Comparative Law and Critical Legal Studies

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CHAPTER 25

COMPARATIVE LAW
AND CRITICAL LEGAL STUDIES

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Turin and Hastings*

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I. For Starters:
Defining the Key Question

In discussing the relationship between comparative law and critical legal studies, we must first clarify the topic. In particular, the meaning of 'critical legal studies' can be defined in various ways. One definition would encompass the whole, fairly rich, contemporary critical movement in comparative law; this movement includes voices from many places, especially various European countries (France, Germany, Italy and the United Kingdom) as well as the United States.¹ This chapter, however, defines the term more narrowly and looks at the relationship between comparative law and the specific network of scholars affiliated with the movement originating in the United States in the 1970s and known as Critical Legal Studies, or, more colloquially, CLS.

Critical Legal Studies, sometimes a political movement, today certainly a school of thought, and perhaps even a theory of law,² encountered comparative law in the early 1990s, that is, quite recently. This encounter created a fairly broad network of Critical Legal Studies scholars thinking and writing about foreign and comparative law. The contributions made by these scholars over the last decade or so are the focus of this chapter.

One must not overlook, however, that Critical Legal Studies has also had another, very different, relationship with comparative law, namely as an object of comparative study. In the last few decades, American law and legal scholarship have acquired a position approaching global hegemony. As a result, Critical Legal Studies, as one of the most important (post-realist) jurisprudential movements in the United States, has received its share of attention abroad as well. Thus, its critical agenda has influenced legal thought in many parts of the world. This contribution through comparative studies may well be as significant as its contribution to the discipline, but it is not my concern here.

The contribution of Critical Legal Studies to comparative law is a matter of considerable (international) interest, not only in light of the remarkable presence of the movement in several leading US-American academic institutions but also in view of the rather desperate need for comparative law as an academic discipline

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¹ A non-affiliated and non-organized recent critical wave of writings in comparative law includes those of Bussani, Curran, Ewald, Feldman, Fitzpatrick, Grande, Hesselink, Legrand, Michaels, Muir Watt, Obiora, Reimann, Seflon Green, and many others. I offer this selection of names purely for the purpose of indicating the kind of work that can certainly be considered 'critical' of the comparative mainstream. It might even be possible that some scholars on this list consider themselves 'insiders' to the network, while others whose work I consider as 'insiders' might not like to be included.

² Duncan Kennedy, A Critique of Adjudication (1997), 8-10.
for theoretical revision and reorientation. The relationship between Critical Legal Studies and comparative law is also interesting from the institutional perspective. Critical Legal Studies has skillfully employed the international appeal especially of the Harvard Law School and its graduate programme to attract young, gifted scholars from all over the globe. Some of them were eager to enter academic life in the United States, while others have returned to their home country. The result is a global network of American-trained scholars working in the United States, Europe and the Mediterranean region, Latin America, and Africa, who affiliate themselves with Critical Legal Studies as a movement and as a critical and leftist agenda.

The encounter of Critical Legal Studies with comparative law has produced a variety of dissertations and law review articles in which the methodological postulates of (traditional) comparative law were scrutinized and criticized. This work has questioned the standard terms and concepts as well their meanings and implications. In particular, functionalism, perceived by Critical Legal Studies as the creed of the priestly caste of mainstream comparative law, has been criticized with the goal of exposing its underlying assumptions. As a result of such, and other, critiques, both comparative law and Critical Legal Studies have been reinvigorated. In particular, comparative law, a discipline which had already begun to overcome its former self-congratulatory mood, was infused with a healthy dose of criticism, for example, through the challenge that it fosters practices of hegemony and domination.

Yet, the relationship between Critical Legal Studies and comparative law raises some important questions. The Critical Legal Studies scholars’ characterization of mainstream comparative law is not beyond challenge, the novelty of their critique is not always free from doubt, and their claims to new discoveries are not always fully convincing. This leads to the key questions pursued in this chapter: what are the contributions Critical Legal Studies has really made to comparative law, and how original are they?

We will first describe the emergence, as well as some of the work, of Critical Legal Studies comparative law (Section II), then pursue to what extent the Critical Legal Studies approach breaks with, or rather continues, the agenda of the discipline’s mainstream (Section III), and finally arrive at a sympathetic critique of the critique (Section IV).
II. Critical Legal Studies Meets Comparative Law: A Tour d’Horizon

The network of Critical Legal Studies comparative lawyers constituted itself as a visible group in the mid-1990s. But its beginnings really lie in a seminal article of the previous decade. In 1985, Günther Frankenberg, a scholar belonging to the German anti-formalist, critical, and leftist school of jurists at the universities of Bremen and Frankfurt, published an essay entitled ‘Critical Comparisons: Rethinking Comparative Law’.\(^3\) In this article, which the discipline’s mainstream happily (and unfortunately) ignored, Frankenberg launched a full-scale attack on traditional comparative law primarily from two sides. He chastised the traditional approach for being ethnocentric and ‘legocentric’; and he claimed that comparatists suffered from a ‘Cinderella complex’, that is, an imbalance between their perception of the discipline’s great value and the very modest recognition it actually enjoyed in legal academia.

