

COMPARATIVE LAW AND THE CLAIM OF CAUSATION

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To accept that everything happens for a reason is to accept the connection between cause and effect that forms the basis of the notion of causation. Although causation or un lien de causalité has long been regarded as integral to the law on extra-contractual obligations, its use in the study of the development and status of comparative law in various legal systems has not been attempted. This article pursues a novel train of inquiry by claiming that the actual importance of comparative law to a legal system should be understood as a chain of events that culminate to inform the regard in which comparative law is held today. The claim of causation in comparative law posits that the history of engaging in comparative law in a legal system influences the type of scholarship on comparative law produced which in turn influences the pedagogy of comparative law. The veracity of this claim is tested by considering the history, scholarship and pedagogy of comparative law in selected legal systems in Europe and North America. This article then looks at several legal systems in Asia in one of which the claim of causation risks total displacement. Such an occurrence, far from defeating the claim of causation, reveals the difficulty of dissociating the pedagogy of comparative law (the effect) from its history and scholarship (the causes).

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I. INTRODUCTION

Comparison can evoke the simplicity of apples and oranges, or the sophistication of using economic theory to explain legal development and change.¹ At its core, comparative law signifies the comparison of the laws of two or more legal systems.² A jurist belonging to one legal system and who wishes to engage in comparative law is likely to study the laws of one or more foreign legal systems for comparison with his own. The act of comparison *per se* serves no obvious purpose and commands no universal mandate. To regard an excursion into foreign law as a calculated effort undertaken by jurists who believe it is worthwhile to compare is thus uncontroversial. The esteem in which comparative law is held in a given legal system depends on its employment by legislators and judges, as well as the presence of jurists willing to justify its value in published works. This value is likely to vary across legal systems because motivation to compare will be driven by momentous events that alter or develop a legal system in a way that expertise on comparisons with foreign law can be put to practical use. When such practical usage can be sustained, teaching comparative law to future jurists becomes necessary and the place comparative law is accorded in legal education commensurate with its perceived value. The foregoing can be represented by what I call the claim of causation – historical events influence

¹ Roe, M. J. “Can Culture Constrain the Economic Model of Corporate Law?” *University of Chicago Law Review* 69 (2002): 1255; Teubner, G. “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences.” *Modern Law Review* 61 (1998): 11.

² This comparison can take place at the systemic level where the foundations of entire legal systems are contrasted or at the institutional level where specific legal institutions are selected for study.

the scholarship of jurists which in turn influence pedagogy.³ This article will examine the veracity of the claim in legal systems that can boast of experience with comparative law and consider its relevance to Asia where experimentation with comparative law is relatively recent. Existing approaches to comparative law in Asia suggest that the claim of causation can be displaced. By considering the ramifications of such displacement, this article urges greater reflection on how the development of comparative law has hitherto been envisioned in Asia.

This article first establishes the claim of causation by considering the history, scholarship and pedagogy of comparative law in representative legal systems in Continental Europe (II), England (III), the United States (IV(i)) and Canada (IV(ii)). It then examines why the claim of causation risks displacement in Asia (V) and the possible ramifications of such displacement (VI) before offering some concluding remarks (VII).

II. THE CLAIM OF CAUSATION IN CONTINENTAL EUROPE (FRANCE, GERMANY AND ITALY)

(A) HISTORY

Being the first of its kind, the *Congrès international de droit comparé* that was organized by the French *Société de législation comparée* and held in Paris in 1900 (“Paris Congress”) is often taken as the common starting point for studying the development of modern comparative law. The two principal objectives of the Paris Congress were the articulation of the function of comparative law as a mean for analyzing disparate national legislation with a view to achieving the partial uniformity of laws, and the elucidation of the method of teaching comparative law.⁴ The Paris Congress was largely dominated by Continental European delegates as virtually all the reports on the Paris Congress were prepared by French, German and Italian jurists.⁵ Although

³ While the use of comparative law by legislators and judges may feature in the historical retelling, the claim of causation devotes greater attention to scholarly works on comparative law because scholarship essentially confirms the presence and impact of comparison regardless of whether it is applied by a legislator or a judge, and regardless of whether it occurs at the systemic or institutional level.

⁴ Saleilles, R. “Rapport présenté à la Commission d’Organisation sur l’utilité, le but et le programme du Congrès.” *Bulletin de la société de législation comparée* 29 (1900) : 228, at 231, 384.

⁵ Daguin, F. “Documents relatifs au Congrès international de droit compare.” *Bulletin de la société de législation comparée* 29 (1900): 218, at 219.

delegates from Great Britain and the United States were also present, the fact that they were neither featured as reporters nor speakers made them akin to observers during the Paris Congress.⁶

The French, German and Italian forays into comparative law predated the Paris Congress. The French *Société de législation comparée* was created in 1869 to promote the study of comparative law and its relevance to law reform,⁷ while the German *Bürgerliches Gesetzbuch* of 1900 which codified German private law was the product of comparative research on foreign codified laws.⁸ The Italian legal culture since unification in 1861 was one of borrowing legal concepts and norms from foreign countries.⁹ In the circumstances, the Paris Congress merely served to reiterate certain points of reference or agreement on comparative law, rather than introduce something new to French, German and Italian jurists. After the second world war, the French were disillusioned with the quest for universalism that served as a driving force for engaging in comparative law,¹⁰ while the legacy of the Nazi regime in Germany which forced comparative law into the role of glorifying Nazi ideology and anti-Semitic oppression, was the mass departure of comparative law scholars of Jewish origin, many of whom fled to the United States.¹¹ However, unlike in France where comparative law diminished in significance after the war, efforts to resuscitate comparative law began in earnest in Germany with the re-establishment of the Max Planck Institute for Comparative Public Law and International Law in 1949.¹² In Italy, the end of the war kindled interest in American law that was to become the system to

⁶ *Id.* The exception was Sir Frederick Pollock (1845-1937), then Professor of Jurisprudence at Oxford University, who spoke on the history of the science of comparative law.

⁷ Fauvarque-Cosson, B. "Comparative Law in France." *The Oxford Handbook of Comparative Law*. Eds. M. Reimann & R. Zimmerman. Oxford: Oxford University Press, 2008 ('Fauvarque-Cosson'): 37, at 42. Today, the *Société de législation comparée*, along with *l'Institut de droit comparé*, a center attached to the University of Paris, come under the direction of the *Centre français de droit comparé*, see generally www.centrefdc.org/ (last visited May 2, 2011).

⁸ Schwenger, I. "Development of Comparative Law in Germany, Switzerland, and Austria." *The Oxford Handbook of Comparative Law*. Eds. M. Reimann & R. Zimmerman. Oxford: Oxford University Press, 2008: 69, at 74 ('Schwenger').

⁹ Grande, E. "Development of Comparative Law in Italy." *The Oxford Handbook of Comparative Law*, Eds. M. Reimann & R. Zimmerman. Oxford: Oxford University Press, 2008: 107, at 108 ('Grande').

¹⁰ Fauvarque-Cosson, *supra* note 7, 48.

¹¹ Schwenger, *supra* note 8, 82-88. Some of these émigré scholars, such as the late Sir Kahn-Freund, also settled in England, see Brown, N. "A Century of Comparative Law in England: 1869-1969." *American Journal of Comparative Law* 19 (1971): 232, at 239-240 ('Brown').

¹² Schwenger, *supra* note 8, 89.

which the Italians, previously reliant on the French and German models, turned for legal innovation.¹³ Today, comparative law in all three countries is experiencing a revivalism due to European integration and resultant calls for unifying European law.¹⁴

(B) *SCHOLARSHIP*

In France, the label of comparative law has for long been regarded as a euphemism for acquiring knowledge about foreign law or *un savoir sur ces droits*.¹⁵ Although one of the aims of the French *Société de législation comparée* was to promote comparative law as a conduit to law reform, it is suggested that the elevated status of France as an exporter legal system did not motivate French scholars to consider how the French legal system could be bettered with the aid of foreign solutions.¹⁶ The study of foreign law thus became an end in itself and an academic endeavour with little or no attempt being made to articulate the purposes and methods of contrasting a chosen foreign law with French law.¹⁷ Published works and unpublished doctoral dissertations which discuss the laws of two jurisdictions unaccompanied by a concrete purpose or methodology of comparison are commonplace in French scholarship claiming to be comparative.¹⁸

¹³ Grande, *supra* note 9, 108-109.

¹⁴ Fauvarque-Cosson, *supra* note 7, 55-58; Schwenger, *supra* note 8, 100-103; Grande, *supra* note 9, 115.

¹⁵ Picard, E. "L'état du droit comparé en France, en 1999." *Revue internationale de droit comparé* 51.4 (1999) : 885, at 887-888 ("Picard").

¹⁶ Monateri, P. G. "Critique et différence : le droit comparé en Italie" *Revue internationale de droit comparé* 51.4 (1999) : 989, at 998 ("Monateri"); also Sacco, R. "La formation au droit comparé. L'expérience italienne." *Revue internationale de droit comparé* 48.2 (1996): 273, at 278 ("Sacco-1996").

¹⁷ Picard, *supra* note 15, 888-890.

¹⁸ When a young tutor in a prestigious French university was asked why he chose to compare the employment laws of France and Italy in his doctoral thesis, he responded, in all seriousness, that it was because he was born to a French mother and an Italian father. Although anecdotal, this response does account for the rather unrestrained view of the notion of comparability which permeates much of French comparative law scholarship, thereby creating the impression that comparability can be justified on the basis of sentiment as much as reason. See for instance Hascoët, M. *Le 'contrat de travail' précaire en droit italien: droit comparé italien et français*. Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2010; Halpérin J. L. & N. Kanayama. *Droit japonais et droit français au miroir de la modernité*. Paris: Dalloz, 2007; Deviant, M. *La règle prétorienne en droit français et canadien: étude de droit comparé*. Ottawa: National Library of Canada = Bibliothèque nationale du Canada, 2003; Kondyli, I. *La protection de la famille par la réserve héréditaire en droits français et grec comparés*. Paris: LGDJ, 1997. This liberal approach to the notion of comparability evident in French scholarship was, interestingly, absent from the ambitious law reform project spearheaded by distinguished French scholars, the Avant-Projet Catala, which proposed an overhaul of the law of obligations and limitations in France. Comparisons with how other jurisdictions have structured, streamlined and modified their law of obligations and limitations were limited to those whose laws were codified along the lines of the French Civil Code. See 'Avant-Projet de Reforme du Droit des Obligations et du Droit de la Prescription' 22 octobre 2005, available at www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf (last visited Apr. 23, 2011). Although the proposals in the Avant-Projet Catala, named after Professor

More recently, European integration has sparked interest among French scholars in English law, which is taken to be representative of the common law. However, with few exceptions,¹⁹ French scholarship tends to be informative on English law, rather than comparative of English and French law.²⁰ It is conceivable that in the context of European integration and the unification of national laws, all national laws of the member states of the European Union are comparable. However, since a common framework is only being proposed for selected areas of law, such as the law on obligations, diversity and non-convergence remain the norm.²¹ Works which highlight differences in the laws of two or more jurisdictions without more are surely informative, but not necessarily comparative.

In contrast to French scholarship, German scholarship places considerable emphasis on how comparison should proceed and has been highly methodical.²² There appears to be some reciprocity between the current approach of German scholars to comparative law and the process of codification in Germany which was also method-centered. Germany in the immediate aftermath of the promulgation of the French Civil Code was still a conglomeration of principalities each with its own body of laws.²³ Ironically, political unity came about for the first time in 1814 when the German forces successfully resisted the French invasion of Russia which was led by Napoleon himself.²⁴ The idea to develop a common law for Germany gained

Pierre Catala who presided over the project, have yet to be adopted as law, the report has already been translated into five languages, see Catala, P. *L'art de la traduction: l'accueil international de l'avant-projet de réforme du droit des obligations*. Paris: Pantheon-Assas, 2011 and a recent English publication on this is Cartwright, J., Vogenauer, S. and S. Whittaker (eds.). *Reforming the French Law of Obligations. Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (the 'Avant-projet Catala')*. Oxford: Hart Pub, 2010.

¹⁹ Scholastique, E. *Le devoir de diligence des administrateurs de sociétés: droits français et anglais*. Paris: LGDJ, 1998.

²⁰ Tunc, A. *Le droit anglais des sociétés anonymes*. 3rd ed. Paris: Economica, 1987; David, R. *Les contrats en droit anglais*. 2nd ed. Paris: Librairie Générale de Droit et de Jurisprudence, 1985.

²¹ Hondius, E. "Towards a European Civil Code – General Introduction." *Towards a European Civil Code*. 3rd ed. Eds. A. Hartkamp and others. Nijmegen: Ars Aequi Libri, 2004: 1, at 3-20.

²² For a general overview and a description of German comparative law scholarship which centers on the evolutive, structural or functional approach to the 'science' of comparison, see Ficker, H. "L'état du droit compare en Allemagne." *Revue internationale de droit compare* 10.4 (1958): 701 ('Ficker'); see also Frankenberg, G. "Critical Comparisons: Re-thinking Comparative Law." *Harvard International Law Journal* 26.2 (1985): 411; Peters, A. & H. Schwenke. "Comparative Law Beyond Post-Modernism." *International and Comparative Law Quarterly* 49 (2000): 800.

²³ Blackbourn, D. *History of Germany 1790-1918*. 2nd ed. Oxford: Blackwell Pub, 2003: ('Blackbourn'), 48-68.

