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A More Elevated Patriotism : The Emergence of International and Comparative Law (Nineteenth Century)

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A MORE ELEVATED PATRIOTISM

The Emergence of International and Comparative Law (19th century)

Martti Koskenniemi & Ville Kari

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I. Introduction: *L'esprit d'internationalité* in 1873

In the inaugural issue of the *Revue de droit international et de législation comparée* (1869) the journal's first Editor-in-Chief, the Belgian *avocat* Gustave Rolin-Jaequemyns sketched the nature and benefits offered by the science of comparative legislation for the world. The professionalization of this science would be a great gift to civilization and progress, he wrote, tracing its pedigree to Grotius, Montesquieu and Bentham. It was now re-emerging as part of what he called the period's *mouvement cosmopolite* that tapped on the convergence of domestic laws with liberal principles and that was not at all averse to what was best in all the nations. On the contrary, it inspired all nations to compete on how best advance "*la justice universelle*". Engagement with international and comparative law would manifest "a more elevated patriotism" uniting the pursuits of progressive European nations with those of humanity itself.¹ In another part of the address Rolin linked international law to his project. Like comparative legislation, international law (*droit international*) was to be rethought in terms of the unification of what he called the "historical" with the "juridical spirit", and thus brought to bear on the world as an element of cosmopolitan progress. The problematic absence from international law of mechanisms of enforcement did not make it non-existent. In a liberal age, public opinion would operate as the legislator, adjudicator and also the executor of international law. His *Revue* and the liberal jurists would now assist public opinion to have a clear view of where agreement among states had come to prevail, and how to clarify questions that were still disputed.²

Rolin belonged to a small group of European lawyers who had met each other in the 1860s at various charity meetings across the continent and shared an understanding of law as an element of liberal progress in Europe and in the civilization of the colonies. Although they were not "natural lawyers" in the sense of that expression from the 18th century, they were certain that law embodied what they called an *esprit d'internationalité* on which they could base their engagement with domestic politics and their effort to codify and unify the laws of Europe and eventually beyond.³ Rolin's Dutch colleague Tobias Asser used the same platform to stress the great utility of preparing treaties on the solution of conflicts of laws problems. Much had already been done, Asser wrote. Model laws had been prepared on acquisition and loss of nationality and on the execution of foreign judgments. But uniform laws were needed also on contracts, commercial law, as well as competence in matters of civil and criminal procedure. In a new political atmosphere it had finally

¹ Gustave Rolin-Jaequemyns, 'De l'étude de la législation comparée et du droit international', (1869) 1 *Revue de droit international et de législation comparée*, 1-17.

² Ibid, 225-243.

³ See in further detail, Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001) 11-97.

become possible to organize conferences on such issues.⁴ Although Asser and many others were above all interested in private and criminal law, the journal would also focus on international law (or “public” international law) at the suggestion of Pasquale Mancini, abolitionist, liberal nationalist and later Italy’s foreign minister, whom the founders had contacted in search for support from established European statesmen.

After a few years, this same group of men, supplemented by colleagues from other European countries, Russia, Turkey and the United States would establish the *Institut de droit international* (1873), a first professional organization of specialists in “public” and “private” international law. The reports produced within the *Institut* during its first decades contained comparative analyses of private and criminal law of various European countries, as well as reports on how to make new laws and treaties known across Europe. The *Institut* also passed resolutions on a wide number of matters in private and public international law. In its first twenty years of operation, the Institute dealt with conflicts of laws in civil, commercial and criminal matters, questions of nationality, marriage and divorce, letters of change and establishment of companies, maritime trade and carriage, extradition, rules of procedure and execution of judgments, mixed tribunals in the “Orient”, the practice of international arbitration, maritime blockades, admission and expulsion of aliens, occupation of colonial territory, the rules on international rivers and the laws and customs of land and maritime warfare.⁵ By the end of the century, the *Revue* had turned into an official propagator of the *Institut*’s activities and the *Institut* itself a leading professional centre for the development of international law. It was not the only such centre. The Association for the Reform and Codification of International Law (later the International Law Association, ILA) was set up also in 1873 as a body of lawyers and humanitarian activists to support arbitration and other pacifist initiatives. The objectives and membership of the two bodies overlapped, so that while the *Institut* limited itself to a select group of elite lawyers, the *Association* was attuned to broader audiences.⁶ Both bodies were searching political influence, though from different directions.⁷

II. Local traditions of legal cosmopolitanism

Of course, Rolin’s project did not arise out of a vacuum. Perhaps the best known of prior traditions of universal law was the “law of nature and of nations” (*ius naturae et gentium*) that had sought to

⁴ See T.-M.-C Asser, ‘Droit international privé et droit uniforme’ (1880) 12 *Revue de droit international et de législation comparée* 5-22.

⁵ See Ernst Lehr, *Tableau général de l’organisation, des travaux et du personnel de l’Institut de droit international pendant les deux premières périodes décennales de son existence (1873-1893)* (Paris, Pedone 1893).

⁶ See also Irwin Abrams, ‘The Emergence of the International Law Societies’, (1957) 19 *Review of Politics* 361-380.

⁷ Asser described the ethos of the *Institut* as “en travaillant à convaincre les hommes d’Etat de la nécessité de subordonner l’intérêt à la justice...en préparant des règles générales propres à être acceptés par les gouvernements dans leurs relations extérieures. Asser, ‘Droit international privé et droit uniforme’ (n 4) 6.

construct universal norms from what Hugo Grotius in his main work *On the Laws of War and Peace* (*De iure belli ac pacis*, 1625) had identified as natural human “sociability”. Later natural lawyers such as Samuel Pufendorf, the holder of the first chair in the discipline at Heidelberg (1661), or Thomas Hobbes in England were sceptical about natural solidarity and instead sought from *reason* the basis for statesmen to cooperate for the security and happiness of all. In the 18th century natural lawyers often followed Montesquieu in trying to seek constitutional principles that would be applicable across Europe and even further. In this spirit Emer de Vattel’s widely read treatise *Droit des gens* (1758) produced a view of a law of nations founded “realistically” on state-centrism and the balance of power.

But 18th century natural law had little to say about international law as understood by Rolin and his colleagues. It supported comparative and historical studies as a basis for finding “universal” norms but it was too abstract to produce tangible directives for state policy. And its authoritarianism was anathema to the late-19th century liberal jurists. Even as Rolin saw his project in some ways inspired by the legacy of Grotius, Bynkershoek, Leibniz and Kant, he did not think he was following exactly in their footsteps. Only now, Rolin felt, conditions were emerging for the unification of the “national spirit” (in contrast to what he called the “national prejudice”) with an “international spirit”. The “more elevated patriotism” that resulted from this synthesis imagined itself as the avant-garde of a new modernity; only now European social and intellectual progress would unite with *la justice universelle*.

Rolin’s was the age of a novel global consciousness in Europe. Liberal ideas merged with the admiration of scientific progress; jurists would take up the study of foreign law both in pursuit of systemic perfection and as defiant critique of the outdated structures of a past Europe. Already the eighteenth century had called for the collection of solid, accurate and fresh information about new legislative innovations throughout the civilized world. But overall, legal comparison remained an aspiration or a mind-set rather than a determined project let alone a discipline. The loose term *législation comparée* emerged to describe this early form of comparative scholarship. In the terminology of posterity, this *législation comparée* might be characterized as an intellectual primordial puddle in which several subsequent legal disciplines such as international law, comparative law, private international law and legal anthropology had their origins.

