, and even culture itself; and in view of increasing knowledge of and interest in, or acceptance of, the way 'the other' organises her affairs. It should be noticed, however, that the new interest in foreign legal systems per se is not exactly a case of reluctance to compare: more accurately, the comparison is simply implicit, and this approach does not obviate the need to have theory, concepts, and methodology, but merely changes their nature.

Comparative law has also become a more significant area for legal research, and for a variety of reasons. As Andrew Harding put it during the sessions, 'some are born comparative lawyers, some achieve comparative law, and some have comparative law thrust upon them: one might add that some merely wander innocently into comparative law, not having had the slightest idea that that was what they were doing.' Esin Örücü reckons that the number of articles and books on the subject has quadrupled in the last ten years:[9] the chapters in this book are merely the tip or at least a rather small segment of a huge iceberg, but are nonetheless indicative of a broad range of comparative law concerns, talents and approaches even just within British scholarship.

Such diversity and popularity are to be welcomed. However, comparative law is not just experiencing the pleasure of the ageing movie star suddenly becoming a cult figure: it is also fraught with internal contradiction, uncertainty, and a sense of mid-life crisis. The new situation raises even more acutely questions that had appeared to be receding in importance, about the nature, aims and purposes of the subject. Who are properly regarded as comparatists, especially if they do not actually compare? What is their actual field of endeavour? What are their motives and agendas? What methods do they, should they, employ? Is comparative law a hobby or a science? How does it differ from other related fields such as international law, socio-legal studies, law-and-development studies, legislative science, and area studies? Does it aim towards legal uniformity and convergence, or diversity and fragmentation?

Örücü notices a quadrupling of effort, but it is also true that a remarkable proportion of these books and articles, compared with other sub-disciplines, are reflexive: these are not comparative-law studies as such but rather angst-ridden

[8] Twining, above n. 4, at p. 47.

[9] 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 *Electronic Journal of Comparative Law* 2.

theses about what comparative law is actually about, or what it is for.[10] This book delves into these questions and provides an indication of the type and scope of comparative law studies at the turn of the millennium.

[10] J.S. Bell, 'Comparative Law and Legal Theory' in W. Krawietz et al (ed), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert Summers* (Duncker and Humblot, Berlin, 1995); H. Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 *Oxford Journal of Legal Studies* 396; I.D. Edge (ed), *Comparative Law in Global Context* (2000); W. Ewald, 'Comparative Jurisprudence I: What was it Like to Try a Rat?' (1995) 143 *Pennsylvania Law Review* 1889; W. Ewald, 'Comparative Jurisprudence II: The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489; Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 *American Journal of Comparative Law* 683; T. Koopmans, T., 'Comparative Law and the Courts' (1998) 45 *International and Comparative Law Quarterly* 545; P. Legrand and J. H. Merryman 'Comparative Legal Studies: A Dialogue' (1999) 47 *American Journal of Comparative Law* 201; B. Markesinis, 'Comparative Law: a Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1; B. Markesinis (ed), *The Gradual Convergence* (Clarendon Press, Oxford, 1994); B. Markesinis, *Foreign Law and Comparative Methodology* (Hart Publishing, Oxford, 1998); U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *American Journal of Comparative Law* P5; .G. Monateri, '"Everybody's Talking": The Future of Comparative Law' (1996) 21 *Hastings International and Comparative Law Review* 825; D. Nelken (ed.), *Comparing Legal Cultures* (Dartmouth, Aldershot, 1997); D. Nelken and J. Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford, 2001); L.A. Obiora, L.A., 'Toward an Auspicious Reconciliation of International and Comparative Analyses' 46 *American Journal of Comparative Law* 669 (1998)'; E. Örücü, 'Critical Comparative Law' (2000) 4 *Electronic Journal of Comparative Law* 2; J.C. Reitz, 'How to do Comparative Law' (1998) 46 *American Journal of Comparative Law* 597; R. Sacco, 'Legal Formants: a Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1 and 343; G. Samuel, 'Comparative Law and Jurisprudence' (1998) 47 *International and Comparative Law Quarterly* 817; R.B. Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *American Journal of Comparative Law* 477; M. van Hoecke and M. Warrington, 'Legal Cultures and Legal Paradigms: Towards a New model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495. And conferences in Michigan (1996), Utah (1996) San Francisco (1997), Chicago (2000); Cambridge (2000) as well as the conference whose papers are published herein (London, 2000). For details of these conferences, see Örücü's chapter in this volume at n. 9.

CONTENTS

Contents

Chapter 1

UNDE VENIT, QUO TENDIT COMPARATIVE LAW?