Frankenberg was well connected and highly respected at Harvard and it was no accident that his article appeared in the *Harvard Journal of International Law*. As a result, his ideas soon circulated widely among Critical Legal Studies scholars in the United States where they helped to stimulate the Crips’ interest in comparative law. It is noteworthy that this occurred at a time when comparative law found itself in a rather paradoxical situation: on the one hand, it played a decidedly marginal role in American legal academia; on the other hand, it was just about to become a powerful agenda on the international level with the initial buzz about globalization.

The Harvard Critical Legal Studies group had generated a few students who were engaged in various non-domestic lines of scholarship, *inter alia*, at the University of Utah. Thus in 1996, Salt Lake City became the venue of a much-noted conference on ‘New Approaches to Comparative Law’. The purpose of the conference was the presentation of Critical Legal Studies work on a panoply of issues transcending American boundaries.\(^4\) In the years after the Utah Conference, annual meetings at the Harvard Law School, as well as in other venues, created a

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\(^3\) Günther Frankenberg, ‘Critical Comparisons: Rethinking Comparative Law’, (1985) 26 *Harvard Journal of International Law* 411. By ‘legocentrism’ Frankenberg means that ‘law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony’. He further specifies that ‘legocentric thinking and legalism, its political strategy, draw their strength from an idealized and formalized vision of law as a set of institutions, rules and techniques that function to guarantee and, in every possible conflict, to vindicate individuals’ rights. If legal provisions do not live up to the promises inherent in the rule of law, this may be interpreted as an unfortunate and atypical accident, a singular event of justice miscarried. Thus the overall legitimacy and efficiency of the legal order remain intact’ 445.

transnational network of loosely affiliated Critical Legal Studies comparatists. Membership is not limited, however, to those affiliating themselves professionally with comparative law as a discipline but instead rests on a common interest in exploring the formation and circulation of global 'modes of legal consciousness'. In other words, the major common denominator of the membership is the expansion of the Critical Legal Studies agenda beyond the domestic American legal system, which had hitherto been the sole target of Critical Legal Studies critiques.

Members of the network share an aversion against allegiances with any established professional discipline or vocabulary and they often create their own alternative terms and categories. Thus, they are active in various fields, ranging from international law and law and development to legal theory and legal history. They are drawn to the comparative method by its critical and de-mystifying potential. Network members are characterized by an (often moderate) leftist political orientation and, more importantly, a belief in the primary significance of critical scholarship. This critique is mostly directed at the implications of law for the reproduction of entrenched social hierarchies, and it usually entails a commitment to greater social and political equality and participation.

The critique has two major, interrelated, dimensions. First, it views law as a hegemonic system legitimating direct forms of domination: legal rules shape and reproduce hierarchical structures of power (race, class, gender, etc.) by both forging legal identities and affecting the redistribution of social resources. Second, it regards the legal system as an instrument for the legitimization of the status quo: (false) legal consciousness is a cluster of beliefs shared by legal actors; it reinforces current power structures by mediating or denying contradictions, creating false necessities, and producing false justifications. While liberals and part of the traditional left attempt to pursue their goals by relying on political practice and seek to build on the (perceived) positive aspects of the rule of law, Critical Legal Studies scholars (and comparatists) subscribe to an agenda of liberation through disruption and disorientation. The goal is to illuminate the fallacies of legalistic strategies, the double-edged nature of our 'dearest treasures', that is, fundamental rights, equality before the law and other such basic concepts, and the double-binds implicit in our political choices.

This intellectual approach is applied to a variety of geographic contexts. The chosen turf depends usually, but not necessarily, on the national origin of the respective scholar. A few examples might serve as a rough guide to this brand of scholarship.

Among Mediterranean comparatists, some are primarily interested in producing a plausible secular and modern account of post-colonial legal consciousness in the

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5 See Kennedy (n 2), at 6.
Arab World. Scholars pursuing this project are deeply influenced by Edward Said and his call for ‘secular criticism’. They are thus ‘fundamentally opposed to the idea of reserving to Islam any privileged space in the public sphere’. They build on the notion of ‘orientalism’, exploring its implications for the law, and engage in an ‘oppositional discourse seeking to transcend both Western hegemony and fundamentalist resistance through systematic critique’. Their studies analyse post-colonial structures through the lens of critical scholarship and undertake to illuminate the relationship between the metropolis (or centre) and the periphery in all its complexity and ambiguity. In particular, by introducing notions such as that of the ‘Muslim Cosmopolitan’, they reject the categorical divide between East and West as a valid epistemological basis and expose the ambivalence of the idea of cosmopolitanism which itself is loaded with conflicting political projects. Thus, a comparative study of violence against women in the Arab World and in the United States can challenge both the orientalist construct of how the other treats its women and the ‘international feminism’ approach. Other scholars and writers are interested in exploring the biases and the deforming effects of nationalist projects in the Mediterranean area. For instance, they show how the nationalist narrative of the Greek state’s creation elides the struggles of various actors with competing agendas for the political organization of the new state.