But even if this primordial puddle originated subsequent cosmopolitan legal orientations, it remained deeply rooted in national, historical, and patriotic legal thought. For example Friedrich Carl von Savigny is often remembered as rejecting comparative study as an appropriate method for creating national codifications (which he also opposed), but he nonetheless became a central symbol in the rise of a sentiment of a common European legal identity. His work inspired many of the late-19th century cosmopolitan jurists. Johann Caspar Bluntschli, for example, had sat at the master’s feet at early age and had no doubt that the historical school’s idea of a common legal

consciousness could be applied to the civilized nations in general. Savigny's explorations in the Roman roots of European legal traditions encouraged the comparative scholars, many of whom joined his disciples to immortalize his legacy.⁸ Savigny's work also advanced private international law designed to resolve problems related to the conflict of laws, thus contributing to a field in which many internationalists have participated since. This everlasting togetherness between the national and the international, the patriotic and the cosmopolitan, was a defining element in the rise of the *esprit d'internationalité* – and perhaps one explanation for its long-term perseverance.

This is not to say that all jurists of the time were internationalists; certainly Savigny and his school challenged internationalist aspirations, and the rules of private international law were drafted by groups of scholars who were more comfortable on a shared map of distinct, autonomous national jurisdictions. But it would be an unnecessary simplification to assume that the internationalists in turn were out to disown the entire domain of domestic law; a closer look discloses a recurring pattern in the writings of men such as Rolin who saw the “international” not so much in opposition to the “domestic” but whose ambition was to realise the utmost potential in both by bringing them together. After all, the legal education and experience of the late-19th century jurists was overwhelmingly domestic. Hence the need to understand their internationalism from their domestic background.

A. Germany: Die Naturgesetze der bürgerlichen Gesellschaft

The way Rolin joined comparative research of domestic laws with international law in the first issue of his journal responded to a well-known ambiguity in the Roman law concept of *ius gentium* that had always oscillated between laws that were applicable to human beings everywhere and the laws governing the conduct of relations between nations *inter se*.⁹ This ambiguity was preserved in the 18th century German academic vocabulary of *ius naturae et gentium* that included explorations of relations of private and public law within a single universal frame. For example, Achenwall and Pütter's widely read natural law textbook from 1750 combined what it called a “universal civil law” (*ius civitatis seu ius civile universale*) with the basic principles of the law of nations (*ius gentium universale*) and even Vattel's *Droit des gens* began with a long first part that dealt with the proper government of the *Fürstenstaat*.¹⁰ Throughout the century, natural lawyers in the universities of Halle and Göttingen developed both rationalist and empirical techniques of comparative study so

⁸ Edouard Laboulaye et al, 'Fondation Savigny' (1867) 13 *Revue historique de droit français et étranger* 113.

⁹ See Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, PUF 1983) 311-358.

¹⁰ Gottfried Achenwall & Johann Sebastian Pütter, *Anfangsgründe des Naturrechts* (Elementa iuris naturae, transl. Jan Schröder, Frankfurt Insel 2005 [1750]); Emer de Vattel, *The Law of Nations* (Ed & intr. By Béla Kapossy & Richard Whatmore, Indianapolis, Liberty Fund 2008 [1758]), Bk I esp Chapters VI- XII, XIX-XX (33-87, 101-109).

as to find norms that would apply everywhere and be useful in the business of domestic government.¹¹

Législation comparée flourished in the formative period of the great European legal codes. A century of comparison began with the *Allgemeine Landrecht für die Preussischen Staaten* (ALR) in 1794, the French *Code Civil* in 1804 and the *Allgemeines bürgerliches Gesetzbuch* (ABGB) of Austria in 1811, and concluded in 1900 with the entry into force of the *Bürgerliches Gesetzbuch* (BGB) of the unified Germany.¹² In the beginning of this period, the rise of legal comparison in the German-speaking world led to the famous clash between Heidelberg scholars such as Feuerbach and Thibaut and the historical school of Savigny over the topic of a possible common German legal code. In 1829, the followers of the former, Karl Salomo Zachariä and Karl Joseph Mittermaier, inaugurated the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, which set forth to “unapologetically” familiarize the German public with the legal developments throughout the continent.¹³ In his keynote essay, Zachariä began by recalling the “*gute alte Zeit*” of the Middle Ages when all the nations of German origin dedicated themselves together to the pursuit of knowledge and science, and lamented the long road of disintegration to the contemporary Europe where peoples had been broken apart from one another. But to Zachariä the hope was no longer in past imaginary folk traditions, but rather in the new collaborative ideals that had recently sprung among European nations in the pursuits of literature and especially natural science. It was time for legal scholars to adopt a similar sense of progress and cooperation across borders. After all, “Sie sind auch Naturforscher; sie erforschen die Naturgesetze der bürgerlichen Gesellschaft”.¹⁴

At the same time, the death of natural law in German universities at the end of the 18th century had brought forward a narrow stream of writings on “modern European international law”, the exposition of European diplomatic practices in the form of a legal system. The most significant representative of such “positivism” was Georg Friedrich von Martens from Göttingen whose brief and practice-oriented textbook was produced in one German and three French editions during his lifetime. The *Précis du droit des gens moderne de l’Europe fondé sur les traités et l’usage* (1795, 1798, 1801, 1821) was, as its name suggests, an altogether practical work that focused on European treaty-making and accepted the balance of power as the political foundation of the legal relations between European states. Martens also published an influential collection of treaties and first-hand materials which enabled jurists across Europe to learn the details of diplomacy and to abstract new

¹¹ See e.g. Martti Koskenniemi, ‘Variations of Natural Law. Germany 1648-1815’ in Anne Orford & Florian Hoffman (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2016) 59.

¹² Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Tony Weir transl., Oxford University Press 1998) 51.

¹³ Von Zachariä, ‘Ueber den Zweck dieser Zeitschrift. Statt einer Vorrede.’ (1829) 1 *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* 1, 26 (“42”). See also Walther Hug, ‘The History of Comparative Law’ (1932) *Harvard Law Review* 1027, 1056-1060.

¹⁴ Von Zachariä, ‘Ueber den Zweck dieser Zeitschrift’ (n 13) 27 (“43”).

principles of public international law from state practice.¹⁵ The fact that Martens and his contemporaries did not engage in naturalist speculations about sovereignty or universal norms was viewed critically in the 1830s and 1840s. Intellectually ambitious jurists such as Carl von Kaltenborn began to search for a proper method to help turn the mere search of converging treaty-provisions into a more “scientific” direction.¹⁶ Similarly for the liberal founders of the *Institut de droit international*, works by Martens and other Germans of early 19th century were too *Realpolitik*-oriented, too respectful of statehood to work as useful models on which to elaborate a “scientific” international law. Moreover, there was also some opposition to *any* effort to envisage a powerful type of (international) law beyond domestic sovereignty. It was felt that “the international” did not have a sufficiently dense or full-bodied social existence to serve as the foundation for a substantive law.¹⁷

From the early years of German unification, many public lawyers regarded international law as best a *Koordinationsrecht* that could perhaps facilitate the formal diplomatic interactions of (European) states but did not (unlike the German Reich) possess a “social idea” to found a robust legal system. To demonstrate the contrary, Bluntschli produced a codification of public international law in 1871. However, the majority of the German public law community, especially towards the end of the century came to regard international law as an aspect of *Landesrecht*, the sum total of the treaties that a nation had concluded and transposed as part of its domestic legislation.¹⁸

B. France: Comparison as reform

When late-19th century jurists looked into the France of the prior century, they sometimes mentioned as sources of inspiration the proposal for perpetual peace by the Abbé de Saint-Pierre and the critiques of Jean-Jacques Rousseau of the absolutist state-system as an obstacle to peace. But it was hard to find any contemporary international law thinking in the country at the time. There had been no significant *academic* tradition of natural law and what existed as legal texts were brief works recapturing principal aspects of *ancien regime* diplomacy. Abbé de Mably’s *Droit public de l’Europe* from mid-18th followed up earlier French treaty collections with a series of reflections that Mably hoped would amount to a “science of negotiations”. It encouraged comparative studies but otherwise operated as a kind of handbook reminding treaty-makers of the

¹⁵ See further Martti Koskenniemi, ‘Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law’ (2008) 15 *Constellations* 189.