²⁴ Blackbourn, *id* note 23, 48-68.

momentum following the German victory.²⁵ The most influential legal theorist of this period in Germany was Friedrich Karl von Savigny, an aristocrat who was fundamentally opposed to French revolutionary ideals and who emphasized the importance and relevance of legal history in the conceptualization of law, the latter being an approach pioneered by another influential German legal theorist, Gustav Hugo.²⁶ For Savigny, codification could not be done from scratch or represent a break from the past but had to be based on the careful study of existing legal phenomena.²⁷ This study, which called for the scientific reconstruction of legal data, was subsequently abbreviated as ‘legal science’ and adopted as the methodology for the conceptualization of the *Bürgerliches Gesetzbuch* drafted for legal professionals.²⁸ Another distinguishing feature of German comparative law scholarship is how scholarly expertise congregates in independent research institutes, such as the Max Planck Institute for Comparative and International Private Law and the Max Planck Institute of Comparative Public Law and International Law,²⁹ which are not affiliated to universities.³⁰ While the reestablishment of the Max Planck Institute of Comparative Public Law and International Law after the war to restore credibility to and develop comparative law was a turning point for comparative law in Germany, it is remarkable that most of the research and scholarship in this area continues to be

²⁵ Thibaut, A. F. J. *System des Pandekten Rechts* (N. Lindley tr. 1885): 21-22, 39-40, 42-43.

²⁶ von Savigny, F. C. *Of the Vocation of Our Age for Legislation and Jurisprudence* (A. Hayward tr. 1831): 138 (‘Savigny’).

²⁷ Savigny, *id* note 26, 32-42, 130-155.

²⁸ Merryman J. H. & R. Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 3rd ed. Stanford, Calif: Stanford University Press, 2007: at 31-32. Although the seed of the idea for the BGB was found in the process that produced the French Civil Code, it would be misleading to say that the BGB was in any way modeled after or adopted the contents of the French Civil Code. What was sought was the development of a common law from the existing disparate regional laws of Germany for Germany, and not the adoption of French law for Germany. For an illuminating account of how Napoléon tried but failed to impose the French Civil Code in various German principalities prior to the unification of Germany, see Arvind, T.T. & L. Stirton. ‘Explaining the reception of the Code Napoleon in Germany: a fuzzy-set qualitative comparative analysis.’ *Legal Studies*, 30.1 (2010): 1. Viewed as a historical legacy, the methodical approach of German scholars is arguably pervasive in and unique to German legal culture. Note however Ficker, *supra* note 22, 708 who regards comparative law as a science and not merely a method.

²⁹ Max Planck Institute of Comparative and International Private Law, available at www.mpipriv.de/ww/en/pub/news.cfm (last visited Apr. 27, 2011); Max Planck Institute of Comparative Public Law and International Law, available at www.mpil.de/ww/en/pub/news.cfm (last visited Apr. 27, 2011).

³⁰ Heide, H. ‘Les professions juridiques et le droit comparé: Allemagne.’ *Revue internationale de droit comparé*, 46.3 (1994) : 729, at 732-733 (‘Heide’).

generated within the confines of two research institutes, albeit research institutes of international renown.

Unlike France and Germany whose legal systems are considered ‘pure’ since they were constructed in the absence of legal borrowing,³¹ Italy’s prolonged experimentation with and receptivity to integrating concepts and approaches borrowed from foreign law into its own legal system has engendered scholarship on comparative law that is both diverse yet profound and has bred a generation of scholars who can be credited with the delivery of ground-breaking, seminal publications.³² Italian comparative law scholarship developed in three principal phases,³³ segueing from a focus on comparative legal history in the first phase,³⁴ to policy-oriented analyses of the function of law in the second.³⁵ The third phase builds on the first two by advocating that a legal system rests on legal formants that may at times be contradictory.³⁶ An illustration given is that of law as promulgated by the legislature and law as applied by the judge and how a comparison of the two can reveal an inconsistency between how the law was *intended* to be applied and how it

³¹ Monateri, *supra* note 16, 998.

³² Notable publications in English by Italian scholars include Cappelletti, M. *Access to Justice and the Welfare State*. Alphen aan den Rijn: Sijthoff, 1981 (“Cappelletti”); Sacco, R. “Legal Formants: A Dynamic Approach to Comparative Law” *American Journal of Comparative Law* 1 (39(1) (1991): 1 (Part I) (“Sacco-I”), in *American Journal of Comparative Law*, 343 (39(2), 1991) (Part II) (“Sacco-II”Mattei,); U. *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*. Westport, Conn: Greenwood Press, 2000. The collaboration between two Italian scholars and a Canadian scholar produced *Commercial Trusts in European Private Law*, M. Graziadei, U. Mattei & L. Smith (eds) (2005). Although Guido Calabresi, former Dean of Yale Law School, currently Sterling Professor Emeritus of Law and Professorial Lecturer in Law at Yale Law School and a United State Circuit Courts Judge since 1994, is Italian, he received his legal education exclusively in the United States which arguably removes him from the company of Italian scholars whose approaches to comparative law developed from and are closely intertwined with their legal education in Italy and the writings of earlier Italian comparatists. One notable publication by Calabresi is *A Common Law for the Age of Statutes* (1982).

³³ Monateri, *supra* note 16, 989-991.

³⁴ Sarfatti, M. “Comparative Jurisprudence In Italy With Regard To Private English Law.” *Law Quarterly Review* 38 (1922): 371. Also Monateri, *supra* note 16, 989-991 where Gino Gorla’s works, and in particular *Il Diritto Comparato In Italia E Nel “Mondo Occidentale E Una Introduzione Al “Dialogo Civil Law-Common Law”* (1983) which was reviewed in English (L. Moccia, in *American Journal of Comparative Law*, 533 (33, 1985), are considered representative of this historical approach to comparative law.

³⁵ Cappelletti, M. *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975); Cappelletti, *Access to Justice and the Welfare State*, *supra* note 32. See also G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale 1970); G. Calabresi, *Ideals, Beliefs, Attitudes, and The Law: Private Law Perspectives on a Public Law Problem* (1985).

³⁶ The key proponent of the third approach is without a doubt Rodolfo Sacco, see Sacco-I, *supra* note 32; Sacco-II, *supra* note 32; R. Sacco, *La Comparaison Juridique Au Service De La Connaissance Du Droit* (1991).

was *actually* applied.³⁷ Using legal formants as comparators across jurisdictions also demonstrates that the relationship between the law and its formants is dynamic and complex and should not be reduced to a positivistic discourse.³⁸ This third phase envisages comparative law scholarship that is both intra- as well as inter-jurisdictional. The rare ability of various Italian comparative law scholars to publish in several languages has enabled the *richesse* of their works to be appreciated by readers worldwide.³⁹ The presence of three established doctrinal schools of thought on comparative law alone in Italy is an indication of the great strides made by Italian scholars in comparative law and the enviable standing of such scholarship within continental Europe today.

(C) PEDAGOGY

Despite the active involvement of French delegates at the Paris Congress of 1900, the teaching of comparative law in France was only institutionalized in 1931 with the establishment of a teaching center attached to the University of Paris, *l'Institut de droit comparé*.⁴⁰ Over the next few decades *l'Institut* also developed a research agenda with three principal focuses – the harmonization of commercial laws, the development of international law in the age of industrialization and criminal law.⁴¹ The establishment

³⁷ R. Sacco, *Définitions savantes et droit appliqué dans les systèmes romanistes*, in *Revue internationale de droit comparé*, 827 17.4 (1965) : 828-829 ('Sacco-1965').

³⁸ Sacco-1965, *id* note 37, 829-833 where the author argues that differences in approaches to the notion of compensable liability for fault in France, Germany and Italy should be considered in light of factors that steer the interpretation of the relevant legislative provisions, and not by mere reference to the text of these provisions.

³⁹ Additionally, a project to identify common traits in the national legislation of European countries, the Trento Common Core Project, was launched by two Italian scholars Ugo Mattei and Mauro Bussani in 1995. This project was pitched as a broadening and continuation of Rudolf Schelesinger's monumental work, *Formation of Contracts – A Study of the Common Core of Legal Systems* (1968). The Trento Project has attracted the active involvement of comparative law scholars from all over Europe since its inauguration in 1995 and enabled the publication of numerous books by Cambridge University Press under 'The Common Core of European Private Law' series, available at www.common-core.org/ (last visited May 5, 2011).

⁴⁰ Van Camelbeke, M. "L'Institut de Droit Comparé de l'Université de Paris 2." *Revue internationale de droit comparé*, 34.1 (1982) : 131 ('Van Camelbeke').

⁴¹ Van Camelbeke, *id* note 40, 142-143. Although it was remarked by one of the founders of *l'Institut de droit comparé*, the late Henri Lévy-Ullmann, that those engaged in comparative law research must always remember to '*peser la documentation, ne comparer que les choses comparables, se diriger par le but, s'inspirer de l'esprit du siècle*', which stresses a more methodical approach to comparative law, see Van Camelbeke, *id* note 40, 144, this admonition which was borne out in Professor Lévy-Ullmann's own work, *Le Système Juridique de l'Angleterre* (1928), which attempted to synthesize common strands in English law and the

and subsequent research initiatives of *l'Institut* did not, however, inspire the integration of comparative law in the legal curriculum for the *licence*, which is the law degree conferred after three years of study. Instead, comparative law was initially taught as an optional one-year course at *l'Institut* at the end of which a diploma was awarded.⁴² *L'Institut* currently offers a one-year post-graduate degree, the *Master 2 Droit Européen Comparé*, which comports a comparative dimension in the context of European integration.⁴³ Leaving aside the implications of European integration today which had yet to be manifested in 1932, there appears to be little change in how comparative law is perceived as optional and extraneous, rather than fundamental, to basic legal education. Learning about comparative law is thus reserved for those who are willing to invest an additional year after obtaining the *licence* on post-graduate studies.⁴⁴ It can be speculated that the numbers interested in such a course will be small. When viewed against the fact that the French legal system has been widely emulated, which diminishes the need to look to foreign law, and the inclination to treat comparative law as the acquisition of knowledge on foreign law, this marginalizing of comparative law in legal education is unsurprising.⁴⁵ A further

laws of continental Europe in order to demonstrate a reconcilable proximity between the two, did not appear to serve as a cornerstone to comparative law scholarship in France in general.

⁴² Van Camelbeke, *supra* note 40, 141.

⁴³ See www.u-paris2.fr/5158R-2009/0/fiche_formation/&RH=M2-COMPA-09 (last visited May 2, 2011). Other post-graduate degrees with a comparative perspective offered by the University of Paris II (Panthéon-Assas) to which *l'Institut* is currently attached are *Master 2 Culture Juridique Française et Européenne*, available at www.u-paris2.fr/5127R-2009/0/fiche_formation/&RH=M2-COMPA-09 (last visited May 2, 2011), and *Master 2 Droit Public Comparé*, available at www.u-paris2.fr/5131R-2009/0/fiche_formation/&RH=M2-COMPA-09 (last visited May 2, 2011). The University of Paris I (Panthéon-Sorbonne) also offers a post-graduate specialist degree in comparative law known as *Master 1 Droit Comparé*, available at www.univ-paris1.fr/ws/ws.php?_cmd=getFormation&_oid=UP1-PROG15087&_redirect=voir_presentation_diplome&_lang=fr-FR (last visited May 2, 2011).

⁴⁴ For those who have less time to spare, the University of Strasbourg offers a three-week course on comparative law taught by an international faculty. Course details for the recently concluded 2011 session are available at www.centrefdc.org/publications/Lettre_62.pdf (last visited May 2, 2011). While time-efficient, it is doubtful if three weeks is enough for anyone to gain a more profound understanding of what it truly means to engage in comparative law.

⁴⁵ It has been hopefully suggested that the offering of double-degree programs by certain French universities, whereby four years of study is equally divided between a French university and one of its foreign partner universities, at the end of which two law degrees are conferred, is a way of integrating comparative law into the legal curriculum, see Lamèthe, D. "Le socle du futur ou la formation en France au droit comparé selon un juriste d'entreprise." *Revue internationale de droit comparé* 48.2 (1996): 331, at 336-338. However, such a practice does no more than reduce the amount of time taken to obtain two law degrees from two different jurisdictions. Unless there are courses at either university requiring the student to learn about the laws of France and the other jurisdiction in comparative perspective, the two years spent in France will be devoted to the study of French law while the two years spent at

illustration of a static attitude towards comparative law is found in René David's *Les Grands Systèmes de Droits Contemporains*, which has been noted for its presentation of the French legal system as the leading legal system rooted in the Romanist tradition,⁴⁶ as well as its archaic way of classifying legal systems.⁴⁷ This book has been and still is the key reference text on comparative law in France since the first edition was published in 1965.⁴⁸

If comparative law can be considered marginalized in France because it is only taught at the post-graduate level, its position is possibly even more obscure on the German legal curricula because courses on comparative law, much less post-graduate specializations, are rarely offered.⁴⁹ Unlike *l'Institut* in France which was originally set up as a center for the teaching of comparative law and for that purpose attached to the University of Paris,⁵⁰ the Max Planck Institutes in Germany were first and foremost independent centers of research. This autonomy was an early indication that the direction of and advancement in research within the Institutes did not necessarily have to complement or supplement the legal curriculum in universities. The self-sufficient nature of the Max Planck Institutes and its ability to attract researchers was a disincentive for them to initiate a symbiosis between their research agendas and the teaching agendas of the universities. There was also no pressing need on the part of the universities to teach or promote comparative law since the fame of the Max Planck Institutes would serve as a magnet to those who were so inclined. Furthermore, legal education in Germany is completed, on average, after ten years and the passing of two State examinations in order to be professionally

the foreign university will be devoted to the study of that particular jurisdiction's laws. Any inroads made in comparison would lie at the sole initiative of the student.

⁴⁶ Monateri, *supra* note 16, 999.

⁴⁷ Markesinis, B. and Fedtke, J. *Engaging with Foreign Law*. Oxford: Hart Pub, 2009: 4-7.

⁴⁸ The book is currently in its eleventh edition, David, R. & Jauffret-Spinosi, C. *Les Grands Systèmes de Droits Contemporains*. 11ème ed. S.l.: Dalloz, 2002.

