COMPARATIVE LAW AS COMPARATIVE JURISPRUDENCE—
THE COMPARABILITY OF LEGAL SYSTEMS

DRAFT

Catherine Valcke

I. Introduction 1

II. Comparability Requires Unity and Plurality 7

III. Naturalism: The Legal System is Unified but not Plural 8

IV. Positivism: The Legal System is Plural but not Unified 10

V. Law As Jurisprudence: The Legal system is Unified and Plural 17

VI. Conclusion 23

I. INTRODUCTION

Much ink has been spilled on what is now commonly labelled the "malaise" of comparative law.[1] This malaise—perhaps the most serious crisis to strike the discipline since its inception[2]--is not about quantity: the comparative law literature is voluminous by any standard. Rather, it relates to the fact that this literature has yet to congeal into a "discipline" proper, that is, into "a shared body of information and theory" with a designate set of tools and methodology, "a scholarly tradition susceptible of transmission

---

[1] See generally: W. Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1898, 1961-90 (1994-95); A.T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624 (1971); J. Mayda*, Some Critical Reflections on Contemporary Comparative Law*, in K. ZWEIGERT & H.-J. PUTTFARKEN, EDS., RECHTSVERGLEICHUNG 361 (1978); G. Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411 (1985); B. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990); A. Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, 10-16 (2nd ed., 1993); J. Gordley, *Is Comparative Law a Distinct Discipline?,* 46 AM. J. OF COMP. L. 607 (1998); N. V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. OF COMP. L. 647 (1998); J. H. Merryman, *Comparative Law Scholarship*, 21 HASTINGS COMP. & INT'L L. REV. 771 (1998); É. Picard, *L'état du droit comparé en France en 1999* 4 R. I. D. C. 885, 888-89 (1999); Van Hoecke & Warrington, 36 *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L. Q. 495, 495-97 (1998).

[2] Comparative law emerged with the European civil codes in the early nineteeth century. On the history of comparative law generally, see: R. Schlesinger, *The Past and Future of Comparative Law,* 43 AM. J. COMP. L. 477 (1995), Ewald, supra note 1, at 2116-23.

to succeeding generations", a "shared foundation on which each can build".[3] The great bulk of the comparative law scholarship produced over the course of the last century indeed consists of cross-jurisdictional catalogues of legal rules on a given topic,[4] the larger purpose or direction of which is often unclear. With respect to many such "common core" projects, the choice of jurisdictions and topics under study is unexplained, perhaps even arbitrary, and the value of the enterprise as a whole hence remains elusive.[5] Accordingly, it has been said of comparative law that it is seemingly animated by "the Muse *Trivia*—the same Goddess who inspires stamp collectors, accountants, and the hoarders of baseball statistics."[6] In the same vein, comparative law scholarship has been described as "obsessively repetitive and sterile,"[7] "a chance to satisfy idle curiosity,"[8] and "a blind eye to everything but surfaces."[9] In short, "virtually all recent assessments of the discipline in the legal literature find it wanting in basic ways. Even discounting for the fact that academic literature is always more likely to bear witness to dissatisfactions than satisfactions, the assessments are conspicuously negative."[10]

In the face of such damning criticism, most comparatists reacted by pointing out that comparative law has in fact served many different purposes,[11] and that it is therefore the search for a single *raison d'être* which is misguided.[12] Comparative law, they note, has long been recognized as a valuable tool for interpreting and reforming domestic law

---

[3] von Mehren, *supra* note 1, at 624.

[4] Most notable in this respect are R.B. Schlesinger, ed., 1 FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (1968); the UNIDROIT Project (International Institute for the Unification of Law) cited in J. Zekoll, *Kant and Comparative Law—Some Reflections on a Reform Effort*, 70 TUL. L. REV. 2719, 2728 (1996); and A. Tunc, ed., INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1983), the 17 volumes of which cover 150 countries and took thirty years and the contributions of over 400 scholars to complete. See also: M. Bussani & U. Mattei, *The Common Core Approach to European Private Law*, 3 COL. J. EUR. L. 339 (1997-98).