Latin American Critical Legal Studies scholars use comparative law to cast light on both the fiction of the ‘European-ness’ of Latin American legal culture and on their distinctive ‘Latin American-ness’. According to this approach, the Latin American periphery is trapped in a peculiar ambiguity. On the one hand, Latin American legal systems are not part of the (European, or at least Western) mainstream. On the other hand, Latin American law is ‘not being exotic enough to claim the cultural exception’. Thus, Latin America is seen as a European appendix lacking a distinct legal culture that could serve as the ‘basis of a genuine and exotic contribution to jurisprudence’. Comparative law also proves to be a crucial tool for questioning the political implications of the trope of European-ness. As an early critical comparatist suggested, the fiction of European-ness serves the interests of Latin American elites, strengthening and supporting the liberal project of national governance by insulating the legal system from the input and interests

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8. Ibid 362.
of broader constituencies and particular local cultures.\textsuperscript{13} Moreover, a critical-comparative investigation helps to formulate and test hypotheses concerning the distinctiveness of Latin American law. It sheds light on the dynamic of production and reception, on the relation between law and social change, and between law and economic development. Finally, critical comparative studies tackle the question whether there are any peculiarly Latin American modes of legal reasoning. Critical comparatists reject the widely held assumption that Latin American law belongs to the civil law family, and they explore the connection between modes of reasoning and particular institutional forms and practices.\textsuperscript{14}

Critical comparative law also has an African spin-off, mostly active in Kenya. This work focuses on the devastating cultural and economic impact of international agencies, such as the World Bank and the IMF, on Third World countries, for example, by means of Structural Adjustment Programs targeting the legal system.\textsuperscript{15}

Finally, ‘metropolitan’ Critical Legal Studies comparatists (ie those in the United States) are often interested in exploring the premises and political implications of the discipline’s ‘Western-ness’. They question the mainstream’s methodological postulates and tacit assumptions and see comparative law as a ‘Western’ enterprise loaded with political projects and strategies.\textsuperscript{16} Thus, they claim to detect and spell out the political implications of the comparative enterprise. In particular, they envision comparative lawyers, together with their fellow international lawyers, as prime actors in a project of cosmopolitan governance. But they also make a plea for rethinking comparative law more generally, claiming that for the comparative method to become a tool of critique, its ethnocentric and ‘legocentric’ biases must be exposed.\textsuperscript{17} Critical Legal Studies comparatists approach the project of European integration in a similar vein, looking for blind spots and ambiguities.\textsuperscript{18}


\textsuperscript{14} These themes have been extensively discussed at the conference ‘Thinking of Law in and Latin America’, Harvard Law School, 4 March 2005, organized by Alvaro Santos and Arnulf Becker. See \texttt{<http://www.law.harvard.edu/programs/elc/events/#mar4>}.\textsuperscript{15}


While this brief overview amounts to little more than a bibliographical guide, it shows that the Critical Legal Studies network points to many areas of the discipline, and to the global model of governance through law, inviting critique. In all this, Critical Legal Studies comparatists have spent considerable time in ‘self reflection’ and have reached a remarkable degree of theoretical sophistication. Unfortunately, their contributions are sometimes difficult to fully appreciate and are easily misunderstood by individuals outside of the network. The main reason for the resulting miscommunication is that Critical Legal Studies comparatists often write and reason at high levels of abstraction and frequently borrow freely from particular intellectual traditions in neighbouring social sciences, putting the resulting scholarship well beyond the ken of many, if not most, readers.

An observer outside the network may be tempted to conclude that Critical Legal Studies comparatists chose, or at least imagined that they were choosing, to start their project from scratch and attempted to construct an entirely new canon for comparative law. Much of the Critical Legal Studies comparative scholarship, it seems, seeks to establish a dialogue with scholars other than (traditional) comparatists, especially with so-called ‘area studies’ (or, from a US perspective, scholarship on ‘foreign’ law and legal systems). Thus, Critical Legal Studies scholars often seem rather reluctant to engage in genuine comparison or to consider critical work carried on by ‘professional’ (ie mainstream) comparatists. As a result, building an agenda common to Critical Legal Studies comparatists and their mainstream colleagues has proved to be difficult, at least in the beginning.

In fact, for years after the Utah conference, Critical Legal Studies comparatists and the discipline’s ‘establishment’, institutionalized in the American Society of Comparative Law (the corresponding institution of the International Academy of Comparative Law), largely failed to communicate in the United States, possibly because of reciprocal suspicion. This situation has begun to change only very recently and today, a number of Critical Legal Studies comparatists are involved with the American Society of Comparative Law (ASCL), often offering outstanding contributions.

20 One can think of Annelise Riles (ed), Rethinking the Masters of Comparative Law (2001) as an exception.
21 A full-scale critique of the discipline has been carried on for example in Mathias Reimann and Ugo Mattei (eds), Symposium, ‘New Directions in Comparative Law’, (1998) 46 AJCL 597.
22 At the recent Ann Arbor Meeting of the ASCL leading comparative Crits such as Lama Abu Odeh, Annelise Riles, Daria Roithmayr, and Teemu Ruskola presented much applauded and important papers.
III. Disruption or Continuity?

Like all complex intellectual phenomena, the work of Critical Legal Studies comparative law scholars is susceptible to different interpretations. In particular, one can conceive of it primarily as the disruption of traditional comparative law assumptions, approaches, and methods, or one can emphasize the elements of continuity and connection with the discipline’s mainstream. This leads to the question to what extent Critical Legal Studies comparative law can really be said to begin the comparative law enterprise ‘from scratch’. There is no question that within the Critical Legal Studies network, the emphasis is all on rupture with the mainstream’s professional project and ideology. This is signalled by the avoidance of the traditional, and the invention of a new, vocabulary, and it becomes evident in the rather eclectic references to, and use of, the existing (traditional) scholarship. Yet, an analysis of the relationship between the iconoclastic and the traditional for purposes of this Handbook requires a more detached perspective. We will look at a variety of contexts in order to observe the respective critiques of Critical Legal Studies comparatists and in order to gauge how revolutionary these critiques really are. As a result, this part of the chapter deals primarily with methodological issues rather than with actual comparative work.