¹⁶ See especially Carl von Kaltenborn, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (Leipzig 1847).

¹⁷ e.g. Adolf Lasson, *Prinzip und Zukunft des Völkerrechts* (Berlin 1871).

¹⁸ See Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (2nd edn. Nördlingen, Beck 1878) and Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld 1899).

need to keep their country's "real interests" well in focus.¹⁹ Viscount de law Maillardière's short work from 1775, for example, had been written for those "in the service of the prince" and read like an abbreviation of Vattel, concentrating on the "perfect" and "imperfect" rights and duties of nations, diplomatic protocol, and with somewhat greater emphasis than usual on the laws of commercial relations.²⁰ In admiralty and prize law, Rene-Josue Valin's *Nouveau Commentaire* was published in 1760 and *Traité des prises* in 1763, while Sylvain Lebeau's *Nouveau code des prises* appeared in 1798. These would be read across Europe by scholars and admiralty judges for another hundred years, but they nonetheless focused mainly on making sense of French maritime law rather than arguing for international syntheses. By contrast, Jean-Marie Pardessus' awesome *Collection des lois maritimes antérieures au XVIIIème siècle* (1828-45) became an international monument in the study of the *longue durée* history of maritime law.

Meanwhile, the comparative study of law was intense in the land of Montesquieu and the Code Civil, auguring the establishment of the French academia as the comparative society *par excellence*. Here, progress and legislation were intimately connected in the minds of new liberal thinkers who pursued a giant leap of industrial progress through an injection of modern republican statecraft. New visions emerged both through homegrown activism and the study of parallel experiences across the Atlantic, as exemplified by the famous enquiries of Alexis de Tocqueville and Gustave Beaumont into the society of the United States.²¹ Throughout France, civil society was experimenting with its new freedom of association by forming political parties, intellectual societies and commercial companies. The results of these experiments were often unstable, causing an interest in rational but controlled reforms to spread among the elites.

A particular comparative effort was propagated among the rising industrialists who turned to legislation as a means to advance their aims. In 1816, Charles Comte and Charles Dunoyer relaunched their previously banned *Le Censeur* as the new *Censeur Européen ou Examen de Diverses questions de Droit public, et des divers ouvrages littéraires et scientifiques, considérés dans leurs rapports avec les progrès de la civilisation*. The authors portrayed themselves as sentinels destined to safeguard the politicians and ministers from ignorance about the progressive world.²² By the time *Le Censeur Européen* was again censored in 1820, it had published a series of critical entries and translations of renowned authors such as Auguste Comte, Jean-Baptiste Say and Jeremy Bentham. Its articles covered broad matters including the balance of power system in Europe, a comparison of the English and French jury systems, a commentary of Montesquieu's

¹⁹ Gabriel Bonnot de Mably, *Principes des négociations. Pour servir d'introduction au droit public de l'Europe* (Paris, Kimé 2001 [1757]).

²⁰ Vicomte de la Maillardière, *Précis du droit des gens de la paix, de la guerre et des ambassades* (Paris, Quillau 1775)

²¹ Gustave de Beaumont et Alexis de Tocqueville, *Du système pénitentiaire aux États-Unis, et de son application en France; suivi d'un appendice sur les colonies pénales et de notes statistiques* (Paris 1833) ; Alexis de Tocqueville, *De la démocratie en Amérique* (2 vols, Paris 1835, 1840). See also Jean Picano, 'La génération de 1840' in Paul-Laurent Assoun (ed), *Analyses et réflexions sur Tocqueville De la démocratie en Amérique* (Ellipses 1985) 24.

²² 'Avant-propos' (1817) 1 *Le Censeur Européen* i.

Spirit of the Laws, and constant reviews of the freedom of the press in France. Overall the journal offered a platform for the rising liberal industrialism which saw itself as struggling against reactionary repression.²³

The ethos of progressive comparativism established itself also within the French academia. In 1831, the Collège de France created a chair for *Histoire générale et philosophique des législations comparées*, and Jean-Gaspard Foelix's *Revue Étrangère de législation et d'économie politique* was launched in 1834. With ebbs and flows in popularity, the *Revue* sought to connect a broader domestic readership with its cosmopolitan authors and audience. In contrast to the industrialist views the content of the *Revue* was less programmatic and more matter-of-factly, focusing on the dissemination of factual information about legal developments in Europe accompanied by an occasional theoretical or historical commentary. Many dealt with matters of private international law such as nationality, naturalisation, cross-border inheritance and the conflict of laws. Among the authors were renowned international scholars such as Henry Wheaton and Karl Zachariä. By the middle of the century, comparison was everywhere. One concrete domain was in the widespread activity of literary review and critique of foreign legal literature which by the early 1850's could support a dedicated publication of their own, the *Revue Bibliographique et critique de droit français et étranger*. Likewise, legal historians moved in to stake their claim to the domain of *legislation comparée*. The *Revue historique de droit français et étranger* was launched in 1855 under the editorship of Édouard Laboulaye who had been elected to the Collège chair in 1849.

Eventually, also public international law found its way amongst French scholars. Many Frenchmen had initially been suspicious of the Protestant background of Rolin and his friends, and it was only when Louis Renault was appointed professor of international law in Paris in the 1870s and became legal counsel with the foreign ministry that international law teaching of note began on France.²⁴ In a brief introduction from 1879, Renault presented international law in the form of inter-state law for the first time to his French readership, defending the reality of a diplomatic law against the sceptics by stressing the compelling laws of interdependence that had united all nations into society.²⁵ In the *Revue générale de droit international public* (established in 1894) and in monographic works, a new generation of French jurists – many of them Renault's students – contemplated European international law in a progressive spirit and debated the conflicts that arose in the colonies. Already Renault had based his arguments on a "sociological" reading of the relations between nations. His students such as the Chilean Alejandro Alvarez would use a similar perspective to argue for an international law of solidarity in support of codification, Latin-American regionalism and against what he saw as reactionary European formalism and state-

²³ See Éphraïm Harpaz, *Le Censeur – Le Censeur Européen. Histoire d'un Journal libéral et industrialiste* (Slatkine, Genève 2000) ; Leonard P. Liggio, "Charles Dunoyer and French Classical Liberalism" (1977) 1 *Journal of Libertarian Studies* 153.

²⁴ See further, Koskenniemi, *Gentle Civilizer* (n 3) 274-309.