⁴⁹ Heide, *supra* note 30, 731. If a distinguishing feature of René David's *Les Grands Systèmes de Droits Contemporains* is how it masterfully presents the French legal system as the leading legal system of a principal (Roman) legal tradition, the same comment can probably be made of the celebrated *Introduction to Comparative Law* by K. Zweigert & H. Kötz (I. Weir tr. 1998) where the German legal system was presented as the progenitor of the Germanic legal tradition and equal in standing and prestige to the French legal system.

⁵⁰ Van Camelbeke, *supra* note 40, 141.

qualified.⁵¹ The unusually long duration is likely to discourage many students from pursuing any interest in comparative or foreign law outside of the standard model for German legal education if doing so will prolong the qualification process.

The Italian experience with legal borrowing and progressive scholarship on comparative law has naturally encouraged reflection on the pedagogy of comparative law. Although educational reforms made it compulsory for law schools to teach comparative law, Italian law schools could choose whether to teach it as a core or an optional subject. The view that comparative law was fundamental to legal education was not uniformly held in Italy,⁵² and only some law schools, often incidentally headed by deans who were comparative law scholars, carefully explored how best to teach comparative law and integrate it into the existing curriculum.⁵³ The pedagogical approach to comparative law adopted by Italian law schools has varied. While most prefer to include courses on comparative law as optional, cumulative courses of study on the curriculum, where those wishing to enroll in a course on, for instance, comparative private law or comparative public law, must have first taken an introductory course on the major legal systems of the world,⁵⁴ the University of Trento stood out by designating comparative law as a compulsory course to be studied in the first year of law school.⁵⁵ Learning about comparative law essentially preceded learning about national law. When comparisons can only be realistically made on the basis of some knowledge about the subjects being compared a difficulty with this approach is how it proposes that engaging in comparative law does not require basic knowledge of one's own or foreign legal systems. This was also at odds with the received wisdom of Italian comparative law scholars on how comparative law should be taught.⁵⁶ Today, a course on legal systems in comparative perspective

⁵¹ Zimmerman, R. "Characteristic Aspects of German Legal Culture." *Introduction to German Law*. I. Eds. J. Zekoll & M. Reimann. The Hague, The Netherlands: Kluwer Law International, 2005: 34-42.

⁵² The unwillingness of certain Italian law schools to teach comparative law as a compulsory subject may have been due to a lack of expertise amongst its academic staff rather than a categorical dismissal of the value of comparative law to legal education. Requiring familiarity with two or more legal systems and the corresponding ability to research in different languages in order to teach comparative law is prohibitive.

⁵³ Sacco, R. "L'Enseignement du Droit Comparé en Italie." *Revue internationale de droit comparé* 40.4 (1988) : 723, at 725-726 ("Sacco-1988").

⁵⁴ Sacco-1988, *id* note 53, 725-726.

⁵⁵ Sacco-1996, *supra* note 16, 276.

⁵⁶ Sacco-1996, *supra* note 16, 277.

is taught as a second year compulsory course on the legal curriculum of the University of Trento.⁵⁷ The first year of legal study, regardless of whether the student chooses to specialize in Italian law or European and transnational law at the outset, covers foundational subjects such as public, private and Roman law.⁵⁸ Although the continuous emphasis placed on comparative law in the legal curriculum at the University of Trento is not representative of the place assumed by comparative law in every other Italian law school, the undeniably widespread institutionalization of comparative law in the form of chaired professorships and tenured positions in the Italian universities has nonetheless elevated comparative law to a position of durable importance in legal education in Italy.⁵⁹

III. THE CLAIM OF CAUSATION IN ENGLAND

(A) HISTORY

As recourse to comparative law took root in England as early as the sixteenth century, it is unlikely that the Paris Congress which was only held at the turn of the twentieth century played a significant role in the development of comparative law in England.⁶⁰ The formative period of comparative law in England coincided with the tacit use of Roman law to further and legitimize the ambitions of absolutist monarchs such as Henry VIII.⁶¹ As laid down in the Magna Carta of 1215 which was a successful attempt by powerful feudal barons to fetter the arbitrary will of their sovereign, the monarch is required to govern in consultation with and obtain some measure of acceptance from Parliament.⁶² Reliance on Roman law to circumvent this check on the monarch was therefore greeted with deep suspicion by Parliament and the

⁵⁷ See *Università degli Studi di Trento, Facoltà di Giurisprudenza, Guida 2010/2011*, available at www.unitn.it/files/download/5142/guida_2010.pdf (last visited May 2, 2011), 22-23, 69-70.

⁵⁸ *Id.*, 22-23.

⁵⁹ Grande, *supra* note 9, 113-117.

⁶⁰ Gorla, G. & Moccia, L. "A 'Revisiting' of the Comparison Between 'Continental Law' and 'English Law' (16th-19th Century)." *The Journal of Legal History* 2.2 (1981): 143, at 154.

⁶¹ A succinct account of Henry VIII's severance of ties with the Catholic Church in Rome, with the assistance of his trusted aide Thomas Cromwell, in order to consolidate royal supremacy over all matters of state and religion, and marry his mistress Anne Boleyn, is given in Elton, G. R. *England Under The Tudors*. London: Methuen, 1955: 130-137. Certain provisions on the law, such as '[i]f the emperor decides a question in a written reply, or if he hears a case and gives judgment, or if he ordains something by edict, his utterance is law', which are found in Book One of Justinian's Institutes appear to bolster a claim to absolutism, see *Justinian's Institutes*, 37 (P. Birks & G. McLeod tr. 1987).

⁶² Holt, J. C. *Magna Carta*. Cambridge: University Press, 1992: 23-49.

resulting hostility to Roman law was an important reason why the wholesale reception of Roman law in England never occurred.⁶³ This hostility was extended to those schooled in Roman law and in the employ of the government. The civilians, as they were so called due to the broad equating of Roman law with civil law, came to be regarded as royalists who set themselves up in opposition to Parliament and those who considered the civil law to be alien to English law.⁶⁴ Fearful for their livelihoods, the civilians defended the use of the civil law in England by publishing treatises which made use of the comparative method to place the civil law in its proper context. By highlighting the many similarities between the civil law and English law, they sought to show that use of the civil law did not have to take place at the expense of English law. The growing prominence of Parliament which culminated in the Bill of Rights of 1689 and the Act of Settlement of 1707 which conferred supreme executive power on Parliament effectively dissipated any perceived threat posed by the civilians and the adoption of or borrowing from the civil law. It was not uncommon for English judges of this period to incorporate civil law notions in their judgments, particularly in the field of mercantile and maritime law.⁶⁵ Thereafter, attention on the civil law as it was applied in Europe gradually shifted to the study of foreign legislation in the nineteenth century. This was prompted by a desire to acquire knowledge on the legislation of its colonies in order to unify the commercial law of the British Empire.⁶⁶ To this end, the Society for Comparative Legislation was established in 1894. The Journal of the Society for Comparative Legislation focused on publishing imperial legislation and written work on the unification of imperial legislation and mercantile law, until it merged with the International Law Quarterly in

⁶³ An extreme example of this hostility was Parliament's reaction to the publication of *Interpreter*, a glossary of legal terms, in 1607 by John Cowell, who was then Regius Professor of Civil Law at the University of Cambridge. Parliamentarians were outraged that the terms 'king', 'parliament' and 'prerogative' were defined in a manner which advanced the absolutist claims of the Stuart king James I and demanded that Cowell be punished. No punishment was meted out by James I but the book was eventually banned by royal proclamation in 1610. See Crimes, S. B. "The Constitutional Ideas of Dr John Cowell." *English Historical Review* LXIV (1949): 461.

⁶⁴ Terrill, R. J. "The Application of the Comparative Method by English Civilians: The Case of William Fulbecke and Thomas Ridley." *The Journal of Legal History* 2.2 (1981): 169, at 172-173.

⁶⁵ Holdsworth, W. S. *A History of English Law*. Vol. 5. London: Methuen, 1924, 124-154.

⁶⁶ Cairns, J. C. "Development of Comparative Law in Great Britain." *The Oxford Handbook of Comparative Law*. Eds. M. Reimann & R. Zimmerman. Oxford: OUP, 2008: 131, at 138-139 ("Cairns").

1952 and was renamed the International and Comparative Law Quarterly.⁶⁷ The history of comparative law in England, like that in Italy, shows that the impetus to engage in comparative law can originate in political change.

(B) *SCHOLARSHIP*

Five centuries worth of engagement has refined English scholarship on comparative law.⁶⁸ Prior to the nineteenth century, a considerable amount of scholarship was centered around the cleavage between the common law of England and the civil law of continental Europe.⁶⁹ The chosen focus during this period was undoubtedly influenced by certain English legal historians who while acknowledging some imprint of Roman or Germanic legal institutions on English law were quick to stress that English law largely developed without reception or need of foreign law.⁷⁰ These historical accounts depicted a stark divide between the common law and the civil law. This characterization of the common and civil law was unwittingly endorsed by continental European scholars who only endeavoured to learn more about the English legal system and English law at the beginning of the twentieth century.⁷¹ The neglect of the English common law by the continental European scholars created the impression that it was so different from the civil law such that the two were

⁶⁷ Cairns, *id* note 66, 140-143.

⁶⁸ The 'ideal' manner of showcasing engagement in comparative law, suggested by Gina Gorla in 1963, was that of a dialogue between two jurists hailing from different jurisdictions and each familiar with both the laws of his own jurisdiction as well as the other, see "Intérêts et problèmes de la comparaison entre le droit continental et la Common Law." *Revue internationale de droit comparé* 15.1 (1963): 5, at 6. Using a dialogue between jurists as a comparative technique had already been attempted by the English civilian William Fulbecke back in 1601, see *A Parallele or Conference of the Civil Law, the Canon Law, and the Common Law of this Realme of England* (1601).

⁶⁹ Stein, P. "Continental Influences on English Legal Thought 1600-1900." *The Character and Influence of the Roman Civil Law*. Ed. P. Stein. London: Hambledon Press, 1988: 209, at 215-218.

⁷⁰ Sir Edward Coke proudly declared in *The Second Part of the Institutes of the Lawes of England* (1642), 98 that 'Here our common laws are aptly and properly called the laws of England, because they are appropriated to this Kingdome of England as most apt and fit for the government thereof, and have no dependency upon any foreign law whatsoever [...] so as the law of England is *proprium quarto modo* to the Kingdome of England; therefore forein [sic] precedents are not to be objected against us, because we are not subject to foreign laws.' Another prominent legal historian who perpetuated this patriotic fervour while chronicling the development of English law was Frederic William Maitland who referred to early Roman influence in England as 'the dark age in legal history' in *The History of English Law* (co authored with Sir Frederick Pollock) (1968 reprint), Chapter 1.

⁷¹ One of the earliest works on English law by a French scholar was *Le Système Juridique de l'Angleterre* which was only published in 1928, *supra* note 41.

incomparable.⁷² Although the view that the common law and the civil law are two very distinct creatures continues to find favour,⁷³ some scholars have since questioned if the divide is indeed as sharp as has been portrayed.⁷⁴ Notably, contemporary English scholarship continues to explore the orientation of English law in light of Roman legal institutions.⁷⁵ The end of the British Empire brought about scholarship comparing English legal institutions and those of countries which had previously received the English common law.⁷⁶ European integration and the quest for legal uniformity then stimulated interest in the post-codification laws of European nations among English scholars and generated comparative scholarship ranging from the law of obligations,⁷⁷ to environmental law.⁷⁸ The richness and

⁷² This neglect has also led to the (erroneous) conclusion that the English legal system and English scholars were insular when in fact this perception of isolation stemmed from unfamiliarity with English legal scholarship. It has been claimed however that German scholars in the eighteenth and nineteenth centuries were far from being ignorant of or indifferent to English law, see Graziadei, M. "Changing Images in the Law in XIX Century English Legal Thought." *The Reception of Continental Ideas in the Common Law World 1820-1920*. Ed. Reimann. Berlin: Duncker & Humblot, 1993: 115, at 146. For an overview of German interest in English political, economic and social institutions, see McClelland, C. E. *The German Historians and England – A Study in Nineteenth-Century Views*. . Cambridge [Eng.]: University Press, 1971: 61-160. The perception of insularity may also have been perpetuated by the fact that some treatises by English scholars on the common law bore haughty titles, such as Pollock, F. *The Genius of the Common Law*. New York: Columbia University Press, 1912.

⁷³ This is seen in how introductory treatises to comparative law continue to favour the categorization of legal systems according to discrete legal traditions, such as the common law tradition and the civil law tradition, see David's *Les Grands Systèmes de Droits Contemporains*, Zweigert & Kötz's *Comparative Law* and P. H. Glenn's *Legal Traditions of the World: Sustainable Diversity in Law*. See also Legrand, P. "Against A European Civil Code." *Modern Law Review* 60 (1997): 44 and Legrand, P. "European Legal Systems Are Not Converging." *International and Comparative Law Quarterly* 45.1 (1996): 52.

⁷⁴ Langer, M. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure." *Harvard International Law Journal* 45.1 (2004): 1; Zeno-Zencovich, V. "The 'European Civil Code', European legal traditions and neo-positivism." *European Review of Private Law* 4 (1998): 349; Langbein, J. H. "The German Advantage in Civil Procedure." *University of Chicago Law Review* 52.4 (1985): 823; Yntema, H. E. "Equity in the Civil Law and the Common Law." *American Journal of Comparative Law* 15.1 (1966): 60.

⁷⁵ Descheemaeker, E. *The Division of Wrongs, A Historical Comparative Study*. Oxford: Oxford University Press, 2009; Lewis, A. D. E. & D. J. Ibbetson (eds). *The Roman Law Tradition*. Cambridge: Cambridge University Press, 1994; Buckland, W. W. & A. D. McNair. *Roman Law and Common Law; A Comparison in Outline*. Cambridge [Eng.]: University Press, 1952. See also Cairns, *supra* note 66, 142-151, 163-166; Brown, *supra* note 11, 249-251.