[5] Zekoll rightly notes that "[a]ctors involved in international commerce have every reason to appreciate the results of this aspect of comparative law." (Supra note 4, at 2728.) However, the point here is that most common core projects were not driven by the production of such (undeniable) benefits. See infra note 52.

[6] Ewald, supra note 1, at 1961.

[7] M. S. McDougal, *The Comparative Study of Law for Policy Purpose: Value Clarification as an Instrument of Democratic World Order,* 1 AM. J. COMP. L. 24, 29 (1952).

[8] W. J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L. Q. 485, 489 (1974).

[9] L. Friedman, *Some Thoughts on Comparative Legal Culture,* in CLARK, ED., COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 52 (1990).

[10] G. A. Bermann, *The Discipline of Comparative Law in the United States* 4 R. I. D. C. 1041, 1044 (1999).

[11] An elaborate typology of the various uses of comparative law by scholars can be found in Frankenberg, supra note 1. See also: M. BOGDAN, COMPARATIVE LAW 18 (1994); Stone, *The End to Be Served by Comparative Law*, 25 TUL. L. REV. 325 (1951); Bermann, supra note 10, at 1042ff; H. Kötz, *Comparative Law in Germany Today* 4 R. I. D. C. 753, 761-66 (1999); D. J. Gerber, *System Dynamics: Toward a Language of Comparative Law* 46 AM. J. COMP. L. 719, 720-21 (1998).

[12] "[I]f the comparative process is to meet with success, it is eminently desirable, if not essential, that its employment should not be hampered by confining it to specified categories." H. C. GUTTERIDGE, COMPARATIVE LAW 2 (2nd ed., 1949). See also: J.C. Reitz, *How to Do Comparative Law*, 46 AM. J. OF COMP. L. 617 (1998); W. P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986); Zekoll, supra note 4, at 2736; Bermann, supra note 10, at 1052; Kamba, supra note 8, at 489; Stone, supra note 11, at 333.

internally,[13] harmonizing and unifying law trans-nationally,[14] and interpreting and constructing international law.[15] It has also provided a bottomless supply of data with which to test philosophical, economic, sociological, and anthropological theories about law, to name only a few.[16] It is therefore hardly surprising, these scholars maintain, that comparative law has failed to congeal into a single academic discipline: comparative law is not one; it is many.

But all these functions of comparative law remain instrumental. Insofar as comparative law serves to improve domestic or international law, "doing comparative law" is not qualitatively different from "doing law" in general: comparative law merely enlarges the pool of law to be considered.[17] Insofar as it assists the advancement of philosophy, economics, sociology and anthropology, its value is reduced to that of a mere "appendage of social science."[18] In all these cases, comparative law is used as a means to an end that lies outside itself. And while most comparatists seem to have resigned themselves to

---

[13] R. Dehousse, *Comparing National and EC Law: The Problem of Level Analysis,* 42 AM. J. COMP. L. 761, 762-63 (1994); Tallon, *Comparative Law: Expanding Horizons,* 10 J. S. P. T. L. 265, 266 (1969); Morrow, *Comparative Law in Action,* 3 J. LEG. ED. 403 (1951); P. DE CRUZ, A MODERN APPROACH TO COMPARATIVE LAW 16-9 (1993). See, e.g., M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1980); C. M. FLOOD, INTERNATIONAL HEALTH CARE REFORM: A LEGAL, ECONOMIC, AND POLITICAL ANALYSIS (2000); U. MATTEI, COMPARATIVE LAW AND ECONOMICS (1997).

[14] J. Gordley, *Comparative Legal Research: Its Function In the Development of Harmonized Law*, 43 AM. J. COMP. L. 555 (1995); R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 343 (1991); Zekoll, supra note 4, at 2725-33; Kötz, supra note 11, at 762-4; Dehousse, supra note 13, at 762; de Cruz, supra note 13, at 19-20.