1. The Assault on the Traditional ‘Canon’

Critical Legal Studies comparatists are actively challenging what they regard as the traditional canon of the discipline’s mainstream. From its early beginnings, Critical Legal Studies comparative law has critiqued the traditional discipline’s tacit methodological and epistemological assumptions. The portrait of traditional legal scholarship in general as a powerful professional project legitimizing the status quo and reproducing hierarchical structures has been extended to include comparative law in particular, thus, in a sense, expanding the critique from the domestic to the global sphere. This critical inquiry approaches comparative law as a canon consisting of interlocking texts and explores how structures of consciousness shape this canon, how it is formed, and which functions it serves. In Frankenberg’s analysis, for instance, ethnocentrism, ‘legocentrism’, and cognitive controllability are among the central ideas informing the canon. Frankenberg thus questions the very epistemological operations by which comparative lawyers select and process their information. He argues that the mainstream has long relied on a mode of comparison that assures ‘cognitive control’ and that it is characterized

23 See Kennedy (n 2) and idem, Legal Education and the Reproduction of Hierarchy (1983).
by the 'formalist ordering and labelling and the ethnocentric interpretation of information, often randomly gleaned from limited data'. This critique suggests that comparative law ought to be envisaged primarily as a 'learning experience', involving two crucial epistemological paradigms: distancing and differencing. The former requires that we resist the power of prejudice and ignorance by casting aside settled knowledge and entrenched beliefs; the latter implies a conscious effort to foreground the observer’s subjective perspective and experience.

Yet, when reflecting upon such a critique, one cannot but wonder whether its full-fledged assault on the entire mainstream tradition is really productive. Critical Legal Studies criticism often fails to distinguish the various elements within this tradition, synchronically, diachronically, as well as in terms of quality of the work. To be sure, there is a lot of bad comparative law out there, characterized by woefully limited efforts at data gathering and by a lot of speculation. But considering that there are also outstanding examples of painstaking data gathering within the mainstream comparative law tradition, the Critical Legal Studies critique appears to be too general as well as too extreme. Perhaps more importantly, the Critical Legal Studies critique, in a sense, misses the mark: the Critical Legal Studies revolt against mainstream liberal scholarship aims at what is constructed as an institution of power, whereas comparative law has always fought its battle against legal chauvinism and positivism from a weak, often marginal, position. If a canon existed at all (eg one constructed in the 'European shadow'), it consists of methods of inquiry across time and space.

It is true that some Critical Legal Studies-affiliated scholars go beyond methodological generalizations. They seek to explore the professional, political, or personal projects of actual comparatists rather than ascribing a monolithic attitude to a tradition that consists of many different individuals working in different times and spaces and that is in fact fairly rich in perspectives. Thus, one Critical Legal Studies international law scholar detects, for instance, a variety of so-called 'comparativism(s)' (pointing at their nature as political and professional projects).

25 The point is made by anthropologist Laura Nader, 'Comments', (1998) 46 AJCL 751.
26 For a classic example, well worth being carefully studied, Rudolf B. Schlesinger (n 34). For a recent example sharing the accuracy but employing an improved theory, see Mauro Bussani and Vernon Palmer (eds), Pure Economic Losses in Europe (2003).
27 Note however, that the very lack of an agreed-upon canon has recently been offered as an explanation of the malaise of the field (at least in the US) by an editor-in-chief of the American Journal of Comparative Law, the official organ of the discipline's (US-American) mainstream; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', (2002) 50 AJCL 671, 695-8.
29 A good example is Annelise Riles, 'Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism', in Annelise Riles (ed), Rethinking the Masters of Comparative Law (2001) 94.
He distinguishes multiple internal divisions of the discipline and invents a multilayered complexity. While at one level, he finds ‘historicists’, ‘functionalists’, and ‘idealists’, at another level he identifies ‘technocrats’ and ‘culture vultures’.\textsuperscript{30} On the whole, this polemic assumes that professional comparatists wield considerable political power—a proposition which is surely open to doubt.

2. Functionalism and Structuralism

As mentioned before, Critical Legal Studies comparatists have aimed their critique, \textit{inter alia}, at a basic method that has characterized mainstream comparative law for well over half a century, that is, functionalism.\textsuperscript{31} Yet, this critique overlooks that functionalism is neither the unquestioned creed of the mainstream any more nor is it a method without alternatives.