*Esin Örücü**

1. *UNDE VENIT* COMPARATIVE LAW?

1.1. Comparative Law as We Know It

> Modern, systematic comparative law is a child of the nineteenth century and an adolescent of the twentieth. During this period, beyond giving the comparative lawyer a free rein and being regarded as interesting, comparative law has provided a seemingly unending pastime for comparatists and others to discuss its true meaning, historical development, dangers, virtues, scope, functions, aims and purposes, uses and misuses, and method, and this even after comparative law had been accepted as part of the undergraduate curriculum in most universities.[1]

Today the subject is regarded as 'strategic', the present century having been heralded as 'the era of comparative law',[2] the time of its majority. Yet there is no decisive definition of what comparative law and comparative method is today. It seems still open to discussion whether this is indeed an independent discipline at all,[3] and comparatists are called upon to re-think their subject.[4] One rather circular and vague definition tells us that: 'the words suggest an intellectual activity with law as its object and comparison as its process'.[5] There is however, an unprecedented growing interest in the subject, and the observation that, 'if comparative law did not exist it

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1 E. Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Kluwer Law International, Deventer, 1999), p. 1.

2 T. Koopmans, 'Comparative Law and the Courts' (1996) 45 *International Comparative Law Quarterly* 545.

3 G. Samuel, 'Comparative Law and Jurisprudence' (1998) 47 *International Comparative Law Quarterly* 817; J. Gordley 'Is Comparative Law a Distinct Discipline?' (1998) 46 *American Journal of Comparative Law* 607.

4 B. Markesinis, 'Comparative Law – A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1.

5 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd. edn., Clarendon Press, Oxford, 1998), p. 2.

A. Harding and E. Örücü (eds.),
Comparative Law in the 21st Century, 1–18.

would have to have been invented',[6] is even more pertinent today. Witness the law journals over the last ten years where the number of articles on comparative law has quadrupled.

All comparative law textbooks inform the reader of the 1900 Paris Congress and of the aligning of comparatists as methodologists and social scientists, the aims and purposes of comparative law and how it relates to other branches of law. Comparative law has been categorised as descriptive/ dogmatic/ applied/ contrasting; legislative/ scholarly/ scientific or theoretical; formal/ dogmatic/ historical; comparative nomoscopy/ nomothetics/ nomogenetics; internal/ external; and, macro comparison/ micro comparison. The objectives of comparative law are noted as academic study, law reform and policy development, to provide a tool for research towards a universal theory of law, perspective to students, aid to international practice of the law, international unification and harmonization – common core research, a gap filling device in law courts, and aid to world peace.[7] Whether these uses have been fully taken advantage of and whether the objectives have been realised is open for discussion[8] when taking stock of comparative legal studies as we move into a 'new century for comparative law'.[9]

1.2. Comparative Law at the End of the 20th Century

A number of distinct approaches to comparative law became prominent towards the end of the 20th century. On the one hand these approaches may enhance the prospects of comparative law; on the other, some of them could swallow it up and change its character. Some such distinct trends worth mentioning in comparative law discourse today are comparative law and legal history (historical comparative law or historico-comparative perspective); comparative law and legal philosophy (comparative jurisprudence); comparative law and culture (comparative legal cultures and law and culture studies); comparative law and economics; and comparative law and regions or subjects hitherto not covered. Public law, whether administrative or constitutional, criminal law and human rights demand that comparatists consider these urgently rather than putting all their efforts into private law which has dominated the scene in the past. In addition, attention should be paid to regions

[6] H.J. Ault and M.A. Glendon, 'The Importance of Comparative Law in Legal Education: United States – Goals and Methods of Legal Comparison' in J.N. Hazard, and W.J. Wagner (eds.), *Law in the USA in Social and Technological Revolution* (Bruylant, Brussels, 1974), p. 69.

[7] These objectives are sometimes grouped as practical, sociological, political or pedagogical, and comparative law categorised as 'descriptive', 'applied', 'abstract or speculative'.

[8] See E. Örücü, *Symbiosis between Comparative Law and Theory of law – Limitations of Legal Methodology*, (Erasmus Universiteit Rotterdam, Mededelingen van het Juridisch Instituut Nr. 16, Rotterdam, 1982), pp. 1–25, and citations therein.

[9] Note recent Symposia in the USA and Europe. See for example, New Directions in Comparative Law, Michigan, September 1996 and Hastings College in San Francisco, 1997; New Approaches to Comparative Law, Utah, October 1996; and Centennial World Congress on Comparative Law, New Orleans, November 2000 (see [2001] *Tulane Law Review*).