[15] Green, *Comparative Law as a Source of International Law* 42 TUL. L. REV. 52 (1967); R. B. SCHLESINGER ET AL., COMPARATIVE LAW 35-7 (5th ed., 1988); Kötz, supra note 11, at 760; Zekoll, supra note 4, at 2733; de Cruz, supra note 13, at 20-22.

[16] For examples of uses of comparative law aimed at demonstrating the existence of universal legal principles, see: Gordley, supra note 1, at 613; J. Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXF. J. LEG. STUD. 101, 111-13 (1989); N. JAREBORG, ED., TOWARDS UNIVERSAL LAW--TRENDS IN NATIONAL EUROPEAN AND INTERNATIONAL LAWMAKING (1995); R. SALEILLES, CONCEPTION ET OBJET DE LA SCIENCE JURIDIQUE DU DROIT COMPARE, 173, vol. I (1905-07); M. G. DEL VECCHIO, HUMANITE ET UNITE DU DROIT, ESSAI DE PHILOSOPHIE JURIDIQUE (1963). For uses of comparative law aimed at supporting the opposite thesis, namely, that all law is culturally relative, see: A. Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. OF TRANS. L.57, 67, 77 (1998); V. G. Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives* 46 AM. J. COMP. L. 657, 661, 663, 666-67 (1998); R. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. &POL'Y 791 (1995); R. Abel, *Law as Law: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982).

[17] Gordley, for example, asserts (supra note 1, at 608) that all legal jurisdictions share a common body of juridical principles, set of intellectual foundations and form of reasoning, and (id., at 613) that the task of the comparatist accordingly is limited to assessing which of the various legal rules in presence best reflect this common body of principle. H. Yntema (*Comparative Legal Research: Some Remarks on "Looking Out of the Cave,"* 54 MICH. L. REV. 899, 901 (1972)) similarly believes that "comparative law" just is another label for "legal science." See also: P. Legrand, *Comparative Legal Studies and Commitment to Theory* 58 MOD. L. REV. 262, 264 (1995) ("Comparative analysis becomes an adjunct of the other 'substantive' spheres of legal activity; that is, no more than a handmaiden to contract, property or constitutional law.")

[18] Reitz, supra note 12, at 625.

having comparative law remain instrumental,[19] a few have stubbornly pursued their quest of an end that might lie within,[20] one that would allow comparative law to come to form an academic discipline in its own right.[21]

William Ewald, in particular, has offered a powerful account of law "as jurisprudence," and suggested that we correspondingly think of comparative law "as comparative jurisprudence."[22] In very short, law as jurisprudence stands for the proposition that law is more than just the sum of its facts—the texts, the institutions, the sanctions, etc…, created and implemented by the State.[23] Law is also, and crucially, the ideas that underlie, animate, and tie these facts together: the view of due process that roots our court system, the understanding of promise-keeping that informs our law of contracts, the

---

[19] von Mehren, supra note 1, at 624 ("Strictly speaking, there is no subject matter properly denominated comparative law;"); O. Kahn-Freund, *Comparative Law as an Academic Subject,* 82 L. Q. REV. 40, 41 (1966); ("The trouble is that [comparative law] has by common consent the somewhat unusual characteristic that it does not exist."); de Cruz, supra note 13, at 3. ("It is […] *a method of study* rather than [a social science in its own right]." Emphasis in original.)

[20] Sacco, supra note 14; WATSON, supra note 1; Ewald, supra note 1. Hamson declared in this respect: "Comparative law is not in bondage to, or even in the service of any one particular purpose, not even that of legislation, for which it is extremely useful." (C. J. HAMSON, THE LAW: ITS STUDY AND COMPARISON, 22 (1955).) Despite some claims to the contrary (see, e.g., Zekoll, supra note 4, at 2733-38 (criticizing Ewald)), these scholars' objective was not to dismiss or undermine the instrumental uses of comparative law, but to demonstrate that comparative law is also *more* than just an instrument. As Picard noted (supra note 1, at 908): "Il est certes très profitable au droit comparé de s'enrichir d'une comparaison pratique et utilitaire des droits. Mais ce ne peut être le moteur exclusif de la comparaison. "