²⁵ Louis Renault, *Introduction à l'étude du droit international* (Paris, Larose 1879).

centrism.²⁶ The influence of Emile Durkheim and the powerful public law realism of the French academy prompted a sociological orientation in some of these works taken as well as in some of the post-war French diplomacy in the League of Nations and in the academy.²⁷

* * * * *

Alongside the German and the French, many other continental, Greek, Turkish and Russian jurists participated in the cosmopolitan ascendancy of the late-19th century. Mention has already been made of Italy's Pasquale Mancini whose essay on the usefulness of codifying private international in several treaties of 1874 started a real avalanche of diplomatic efforts, leading eventually in 1893 to the establishment of the Hague Conference on Private International Law. Mancini defended the view that the application of foreign law in the appropriate situations was not only a matter of (non-binding) comity but states were under an obligation to do so in cases where that solution was dictated by the conflicts of laws rules.²⁸ Italian internationalists were actively pushing forward the "principle of nationalities" – a view of international law that presumed that every nation was entitled to legal status, normally statehood, among whom the principle of national self-determination would operate as a kind of *Grundnorm*. Among the many Italians who were pushing this idea at the international level was Pasquale Fiore, a member of the *Institut* whose natural law approach received wide audience in French translation. For Italians, the study of international law from mid-century onwards was closely bound to the constitutional debates about the country's unification and the possibility of there being a real "science" of law beyond the domestic.²⁹ The active participation of jurists from Belgium, the Netherlands and Switzerland at the end of the century is conspicuous. On the Belgian side, members of the Rolin family (alongside Gustave, his son Eduard, his brother Albéric the latter's son Henri), aligned their legal interests with their political activism at home and abroad while Asser (like Louis Renault and the *Institut* itself) received the Nobel Peace prize for their legally oriented internationalism. They like the Swiss Gustave Moynier, one of the founders of the *Institut* and one time President of the International Committee of the Red Cross, no doubt regarded international law as one means to give a voice to representatives from outside the circle of the great powers.

²⁶ Alejandro Alvarez, *La codification du droit international – ses tendances, ses bases* (Paris, Pedone, 1912).

²⁷ For an early specimen, see Antoine Pillet, 'Le droit international, ses elements constitutifs, son domaine, son objet' (1894) 1 RGDIP 1.

²⁸ P-S. Mancini, 'De l'utilité de rendre obligatoire pour tous les états, sous la forme d'une ou de plusieurs traités internationaux un certain nombre de règles générales du Droit international privé pur assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles' (1874) 5 JDILC 221.

²⁹ See further Claudia Storti, 'Empirismo e scienza: il crocevia del diritto internazionale nella prima metà dell'Ottocento' in Luigi Nuzzo & Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Frankfurt, Klostermann 2012) 51, 57-73.

C. Britain: The view from Empire

In contrast to the continental aspirations for progressive legal comparison, the juristic tradition of Great Britain stands slightly aside during the earlier half of the nineteenth century. There certainly was no lack of an institutional framework for the study of foreign and European law in Britain – both Oxford and Cambridge had had *Regius* Chairs of Civil Law since 1540, and the University of Edinburgh had been endowed one on Public Law and the Law of Nature and Nations in 1707. The role of these scholars of continental and Roman law, known as the civilians, traditionally centered around the fields of ecclesiastical and admiralty law. This work, which the civilians conducted under the auspices of the Doctors' Commons, represented an inevitably comparative tradition.³⁰ But during recurrent reforms of the judiciary also the Doctors' Commons was brought under scrutiny. Although the century still witnessed many famous civilians – William Scott, Travers Twiss and the Phillimores to name a few – their particular specialism was slowly absorbed by the British legal corps at large. In 1857 the Doctors' Commons were instructed by the Parliament to sell their property and to put an end to their corporate existence. “It is said that thereupon the rooks, which some held to embody the spirits of departed civilians, forthwith forsook the trees in the college garden,” laments one chronicler, while “the following year the right of audience in the Court of Admiralty, the advocates' last preserve of importance, was thrown open to the ordinary Bar.”³¹

Neither had there emerged a strong tradition of natural law to produce experts in the law of nations until late in the century. Earlier civilians such as Alberico Gentili or Richard Zouche had written in a continental mode on aspects of *ius gentium* (which the latter renamed *ius inter gentes*) but little legal argumentation accompanied imperial expansion in the eighteenth century beyond what happened in the courts of admiralty or by way of speculating about the application of the royal prerogative in the colonies. Writing a history of the law of nations in 1795 Robert Ward, too, remained silent about the expansion and canvassed the field in terms of the writings of the continental naturalists.³² A plan for international law and universal peace could be found in the voluminous writings of Jeremy Bentham, even as they remained mostly unpublished during his lifetime. Their content is as unsurprising as it remains distant to practice, focusing on the realization of the principle of “greatest happiness of the greatest number” across the world. Bentham urged Britain and France to give up their colonies, advance free trade and reduce their

³⁰ See Arnold McNair, ‘The Debt of International Law in Britain to the Civil Law and the Civilians’ (1953) 39 *Transactions of the Grotius Society* 183; Michael Lobban, ‘English Approaches to International Law in the Nineteenth Century’ in Matthew Craven et al (eds.), *Time, History and International Law* (Martinus Nijhoff 2007), 65 esp 67-70; Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge University Press 2014) 229-232.

³¹ William Senior, *Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England* (Longmans, Green and Co. 1922) 110.

³² Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations from the Time of the Greeks and the Romans to the Age of Grotius* (2 vols, London, Butterworth 1795).

armies and navies to what was absolutely necessary in view of national defense.³³ By contrast, Bentham's student, J. L. Austin dismissed any idea of a law between nations as "positive morality", owing to the lack of any system of effective sanctions.³⁴ Unquestionably the most important contribution by British lawyers to international law was precisely (Austinian) skepticism that then became the favoured *bête noir* of subsequent scholarship.

In the latter part of the 19th century the most visible British international lawyer was probably John Westlake, having begun his career by producing the first "modern" English textbook on private international law. As a barrister he was active in various international and charity organizations. He was appointed professor in Cambridge after having given up his parliamentary seat owing to a clash with Gladstone on the Irish home rule question. Westlake shared his colleagues' liberal attitudes towards law in Europe but was firm in insisting on the inapplicability of this law in the colonies. Chairs in international law had been established in Oxford and Cambridge (respectively 1859/1868) and after Westlake, the most influential of their occupants was Lassa Oppenheim, an Austrian émigré whose two-volume *International Law* became, in successive editions, the most widely used textbook across the world. Westlake and Oppenheim represented a continental state-centrism that differed greatly from the way the law of nations had been seen in Britain in the 17th and 18th centuries. Replacing speculations about the extent of the royal prerogative they operated with a system legal sources adopted from the German tradition. Admiralty law and colonial law would develop in their own avenues, but Britain's "public international law" would be streamlined into the rules of European official diplomacy.

Late nineteenth century British international lawyers – William Hall, John Westlake and the rest – were soon drawn into a new legal world of emerging cosmopolitan positivism, humanity and civilisation. But alongside their activism in Rolin's *Institut* and in the mainstreaming of public international law in British legal culture, they also contributed to the management of the British Empire. Studying the contexts and development of colonial law, advocating free trade and the abolition of slavery and privateering, they were in no small part influenced by the ideological atmosphere of Victorian empire. Imperial administration proved to require vast comparative undertakings, and towards the end of the century colonial law continued to form an integral part of the organized British comparatist agenda. In the world beyond Europe, nineteenth-century Britain was a cartographer and transformer of the legal world unlike any other. While the British often worked asynchronously with their continental European counterparts, at the same time they made great contributions to the pool of basic information from which the *grands systèmes* scholarship of the twentieth century would eventually arise. It is to this experience in general that we turn next.

³³ Jeremy Bentham 'Principles of International law', in John Bowring (ed), *The Works of Jeremy Bentham*, vol II (Edinburgh, Tait 1843) 535.

³⁴ John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (H.L.A. Hart Intr., Indianapolis, Hackett, 1988), 126-127, 200-201.