Traditional comparative law can no longer be considered unambiguously functionalist.\textsuperscript{32} Functionalism, though certainly an important (and arguably the dominant) approach in the second half of the last century, had long been hybridized by the time the Critical Legal Studies first turned to comparative law. As I have argued elsewhere,\textsuperscript{33} even in the early ‘Common Core’ methodology developed by Rudolf Schlesinger,\textsuperscript{34} the functionalist approach was clearly, though perhaps unconsciously, infused with structuralism. Moreover, beginning as early as the 1970s, the structuralist method developed by the Italian school of Rodolfo Sacco grew rather influential in Europe and, by the early 1990s, it became well known in the United States as well.\textsuperscript{35} Thus, the Critical Legal Studies contribution in that regard may well be more mainstream than its young adepts are willing to acknowledge in their (academically mandatory) search for originality. It is a fact that the structuralist approach proved a powerful weapon in the hands of critical comparatists both belonging to the Critical Legal Studies network and outside of it. By abandoning the principle of the unity of the law, Sacco and his school demonstrated that legal ‘rules’ are really products of the competitive interaction between multiple ‘legal formants’. Sacco’s structural dissection of law is a powerful tool in

\begin{itemize}
  \item \textsuperscript{31} On functionalism, see Chapter 10 of this \textit{Handbook}.
  \item \textsuperscript{34} Rudolf B. Schlesinger, ‘Formation of Contracts. A Study on the Common Core of Legal Systems’; conducted under the auspices of the General Principles of Law Project of the Cornell Law School (2 vols, 1968).
\end{itemize}
several respects. It sheds light on the gaps, conflicts, and ambiguities resulting from the clash between the multiple legal formants that constitute the rule, and it illuminates the role of ideology in reconciling conflicting formants and shaping legal outcomes. In emphasizing the disjunction between the legal rule and the rhetorical justification for the rule devised by legal professionals, Sacco's structuralism showed remarkable similarity to Duncan Kennedy's contrast between the legal parole and the legal langue. These obvious methodological similarities between comparative structuralism and Critical Legal Studies work had been observed in Europe long before the Critical Legal Studies comparative law network was founded at Harvard and launched at Utah in 1996. In particular, scholars have described the post-realist nature of both approaches and they have examined some of their common 'non legal', especially linguistic and anthropological, references. Thus it was not an accident that a significant contingent of European comparatists (including this author) travelled all the way to Salt Lake City to observe the first official Critical Legal Studies comparative conference. These Europeans considered themselves kindred spirits, trying to connect with the emerging critical movement in the United States.

Beyond structuralism, other approaches have played a significant role in mainstream comparative law as well. This is true, inter alia, for John H. Merryman's dense stylistic analysis which carried Konrad Zweigert's notion of 'legal style' beyond the context of a general taxonomy of legal families. Merryman's analysis constituted a fairly radical departure from the socio-functionalist mode of inquiry and provided important insights for the Critical Legal Studies comparative project. In particular, the concept of 'legal style' (and many variations on this basic idea, such as mentalité) can be considered the ancestor of the critical concept of 'legal consciousness'. Embracing this concept is as crucial for the self-portrait of Critical Legal Studies network members as subscribing to the 'legal formants' approach is for members of the Sacco school.

Finally, even Critical Legal Studies comparatists should not overlook that historical-comparative analysis was part of mainstream comparative law long before the Critical Legal Studies network entered the scene. This analysis has generated a number of now classic studies on the formation and development of European legal systems and provided the material for Alan Watson's theory of


Legal Transplants to which we turn in a moment. Thus, when Critical Legal Studies scholars generated their own studies on the historical contingency and sensitivity on law as well as on its development over time, they did not really transcend the mainstream of the discipline but rather enriched it—often with much needed critical bite.

3. Critiques of Transplants and Receptions

Just as Critical Legal Studies comparatists shift from the traditional concept of 'legal style' to the notion of 'legal consciousness', they also tend to replace the idea of 'legal transplants'—which has become part of the general vocabulary within the mainstream—with neologisms intended to emphasize various phenomena occurring in the process of transferring law from one context to another. While Alan Watson's legal transplants' paradigm receives credit for striking a full blow at functionalism, it is ultimately considered inadequate to capture the complexity of the phenomenon of legal exportation or importation. In order to overcome the deficiencies of the notion of legal transplants in explaining the circulation of legal ideas, Critical Legal Studies-affiliated comparatists turn to other disciplines, mostly literary theory and linguistics from which they try to derive new heuristic devices. Terms such as 'globalizations', 'productive misreadings', and 'translations' are employed to effect a paradigm shift in theories of legal change that are capable of accounting for domination and power disparity. Some elements of the Critical Legal Studies critique are novel, while others resemble long-established notions. For example, Critical Legal Studies comparatists share with other critics the idea that the legal transplants metaphor is pre-realistic, focuses exclusively on prestige, historical accidents, inertia, or internal characteristics of the legal profession, and thus obliterates the link between law and external political, social, and economic factors. Nor is there much novelty in the Critical Legal Studies idea that the very notion of a 'transplant' obscures the creative, and sometimes very original, re-shaping of the transplanted element in the receiving

39 See Alan Watson, Legal Transplants (1974); on this topic see Graziaede, Chapter 13 of this Handbook.
43 Lopez Medina (n 12).
context.\textsuperscript{46} Still, both the notion of a ‘productive-misreading’ and the idea of ‘translations’ correctly emphasize the creatively transformative effect of receptions. In particular, the idea of misreading (a phenomenon similar to what is known in some non-affiliated circles as ‘acoustic reception’),\textsuperscript{47} is explored in a variety of ways and much debated within the network. It has recently been suggested, for instance, that excessive emphasis on the transformative power of peripheral misreading might itself hide a pattern of domination.\textsuperscript{48} It is certainly an important contribution to emphasize the fact (in line with some anthropologists)\textsuperscript{49} that Watson’s paradigm fails to capture the complexity of the unequal power relations between the metropolitan centre, the semi-periphery, and the colonial periphery.\textsuperscript{50} Here, Critical Legal Studies-affiliated comparatists, have developed a more complex understanding of ‘contexts of production and reception’.\textsuperscript{51} This understanding has now gained considerable international currency. Important applications of this idea include Shalakani’s work on Sanhuri’s Egyptian civil code\textsuperscript{52} and Duncan Kennedy’s essay on ‘Two Globalizations’.\textsuperscript{53}