⁷⁶ Dupont, J. *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire*. Littleton, Colo: F.B. Rothman Publications, 2001; Atiyah, P. S. & R. S. Summers. *Form and Substance in Anglo-American Law*. Oxford: Clarendon Press, 1987; Zines, L. *Constitutional Change in the Commonwealth*. Cambridge, England: Cambridge University Press, 1981.

⁷⁷ *Comparative Studies in the Development of the Law of Torts in Europe* (2010) 6 volumes; Giliker, P. *Vicarious Liability In Tort – A Comparative Perspective*. Cambridge, UK: Cambridge University Press, 2010; Cartwright, J. & M. Hesselink. *Precontractual Liability in European Private Law*. Cambridge, UK: Cambridge University Press, 2009; Werro F. & V. V. Palmer. *The Boundaries of Strict Liability in European*

diversity in English comparative law scholarship brings to mind the equally commendable works of Italian comparative law scholars. However, as the first push for engaging in comparative law in England came from self-preservation of the civilians in the sixteenth century, while Italy saw comparative law as the avenue for self-betterment, conceptual discourses on the purpose of comparison are understandably less pronounced in English scholarship. Treatises published in the interest of self-preservation must demonstrate the tangible benefits of knowing and practicing the civil law.⁷⁹

(C) PEDAGOGY

Comparative law, if offered, is usually an optional course on the English curriculum. However and remarkably so, classical Roman law, or civil law, is being taught alongside other foundational courses such as the law of torts in some English law schools.⁸⁰ If the purpose of making the learning of Roman law compulsory is to prompt students to explore the civil law/common law dichotomy that was fleshed out by English scholars and historians in the sixteenth century, such an approach appears to be innately comparative as students are invited to reflect on comparable precepts and notions of Roman law when they learn something new in the English common law. Therefore, when Roman law is being taught as a foundational subject,

Tort Law. Durham, NC: Carolina Academic Press, 2004; Gordley, J. *The Enforceability of Promises in European Contract Law*. Cambridge, UK: Cambridge University Press, 2001.

⁷⁸ Hinteregger, M. *Environmental Liability and Ecological Damage in European Law*. Cambridge, UK: Cambridge University Press, 2008.

⁷⁹ An empirical study published in 2003 on the citation rate of renowned contemporary English scholars who held chairs in comparative law or wrote significant comparative law treatises revealed that they were far more frequently cited for their non-comparative works, Markesinis, B. *Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years*. . Oxford: Hart Pub, 2003: 94-96 ('Markesinis-2003'). One example given was the late Barry Nicholas who was Professor of Comparative Law at Oxford University from 1971 to 1978 and best remembered for his work on Roman law (Jolowicz H. F. & B. Nicholas. *A Historical Introduction to the Study of Roman Law*. 3rd ed. Cambridge [Eng.: University Press, 2008) than comparative law. Another example given was Tony Honoré, currently Emeritus Regius Professor of Civil Law at Oxford University. Professor Honoré is the co-author of *Causation in the Law* (2nd ed. 1985), which has turned out to be the treatise for which he is most often cited. These findings suggest that genuine comparative literature is not given great attention, which further suggest that comparative law treatises are seen as missing a practical dimension.

⁸⁰ See www.law.ox.ac.uk/theme/roman (last visited May 5, 2011); www.law.cam.ac.uk/faculty-resources/courses-and-subjects/tripos/papers/civil-law-i-tripos/143 (last visited May 5, 2011). Although Roman law is also taught as a compulsory course in Italian law schools, the fact that the Italian legal system is rooted in Roman law, as opposed to the English legal system which the English legal historians claim is not, makes this curricular inclusion in Italy unexceptional.

all students will understand what it means to engage in comparative law and exposure to comparative law no longer hinges on the presence of an optional course on the curriculum. The emphasis on Roman law in the curriculum and the comparative inquiry that it sparks hints at the genre of comparative law scholarship which has garnered the most influence in England. The tribute paid to such scholarship by its core status on the curriculum of top English law schools may explain why the pedagogy of comparative law was rarely broached.⁸¹ There was a brief moment in the 1990s when the opportunity to assess the method of teaching comparative law in English law schools presented itself in the form of the claim that comparative law, despite being featured on the curriculum, was unattractive to students and practitioners alike since it was usually being taught in a way that those trained in the English common law were unaccustomed to.⁸² The proposal to teach comparative law by relying more heavily on judicial decisions,⁸³ has been challenged on the grounds that this does not provide a practical insight to codified legal systems,⁸⁴ and that this reductionist approach to comparative law risks obscuring the significance of

⁸¹ When the late Sir Otto Kahn-Freund was appointed professor of comparative law at the University of Oxford, he remarked at his inaugural lecture in 1965 that someone in his position receives the greatest and most dangerous gift of freedom in deciding what to teach, see “Comparative Law as an Academic Subject.” *Law Quarterly Review*. 82 (1966): 40, at 41. The Universities of Oxford and Cambridge appear to have decided to integrate comparative law into the core legal curriculum by the teaching of Roman law while comparative law electives have focused on French, German and/or European law, see www.law.ox.ac.uk/theme/compara (last visited May 5, 2011); www.law.cam.ac.uk/faculty-resources/courses-and-subjects/tripos/papers/comparative-law-tripos/26 (last visited May 5, 2011). Publications addressing pedagogy in legal education have not regarded the teaching of comparative law as a concern that had to be raised, see generally Birks, P. B. H. (ed.) *Examining the Law Syllabus – The Core* Oxford: Oxford University Press, 1992; Birks, P. B. H. *Examining the Law Syllabus – Beyond the Core*. Oxford University Press, 1993; Birks, P. B. H. (ed.). *Reviewing Legal Education*. Oxford: Oxford University Press, 1994. The lone voice in the pedagogical landscape belonged to Markesinis, B. S. “The Comparatist (or a plea for a broader legal education).” *Pressing Problems In The Law – What Are Law Schools For?* Ed. P. B. H. Birks. Oxford: Oxford University Press, 1996: 108.

⁸² Markesinis, B. “Comparative Law: A Subject in Search of an Audience.” *The Modern Law Review* 53.1, (1990): 1 (‘Markesinis-1990’) where the author argued that judicial decisions should be given a place of greater prominence than hitherto accorded when studying foreign legal systems. He subsequently reiterated the utility of contrasting foreign judicial decisions with English ones when teaching comparative law in Markesinis, B. “A Matter of Style.” *Law Quarterly Review* 110 (1994): 607 (‘Markesinis-1994’). This proposal has received some measure of assent from Rodolfo Sacco who considered the prioritizing of one legal formant – judicial decisions – over others a way of simplifying the epistemology of his theory on legal formants, *supra* note 32, Legrand, P. “Questions à Rodolfo Sacco.” *Revue internationale de droit comparé* 47.4 (1995): 943 965.

⁸³ Markesinis-1990, *id* note 82; Markesinis-1994, *id* note 82.

⁸⁴ Ewald, W. “Comparative Jurisprudence (I): What was it like to Try a Rat?.” *University of Pennsylvania Law Review* 143 (1995): 1889, at 1968.

judicial decisions in jurisdictions that subscribe to the doctrine of *stare decisis* and those that do not.⁸⁵ This pedagogical debate has since been abandoned.⁸⁶

IV. THE CLAIM OF CAUSATION IN NORTH AMERICA

i) UNITED STATES

(A) HISTORY

The Paris Congress probably had the greatest impact in the United States as it was the source of inspiration for the first international congress on comparative law, the St. Louis Universal Congress of Lawyers and Jurists ('St. Louis Congress'), held in 1904.⁸⁷ However, neither the Paris Congress nor the St. Louis Congress was the first point of contact with comparative law for the United States. Unlike France, Germany and England whose legal systems and laws evolved in the absence of legal borrowing, the law of the land of a newly-independent United States of America in 1783 was the English common law. And unlike Italy which borrowed from various legal systems, legal institutions and laws in the United States were imported from only one source. The nationalistic fervor of the American Revolution was apparent in later deliberations on a suitable legal system for an independent United States. Some found it appealing to substitute English law with a system constructed anew from principles of natural justice or one aligned with the French model which bore the ideological aspirations of the French Revolution.⁸⁸ However, an existing functional legal system staffed by generations of judges and legal professionals trained in the English common law made it impracticable to implement sweeping changes in the name of independence.⁸⁹ The English common law was eventually retained but it was to be adapted, modified and supplemented to suit changing needs in the United

⁸⁵ Sacco-I, *supra* note 32, 26. See also Gutteridge, H. C. *Comparative Law*. Cambridge: Cambridge University Press, 1946: 88 ('Gutteridge').

⁸⁶ Professor Markesinis is currently the Jamail Regents Chair at the School of Law of the University of Texas at Austin, a position which he has held for more than ten years.

⁸⁷ Clark, D. S. "Nothing New in 2000? Comparative Law in 1900 and Today." *Tulane Law Review* 75 (2001): 871, at 888-889.

⁸⁸ Friedman, L. M. *A History of American Law*. 3rd ed. New York: Simon and Schuster, 2005: 65-66 ('Friedman').

⁸⁹ Friedman, *id* note 88, 66-70.

States.⁹⁰ During the formative years of American law, developments in the English common law and the laws of continental Europe were considered by certain judges of the United States Supreme Court for the purpose identifying what was optimal for the United States.⁹¹ What the St. Louis Congress brought about was the organized development of comparative law as an academic discipline in the United States. The period following the St. Louis Congress saw the setting up of a Comparative Law Bureau by the American Bar Association in 1908, whose role resembled that of the French *Société de législation comparée*, and which undertook the publication of English translations of continental European laws and legal theory.⁹² The 1930s and 1940s witnessed the influx of *émigré* Jewish scholars who wanted to escape the anti-Semitic oppression in Germany and Austria. These *émigré* comparative law scholars encountered extreme difficulty finding employment in American universities since very few law schools offered courses on comparative or Roman law.⁹³

(B) SCHOLARSHIP

The development of American law into a body of law that had its origins in but was nonetheless markedly different from the English common law prompted comparative treatises on Anglo-American law.⁹⁴ Early proposals to import the civil law into America also signified an interest in the laws of continental European nations which was borne out in scholarship comparing the civil law with American

⁹⁰ This was particularly true for the law of property in the context of a burgeoning American middle class, see Friedman, *supra* note 88, 167-188.

⁹¹ See for instance Marshall CJ's holdings in *Murray v The Schooner Charming Betsy* (1804) 6 U. S. 64; *Ross v Himely* (1808) 8 U. S. 241; *Brown v United States* (1814) 12 U. S. 110; *Johnson v McIntosh* (1823) 21 U. S. 543; *The Antelope* (1825) 23 U. S. 66; Story J's holdings in *United States v Smith* (1820) 18 U. S. 153; *Columbian Insurance Company of Alexandria v Ashby* (1839) 38 U. S. 331; and Johnson J's holding in *The Rapid* (1814) 12 U. S. 155.

⁹² Clark, D. S. "Development of Comparative Law in the United States." *The Oxford Handbook of Comparative Law*. Eds. M. Reimann & R. Zimmerman. Oxford: OUP, 2008: 175, at 195-196.

⁹³ Clark, D. S. "The Modern Development of American Comparative Law." *American Journal of Comparative Law* 55 (2007): 587, at 613. Max Rheinstein (1899-1977) who secured a position at the University of Chicago Law School in 1935 and Rudolf Schlesinger (1909-1996) who started his academic career at Cornell University Law School in 1948 were notable exceptions to the norm.

⁹⁴ Story, J. *Commentaries On Equity Jurisprudence As Administered In England And America*. 13th ed. Boston: C.C. Little & J. Brown, 1886. See also Pound, R. *The Spirit of the Common Law*. Boston: Marshall Jones Co, 1921. A succinct listing of American scholars who have made important contributions to Anglo-American jurisprudence is found in Holdsworth, W. S. *The Historians of Anglo-American Law*. Hamden, Conn: Archon Books, 1928: 99-118.

law.⁹⁵ Over time, the originality of certain aspects of the American legal system such as the Uniform Commercial Code,⁹⁶ and the constitutional law regime transformed the United States from a recipient legal system of the English common law to an exporter legal system of American law.⁹⁷ The experience of successfully refashioning the English common law into something uniquely American attested to the rise in status of the American legal system and scholarship discussing foreign law shifted gradually from being comparative to being informative.⁹⁸ The type of comparative law scholarship that emerged in America became similar to that prevalent in another exporter legal system, France.⁹⁹ Where American comparative law scholarship distinguished itself was the meticulous attention paid to the place occupied by

⁹⁵ Story, J. *Commentaries On The Law Of Bailments, With Illustrations From The Civil And The Foreign Law*. 8th ed. Littleton, Colo: F.B. Rothman, 1870. James Kent in *Commentaries On American Law* vol. 1 (1826), 506-507 offered a balanced view of the respective strengths of the civil law and American law: "The value of the civil law is not to be found in questions which relate to the connexion between the government and the people, or in provisions for personal security in criminal cases. In every thing which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law. But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice. I prefer the regulations of the common law upon the subject of the paternal and conjugal relations, but there are many subjects in which the civil law greatly excels."

⁹⁶ Basedow, J. "Transjurisdictional Codification." *Tulane Law Review* 83 (2009): 973, at 978. Also worthy of mention are the federal securities laws of the United States which were imported into Japan as a result of the American Occupation during the second world war, see Milhaupt, C.J. "A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law." *Harvard International Law Journal* 37 (1996): 3, at 15.