III. Attitudes towards the Non-European World

The 19th century cosmopolitan jurists were embarked in a *European* project. International law, they all assumed, was a European inheritance so that for non-Europeans to become part of it (as some did quite early on), they needed to be properly educated in and introduced to the European modes of modern legislation, commerce, and government. In the wake of the American Revolution and the Napoleonic Wars, revolutions in the Spanish America and the Caribbean saw the emergence of several new overseas republics that adopted constitutions and basic laws modelled after European and American examples.³⁵ At the same time, jurists from Turkey, China and Japan were touring Europe in search for such legal training and trying to persuade Europeans to lift the regimes of extraterritoriality and consular jurisdiction that were reducing their countries to a plebeian status.³⁶ Members of the *Institut de Droit International* engaged in (ultimately futile) efforts to lay down formal criteria for what the attainment of civilization might mean so as to decide when countries they termed collectively the “Orient” might be allowed to become full members of the “family of nations”.³⁷ Some of them, such as the eccentric Scotsman James Lorimer, were outright sceptical for example of Islamic countries ever being able to attain this status while even Westlake was clear that the rules of civilized warfare were to be set aside when disciplining native Africans. As a whole, the men of this first generation of professional international lawyers were mostly ardent colonialists. Rolin for example was member of the *Conseil superieur du Congo* set up by Leopold II and ended his career as the legal advisor to the king of Siam. Likewise, Sir Travers Twiss was enlisted by Leopold to develop an international legal basis for the sovereignty of his company and ultimately drafted the constitution for the Congo Free State.³⁸ It was in such variable and complex ways that the apparently liberal worldview of the civilizing project intertwined with the legal needs and realities of colonialism.

A. European colonialism

Throughout the century, the forms of imperialism changed and deepened constantly. Support for both official, centrally led colonialism and for empire of free trade was prompted by critiques of the

³⁵ Many of these can be found in *British and Foreign State Papers* volumes 1–11.

³⁶ See Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History, 1842-1933* (Cambridge University Press 2014).

³⁷ The *Institut* did at one point after 1878 carry out a study on the possibility of entry of non-European states as full members of the family of nations – but the results of that study were inconclusive. In practice, European international law, with minor exceptions, had little or nothing to say about the continuation of the practices of inequality.

³⁸ Andrew Fitzmaurice, ‘The Justification of King Leopold II’s Congo Enterprise by Sir Travers Twiss’ in Shaynnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan 2010), 109 esp 118; Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (OUP 2013) 22.

colonial companies that were failing to administer their territories and were anyway becoming redundant as their trade monopolies were discontinued. But there was also a genuine wish to expand the civilizing mission, often promoted by the budding civil society and expressed through humanitarian projects such as the abolition of slavery or the banning of the *sati*. An important element among these ambitions was the idea to introduce the centralized State form in indigenous territory.³⁹ These fundamental changes led into new forms colonial administration – bureaucracies if you will – and an unprecedented need of colonial officers with specialist knowledge. Soon, a jurisdictional struggle began between international lawyers and the new experts of colonial law. Colonial law **[explored in detail by Lauren Benton in another Chapter of this book]** redefined European behaviour in the colonies as a matter of the domestic administrative law of the respective countries as opposed to the law of nations and effectively barred any international involvement or criticism. Westlake, for example, was clear that international law would have nothing to say about how Britain treated the “native states” on the Indian peninsula; as a colonial question the matter was not of international but British domestic jurisdiction. The outcome would be a parallel coexistence of two tiers of diplomatic corps, one of which would function in the specialized development of overseas territories and the other retaining its general handle on international affairs proper.

In the broader academia, the colonial experience had a profound impact as it coincided with Charles Darwin’s *Origin of Species* (1859) and produced a period of evolutionist worldviews and theories. Legal scholars were not behind others. Soon after the publication of Henry Sumner Maine’s *Ancient Law* (1861) they justified colonialism through theories of universal transition from savage to civilized societies.⁴⁰ The resultant legal primitivism was a mode of scholarship that combined the study of early European legal traditions with studies of the legal customs of indigenous peoples, often comparing the non-European civilisations with the European nations in their own primitive (and often imaginary) pasts.⁴¹ This mode of thought impregnated all international fields of legal thought. To legal anthropology and legal ethnology it was fundamentally relevant. In colonial law a distinction between the civilized man and the savage was a routine fact, and as mentioned earlier, most international lawyers were also colonialists part and

³⁹ See e.g. Matthew Craven, ‘The Invention of a Tradition: Westlake, the Berlin Conference and the Historicisation of International Law’, in Nuzzo & Vec (eds), *Constructing International Law* (n 29) 380-383.

⁴⁰ Kaius Tuori, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (Routledge 2015) 57: “Starting with Maine’s *Ancient Law* (1861), the main works were Bachofen’s *Mutterrecht* or *Mother Right* (1861), Fustel de Coulanges’s *The Ancient City* (1864), McLennan’s *Primitive Marriage* (1865), Tylor’s *Primitive Culture* (1871), and Morgan’s *Ancient Society* (1877).” See also Frederick Pollock, ‘The History of Comparative Jurisprudence’ (1903) 5 *Journal of the Society of Comparative Legislation* 74, 79.

⁴¹ Tuori, *Lawyers and Savages* (n 40) 1-11.

parcel. And the comparatists were in the middle of it all. While much of their work was strictly focused on private law in Europe, in Oriental questions they accompanied their internationalist colleagues. Already in 1838 William Burge published his four-volume *Commentaries on Colonial and Foreign Laws*.⁴² At times the German *Vergleichende Rechtswissenschaft* shared influences with widespread historical evolutionism.⁴³ The very first thing the British *Journal of the Society of Comparative Legislation* did was chart and review the indigenous and colonial law within the Empire.⁴⁴ Pollock's praise of Maine leaves little doubt about the adoption of *Ancient Law* by comparative historians.⁴⁵

B. Non-European reception

The nineteenth century was not all about the European colonizers. The Oriental world in the receiving end also engaged with European internationalism.⁴⁶ Throughout the century many non-European countries sought to replace their indigenous legislation by Europeanized legal transplants that either set aside indigenous laws or created complex hybrids where several types of laws operated side by side. Instrumental in these processes were often the non-European jurists who, after studying in Europe or the United States, had begun to use their knowledge of European codes and forms of legal argument to “modernize” their domestic legal systems. Educating these new generations of lawyers was an important project among European legal scholars. In Paris, for example, Louis Renault would collect a large group of foreign disciples, including the Chilean jurist Alejandro Alvarez and the Argentinian Carlos Calvo. While Alvarez spent much of his life in Europe propagating Latin American legal regionalism, he did this by using the vocabulary of legal collectivism or “solidarism” that he imbibed at least in part from French Third Republic liberalism. Calvo, in turn, became an active proponent of Latin American “Creole” politics that sought to

⁴² William Burge, *Commentaries on Colonial and Foreign Laws Generally, and in their conflict with each other, and with the Law of England* (4 vols, London 1838). On its significance, see Walther Hug, ‘The History of Comparative Law’ (n 13) 1064-1065; Zweigert & Kötz (n 12) 56.

⁴³ Ingeborg Schwenzer, ‘Development of Comparative Law in Germany, Switzerland, and Austria’ in Mathias Reimann & Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 69, 73-74.

⁴⁴ See ‘Statement of the Objects of the Society’, Sir Courtenay Ilbert, ‘Review of the Legislation of the British Empire in 1895’ and ‘Modes of Legislation in the British Colonies’ (1986-7) 1 *Journal of the Society of Comparative Legislation*, vi-x, 1-133, 134-190.