[21] "It follows from the fact that the domain of law is badly defined, and that it is impossible to establish a definition of law valid on a global level, that comparative law is a law without borders, largely overflowing into neighboring sciences." R. David, *Droit comparé et systèmes socio-politiques*, in LIVRE DU CENTENAIRE DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE, vol. II, 148 (1971). (My translation.) See also: L. M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 2-11 (1975); H. Izdebski, *Le rôle de droit dans les sociétés contemporaines: essai d'une approche sociologique du droit comparé*, 3 R. I. D. C. 563, 567-68 (1988).

[22] Ewald, supra note 1, at 1944. See also his *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J. OF COMP. L. 701 (1998). For scholars who have endorsed similar conceptions of law, but have not explored the implications of these conceptions for comparative law, see: A. BRUDNER, UNITY OF THE COMMON LAW (1995); E. WEINRIB, THE IDEA OF PRIVATE LAW (1995); G. P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996); A. RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999). These conceptions, like the one presented here, were inspired by German idealism.

[23] The recognition that the State plays a necessary role in the creation of law distinguishes law as jurisprudence, in particular, from post-modern conceptions of law, according to which all forms of normativity, including merely social habits, cultural rituals, and economic sanctions, qualify as "law." The issue is not one of semantics: the post-modernist objects, not just to reserving the label "law" for State-enforced normativity, but also to drawing of a distinction between State-enforced and non-State-enforced normativities, on the ground, *inter alia*, that it obfuscates the dialogic interplay between the legal and the non-legal. (See, e.g., B. de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L & SOC'Y 279, 293 (1987); S. Henry, *The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice* in J. LOWMANN ET AL., EDS., TRANSCARCERATION: ESSAYS IN THE SOCIOLOGY OF SOCIAL CONTROL 89 (1987); M. Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law* 19 J. OF LEGAL PLURALISM 1 (1981).) Yet, as Franz von Benda-Beckmann notes, "talking of intertwining, interaction or mutual constitution presupposes distinguishing what is intertwined." (*Comment on Merry* 22 LAW & SOC'Y REV. 897, 898 (1988). See also: J.-F. LYOTARD, LE DIFFÉREND 24-5 (1983).)

conception of crime that seeps through our criminal law.[24] Law as jurisprudence is neither "law in books," nor "law in action,"[25] both of which can be fully grasped through external observation alone. It is "law in minds"[26]--"a deliberative enterprise … [taking place] within 'the logical space of reasons',"[27] a "style of thought,"[28] "a web of beliefs, ideals, choices, desires, interests, justifications, principles, techniques, reasons, and assumptions"[29]—which accordingly can be apprehended only from within,[30] from the standpoint of legal actors.[31] And comparative law as comparative jurisprudence correspondingly is "comparative law in minds:" "the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems."[32]