⁹⁷ Okudaira, Y. "Forty Years of the Constitution and its Various Influences: Japanese, American and European." *Japanese Constitutional Law*. Eds. P. R. Luney, Jr. & K. Takahashi. Tokyo: University of Tokyo Press, 1993: 1 at 6-20; Kim T. & S. D. Lee. "The Influence of US Constitutional Law Doctrines in [South] Korea." *Constitutional Systems In Late Twentieth Century Asia*. Ed. L. W. Beer (ed.) Seattle: University of Washington Press, 1992: 303, at 304-305; Fernando, E. Q. *Philippine Constitutional Law*. Manila: Rex Book Store, 1984: 1-13.

⁹⁸ R. Schlesinger's *Formation of Contracts – A Study of the Common Core of Legal Systems* (1968) typifies an era of comparative law scholarship where a particular aspect of selected legal systems is presented in a jurisdiction-by-jurisdiction format. An illustration from France is found in Poudret J-F. & S. Besson. *Droit comparé de l'arbitrage international*. Zürich: Schulthess, 2002. Although these works arguably serve to inform more than they compare, they are no less significant for their identification and distillation of pertinent legal rules from an immense amount of material and for their meticulous treatment of the subject matter.

⁹⁹ It should be noted that although the private law of Louisiana is codified in the civilian mould which could have formed the basis for contrast with the common law of the United States, the number of comparative treatises involving Louisiana private law has not been significant. A perusal of the contents of the Tulane Law Review ("TLR") which was founded in 1916 and the Tulane Journal of International & Comparative Law ("TJICL") which was started in 1993, both journals being managed by the students of the Tulane University Law School in Louisiana, show that comparative and foreign law treatises in the TLR have given way to treatises on American law in the last two decades (available at www.law.tulane.edu/tlsjournals/lawreview/ (last visited May 30, 2011)) while comparative treatises account for less than one fifth of the total number of articles published by the TJICL from 1993 to 2011.

comparative law in legal education in the United States.¹⁰⁰ The livelihood of the *émigré* scholars and their ability to stay on in the United States depended not only on the recognition of the value of their scholarship, but more importantly, the availability or creation of teaching positions in the American universities which they could fill. Consequently, the American discourse linking comparative law to legal education accepts that comparative law should be taught and centers instead on the viability of teaching comparative law as a separate course in the curriculum or as an integral component of foundational courses such as contracts and torts.¹⁰¹ Such a group of *émigré* scholars was largely absent in France, Germany, Italy and England or did not share the plight of their contemporaries in the United States. There was consequently less need for sustained scholarship attempting to justify the import of comparative law to legal education in these countries.

(C) PEDAGOGY

It has been suggested that an important reason for the peripheral status of comparative law on the curriculum of American law schools today is how comparative law has been taught in the German mould since the 1930s and unsuited to American circumstances.¹⁰² This claim requires elaboration because there has been no discernible pedagogical tradition in comparative law in Germany. Comparative law scholarship in Germany was generated by the independent Max Planck Institutes which did not translate into the widespread teaching of comparative law in German

¹⁰⁰ Reimann, M. "Beyond National Systems: A Comparative Law for the International Age." *Tulane Law Review* 75 (2001): 1103, 1104; Waxman, M. P. "Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy." *Journal of Legal Education* 51 (2001): 305; Curran, V. G. "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives." *American Journal of Comparative Law* 46 (1998) 657, at 665-666; Reimann, M. "The End of Comparative Law as an Autonomous Subject." *Tulane European and Civil Law Forum* 11 (1996): 49, at 52-53 (Reimann-1996).

¹⁰¹ An early advocate of the view that comparative law should be taught during formative courses was Rheinstein, M. "Teaching Comparative Law." *University of Chicago Law Review* 5 (1937-1938): 615. See also Pound, R. "The Place of Comparative Law in the American Law School Curriculum." *Tulane Law Review* VIII.2 (1934): 161 and Gutteridge, *supra* note 85, 136 writing on the place of comparative law as an undergraduate subject in English law schools. A more recent advocate is M. Reimann, Reimann-1996, *id* note 100.

¹⁰² J. H. Merryman observed in 1999 that comparative law was not being considered a mainstream subject by American law schools, Legrand, P. "John Henry Merryman and Comparative Legal Studies: A Dialogue." *American Journal of Comparative Law* 47 (1999): 3, at 6. A survey of the courses offered by the leading American law schools in 2009 attests to the appositeness of Merryman's decade-old comment. Although comparative law is generally offered as a separate course in American law schools, it has not, with the possible exception of the new curriculum at Harvard Law School, found a place on the core curriculum.

law schools. It is more likely that the *émigré* scholars who could teach comparative law in America taught it in an individualistic manner, as opposed to trying to graft a standard German pedagogical model for comparative law onto American legal education. Another important reason had to be the change in direction evident in American comparative law scholarship over the years. Increasing pride in American innovation has seen a decline in the number of Anglo-American comparative law treatises as well as comparative works examining the civil law and American law.¹⁰³ Absent influential contemporary scholarship to sustain academic interest in comparative law, such as Roman law scholarship in England, and a critical mass of influential scholars who could lead change in the faculties that they headed, such as those comparative scholars who were also deans of law schools in Italy, securing a position of prominence for comparative law in American law schools was an uphill task.¹⁰⁴ The additional opportunity for rejuvenation given to comparative law in Europe as a result of the economic and legal integration of the member countries of the European Union did not present itself in the United States which has not been and is unlikely to be the subject of regional integration. Against this backdrop which is deficient on historical, scholarly and political push for engaging in comparative law that goes beyond the informative, the academic debate over whether comparative law should be taught autonomously or in core courses can only highlight the feeling of alienation of those committed to the teaching of comparative law in the United States, but is clearly insufficient to propel comparative law to a position of greater prominence in legal education.¹⁰⁵

ii) CANADA

(A) HISTORY

Canada's first brush with comparative law predated the Paris Congress of 1900. Canada comprises ten provinces, nine of which have received only the English

¹⁰³ The best-known works on comparative law by American scholars were published in the nineteenth and twentieth centuries, *supra* notes 94 and 95.

¹⁰⁴ The United States was not only home to *émigré* scholars from Germany and Austria. Italian comparative law scholars have also made their mark in America, one of the most illustrious being Ugo Mattei, a pupil of Rodolfo Sacco, protégé of Rudolf Schlesinger and the Alfred and Hanna Fromm Chair in International and Comparative Law at the University of California Hastings since 1994.

¹⁰⁵ *Supra* note 100.

common law.¹⁰⁶ The tenth province, Québec, has been called a ‘mixed jurisdiction’ because the English common law has co-existed with French civil law ever since the French ceded sovereignty of the province to the British by the Treaty of Paris in 1763.¹⁰⁷ The private law of Québec is largely founded on civilian concepts. The Civil Code of Lower Canada, which was inspired by the French Civil Code and the Louisiana Civil Code in the United States,¹⁰⁸ had been in force since 1866 and was replaced by the Québec Civil Code in 1994. The presence of the Louisiana Civil Code alongside the common law of the United States and the Québec Civil Code alongside the common law of Canada did not foretell the same trajectory for engagement in comparative law in these two countries. As evidenced by the shift in scholarly focus, engagement in comparative law in the United States gradually became synonymous with the acquisition of knowledge about foreign law as the United States assumed the position of an exporter legal system. Engagement in comparative law in Canada remained truly comparative for two interrelated reasons; first the requirement that at least three out of nine judges of the Supreme Court of Canada had to be appointed from Québec,¹⁰⁹ and second, the frequency with which the Supreme Court of Canada turned to foreign law as an interpretive aid for national legislation.¹¹⁰ With at least one third of the bench of the Canadian Supreme Court bench having been instructed in or at least very familiar with the civil law, reflexive infusion of a civilian approach and recourse to the civil law in the judgments of the Supreme Court where the occasion called for it were inevitable.¹¹¹ The need for

¹⁰⁶ The nine provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Québec, Saskatchewan and Yukon.

¹⁰⁷ See Article IV of The Definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain, concluded at Paris the 10th day of February, 1763, available at avalon.law.yale.edu/18th_century/paris763.asp (last visited May 30, 2011). For an overview of ‘mixed jurisdictions’, see Palmer, V. V. *Mixed Jurisdictions Worldwide The Third Legal Family*. Cambridge, U.K: Cambridge University Press, 2001, especially 329-363 for Québec.

¹⁰⁸ For an overview of the transfer of sovereignty of Louisiana from the French to the Americans, see Gayarré, C. *History of Louisiana Volume IV: The American Domination*. S.I.: Firebird Press, 1965.

¹⁰⁹ Supreme Court Act, R.S.C., 1985, c.-S26, s. 6.

¹¹⁰ An study on the frequency with which foreign law was cited by the Canadian Supreme Court from 2000 to 2008 can be seen in McCormick, P. “Waiting for Globalization: An Empirical Study of the McLachlin Court’s Foreign Judicial Citations.” *Ottawa Law Review* 41 (2009-2010): 209.

¹¹¹ Four of the justices of the current bench of the Canadian Supreme Court are from Québec. They are The Honourable Mr. Justice William Ian Corneil Binnie, The Honourable Mr. Justice Louis Lebel, The Honourable Madam Justice Marie Deschamps and The Honourable Mr. Justice Morris J. Fish.

Québécois judges in provincial courts to apply the civil law in matters of private law governed by the Québec Civil Code and their readiness to turn to foreign legal sources underscored the comparative flavour found in judgments of the Canadian Supreme Court.¹¹² Additionally, judicial involvement in and endorsement of a comparative approach highlighted that engagement in comparative law had practical consequences and elevated it from being a purely academic endeavour. In contrast, there is no requirement for judges of the United State Supreme Court to be appointed from any given district and while the United States Supreme Court has not refrained from citing foreign legal sources in its judgments, the strong resistance by some judges to the consideration of foreign approaches when adjudicating on American law favours the view that opinions on the utility of engaging in comparative law for the United States Supreme Court remain at best divided.¹¹³

(B) SCHOLARSHIP

The attempts made by the Canadian Supreme Court to bridge the divide between the civil law and the common law have provided fertile ground for scholarly reflection on comparative law. Continued reliance by the Canadian Supreme Court on French legal doctrine to elucidate the meaning of provisions in the Québec Civil Code has been questioned since legislative developments in Québec and France have rendered

¹¹² *Canadian Western Bank v Alberta* [2007] S. C. R. 3; *R v. Boulanger* [2006] 2 S. C. R. 49; *Whiten v Pilot Insurance Co.* [2002] 1 S. C. R. 595; *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2001] 1 S. C. R. 551; see also *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd*, 91 D.L.R. (4th) 289 (1992), 20-35.

¹¹³ A leading light against reliance on foreign legal sources, especially in the realm of constitutional adjudication is Scalia J. In a scathing dissent in *Roper v Simmons*, 125 S. Ct. 1183 (2005), in which he was joined by Rehnquist CJ and Thomas J, Scalia J thundered at 1226-1228 that 'the basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand... in many significant respects the laws of most other countries differ from our law... The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion... It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War – and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists – a legal, political, and social culture quite different from our own.' O'Connor J in a separate opinion explicitly rejected Scalia J's denunciation of reference to foreign law when interpreting the United States Constitution at 1215-1216: '[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries – that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.'

French legal doctrine less applicable in light of the amendments to the Québec Civil Code.¹¹⁴ The use of the common law to interpret the provisions in the Québec Civil Code has also invited academic criticism,¹¹⁵ such use possibly qualifying as a ‘misuse’ of comparative law.¹¹⁶ The instrumental role played by the Canadian Supreme Court in fostering comparative law scholarship is apparent. However its preoccupation with integrating the civil law of Québec and the common law of the rest of Canada has focused the genre of comparative law scholarship produced by Canadian academics on the arguably porous civil law-common law divide reminiscent of English comparative law scholarship in the seventeenth century and American comparative law scholarship in the nineteenth century.¹¹⁷ The difference in the time periods of these written works is less indicative of the advancement of comparative law scholarship in each country than a sign of what was or continues to be relevant during a given time period. The civil law-common law divide is of far greater relevance to Canada than to England or America today because this dichotomy must be addressed whenever the Canadian Supreme Court has to adjudicate a case involving a provision of the Québec Civil Code. Comparative law scholarship that complements the deliberations of the Canadian Supreme Court simply reflects a topical concern.¹¹⁸

¹¹⁴ Jobin, P.G. “L’influence de la doctrine française sur le droit civil québécois : Le rapprochement et l’éloignement de deux continents.” *Revue internationale de droit comparé* 44.2 (1992) : 381, at 393-404.

¹¹⁵ See Beaulieu, M.L. “Québec et la Formation d’un Droit Canadien.” *Revue internationale de droit comparé* 13.2 (1961): 300, at 302-303 where the author laments the use of English law by the English-speaking majority of the Canadian Supreme Court in *Taillon v Donaldson* (1953) 2 S. C. R. 257 to interpret provisions of the Québec Civil Code dealing with parental authority when these very provisions were rooted in French law.

¹¹⁶ However, O. Kahn-Freund argues in “On Uses and Misuses of Comparative Law.” *Modern Law Review* 1 (1974): 113-17 that even differentiation in geographical and sociological factors can only justify purported irreconcilability across jurisdictions of the traditionally autochthonous field of family law to a ‘greatly diminished extent’.

¹¹⁷ A recent publication is Grenon, A. & L. Bélanger-Hardy (eds.). *Elements of Québec Civil Law: A Comparison With The Common Law Of Canada*. Toronto: Thomson Carswell, 2009. Other publications include Gaudreault-DesBiens, J-F. “Les Chartes des Droits et Libertés Comme Louves dans la Bergerie du Positivisme.” *Transformation de la culture juridique québécoise*. Ed. B. Melkevik. Sainte-Foy, Québec: Presses de l’Université Laval, 1998 : 83; Howes, D. “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” *McGill Law Journal* 32 (1987) : 523; Boudouin, J-L. “The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec.” *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*. Ed. J. Dainow. Baton Rouge: Louisiana State University Press, 1975: 1.