⁴⁵ Sir Frederick Pollock, *Introduction and Notes to Sir Henry Maine’s “Ancient Law”* (London 1906), esp. viii; Pollock, ‘The History of Comparative Jurisprudence’ (n 40).

⁴⁶ While lumping all the non-European jurists together is a highly dubious practice, we shall here nonetheless try to serve the overall interest of the present *Handbook* by providing at least a brief characterisation of the recipients of European legal transplantation projects. The reader is advised to take into account the extremely approximate nature of this section.

prevent the excessive penetration of US interests in the Southern Hemisphere.⁴⁷ Nobushige Hozumi, who in 1882 became the first Professor of Jurisprudence in the Imperial University of Tokyo, was originally in 1876 sent to England to study law, and in 1880 moved on to Germany in pursuit of a better quality of legal education and because the British colonial attitudes at the time made them “too proud” to facilitate genuine exchanges. Upon his return, Hozumi became part of the Japanese legal elite that designed the Japanese constitution of 1889 as well as the Civil, Commercial and Procedural codes by using German law as a source of transplantation.⁴⁸ Abdel-Razzak Al-Sanhuri, the Arab World’s foremost comparative lawyer of the time and the chief architect of the Egyptian civil code of 1949, belonged to *l’école Lambert égyptienne*, a group of Egyptian and law students who studied under professor Edouard Lambert in Lyon between 1906 and 1937 and collaborated in the formulation of the modern hybrid forms of Islamic law during the early twentieth century.⁴⁹

Many of the non-European cosmopolitan lawyers believed in or were at least willing to accept the notion of a universal legal order. They also tended to accept the civilized/non-civilized distinction and, like the Creole elites in Latin America, used it to differentiate themselves from their indigenous populations. They also assumed that “civilization” meant possession of the European state form and were quite ready to engage and integrate their communities in most rules of diplomacy. But they were adamantly against grouping the non-European world as “uncivilized” *en bloc*. Harmful regimes of legal inequality (such as the Capitulations of Turkey or the unequal treaties with China) were an affront to their status as equal members of the “family of nations”.⁵⁰ As lawyers they were ready to appropriate large parts of European-made law so as to speak in a professional vein to their European audiences. But they rejected the rules or institutions that operated to subordinate their countries.

As is well known, these attitudes would change in the course of time as the non-Europeans found that however much they aimed to prove that they were just as civilized as the Europeans, they would not be let into the club. For example, while Europeans responded to the legislative changes in Turkey in the 1830s and 1840s by deciding to admit it to participate in “the advantages of European Public Law and system” in 1856, the Conference foreseen to end the system of one-sided

⁴⁷ See Liliana Obrégon, ‘Completing Civilization: Creole Consciousness and International Law in Nineteenth-century Latin America’, in Anne Orford, *International Law and its Others* (Cambridge University Press 2006), 247.

⁴⁸ Hitoshi Aoki, ‘Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil’, in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Oxford, Hart 2001) 129, 134-135 and 149.

⁴⁹ Amr Shalakany, ‘Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing your *Asalah* can be good for You)’ in Riles (ed), *Rethinking the Masters* (n 48) 152.

⁵⁰ See Becker, *Mestizo International Law* (n 36) esp. 98-140.

privileges never took place. Instead, Turkey remained under a special regime until it was formally (though still not fully in fact) abolished in the Treaty of Lausanne of 1923.⁵¹ Overall, it would take another half-century and a succession of various international regimes, mandates and trusteeships before many of the non-European peoples would see themselves addressed as sovereign. Since then, the question would be to what extent their newly attained sovereignty would in fact count in the legal, political and economic circumstances of the post-colonial world.

IV. International Disciplines in 1900

The jurists who took part in the activities of the *Institut de droit international* in the last decades of the 19th century shared usually experience in both comparative and public international law. This made their “civilizing” outlook reasonably similar despite the difference in their legal backgrounds. Cooperation between them was also enhanced by their admiration of the works of Savigny’s historical school, even as they admitted that in addition to looking backwards into the “conscience” of the people a competent codifier also needed to have integrated an evolutionary view of the law as a companion and supporter of progress and “civilization”.⁵² They were also united in their effort to take some distance from amateurish pacifists by taking a consciously “scientific” approach to their work of comparison, codification, and reform. Many of them (though not all) thought of “civilization” as something like a scientific category through which to measure the quality and degree of development of different legal systems, and they agonised over the difficulty to turn that motion into more concrete indicators, to assist them in legal reform. Being “scientific” was not at all in conflict with their search for political influence. On the contrary, the effort to display rigorous professionalism served many of them well in domestic parliaments and even governments, and the stream of Nobel prizes that came in their direction in the first years of the 20th century illustrates that this assessment was widely shared. But being “scientific” meant increasing specialization and the call for detailed knowledge contributed to the gradual “disciplinization” of the different approaches from which the jurists would approach the “international”. Throughout the nineteenth century, a large number of partially overlapping approaches such as public and private international law, comparative legislation, legal anthropology, comparative legal history, colonial law, and legal ethnology made their appearances. As if to create order from chaos, at the turn of the century great gatherings were convened to organize large schools of international legal thought. The Hague Conference on Private International Law had been formed in 1893, the Hague Peace Conferences took place in 1899 and 1907, and the foundational World Congress of Comparative

⁵¹ e.g. Eliana Augusti, ‘From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire’ (2011) 4 *Journal of Civil Law Studies* 285, 301-307.

⁵² Luigi Nuzzo, ‘History, Science and Christianity. International Law and Savigny’s Paradigm’, in Luigi Nuzzo & Miloš Vec (eds), *Constructing International Law* (n 29) 25.

Law was held in Paris during the Paris World Exposition of 1900. Of the many incipient disciplines we shall in the following focus on two, namely public international law and comparative law.⁵³

A. International Law

What had come of the liberal internationalist project of the men of 1873? By 1900 it had built considerable momentum. Although the concept of the sovereign state still stood at the centre of late-19th century international law, the lawyers had by now developed a profoundly ambivalent attitude towards it. On the one hand, as liberal nationalists imbued with *l'esprit d'internationalité*, most of them were suspicious of old diplomacy, the *raison d'état* and any excessive emphasis on the sovereignty of the state. Thus when the German delegates at the Hague Peace Conference in 1899 turned their back to the binding jurisdiction of the proposed permanent arbitration tribunal, most of the “Western” jurists were scandalized over opposition to what they thought an obviously enlightened internationalist advance.⁵⁴ Instead of obsessing over sovereign jurisdictions they openly celebrated the economic and technical interdependence that bound states to ever more dense networks of international cooperation where lawyers would obviously play increasingly important roles. They deplored the ease with which nationalist feeling transformed into belligerent agitation and stressed the harmony of interests that linked all states to what they began to call an “international community”. Some, such as Bluntschli and the Italian Fiori, wrote about individual rights and argued that it would be the task of international law to advance them across the world. On the other hand, international lawyers at the *fin de siècle* were in many ways also good patriots. They saw European statehood without a doubt as the most advanced type of political community and states themselves as carriers of rich national heritage and as indispensable instruments of any international cooperation. Many of them followed Mancini and other Italian jurists in supporting a “principle of nationalities”, the division of the earth’s surface into primordial “nations” that would form the basis of healthy internationalism: the law was to guarantee the “natural growth of nations and states”.⁵⁵ As many of them came from small countries where they often played important public roles, European international lawyers were suspicious of great powers and, no doubt, took to international law also for defensive reasons. Thus they rejected the early and mid-19th century policy of Great Power primacy and supported the independence of smaller nations under old empires. Many of these jurists kept a close eye on land acquisitions and annexations in the imperial peripheries, studied the international status of small states, and publicly expressed their opinions

⁵³ Alongside these, at least private international law and colonial law were well under way to becoming distinct disciplines as well.