4. Exploring ‘Legal Consciousness’

As already mentioned, an important activity of critical comparatists consists of exploring the structure and operation of different forms of what they call ‘legal consciousness’. Of course, as suggested, notions of style, mentalités, or sensitivity, which were borrowed from anthropologists and other social scientists, have a distinguished pedigree even in the work of the mainstream. Nevertheless, Critical Legal Studies scholars have developed theories and ideas of ‘legal consciousness’ to a high degree. A brief description of these theories and ideas will allow the reader to judge their originality for him- or herself.

\textsuperscript{46} Again this critique can hardly be considered entirely novel. Among ‘non-affiliated’ critical comparatists such observations have been around for quite a while. See eg Elisabetta Grande, Imitazione e diritto. Ipotesi sulla circolazione dei modelli (2000).

\textsuperscript{47} See a variety of such uses in A. D’Angelo (ed), Good Morning America (2003).


\textsuperscript{50} For instance, the ‘Globalization’ of Classical Legal Thought was ‘a combination of influence within the system of autonomous Western nation states and imperialism broadly conceived’; Kennedy, (2003) 36 Suffolk University LR 640.

\textsuperscript{51} The underlying ideas were more fully developed by the Colombian jurist Lopez Medina (n 13) who distinguished between ‘hermeneutically rich’ contexts of production and ‘hermeneutically poor’ contexts of reception.

\textsuperscript{52} Amr Shalakani, ‘Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamism’, (2001) 8 Islamic Law & Society 201.

\textsuperscript{53} See Kennedy, (2003) 36 Suffolk University LR 631.
The notion of legal consciousness refers to a set of premises about the salient features of the legal order, especially the historical background of the legal process, the institutional apparatus, and the conceptual tools devised by lawyers, judges, and commentators. A number of those shared premises are so deeply embedded in the actors’ minds that they are seldom acknowledged and tend to operate—in structuralist terminology—as cryptotypes. Thus, legal consciousness is the cluster of beliefs held by the legal profession as a social group. To some extent, it operates independently, or in relative autonomy, from concrete economic or social interests. Such autonomy, however, is relative in the sense that the peculiar structure and operation of a certain mode of legal consciousness are intelligible only against the backdrop of larger patterns of social thought and action. Like their more traditional fellow comparatists engaging in the study of legal transplants and legal change, Critical Legal Studies comparative lawyers are interested in how different modes of legal consciousness emerge, operate, and travel. For example, the network leader’s ambitious effort consisting of a project analysing "Three Globalizations" is a sweeping study of the circulation of different transnational modes of consciousness. Here, ‘Classical Legal Thought’ and ‘The Social’ are conceived not only as two subsequent styles of legal scholarship but also as transnational modes of thought, produced piecemeal in different civil law and common law countries and providing conceptual vocabularies, organizational schemes, modes of reasoning, and characteristic arguments. Within the network, studies now explore the operation of legal consciousness in foreign systems and expose these systems’ self-critique; the respective study on France is almost a classic, and there is also an important line of scholarship dealing with China and Japan. A study of the Juristes Inquiets, for example, challenges the dominant image of the French legal system as formal and positivist by emphasizing the existence and complexity of a vibrant critical tradition in France; ultimately, the analysis shows that the unitary and systematic nature of the école de l’exégèse is largely a result of the projections of the French antiformalist scholars. Here, the close examination of a different legal system, in which a tradition is almost invented by subsequent

55 Duncan Kennedy, 'The Rise and Fall of Classical Legal Thought' (Harvard Law School, on file with author).
56 So far only a discussion of the first two globalizations has been published. See Kennedy, (2003) 36 Suffolk University LR 640.
60 One can find similar observations in the work on the exegetic school of Carlo Augusto Cannata and Antonio Gambaro, Lineamenti di Storia della Giurisprudenza Europea (1983).
scholars, is employed as a powerful tool for questioning the observer’s own system, where similar phenomena might have been produced by the legal realists in their (stereotyped) account of legal formalism. One should note that a very similar function of comparative law was suggested in the structuralist canon of the ‘Theses of Trent’. Again, the question of rupture versus continuity between more mainstream and Critical Legal Studies comparative scholarship remains open.

5. Other Areas of Activity and Contexts of Critique

The topics explored above do not constitute a comprehensive summary of Critical Legal Studies comparative law scholarship but simply highlight some of the most important areas. An exhaustive survey is not possible here. Suffice it briefly to mention three other aspects of Critical Legal Studies comparative law: the effort to overcome the traditional West-centred perspective; the examination of the interface between comparative and international law; and the exploration of the ‘dark sides’ of particular phenomena which are usually seen in an unquestioned positive light.