¹¹⁸ The practice of the Canadian Supreme Court in citing academic writings in its judgments can raise the profile of scholars whose works the Supreme Court finds to be of assistance. Citation by courts is one but certainly not the only way of ascertaining the impact factor of scholarly work. It has been

(C) PEDAGOGY

When a law student in Canada receives instruction in both the civil and the common law at the same institution, two pedagogical models stand out. The first is the National Program which was implemented by the Faculty of Law of the University of Ottawa from 1971,¹¹⁹ and the Faculty of Law of McGill University from 1968 to 1999.¹²⁰ The National Program enabled students who have obtained a common law degree (LL.B.) or a civil law degree (LL.L.) from the University of Ottawa to spend an additional year taking courses on the civil law or the common law as the case may be in order to graduate with a bijural degree. The second is the revolutionary ‘transsystemic’ model started by McGill in 1999 to replace its National Program.¹²¹ Under this ‘transsystemic’ model, the civil law and the common law are taught in a fully integrated manner in both English and French. A student in his or her first year course on Contractual Obligations, for example, will learn about the law of contracts from both a civil law and a common law perspective. The same approach is applied in other foundational courses thereby ensuring that graduates are equally adept in civil law as well as common law reasoning and methods.¹²² McGill’s ‘transsystemic’ model is extremely appealing to bilingual comparative law scholars trained in both

asserted that scholars from Germany and increasingly England consider citation of scholarly work by the courts as an accolade whereas scholars hailing from France and Italy where the courts do not cite academic writings in their judgments simply do not have the same preoccupation, see Markesinis-2003, 78, 83.

¹¹⁹ *Common Law History At The University Of Ottawa*, available at www.commonlaw.uottawa.ca/en/common-law-history/blog/common-law-history.html (last visited May 14, 2011), 63-64. A modified version of the National Program is offered by the Osgoode Hall Law School of York University. Students enrolled in the Common Law/Droit Civil program which is conducted jointly by Osgoode Hall and Université de Montréal in Québec can obtain a double degree in the common law and the civil law upon successful completion of a three-year common law degree at Osgoode or civil law degree at Montréal and a one-year degree on the common law or the civil law as the case may be at the partner university, www.osgoode.yorku.ca/jd/common_civil.html (last visited May 14, 2011). Osgoode Hall is the only law school aside from Ottawa that offers such a double degree program in the common law and the civil law.

¹²⁰ *History of Legal Education at McGill*, available at www.mcgill.ca/crdpcq/transsystemic/history/ (last visited May 14, 2011). For a critique of the National Program at McGill University, see Macdonald, R. A. “The National Law Programme at McGill: Origins, Establishment, Prospects.” *Dalhousie Law Journal* 13 (1990): 211.

¹²¹ *Transsystemic Legal Education*, available at www.mcgill.ca/crdpcq/transsystemic/ (last visited May 14, 2011).

¹²² Jutras, D. “*Enoncer l’inducible: le droit entre langues et traditions.*” *Revue internationale de droit comparé* 52.4 (2000): 781, at 791-793.

the civil law and the common law but is difficult to duplicate elsewhere.¹²³ Such an integrated program requires teaching staff who are bijural and bilingual and students who are bilingual. It is not fortuitous that a ‘transsystemic’ legal education can take root and flourish at McGill which is located in Québec, a province which has known a long tradition of bijuralism and bilingualism.¹²⁴

The experience in Europe and North America has shown that there appears to be a stronger causal link between the history and scholarship on comparative law and a weaker causal link between the scholarship and pedagogy of comparative law. Although scholarship is highly responsive to the historical lineage of a legal system, the accumulation of significant experience and scholarship on comparative law does not automatically translate into its prominence in legal education. The lack of widespread attention paid to the development of comparative law scholarship over the years will almost certainly exclude comparative law from mainstream legal education, as in the case of France, Germany and the United States, but the influence exerted by scholars in England and Italy and the Supreme Court in Canada have played an indelible part in fashioning the way in which comparative law is, if at all, taught. The causal link between scholarship and pedagogy is weaker because the content of legal education is the product of an institutional decision that is made on the basis of more than just preponderance of scholarship in a given field. If the basic function of legal education is to educate on the law of the land, the study of comparative law, which would include an examination of foreign law, does not in the absence of further explanation appear germane to legal education. The onslaught of globalization has lent greater weight to the view that there is little to lose in learning about foreign law. However, this does not suggest that the learning of foreign law alongside local law must be done in a

¹²³ Some suggestions for adopting McGill’s transsystemic pedagogical model in the absence of bijuralism and bilingualism are offered in Strauss, P. L. “Transsystemia – Are We Approaching A New Langdellian Moment? Is McGill Leading The Way?” *Journal of Legal Education* 56 (2006): 161.

¹²⁴ The amendment of the Ontario Judicature Act 1881 (later renamed the Courts of Justice Act, R.S.O. 1990, c.43) and the Juries Act (R.S.O. 1990, c.J.3) in 1978 to allow the use of the French language before the courts in the province of Ontario prompted the University of Ottawa, which is located in Ontario, to offer a French Common Law Program where courses on the common law are taught in French, see *Common Law History At The University Of Ottawa*, *supra* note 119, 64-69. In the context of these legislative amendments, being bilingual in English and French should no longer be regarded as a non-essential pursuit.

comparative manner. Foreign law can be either be studied discretely or comparatively and unless the adoption of a comparative pedagogical model stems from the convergence of powerful factors such as Québec's bijural, bilingual heritage and the stance of the Canadian Supreme Court, there is little reason to suppose that the comparative model is, without exception, pedagogically superior. The weaker causal link between scholarship and pedagogy proves even weaker in Asia where in some legal systems scholarship has had no influence on pedagogy while in another the dearth of comparative law scholarship has not prevented the designation of comparative law as a foundational course in legal education.

V. THE CLAIM OF CAUSATION IN ASIA

Legal systems in Asia can be broadly divided into two categories – those that have contemplated and initiated legal borrowing in reconstructing the legal system (the reconstructionists) and those that have remained loyal to the model received during the age of colonization (the recipients). To date, it appears that the claim of causation as firmly established above is neither fully played out within the reconstructionists nor the recipients in Asia, but in very different ways.

i) THE RECONSTRUCTIONISTS

The legal systems of China and Thailand are of great interest here because the construction and reconstruction of both legal systems took place in the absence of colonial rule.¹²⁵ The end of imperial rule in China in 1911 brought about a sea change in the Chinese legal system – all prior law was abolished and the Civil Code drafted by the Kuomintang government was promulgated in 1930 after consulting the laws of countries such as Germany and Japan.¹²⁶ The triumph of the Communists with the founding of the People's Republic of China in 1949 and the departure of key

¹²⁵ This did not however mean that the reconstruction of the legal systems in China and Thailand occurred without foreign pressure. The Qing government, weakened by military defeats and accessions to imperialist demands to establish concessions in China, could no longer convince itself of the superiority of Chinese civilization and Chinese laws. Modernization and looking to foreign law for ideas on how to improve the Chinese legal system therefore began during the late Qing dynasty, see generally 张德美, 探索與抉擇: 晚清法律移植研究 (清華大學出版社 2003). For a more concise overview, see Chen, L. "The Historical Development of the Civil Law Tradition in China: A Private Law Perspective." *The Legal History Review* LXXVIII (2010): 159, at 161-168 ('Chen').

¹²⁶ Chen, *id* note 125, 169.

Kuomintang personnel to Taiwan meant the replacement of the Kuomintang Civil Code with a new Civil Code that emphasized communitarian principles which the ruling Chinese Communist Party espoused.¹²⁷ China's indubitable economic strength has trained the spotlight on the Chinese legal system and Chinese law for decades.¹²⁸ This has further prompted the Chinese government to consider modifications to its existing law in order to instill greater confidence in foreign investors. Discussions to redraft the Civil Code by studying foreign law began in earnest in 1998 and codification is still underway.¹²⁹ Even if China's imperial legal system was constructed in the absence of legal borrowing and engagement in comparative law, its current reconstruction efforts evince a clear intention to understand and engage with foreign law at the conceptual level in order to design the most appropriate legal framework for China.

Unlike China where recourse to foreign law in aid of legal reform took place only after the monarchy was toppled, Thailand's first real attempt at legal reform came from its visionary monarch, Rama IV or King Mongkut. To fend off the threat of colonialism which had materialized in Thailand's neighbours, Malaya and Indochina, King Mongkut deemed it necessary to 'modernize' Thailand's legal system in the hope that it would be perceived as an equal to those of countries with military ambitions in Asia and left in peace.¹³⁰ With the death of King Mongkut in 1868, the

¹²⁷ Chen, J. *Chinese Law: Context and Transformation*. Leiden: Martinus Nijhoff Publishers, 2008: 347.

¹²⁸ Two foreign luminaries among scholars of Chinese law are undoubtedly Jerome Cohen and Randall Peerenboom. Connor, A. W. "Jerome Alan Cohen – Legends of the Legal Academy." *Journal of Legal Education* 60 (2011): 687 and. Hsu, C. S. (ed.). *Understanding China's Legal System: Essays In Honour of Jerome A. Cohen*. New York: New York University, 2003 are two tributes of many that have been paid to Jerome Cohen. Randall Peerenboom's prolific writings and publications such as *China Modernizes: Threat to the West or Model for the Rest?* (2007) and *China's Long March Toward Rule of Law* (2002) have cemented his position as one of the leading scholars of Chinese law today.

¹²⁹ See generally Lin, H. (ed.) *The Draft Civil Code of the People's Republic of China*. Leiden: Martinus Nijhoff Publishers, 2010.

¹³⁰ Winichakul, T. *Siam Mapped: A History of the Geo-body of a Nation*. Honolulu: University of Hawaii Press, 1994: 40. This spirit of learning from the West also extended to domestic life in King Mongkut's royal household where an English governess, Anna Harriette Leonowens, was hired to teach the royal children. Her autobiography, *The English Governess at the Siamese Court: Recollections of Six Years in the Royal Palace in Bangkok* (1871) is perhaps less well-known than the controversial part-fiction *Anna and The King of Siam* (1945) by Margaret Landon that depicted Anna Leonowens as a highly influential figure in the Siamese court and a love interest of King Mongkut. Landon's book was adapted into two films, *Anna and The King of Siam* in 1946 and *The King and I* in 1956. The 1999 remake by Twentieth Century Fox, *Anna and the King*, claimed to be based on Leonowens' autobiography but the amount of screen time devoted to the blossoming romance between Anna Leonowens and King Mongkut, is more reflective of Landon's semi-fictional account. It is abundantly clear from Leonowens' autobiography that she was nothing more than an employee of King Mongkut

task of legal reform was carried on by his son and successor, Rama V, King Chulalongkorn. Like his father, King Chulalongkorn employed the services of many foreign advisers and after a brief, unsatisfactory experiment with the unsystematic application of the English common law in Thai courts, King Chulalongkorn was persuaded by his Belgian adviser Gustave Rolin-Jacquemyns that the French model of codification could better meet the needs of desired legal reform without fundamentally altering the substance of Thai law which was hitherto a mixture of written law found in what was known as the 'Three Seals Code' and unwritten custom.¹³¹ The changes that King Chulalongkorn sought to implement were sweeping. The laws of evidence, civil procedure, crime, commerce, property and the family were some of the areas that were subject to re-codification.¹³² Thailand's abortive attempt at importing the English common law and its eventual adoption of the French procedure of codification but *not* French law is not only a fascinating case-study in legal transplants but illustrates the difficulty of importing English common law notions unaccompanied by English judicial decisions which are vital in refining and articulating the legal principles and rules to be applied.

Mention should also be made of the legal system of Japan whose private law was codified with reference to the draft German Civil Code and whose constitutional law was aligned with the American model during the American Occupation which lasted from 1945 to 1952. The Meiji government in Japan, like King Mongkut of Thailand, sought to improve the standing of Japan in the eyes of Western nations by reforming its legal system to more closely resemble those of nations whose approval she sought. Japan was poised to promulgate a Civil Code which was drafted by the French scholar, Gustave Boissonade and based exclusively on French law,¹³³ until the decision swung in favour of the German model which the Meiji government was also familiar with.¹³⁴ It has been suggested that the eventual preference for the German

and embroidered insinuations of impropriety should not be taken too seriously. Landon's book, as well as the films, are banned in Thailand.

¹³¹ Harding, A. "The Eclipse of the Astrologers: King Mongkut, His Successors, and the Reformation of Law in Thailand." *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*. Eds. P. Nicholson & S. Buddulph. Leiden: Martinus Nijhoff Publishers, 2008: 307 at 313-326 ('Harding').

¹³² Harding, *id* note 131, 318-321.

¹³³ Jansen, M. B. *The Cambridge History of Japan*. vol. 5. Cambridge, UK: Cambridge University Press, 1993: 472-476.

¹³⁴ Dean, M. *Japanese Legal System*. 2nd ed. London: Cavendish Pub, 2002: 102-103 ('Dean').

model, albeit dosed with French influence, stemmed from the increasing esteem in which German legal science was held.¹³⁵ Additionally, this switch may have been influenced by Germany's rising military prowess during the late twentieth century and France's declining military prestige during the same period.¹³⁶ Substantial amendments to the Japanese Civil Code which were completed in 2005 and which greater reflect conditions unique to Japan make it misleading to continue to regard the Japanese Civil Code as largely derivative of the French and German Civil Codes.¹³⁷ Japanese constitutional law which is tightly linked to the culture of judicial review in Japan has since diverged significantly from the American model that was imposed during the Allied Occupation.¹³⁸

With a history rich in legal borrowings and legal transplants, the claim of causation anticipates Chinese, Thai and Japanese scholars harnessing historical material for use in comparative law scholarship. Although comparative law scholarship by Chinese scholars who publish in Chinese appears fairly abundant,¹³⁹ Chinese scholars who have published with a larger readership in mind have generally preferred to write informative rather than comparative treatises.¹⁴⁰ Without the benefit of being able to

¹³⁵ Dean, *id* note 134.