---

[24] Ewald, supra note 22, at 705-06. For another attempt at accounting for law as a merger of facts and ideas, see: M. R. COHEN, LAW AND THE SOCIAL ORDER, 248ff (1967); REASON AND LAW 75ff (1950).
[25] Which Ewald respectively describes as "text-" and "context-based" accounts of law. Ewald, supra note 22, at 702. The expressions "law in books" and "law in action" were coined by Roscoe Pound (*Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)).
[26] Ewald, supra note 1, at 2111. See also Ewald, supra note 22, at 705.
[27] Ewald, supra note 1, at 1949.
[28] Id., at 1947.
[29] Id., at 1948.
[30] "A legal sociologist might agree that [the] black-letter approach is too narrow, and urge that we look instead to 'law in action,' that is, to law as it functions in a broader social context. But if this context is understood in external terms (say, as the observable regularities in the behaviour of the members of the society) then … a study of 'law in action' falls as short of the target as a study of 'law in books.' The problem is at bottom the same. The social-context approach gives us external facts about the way people behave; but what we need to understand is the ideas and the reasons for the behaviour. In other words, it seems that what we need to understand is neither law in books nor law in action, but law in minds." Ewald, supra note 1, at 2111.
[31] "[T]hose participants in a … legal system who are in some way professionally engaged in the development or administration of law … not just legal scholars, but also attorneys, judges, legislators, academicians, administrators, and the like." Ewald, supra note 1, at 1944. Law's ideas should not to be confused with the personal views, subjective beliefs, inner thoughts of *actual* legal actors, however. As "the expression of [a collectivity's] political and ethical beliefs" (id., at 2144), law is not a matter of private opinion, something that varies from one actor to another. It is very much public: the reasons motivating judicial decisions are published; legislation is debated publicly. (id., at 1949.) Law's ideas accordingly are the ideas of *ideal* legal actors, actors who, like Dworkin's Hercules (R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977)), would be infinitely smart and in possession of all relevant legal facts. Hence, law's ideas can be uncovered, not through surveys of empirical legal actors, but rather through the intellectual reconstruction of law's facts: through interpretation, law's ideas are allowed to surface from behind the facts.
[32] Ewald, supra note 1, at 2114. See also: *id*., at 1947-48; Ewald, supra note 22, at 705. For implicit endorsements of this view, see: J. VANDERLINDEN, COMPARER LES DROITS, 312-13, 416-17 (1995); G. Sawer, *The Western Conception of Law* in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol. II, 14-48; A. N. KATZ, LEGAL TRADITIONS AND SYSTEMS (1986); G. Samuel, *Comparative Law and Jurisprudence*, 47 INT'L & COMP. L.Q. 817, 825, 836 (1998); J. Bell, *Comparative Law and Legal Theory*, in W. KRAWIETZ, N. MACCORMICK, & G. H. VON WRIGHT, PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 19-31 (1994); Örücü, *Mixed and Mixing: A Conceptual Search* in E. ÖRÜCÜ, E. ATTWOOLL & S. COYLE, STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING, 335, 338 (1996). See in particular: Gerber, supra note 11, at 722, 728, 730-33 (defining "legal system" by reference to legal agents' every day decisions): N. Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos* 29, 32-9 J. LEG. ED. (2000), and Samuel, *op. cit*., at 833ff (both borrowing Pierre Legrand's description of law as *mentalités*); G. SAUSER-HALL, INTRODUCTION À LA MÉTHODE COMPARATIVE DANS LA RECHERCHE JURIDIQUE ET L'ÉTUDE DU DROIT 43 (1953) (outlining the different *cérébralités* of law); K. ZWEIGERT & H.

Ewald stops short of defining "legal systems," however. Nor does he explain how such legal systems might be amenable to the kind of comparisons he suggests. Presumably, "legal systems" here is understood in a way that is consistent with the conception of law as jurisprudence, but this is far from explicit in Ewald's analysis. Moreover, the inherent comparability of these legal systems simply is assumed. Yet, a complete theory of comparative law cannot but face these issues head on.[33] Unlike domestic lawyers, who can perhaps go about "doing law" without much thinking about the precise boundaries of their domain of operation, comparatists cannot begin their work without first circumscribing that which is to be compared, the distinct wholes between which the comparison is to take place.[34] Before we can cross from law as jurisprudence over to comparative law as comparative jurisprudence, therefore, we need a clear understanding of what constitutes a legal system, and we must be satisfied that legal systems so-understood indeed are inherently comparable.