Mainstream comparative law and its taxonomy have often been accused of being too centred on a Western perspective. Critical Legal Studies comparatists have not only joined that critique but have also attempted to establish a genuinely global perspective by broadening the scope of comparative analysis both horizontally and vertically. They look at the East and the South and are concerned with the interaction of multiple layers of regulation, for example, on the national versus the transnational level. In the horizontal dimension, they undermine the myth that the Western legal tradition is coherent or unique, unveiling non-Western roots, for example, by ‘rehabilitating’ multiple non-Roman ‘legal imaginations’. Moreover, they explore how the ethnocentricism of traditional comparative law has constructed a whole set of binary opposites (not only West versus East but also Us versus Them or Here versus There) through a careful policing of similarities and differences. In all this, the influence of mainstream anthropological ideas is evident. In the vertical dimension, Critical Legal Studies comparatists seek to dissect the coherence and unity of legal systems, emphasizing pluralism, ‘interlegality’, and legal ‘policentricity’. In this, they again share with other comparatists a variety of approaches that appropriate and adopt sophisticated tools of social inquiry.

Another interesting area of Critical Legal Studies critique entails the exploration of the uneasy relationship between comparatists and their fellow international

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62 See Grande, Chapter 3 of the present Handbook.
64 Arnulf Becker Lorca, ‘Mestizo International Law’ (Harvard Law School, on file with author).
lawyers. David Kennedy has investigated the role comparatists, as ‘legal specialists in difference’, play in the wider project of public and private governance. He suggests that internationalists and comparatists share more than they realize: they ultimately deal with the same crucial problem—the problem of ‘order above states and understanding between cultures’. Comparatists perceive themselves as concerned with culture and knowledge but assign to internationalists the terrain of (world) politics. However, if one sees both groups as partners and rivals in a project of cosmopolitan governance, they face and manage essentially the same threats and temptations. The diversity of the Critical Legal Studies network’s constituency and the current collapse of disciplinary boundaries have made it clear that we need to rethink the relationship between comparative and international law—incidentally a view widely shared by scholars outside the network as well. All this brings to mind the lesson taught by the late Rudolf Schlesinger who showed how differences and analogies in the law are a matter of emphasis, changing across time, space, and politics. In this (mainstream) light, the description of comparatists as ‘specialists in difference’ is clearly insufficient.

Finally, some Critical Legal Studies comparatists seek to shed light on the ‘dark side’ of phenomena that have traditionally been seen in a very positive fashion. This hermeneutic of suspicion can be very refreshing in a field that has too often revelled in self-congratulatory rhetoric (or that has been, if one prefers that point of view, suffering from a ‘Cinderella complex’). For example, Jorge EsQUIROL’s important study of René David’s portrayal of Latin America exposes the dark side of David’s anti-formalist and socio-historical approach. When applied to the Latin American context, David’s anti-formalist method with its emphasis on the social and material embeddedness of law ends up serving a neo-colonial project of liberal democracy. In a similar fashion, the Human Rights Movement has been subjected to critical scrutiny. If viewed pragmatically and comparatively, the human rights agenda is marked not only by humanitarian, progressive, and emancipatory characteristics but also by deficiencies, distortions, and dangers. In a similar vein, the Western ideology of rights displays its dark side as well if it is applied to those lacking all power. Interestingly, these very issues took centre-stage in the

dialogue between Critical Legal Studies comparatists and the mainstream at the annual meeting of the American Society of Comparative Law in Ann Arbor in the fall of 2004.

IV. Conclusions: A Sympathetic Critique of the Critique

In summarizing this survey of select issues and materials, we need to evaluate the actual political and scholarly contribution of the Critical Legal Studies approach to comparative law. So far, the encounter between comparative law and Critical Legal Studies has proved productive and its potential is far from exhausted. Paradoxically one can regard the encounter between more traditional comparatists and Critical Legal Studies as the counter-hegemonic by-product of the present hegemonic state of American law. After all, at the core of the Critical Legal Studies network, comparative law is taken up by powerful academic superstars whose work enjoys worldwide attention because they operate from prestigious academic centres, such as the Harvard Law School and other elite institutions that reproduce academic hierarchies. Because of their power and prestige, comparative law, otherwise mostly relegated to peripheral or semi-peripheral contexts, suddenly becomes a hot topic.71 Yet, its critique also construes the discipline’s mainstream in a monolithic and simplified manner that obliterates the nuances, complexities, and the variety of voices. This not only hides the target’s complexity from worldwide view, it also risks—ironically—empowering it. But despite the original sin of launching a counter-hegemonic critique from a highly hegemonic academic centre, the creation of the Critical Legal Studies network undeniably has its merits: it has institutionalized the encounter between critical legal studies and comparative law and thus moved the Crits’ progressive legal agenda to a global level.

None the less, one must wonder about the counter-hegemonic nature of the network, that is, about the very possibility and efficacy of a leftist and critical comparative project from a geo-political point of view. In fact, the Harvard-centred network of critical comparatists can be seen as yet another instance in which a strong (herein: academic) metropolis colonizes weaker cultural contexts. In other words, one may question the Critical Legal Studies project’s fundamental

ambitions: can one really resist hegemony from a highly privileged position at the centre of the Western world?