¹³⁶ German military standing was given a boost when the German Empire emerged victorious in the Franco-Prussian War in 1871, see generally Kitagawa, Z. & K. Riesenhuber. *The Identity of German and Japanese Civil Law in Comparative Perspective*. Berlin: DeGruyter, 2007: 28-30.

¹³⁷ Oda, *infra* note 141, Part II.

¹³⁸ Shinegori, M. *The Constitution of Japan: A Contextual Analysis*. Oxford: Hart Pub, 2011: 18-21, 145-151.

¹³⁹ '比较法研究' a journal on comparative law by China's leading law school, the Peking University Law School, has been publishing five to six issues per year since 1987, available at journal.chinalawinfo.com/Journal_Info.asp?id=5 (last visited May 16, 2011). A perusal of the most recent issues reveals a mix of articles that discuss a particular aspect of Chinese law in relation to foreign law as well as articles that compare and contrast imperial legislation from different dynasties.

¹⁴⁰ Statistical findings from the International & Comparative Law Quarterly ('ICLQ'), the American Journal of Comparative Law ('AmJCL'), and the Asian Journal of Comparative Law ('AsJCL') show that of the few Chinese scholars who have published in these English language peer-reviewed academic journals, the vast majority have contributed pieces that address only Chinese legal issues or international law. The ICLQ (1952-2011) has published a total of 2512 articles, 12 of which were solely authored by Chinese scholars, 1 of which was on comparative law (Cheng, Y. "Criminal Procedure in China: Some Comparisons with the English System." *ICLQ* 37 (1988): 190). The AmJCL (1952-2011) has published a total of 1707 articles, 18 of which were solely authored by Chinese scholars, none of which were on comparative law. The AsJCL (2006-2011) has published a total of 55 articles, 2 of which were solely authored by Chinese scholars, 1 of which was on comparative law (Qin, J. Y. "China, India, and the Law of the World Trade Organization." *AsJCL* 3.1 (2008)). It is remarkable that less than a quarter of the total number of publications to date in the ICLQ (15%), the AmJCL (20.7%) and the AsJCL (20%) are comparative treatises. These figures indicate that even for journals dedicated to writings on comparative law, scholarship addressing national law in a non-comparative manner and international law have and may continue to dominate.

read Thai or Japanese, I speculate that the situation is similar for Thailand and Japan, where comparative law treatises written in the native language continue to outnumber their counterparts in English.¹⁴¹ By restricting the accessibility of a comparative law treatise to a native audience, the opportunity for foreign responses to the treatise which may stimulate transnational academic debate and sharpen or alter the original approach of the author is lost. Furthermore, it may create the false impression that a particular legal system is insular thereby perpetuating a vicious cycle where non-native scholars who could have filled the gap of writing for an international audience are disinclined to study or write about the legal system and its laws since little is known about them.¹⁴² When primary legal sources are only available in a native language which is not widely spoken or read, it is even more crucial for native scholars who are able to publish in a non-native language to do so since they are in the best position to comment authoritatively on their own laws and legal system.¹⁴³ With the possible exception of China, the shortage of informative and

¹⁴¹ The small number of informative treatises on Thai and Japanese law written in English by native scholars suggests even fewer comparative treatises written in English. A notable publication by a Thai scholar on the intersection of Thai and Buddhist Law is Sucharitkul, S. "Thai Law and Buddhist Law." *American Journal of Comparative Law* 46 (1998): 69, while several others by non-Thai scholars include Harding, A. & P. Leyland (eds.). *The Constitution of Thailand: A Contextual Analysis*. Oxford: Hart Pub., 2011; Ginsburg, T. "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution." *International Journal of Constitutional Law* 7 (2009): 83 and Huxley, A. *Thai Law: Buddhist Law*. Orchid Pr, 2006. A recent informative treatise on Japanese law is Oda, H. *Japanese Law*. 3rd ed. London: Butterworths, 2009 ('Oda'). The renown of American scholars with an expertise in Japanese law such as Haley, J. O. "The Japanese Judiciary – Maintaining Integrity, Autonomy and the Public Trust." *Law in Japan: A Turning Point*. Ed. D. H. Foote. Seattle: University of Washington Press, 2007: 99., Ramseyer, J. M. *Odd Markets in Japanese History: Law and Economic Growth*. Cambridge: Cambridge University Press, 1996 and Upham, F. K. "Political Lackeys or Faithful Public Servants: Two Views of the Japanese Judiciary." *Law and Social Inquiry* 30 (2005): 421; Upham, F. K. *Law and Social Change in Postwar Japan*. Cambridge, Mass: Harvard University Press, 1986 has contributed to a high level of interest in the United States in learning about Japanese law. The visibility of Japanese law has also received a boost in Australia with the setting up of the Asian Law Center at the Melbourne Law School in 1985 and the pioneering of an exchange program with Chuo Law School in Japan in 2004 by the late Malcolm Smith, alc.law.unimelb.edu.au/go/research-programs/japan/index.cfm (last visited May 21, 2011). An Australian scholar who maintains an active publication interest in Japanese law is Nottage, L. (ed.). *Japan Business Law Guide* (2007).

¹⁴² The presence of non-native scholars who specialize in and publish in English on Indonesian law (M. B. Hooker, Tim Lindsey, Gary Bell and the late Daniel S. Lev who was a well-regarded scholar of Indonesian law), Vietnamese law (John Gillespie, Penelope (Pip) Nicholson) and Burmese law (Andrew Huxley) is encouraging but their small numbers point to untapped potential in scholarship on the region's laws and is an open invitation for more scholars, and in particular, native scholars, to join their ranks.

¹⁴³ It has been pointedly observed in Markesinis-2003, 77 that the increasing dominance of the English language in the business and legal spheres makes it imperative for comparative law scholars who wish to construct or maintain a reputation to publish in English. In this regard Markesinis singled out the

comparative treatises in more accessible languages by scholars from the reconstructionist nations renders the second limb in the claim of causation, that of scholarship, only partially fulfilled.

The claim of causation further anticipates that the perceived importance of comparative law to the legal system of each country which is borne out in scholarship will be reflected to some extent in legal education. The risk of displacement of the claim of causation in the reconstructionists is manifest in the pedagogy of comparative law. The teaching of comparative law, whether in an integrated or autonomous manner in the reconstructionists, is virtually unknown. This may seem odd especially in the case of China which is still undergoing major legal reform and has experimented with legal borrowing.¹⁴⁴ China's efforts today recall Italy's construction of its legal system through legal borrowing. The abundance and quality of Italian scholarship on comparative law certainly raised the profile of comparative law but the elevation of comparative law to a position of core importance in the curriculum of some Italian law schools required a final push administered by a few comparative law scholars who had sufficient institutional mandate to implement curricular reform. This is analogous to the teaching of Roman law in some English law schools. It is therefore possible to attribute the absence of comparative law on the curriculum of Chinese law schools, despite its currency to legal reform and scholarly contributions, to institutional inertia.

ii) THE RECIPIENTS

The reception of the English common law in Asia has been remarkably successful.¹⁴⁵ The recipients, such as India, Malaysia, Singapore and the Hong Kong Special

Italians for special mention, lamenting the small number of English works by Italian scholars which do not adequately showcase the originality and depth of Italian comparative law scholarship to English-speaking readers. The English-language peer-refereed *Comparative Law Review* which is published under the auspices of the venerable Italian Association of Comparative Law appears to be a belated but nonetheless promising response to Markesinis.

¹⁴⁴ For example, the notion of good faith which permeates the Chinese law on contract and franchising was borrowed from foreign civil codes such as the German Civil Code, see Jones, P. "The Regulation of Franchising in China and The Development of a Civil Law Legal System." *Chinese Law & Policy Review* 2 (2006): 78, at 82-87.

¹⁴⁵ Korea, which formally received Japanese civil law in 1912 as a result of colonization by Japan, will not be discussed because there was only partial imposition of the Japanese Civil Code. The application of the Japanese Civil Code alongside Korean customary law during the colonial regime and the subsequent promulgation of the Korean Civil Code which maintained elements of Japanese civil law

Administrative Region, continue to maintain major English legal institutions like Trusts, while their legal systems have adopted piecemeal legislative amendments to better accommodate local circumstances.¹⁴⁶ In many areas of law, the *locus classicus* is often an English judicial decision and English cases which remain persuasive are cited with great frequency by local courts. The adaptability of the English common law to any jurisdiction that has inherited it is said to be one of its greatest strengths.¹⁴⁷ When there is differentiation in the development of social norms in each jurisdiction, divergence will inevitably be found in the development of the common law.¹⁴⁸ For instance, the presence of a significant Muslim community in India, Malaysia and Singapore has led to the application of Shar'iah law alongside the common law. Matters concerning Muslim individuals that are governed by Shar'iah law are normally heard by Shar'iah courts which do not form part of the hierarchy of ordinary courts.¹⁴⁹ The difference in the experience of the recipients and the

when independence was achieved in 1945 suggest that Korea cannot be considered a reconstructionist or recipient legal system. See generally Kim, M. S-H. "Customary Law and Colonial Jurisprudence in Korea." *American Journal of Comparative Law* 57 (2009): 205.

¹⁴⁶ In Singapore, the passing of the Maintenance of Parents Act (Cap. 167B, Act 35 of 1995, 1996 Rev. Ed.) reinforced the Confucian teaching of filial piety which permeates civics and moral education in Singapore. Another example of a legislative amendment developing from local circumstances is the Central Provident Fund Act (Cap. 36, 2001 Rev. Ed.) which obliges all salaried employees to contribute a proportion of their monthly pay to a common fund which is held in trust by the Central Provident Fund Board and can be withdrawn upon the satisfaction of certain conditions. This idea of 'forced savings', which is a display of communitarianism, is unique to Singapore.

¹⁴⁷ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (Judicial Committee of the Privy Council), 519-520.

¹⁴⁸ *Cassell & Co. Ltd. v Broome & Anor* [1972] AC 1027 (HL) 1127 (Lord Diplock).

¹⁴⁹ The Supreme Court of India which has wide original and appellate jurisdiction is the final court of appeal even for matters concerning the interpretation of religious law. One of its most infamous and controversial judgments on the concept of divorce in Shar'iah is *Mohd Ahmed Khan v. Shab Bano Begum & Ors* (1985) 2 SCC 556. For an excellent case comment, see Mullally, S. "Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case." *Oxford Journal of Legal Studies*. 624.4 (2004): 671. In Singapore, certain aspects of the personal law of Muslims are governed by the Administration of Muslim Law Act, Cap. 3, Act 27 of 1966, 1999 Rev. Ed. (AMLA). The Shar'iah court has the jurisdiction to hear and determine five categories of disputes where all the parties involved are Muslims or where the parties were married under the provisions of the Muslim law (AMLA, s. 35). A *conflit de compétence* between the Shar'iah court and the ordinary courts over the personal law of Muslims has been shown to exist. The Singapore High Court in *Chaytor v Zaleha bte A Rahman* [2001] 2 Singapore Law Reports 236, 240-246, despite acknowledging the conferment of exclusive jurisdiction on the Shar'iah Court by the Supreme Court of Judicature Act, Cap. 322, Act 24 of 1969, 2007 Rev. Ed., s. 17A(1), over the administration of Muslim law in areas covered by the AMLA, s. 35, nevertheless proceeded to determine that a 'married woman' against whom a *talak* had been pronounced could be considered a 'married woman' for purposes of claiming maintenance under the Women's Charter, Cap. 353, 1995 Rev. Ed. As disputes relating to divorces involving pronouncements of a *talak* by the husband were specifically covered under the AMLA, s. 35(2)(b), the issue of whether a 'married woman' against whom a *talak* had been pronounced was divorced or could still be considered a 'married woman' should have been determined by the Shar'iah Court, not the

reconstructionists with foreign law is that the former were subjected to the wholesale transfer of the English common law which for the most part replaced existing local law and custom,¹⁵⁰ while the latter could make a conscious choice as to which aspects of foreign law they wished, if at all, to adopt. So unlike the reconstructionists where adopted foreign law is added to the foundation of indigenous law, it can be said that the recipients add subsequent legislative amendments to the foundation of the English common law.¹⁵¹ The manner in which foreign law is introduced is important from the perspective of the utility of comparative law in the formation of a legal system. The thorough imposition of a well-developed and functional foreign legal system and its laws pursuant to military conquest greatly diminishes the need to consider the suitability of such foreign law for the recipient legal system at the moment of import.¹⁵² Comparative studies of the indigenous laws and the foreign laws prior or subsequent to the introduction of foreign laws thus serve little purpose. In addition, the achievement of independence by India, Malaysia and Singapore due to the voluntary departure of the British in the middle of the twentieth century and the handover of Hong Kong to China in 1997, did not, unlike in the United States, result in calls for the replacement of the English legal system. There was therefore little impetus to engage in the study of foreign laws in order to ascertain if they could be adopted in place of English law.

High Court. It was recently declared by the Singapore Court of Appeal that a 'fatwa', which is a ruling made by Islamic authorities in Singapore on the interpretation of Islamic law, is akin to an expert opinion on a given matter and is not binding on the court see *Shafeeg bin Salim Talib & Anor v Fatimah bte Abud bin Talib & Ors* [2010] SGCA 11, ¶63.

¹⁵⁰ The exception was the personal laws of Muslims which was governed by religious law.