The object of the present Article is to take up these very issues. Specifically, I propose to show that law as jurisprudence,[35] unlike naturalist and positivist conceptions of law, entails a conception of the legal system as inherently comparable. Among the many conceptions of law, only naturalism and positivism here are considered, for they are the only likely competitors to law as jurisprudence when it comes to finding a conception of law that allows for the possibility of comparative law *per se*.[36] Unlike these conceptions, law as jurisprudence indeed would allow for the possibility to compare, not just legal rules, institutions, or solutions, but entire legal systems--law as a whole. Should it be successful, therefore, the present analysis would prove a contribution to the field of comparative law. But it could also contribute to legal philosophy, albeit incidentally, by underscoring the appeal of law as jurisprudence as against other possible theories of law. Indeed, inasmuch as comparative law has been instinctively perceived and treated as a self-standing discipline, despite its having yet to be articulated as such, any theory of law that succeeds at corroborating this instinct is bound to see its own power correspondingly increased.[37] As concurrent contributions to comparative law and legal philosophy,

---

KÖTZ, INTRODUCTION TO COMPARATIVE LAW 62ff (1987) (referring to "legal styles"); Van Hoecke & Warrington, supra note 1, at 532-36 (referring to "legal cultures").

[33] Ewald does not deny this, quite the opposite. See: Ewald, supra note 22, at 706-07.

[34] "Certainly for cross-cultural purposes, for example, we would have to agree upon an operational definition of law in order to agree upon what is to be compared." L. Nader, *The Anthropological Study of Law*, 67 AMERICAN ANTHROPOLOGIST 6 (1965).

[35] In reconstructing law as jurisprudence from Ewald's analysis, I have had to reach beyond his explicit statements into what I take to be suggested implicitly. In so doing, I may have strayed somewhat from Ewald's own views. This would not weaken my analysis, however, since my ultimate purpose here is not so much to interpret Ewald as to contribute to a conception of law that allows for the comparability of legal systems.

[36] Realist and postmodernist conceptions of law are not considered here, as they are premised on law's *non*-autonomy from politics, culture, etc… (see, e.g., Friedman, supra note 21, at 11-15; B. de Sousa Santos, supra note 23; S. Henry, supra note 23; Galanter, supra note 23), and if law is devoid of intrinsic object, so is comparative law.

[37] In other words, while law as jurisprudence here is offered primarily as a *nominal* conception—one set up for the particular purpose of legitimizing comparative law *per se*—it does lay claim, albeit incidentally, to also constituting an apt *real* conception of law, one that "embodies an ontological claim." K. I. Winston, *The Ideal Element in a Definition of Law*, 5 LAW & PHIL'Y 89, 101 (1986).

finally, the present analysis may serve to appease what have become recurring calls for greater cross-pollination between legal theory and comparative law.[38]

The conditions which legal systems must meet in order to be comparable are set out in Part II. It is there explained that only objects that are simultaneously plural and unified are comparable, and that a conception of the legal system as comparable hence is a conception that is sufficiently broad to accommodate a plurality of legal systems, but not so broad as to preclude minimal unity among them. Part III shows that, by these standards, a naturalist conception of the legal system is too narrow: it accounts for unity, but not for plurality. Part IV shows that a positivist conception instead is too broad: it accounts for plurality, but not for unity. Part V argues that the conception of the legal system under law as jurisprudence in contrast is neither too narrow nor too broad: under this conception, legal systems are plural, but they are nonetheless somewhat unified. It is concluded that law as jurisprudence, unlike naturalism and positivism, entails a conception of the legal system as comparable, and that comparative law as comparative jurisprudence—comparative law *per se*—hence appears possible.

II. COMPARABILITY REQUIRES UNITY AND PLURALITY

Comparison is possible only among objects that are, simultaneously but without contradiction, unified and plural. Contrary to the old saying, apples and oranges are comparable, at least in some ways. They are plural *qua* apples and oranges, but they are also one *qua* fruit. As apples and oranges, their distinctiveness is absolute and thus a bar to comparison: they are incommensurable (so goes the saying). But as fruit, their distinctiveness is relative, and it is accordingly possible to compare them in terms of sweetness, colour, and nutritional value, for example. It is because apples and oranges are simultaneously one and plural that their comparison is possible.