⁵⁴ On the “arbitration crisis”, see Arthur Eyffinger, *The 1899 Hague Peace Conference. The Parliament of Man, the Federation of the World* (The Hague, Kluwer 1999), 374-378.

⁵⁵ Bluntschli, *Das moderne Völkerrecht* (n 18) VI.

by for example signing the 1910 London Declaration that supported Finnish nationalists against Russification.⁵⁶

In the academy, late-19th century international lawyers began the tradition of producing thick, sometimes multi-volumed textbooks whose structure and contents remained relatively unchanged throughout the years. An effort was made to respond to the sceptics by pointing to public opinion as the real sanction of the law, sometimes by reading treaties and arbitration as functional substitutes to legislation and adjudication and by denying the need for formal enforcement. Bluntschli was ready to accept that the “sweet dream” of the idealist about a humanity united in a “*Rechtskörper*” was not even close to realization but argued that the century’s many congresses had produced no mere contracts but genuine rules of general application.⁵⁷ The German public lawyer Georg Jellinek produced his *autolimitation* theory where he compared international to constitutional law that did not possess a system of enforcement either and in which the state also limited the behaviour of supreme state institutions with binding effect.⁵⁸ Much textbook “theory” was not of impressive depth: international law was either seen as a more or less sociological type of law that was underlain by an ideology of humanitarian progress and mounting civilization – or then as the formal structure of diplomatic and treaty relations accompanied by a series of multilateral conventions on peace and war. In more or less “idealist” and “realist” terms lawyers debated whether something like an “international legal community” could be said to exist. These mid-level theories had remarkably little effect on the substance of the law, however. The two great starting-points for norm-production were on the “realist” side the theory of “sovereignty” – and on the “idealist” side the theory of legal sources. These created a reasonably coherent formal structure in which valid norms would be derived from state policy and the legality of state policy would be adjudicated by valid norms. Even as substantively wholly indeterminate, these argumentative patterns developed in the course of the 20th century into more detailed legal institutions (“jurisdiction”, “succession”, “responsibility”, “law of treaties”, “settlement of disputes”, and so on) that provided textbook chapters for academics and reserves of argumentative material for practitioners.⁵⁹

⁵⁶ e.g. J. De Louter, 'L'Annexion du Transvaal' (1881) 13 *Revue de Droit International et de Législation Comparée* 194; Milenko Vesnitch, 'Annexion de la Bosnie-Herzegovine et le Droit International' (1909) 11 *Revue de Droit International et de Législation Comparée* 123; E.-R. Salem, 'Effets de l'Annexion sur la Nationalité des Sociétés Anonymes Ottomanes' (1914) 41 *Journal du Droit International Privé et de la Jurisprudence Comparée* 38; S. Bury, 'La neutralité de la Suisse, et son observation durant la guerre actuelle' (1870) 2 *Revue de Droit International et de Législation Comparée* 636; Antoine de Bustamante, 'Le canal de Panama et le droit international' (1895) 27 *Revue de Droit International et de Législation Comparée* 112 and 223; M.P. Eyschen, 'La position du Luxembourg selon le droit des gens' (1899) 1 *Revue de Droit International et de Législation Comparée* 2nd ser 5; J.N. Reuter, 'Finland', *Memories of John Westlake* (London, Smith, Elder & Co. 1914) 166, 122-124.

⁵⁷ Bluntschli, *Das moderne Völkerrecht* (n 18) 3-4.

⁵⁸ Georg Jellinek, *Die Rechtliche Natur der Staatenverträge* (Vienna, Hölder, 1880).

⁵⁹ See further Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (reissue with a new Epilogue, Cambridge University Press 2005).

B. Comparative Law

While the international lawyers had busied themselves with the newfound legal conscience of the civilized world, the municipal world which they sought to transcend did not quite disappear. Although genuine comparative scholarship may have endured something of an eclipse under the late-nineteenth century pressures of evolutionary and positivist theory, institutionally speaking *législation comparée* seems to have gone on as before, especially in the fields of commercially oriented private law and maritime law. In many ways comparative law represented a responsible desire to carry on the serious and delicate tasks on the home front which the internationalists had abandoned. Domestic legal academics and practitioners – in particular private lawyers whose professional identity as distinct from public law had crystallized throughout the century – continued to process the ever-more complex advances in modern trade and technology into new legal forms and principles. In this work, the task of the traditional comparatist seemed as vital as ever. Journals such as *Nouvelle revue historique de droit français et étranger* and *Zeitschrift für vergleichende Rechtswissenschaft* either continued the chronicle work of their predecessors or furthered new economic, societal and colonial ideas that their editors thought would thrive in *fin de siècle* Europe. New national societies of comparative law emerged all over Europe; the *Société de législation comparée* was founded in 1869, the *Internationale Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre* in 1894 and the *Society of Comparative Legislation* in 1898. As the discipline grew, so did the ambitions of its participants.

The *Congrès international de droit comparé* was held in Paris between July 31st and August 4th during the Paris World Exposition of 1900. Subsequent generations of comparatists up to the present have preserved its memory as the mythical birthplace of the discipline as we know it.⁶⁰ The Congress was convened by the French *Société* at a tumultuous period in the French legal academia where liberal scholars concerned by social riots and political unrest hoped to respond to the demands of the society on a rational basis by developing new methods for a progressive legal science.⁶¹ The purpose of the *Congrès* was not merely to bring international researchers together but also “de chercher à fournir à la science du droit comparé une formule précise et une direction sûre, dont elle a besoin pour assurer son développement.”⁶² The time had come for comparative law to take a disciplinary form of its own, not merely for the sakes of academic organization but for

⁶⁰ Zweigert & Kötz (n 12) 2; René David et Camille Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (11^e edn, Dalloz 2002) 2; Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015) 8; David S. Clark, ‘Nothing New in 2000? Comparative Law in 1900 and Today’ (2001) 75 *Tulane Law Review* 871; Rodolfo Sacco, ‘One Hundred Years of Comparative Law’ in (2001) 75 *Tulane Law Review* 1159.

⁶¹ Marie-Claire Belleau, ‘The “Juristes Inquiets”: Legal Classicism and Criticism in Early Twentieth-Century France’ (1997) 2 *Utah Law Review* 379 esp 380-386.

⁶² ‘Circulaire’ in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, procès-verbaux des séances et des documents*, Tome I (Paris, 1905) 7, 7-8.

the benefit of all humankind. It was the inevitable outcome of any comparative activity. In the famous words of Raymond Saleilles:

Pendant longtemps on ne l'a conçu que comme une sorte de constatation des diversités législatives entre pays d'une civilisation similaire. Mais il est arrivé forcément que, de cette constatation, et, par suite, de cette comparaison, on a voulu tirer des conséquences. L'esprit humain est ainsi fait, et c'est son honneur. Il ne peut enregistrer les faits de la vie sociale sans se demander quel profit doit en résulter pour le progrès de la science et celui de la civilisation générale.⁶³

A distinction between “true” comparison and the “mere” study of foreign law was decisive to the *Société's* vision. Saleilles' protégé Edouard Lambert underlined “la nécessité de rejeter, en dehors du domaine du droit comparé, l'un de ces types de travaux, celui qui, jusqu'ici, a été le plus largement représenté dans la littérature, les *études de droit étranger*.”⁶⁴ From now on, the specialized comparativist was to pursue a different, more advanced goal – but which?⁶⁵ Aye, there was the rub. To answer it, Saleilles and Pollock suggested theoretical or historical themes as the key, while Lambert argued for more direct applications of comparative law in legal development. Many seemed content to just keep comparing as they always had. In a way, this inconclusive discussion continues to the present day.