¹⁵¹ The Indian Penal Code and the Indian Evidence Act which were specially commissioned by the British to be drafted for India are arguably additions to the foundation of the English common law, see generally Ranchhoddas, R. *Ratanlal & Dhirajlal's law of crimes: a commentary on the Indian Penal Code, 1860*. 26th ed. New Delhi: Bharat Law House, 2007 and Stephen, J. F. *The Indian Evidence Act (1 of 1872): with an introduction on the principles of judicial evidence*. Calcutta: Thacker & Spink, 1872. As the penal law and law on evidence in England was scattered across various pieces of legislation and case law, the British found it more efficient to draft a consolidated piece of legislation for each area of law. The provisions in the Penal Code and the Evidence Ordinance were not however mirror images of the state of law in England with the result that Singapore, whose Penal Code and Evidence Act are modeled after its Indian predecessors, has relied on Indian as well as English authorities when interpreting these two statutes, see generally Yeo, S., N. Morgan & W. C. Chan. *Criminal Law in Malaysia and Singapore*. Singapore: LexisNexis, 2007 and Pinsler, J. *Evidence and the Litigation Process*. 3rd ed. Singapore: LexisNexis, 2010.

¹⁵² The subsequent interplay of foreign law received in this manner and local custom has been considered by Harding, A. "Comparative Law and Legal Transplantation in South East Asia: Making Sense of the Nomic Din." *Adapting Legal Cultures*. Eds. D. Nelken & J. Feest. Oxford: Hart Pub, 2001: 199.

The triumph of the implementation of the English common law in the recipients has clearly discouraged scholarly reflection on legal borrowing and the civil law because it is still rare for a legal scholar hailing from India, Malaysia, Singapore or Hong Kong SAR to be instructed in the civil law but fairly common for them to have read law in England or the United States. It should come as no surprise that there are hardly any comparative law publications that look beyond jurisdictions that have received the English common law.¹⁵³ The absence of pondered legal borrowing and the impoverished state of comparative law scholarship in the recipients makes it reasonable to infer from the claim of causation that comparative law is likely to be marginalized or excluded from legal education. This is the case for India, Malaysia and Hong Kong SAR.¹⁵⁴ In stark contrast to China where institutional ambivalence has severed the bountiful history and writings on comparative law from its teaching, institutional support in Singapore has enabled comparative law to be taught as a foundational course without any basis in history or scholarship.¹⁵⁵ The different historical circumstances of the reconstructionists and the recipients show that certain legal systems have had greater need for comparative law than others, and the scholarship that emerges is reflective of the varying usefulness and importance of comparative law to different legal systems. Singapore's example is all the more striking because despite confirmation by history and the absence of scholarship that the role played by comparative law in Singapore is negligible, its current visibility in legal education appears to suggest otherwise.

¹⁵³ A possible exception is Leung, P. *The Hong Kong Basic Law: Hybrid of Common Law and Chinese Law*. Hong Kong: LexisNexis, 2006.

¹⁵⁴ Neither comparative nor foreign law appears to feature in the legal curricula of Indian and Malaysian law schools. In Hong Kong SAR however, comparative law is offered as an elective course at the undergraduate level at the Faculty of Law of The University of Hong Kong, www0.hku.hk/law/programmes/llb_structure.html (last visited May 20, 2011), the School of Law of The Chinese University of Hong Kong, www.law.cuhk.edu.hk/download/LLB_Brochure_2010.pdf (last visited May 20, 2011) and the School of Law of the City University of Hong Kong, [www.cityu.edu.hk/slwl/lib/doc/LLB/LLB%20Programme%20Structure%20\(Aug%202010\).pdf](http://www.cityu.edu.hk/slwl/lib/doc/LLB/LLB%20Programme%20Structure%20(Aug%202010).pdf) (last visited May 20, 2011).

¹⁵⁵ An autonomous introductory course to comparative law, *Comparative Legal Traditions*, is being taught to all second year law students at the Faculty of Law of the National University of Singapore, see www.law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LC2001C&Sem=1&MGC=1 (last visited Jun. 3, 2011). A similar course, *Comparative Legal Systems*, is being taught to all the second year law students at Singapore's only other law school, the School of Law of the Singapore Management University which welcomed its first batch of students in 2007, see www.law.smu.edu.sg/jd/programme/courses_description.asp. (last visited Jun. 3, 2011).

VI. RAMIFICATIONS OF DISPLACING THE CLAIM OF CAUSATION

When the claim of causation risks displacement in Asia, whether by historical and scholarly offerings which do not receive exposure in legal education, or by significance in legal education which is not grounded in historical and scholarly teachings, the credibility of the claim is called into question. The experience with comparative law in European and North American legal systems has already shown that the claim of causation enables a chronologically structured understanding of how comparative law has evolved in each legal system. It has been seen that differing historical backgrounds engender varying genres of comparative law scholarship which in turn foment disparate views on comparative law in legal education. To posit that scholarship and legal curricula can be conceptualized without any historical underpinnings is to de-contextualize scholarship as well as legal education. Are the legal systems of Asia so different from those of Europe and North America so as to warrant a de-contextualization of its scholarship and legal education? This question must be answered in the negative because to displace the claim of causation is to reject history and the projected consequences of doing so in Asia are (i) dwindling sustainability in comparative law scholarship and (ii) cultivated disinterest in comparative law.

i) SUSTAINABILITY IN SCHOLARSHIP

When reliance by a legal system on comparative law is substantial and ongoing, scholarship will be forthcoming to address matters of current interest. The absence of comparative law in legal education is unlikely to adversely impact the volume and quality of comparative or informative treatises being generated. However, when legal borrowing and adaptation tapers off, the continuation and rejuvenation of comparative law scholarship is left to those who, despite not having being exposed to comparative law during legal education, nevertheless maintain sufficient interest in comparative law to publish a treatise on it. As engagement in comparative law is, by its very nature, the domain of legislators and academics, it is possible say that the complexities of comparison are unlikely to occupy the attention of most practitioners. This makes the pool of people who are potential scholars of comparative law rather small to begin with. When reliance on comparative law for legal reconstruction

ceases to be topical, the number of scholars who maintain an active interest in comparative law is likely to drop. The further in time a legal system moves from the period of intense legal borrowing and adaptation, the fewer the number of scholars who feel the need to claim an inactive interest in comparative law. At times like these, projects that promote regional legal harmonization and the possible integration of diverse national laws may prolong or resuscitate interest in comparative law.¹⁵⁶ Including comparative law in legal education may persuade some who envisage an academic career to explore the option of being comparative law scholars. Excluding comparative law from legal education in a legal system where comparative law is a valuable tool for legal reform and progress can never halt comparative law scholarship; but lack of exposure to comparative law during the formative years of legal education will result in a shrinking pool of scholars who bear the increasingly heavy burden of preventing the fall of comparative law into academic oblivion.

ii) SUSTAINABILITY IN PEDAGOGY

If the absence of comparative law in legal education may stifle interest in comparative law, then according it core importance in the legal curriculum, even where history and scholarship are lacking, ought to stimulate interest. However, it still remains to be seen if this expectation will be met. The teaching of comparative law as an autonomous course in a legal system where borrowing from foreign law has been minimal is unlikely to involve the teaching of substantive law. This is because foundational courses being taught alongside a core course on comparative law will be devoted to the teaching of the common law of the land and its legal sources with minimal opportunity for considering foreign law. Introducing substantive foreign laws on every foundational topic in a comparative manner in a single course would be an impossible task whereas singling out one foundational topic to be taught in a

¹⁵⁶ One example is a project called *Principles of Asian Civil/Commercial Law* (PACL) which was started in 2009 and partially funded by the Fondation pour le Droit Continental, a research organization committed to the study of the civil laws of Continental Europe, available at www.fondation-droitcontinental.org/jcms/c_9987/les-pacl-principles-of-asian-civil/commercial-law-ou-le-droit-des-contrats-en-asie-est-et-sud-est (last visited May 23, 2011). PACL is chaired by Professor Naoki Kanayama of Keio University and involves a small group of scholars from Japan, South Korea, China, Vietnam and Singapore who consider the possibility of drawing up a blueprint for the harmonization of some aspects of civil/commercial law in the region. As PACL is a very recent initiative, it is too early to assess its impact on or contribution to raising the profile of comparative law among scholars in Asia. However, it signals a promising start.

comparative manner in a core course lends itself to the charge of arbitrary selection. As such, the teaching of comparative law can only provide an overview of the historical and theoretical foundations of foreign legal systems and/or traditions. The knowledge gleaned on foreign legal systems from such a course enables perfunctory engagement in comparative law. Profound engagement would require the taking of initiative to learn about the substantive law of foreign legal systems law either by the taking of elective courses on foreign law, pursuing further studies in a foreign legal system, or voracious reading. The benefit of being able to engage, even perfunctorily, in comparative law is tangible. To give an example, different laws govern Muslim and non-Muslim marriages in Singapore.¹⁵⁷ Students habituated in the fixity of traditional core teaching are likely to characterize the different regimes as a religious exception to the secular norm, with the application of the exceptional law being determined by conflict of laws principles.¹⁵⁸ In contrast, a student who has been introduced to comparative law, rather than viewing this as a pure conflict of laws issue, may be able to perceive the existence of different legal regimes governing marriages as a basis for charting the difference in application of religious law in secular jurisdictions and exploring the possibility of harmonizing such application across jurisdictions. Exposure to the method of comparative law thus inculcates sensitivity and nuance in students when studying law, its practice and accompanying institutions in a variety of jurisdictions and dilutes their reflex to make value judgments without a sound understanding of the legal concept or institution on which judgment is being passed.¹⁵⁹ However, the above remains an optimistic and untested hypothesis because

¹⁵⁷ Muslim marriages are governed by the AMLA, while all other marriages are governed by the Women's Charter.

¹⁵⁸ See for instance Tan, Y. L. *Conflicts Issues in Family and Succession Law*. Singapore: Butterworths, 1993: Chapter 2.

¹⁵⁹ In a series of libel suits that have attracted much international scrutiny the then Prime Minister of Singapore and current Minister Mentor Lee Kuan Yew sued the Far Eastern Economic Review and the International Herald Tribune for allegedly defamatory remarks in its articles, directed at the integrity of the Singapore government and some of its political actors: *Lee Kuan Yew v Davies & Ors* [1990] 1 MLJ 390; *Lee Kuan Yew & Anor v Vinocur John & Ors* [1995] 3 SLR(R) 38; *Lee Hsien Loong v Review Publishing & Anor & another suit* [2009] 1 SLR(R) 177. It has been asserted that since '[a] newspaper influences the politics of a country... a foreigner not rooted in Singapore [should not] decide [Singapore's] political agenda', Lee, K. Y. *From Third World to First – The Singapore Story: 1965-2000*. New York: HarperCollins Publishers, 2000: 217. For a pithy account by of how the treatment of defamation suits by the Singapore judiciary appears to lend weight to the view that defamation laws can be seen as a tool to stifle political dissent, see Tey, T. H. "Singapore's Jurisprudence of Political Defamation and its Triple-Whammy Effect on Political Speech." *Public Law* 2008: 452.

student reaction to a mandatory introduction to comparative law indicates a degree of aversion to the course.¹⁶⁰ Ploughing on in the face of resistance may yield greater enthusiasm in the long run but it is improbable, without re-examining the role of comparative law in legal education and the way in which comparative law *should*, rather than *can*, be taught, that persistent sentiments of discontent will simply fade with time. The misgiving felt by students toward a mandatory course on comparative law, which is not shared for traditional foundational courses, is not unfounded. Designation as a foundational course on the legal curriculum does not substantiate the belief that limited recourse to foreign law by legislators in a legal system must nonetheless beget the compulsory teaching of comparative law.¹⁶¹ It is hardly radical to acknowledge that comparative law is not necessarily fundamental to legal education in all legal systems.

VII. CONCLUDING REMARKS

As history cannot be rewritten, a legal system either has experience with comparative law which is reflected in scholarship both past and present, or it does not. The place of comparative law in legal education is one, but not the only, indication of the continuing importance and relevance of comparative law to a legal system. What this article has sought to show is the necessity of viewing the history, scholarship and pedagogy of comparative law conjunctively rather than in isolation, in order to fully appreciate what comparative law means today to different legal systems. The claim of

¹⁶⁰ According to comments given in an anonymous feedback exercise on the Comparative Legal Traditions course which is taught at NUS Law School, many students considered the course to be 'mere trivia', 'very abstract', 'esoteric' and have questioned its practical applicability and relevance in Singapore with one student emphatically declaring that 'I also fail to see how this module is considered so important for all undergrads to take'.

¹⁶¹ Legislators in Singapore tend to limit themselves to the laws of jurisdictions that have received the English common law when considering foreign law for the purpose of law reform. See for instance Ministry of Finance, *Report of the Company Legislation and Regulatory Framework Committee*, available at www.agc.gov.sg/publications/docs/CLRFC_Oct_2002.pdf (last visited Feb. 1, 2010), which considered legislation in England, Australia, United States, New Zealand, Canada and Hong Kong in proposing amendments to the Companies Act; Law Reform and Revision Division of the Attorney-General's Chambers, *Review of Child Custody Law*, available at www.agc.gov.sg/publications/docs/ChildCustodyLaw_DP_and_ExecutiveSummary.pdf (last visited Feb. 1, 2010), which considered England's Children Act of 1989 and Australia's Family Law Reform Act of 1995; Law Reform Committee, *Report of the Law Reform Committee on Reform of Admissibility of Hearsay Evidence in Civil Proceedings*, available at www.agc.gov.sg/publications/docs/Report_of_LRC_on_Reform_of_Admissibility_of_Hearsay_Evidence_in_Civil_Proceedings_May2007.pdf (last visited Feb. 1, 2010), which considered legislation in Australia, New Zealand, England and Wales, Scotland and South Africa in reforming the law of evidence.

causation streamlines the analysis by presenting history as the starting point, scholarship as the transition and pedagogy in legal education as the finish line. Abandoning the race mid-way or attempting to run it backwards may adversely affect the development of comparative law in a legal system, but it also opens the broader question of whether legal education should be confined to the dictates of history and scholarship? It is hoped that this ambitious query can be addressed on a future occasion.