Like the glossators and commentators from Bologna, the humanists from Montpellier, the natural lawyers from Salamanca, and the Roman-Dutch jurists from Leyden, Critical Legal Studies scholars have managed to spread their message from a remarkably influential venue. Critical Legal Studies comparative law is ultimately the product of a leftist elite born and developed at Harvard, a Mecca of Western academic culture. It is true that it has drawn considerable intellectual power from non-Western students but even they usually come from elite backgrounds and are often quickly seduced to become part of American legal academe. Given the complex structure of the new political, economic, and cultural world order, a critical project that operates from the hegemonic metropolitan centre is easily susceptible to cooption and neutralization by the very forces it seeks to oppose. True resistance, one may argue, can come only from oppression, not from privilege. It can thus hardly be expected from Critical Legal Studies comparatists who enjoy privileged mainstream career patterns and use elite venues of publication. Also, their Critical Legal Studies mentors have shown little concern for the consequences of the brain-drain they orchestrated at the expense of less privileged countries and for the need to create alternative patterns of academic communication. Other network members, however, have arguably made serious contributions to the counter-hegemonic project by returning to, and then operating in, subordinate contexts.

Even observers who sympathize with the general political and critical stance of the Critical Legal Studies comparatists may also wonder about the negative tone and the dangerously self-indulgent character of the post-modernist critical exercise, which is so common in its metropolitan venue. At least at times, the Critical Legal Studies approach takes on features of a mere divertissement, played by ultra-theoretical scholars; such games, however, can easily deteriorate into mere aestheticism and entail the risk that all serious political struggle is abandoned. Especially in the choice of their tools and literary forms, Critical Legal Studies comparatists display a striking eclecticism, appropriating different genres and often crossing disciplinary boundaries. A now classic study, for example, presents an unofficial portrait of the French judge through the use of several lenses of literary criticism, borrowing from such disparate sources as Russian formalism and French post-structuralism. It is true that unusual style can release valuable critical

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73 See Lopez Medina (n 12). See also on African Crits n 15. Kang’haro, for example publishes a column in a daily periodical in Nairobi.
energy but it can also lose touch with the underlying political concerns. All too easily, critique can turn from a means to a (political) end into an exercise just for its own sake. Thus, on some occasions, Critical Legal Studies authors use a theatrical,\textsuperscript{75} carnivalesque language; on others, they create complex and suspenseful narrative structures.\textsuperscript{76}

Critical Legal Studies comparatists often display an outright irony towards the discipline as a whole as well as an unfortunately condescending attitude towards what they consider the grandiosely overambitious understanding of its functions and aims by the mainstream. But if a scholarly agenda seeks to have a political impact, post-modernist irony is not sufficient; instead, a lot of real work must be done. Some of that work requires a real political struggle for the sake of freeing the subordinate elements of the (intellectual) world from present structures of domination. To be sure, critique may be the beginning of such work. But comparative law, in any form, remains elite business until one seriously tackles the problem of how to give voice to the subordinate contexts. In the interim, scholarly exercises like comparative law still have to be evaluated in scholarly terms.

Viewed from this perspective, the institutionalization (however loose) of a network may well present the dark side of the critical potential of the discipline. It is an almost invariable consequence of such institutionalization that the respective group needs to produce an identity, and that need, in turn, may in fact produce the canon against which the revolt is then directed. This can easily lead to a rather ungenerous and wholesale targeting of an entire scholarly tradition, notwithstanding the fact that many of its members share much of the critics' political and scholarly agenda—perhaps precisely because of earlier encounters with these critics and their work. Thus, the requisite process of identity creation leads various contributions of the Critical Legal Studies network to ignore previous work of non-affiliated scholars although this work may be fully in line with the Critical Legal Studies comparatists' own inquiry. At least occasionally, the result is the appropriation, and publication under the Critical Legal Studies logo, of critical insights that originated elsewhere and long before the Critical Legal Studies network ever came into being. This practice is itself essentially a form of hegemony.

Perhaps most importantly, some Critical Legal Studies comparatists portray the mainstream of the discipline, as well as its masters, in caricature form rather than trying to genuinely understand the tensions and nuances in the mainstream scholars' work. At least some of the reason for this problem may lie in the Critical Legal Studies comparatists' extensive use of anthropomorphic ideas, such

\textsuperscript{75} Frances Olsen, 'The Drama of Comparative Law', (1997) \textit{Utah LR} 275.

\textsuperscript{76} Frankenberg, (1985) 26 \textit{Harvard International LJ} 411.
as 'project' or 'strategy'; it is almost ironic that these terms are being applied to a scholarly tradition that has never been the mainstream to begin with.

All this being said, it remains true that the multiple projects pursued by Critical Legal Studies-affiliated comparatists help to nurture scepticism within the field, to open up space for critique, and to empower alternative voices. Constant critical scrutiny focusing on any claim of intellectual or political correctness is a source of creative energy and sometimes of relief. For example, Critical Legal Studies comparatists have challenged the myth of comparative law as a universal language. Jacques Derrida suggested that there would be no architecture if the Tower of Babel had been completed; only the impossibility of the tower, the symbol of a logocentric ideal of a universal language, allows architecture to have a history. In comparative law, Critical Legal Studies-affiliated scholars and writers have the potential to draft such a history but they must recognize that just patting each other on the shoulder is dull business, both for the mainstream and for the Critical Legal Studies comparatists.

At the end of the day, the genuinely important contribution of Critical Legal Studies to the development of comparative law, both through the network and through previous encounters, consists not so much of a higher degree of theoretical sophistication which can easily end up in mere self-congratulation; instead, the network's most significant contribution to comparative law consists of two other elements: the systematic and collective attempt to include both the dimension of power and a theory of domination, and the relentless questioning of the 'dark sides' of apparently emancipatory and progressive agendas. These contributions are lessons likely to remain.

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