The Congress was constituted broadly. Apart from the main theoretical and methodological stream, the most discussed topics included the status of foreign companies in various states, parliamentary government and proportional representation, family law, criminal law, and legal persons. Several theoretical and methodological contributions took as their starting point the needs of private law, but public law, criminal law and sociology were also represented. Saleilles took particular note of the special needs of private law. He suggested that comparative studies had made less progress than in criminal or public law, since contrasting and transplantation constituted a more self-evident part of those subjects.⁶⁶ He also requested that the Congress specifically leave aside any discussion concerning the political economy. Since political economy was an external science of objective facts it was not open to a meaningful debate by international jurists. On the contrary, “elle est ou doit être à la base de toutes nos institutions de droit privé comme de droit public”.⁶⁷ The Congress was thus a meeting of serious-minded liberal jurists intent on creating a comparative discipline on purely juridical and not political terms.

⁶³ Raymond Saleilles, ‘Rapport présenté à la commission d'organisation sur l'utilité, le but et le programme du congrès’ in *Procès-verbaux des séances et des documents* (n 62) 9.

⁶⁴ Lambert's speech in *Procès-verbaux des séances et des documents* (n 62) 26, 29.

⁶⁵ Ibid, 31.

⁶⁶ Raymond Saleilles, ‘Rapport présenté à la commission d'organisation’ (n 63) 10.

⁶⁷ Ibid, 17.

After the Congress the discipline of comparative law is generally understood to have undergone a period of youthful and energetic intercourse which combined the further proliferation of European legal codes across the world with idealistic visions of progressive liberal legislation in Europe. An example of this was Edouard Lambert himself, who sometimes depicted himself as a daring rebel pushing against the boundaries of law and engaged in the education a prominent young generation of Arab jurists and reformers.⁶⁸ But this drive did not last forever.⁶⁹ The positivist inter-war years saw the emergence of the functionalist agenda after Ernst Rabel began to respond to the problems of private international law by focusing on the functions and context of law rather than its language and concepts.⁷⁰ Sometime after the Second World War, comparative lawyers shifted their attention back to the comforts of European private law while the methodological voices within the discipline lost their engagement with cosmopolitanism and instead found their new essence in particular projects such as the European economic integration. The result has been variably described as scientific functionalism, an eclectic “method-of-no-method”⁷¹ or a narrow “country and western tradition”⁷². At the same time, looking back to 1900 (or even the 1830s) one can discern the stream of microcomparative studies on foreign law flowing incessantly since the early days of *législation comparée*. Despite repeated denunciations, that scholarly tradition-within-a-tradition appears to never have disappeared from the comparative agenda.

Conclusion

International and comparative law arose in the late 19th century at a time when the liberal ascendancy in most European states had reached its peak. Nationalism and socialist agitation were on the rise and the easy assumption about the automatic growth of civilization and liberal progress were undermined by Franco-German hostility and conflict in the colonies. In this situation, politically active jurists (many of whom were party members, parliamentarians, and even members of their national governments) tried to consolidate the progress that had been reached in domestic and international laws that they sought to propagate by comparative studies and legislative proposals as well as professional legal cooperation across boundaries. It was in this direction that

⁶⁸ Amr Shalakany, ‘Sanhuri and the Historical Origins of Comparative Law’ in Riles (ed), *Rethinking the Masters* (n 48) 164-181; Edouard Lambert, *Les Inégalités de Classe en Matière d’Électorat Politique* (Paris 1906) ; Edouard Lambert, ‘Le droit comparé et la formation d’une conscience juridique internationale’, [1929] *Revue de l’université de Lyon* 441.

⁶⁹ Authoritatively Zweigert & Kötz (n 12) 3: “The belief in progress, so characteristic of 1900, has died.”

⁷⁰ Rodolfo Sacco, ‘One Hundred Years of Comparative Law’ (n 60) 1167; Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *American Journal of Comparative Law* 671, 679; Julie de Coninck, ‘The Functional Method of Comparative Law: *Quo Vadis?*’ (2010) 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 318, 321; David J. Gerber, ‘Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language’, in Riles (ed), *Rethinking the Masters* (n 48) 190 esp 199-202; Zweigert & Kötz (n 12) 61-62; David Kennedy, ‘The Methods and the Politics’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge 2003) 345 in 383-387.

⁷¹ Kennedy, ‘The Methods and the Politics’ (n 70) 350-2 and 406.

⁷² William Twining, *Globalisation and Legal Theory* (Cambridge 2000), 184-189.

the Italian Pasquale Fiore saw international strive towards “a more rational organisation of international society” in cooperation with “contemporary intellectual, parliamentary, scientific, and popular movements”.⁷³ But however much jurists at the turn of the century were inspired by what they felt as the “spirit of internationalism”, the specific form of their internationalism arose from domestic training and experience. Duncan Kennedy has written of the “two globalizations” of law and legal thought from the middle of the 19th century – a first wave of “classical legal thought” heavily under German influence, followed by the entry of “the social”, inspired by French critiques, into law and legal culture. If the former operated under the two-pronged influence of Savigny and the codification movement, highlighting the formalism and specificity of legal professionalism, the second would capture some of French third republic sociological thinking about the complexities of industrial society where formalism needed to give way to open-ended and functional standards and where it would not be courts, but legislation and administration that form the centre of the law. Instead of an autonomous system, law would be seen as deeply embedded in social evolution.⁷⁴

The professional consolidation of legal disciplines embracing the “international” (“public” and “private” international law, comparative law) arose as part of a fin-de-siècle project to align liberal ideas about society and government with a scientific ethos. Heavily influenced by academic and professional cooperation, within new institutions and congresses, this was part of a European elite consciousness that was wholly unprepared to face the disaster of 1914. As the old societies picked up the pieces in the postwar era, debating the relative merits of formalist and antiformalist approaches, they no longer harboured excessive expectations about legal professionalism as a shortcut to peace and progress. A pattern that separated the international disciplines took root in the universities, drawing sharp lines between “private” and “public” law, the study of positive laws on the one hand, and the sociology of “transnational” or “global” laws on the other. The effort to marry domestic laws with international standards and projects – the struggle for a “more elevated patriotism” – continued throughout the 20th century. What was not always well understood was that this marriage was also – and perhaps above all – about the distribution of powers of decision between domestic political constituencies and groups of international experts. The latter would often have recourse to ideas about the “natural” ways of legal “development” that would play the role once assumed by the standard of civilization.⁷⁵ The point to bring home from more recent debates about law and globalization is that just like there is no one “domestic” law, there is also no one “international” law; but the stakes involved in the endless conflicts of projects and preferences represented by proliferating international disciplines can only be meaningfully scrutinized once their late-19th century separation is finally brought to a close.

⁷³ Pasquale Fiore, *Le droit international codifié et sa sanction juridique* (Paris Pedone 1911) 16.

⁷⁴ Duncan Kennedy, ‘Two Globalizations of Law & Legal Thought’ (2003) 36 *Suffolk University Law Review* 631.

⁷⁵ See Anne Orford, ‘Theorizing Free Trade’ in Orford & Hoffman (eds), *The Oxford Handbook of International Legal Theory* (n 11) 701.

Further reading:

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