By this reasoning, it is *not* possible to compare apples (or oranges) with themselves, or apples (or oranges) with, say, airplanes. Apples are not comparable with themselves because of the absence of plurality.[39] They are not comparable with airplanes because of the absence of unity: apples have nothing in common whatsoever with airplanes. There is little sense in saying of apples and airplanes that they have different textures, sweetness, or propulsion mechanisms (although they clearly do). As a result, there simply is nothing to compare. Of course, it is possible to observe apples and airplanes superficially and conclude that they indeed are incommensurable. But this does not amount to true comparison, for this conclusion can be arrived at without any real knowledge or understanding of either apples or airplanes.

[38] See, e.g., P. Legrand, supra note 17; Samuel, supra note 32, at 817; W. Twining, *Globalization and Comparative Law*, 6 MAASTRICHT J. 217, 229 (1999); Hill, supra note 16.
[39] I am here assuming that the very same apples or oranges are compared to themselves. Clearly one apple can be compared to another, as no two apples are exactly the same, while they both qualify as "apples."

The unity/plurality antinomy is sometimes described in terms of self-ness/otherness[40] or sameness/difference.[41] The self/other antinomy is apt, in that it conveys plurality and unity alike: insofar as the "other" is an *alter ego*—"the other "I" existing as unexplored virtuality of the self"[42]--the self and the other clearly are distinct, yet partaking of a common kind. The sameness/difference antinomy, in contrast, is misleading, in my view. It captures both plurality and unity, but it says too much. Plurality is necessary, but difference is not: comparison can proceed so long as there is a plurality of entities to compare, quite apart from whether these entities turn out to be identical or different. In other words, sameness and difference are possible conclusions of, not conditions for, the comparative process.

If the legal system is to be comparable, therefore, it must be simultaneously unified and plural, simultaneously "self" and "other." This is to say, it must be defined sufficiently broadly to accommodate plurality--one or several "others"--but not so broadly as to lose all sense of unity--all sense of "self."

III. NATURALISM: THE LEGAL SYSTEM IS UNIFIED BUT NOT PLURAL

Under an extreme naturalist conception,[43] law is not comparable because it is defined so narrowly as to preclude the possibility of its being plural. Law is reduced to a fixed set of ideas, namely, ideas of juridical morality.[44] The facts of law—legal materials--are diverse and changing, but they are not legally significant as such. They merely are practical, useful. They are physical evidence, official confirmation, convenient implementation of independently existing law.[45] As the ideas of law are presumed universal, there can only be one and the same Law.[46] Plurality is ruled out by hypothesis.

---

[40] Curran, supra note 16, at 657.

[41] « L'on ne saurait en effet comparer que des entités qui, même si elles peuvent et doivent être à certains égards différentes, doivent au moins prêter à la comparaison, c'est-à-dire présenter cette unité minimale de nature sans laquelle la comparaison n'aurait aucune raison d'être ni aucun sens. » Picard, supra note 1, at 902. See also, P. Legrand, *Sur l'analyse différentielle des juriscultures*, 4 R. I. D. C. 1053 (1999).

[42] Legrand, supra note 41, at 1053. See generally: M. KILANI, L'INVENTION DE L'AUTRE (1994).

[43] By "extreme" naturalist conception I mean a conception such as Locke's, under which individuals can have "rights" despite the absence of any State. J. LOCKE, TWO TREATISES OF GOVERNMENT (Cambridge, 1960). Lon Fuller's conception of law would not qualify as "extremely naturalist" in contrast. L. FULLER, THE MORALITY OF LAW (1963). While he is, in his own words, "emphatic" about his theory being "some variety of natural law" (at 96), he nonetheless takes the facts of law seriously: "[B]efore what emanates from that source [the source identified by the Rule of Recognition] can be called law, it must conform to certain standards …" (At 198.)

[44] H. GROTIUS, DE IURE BELLI AC PACIS (1625); PUFENDORF, DE IURE NATURAE ET GENTIUM (1672); T. AQUINAS, SUMMA THEOLOGICA, II, 742-53 (A. Pegis, ed., 1945); J. SELDEN, OPERA OMNIA (D. Wilkins, ed., 1726); Locke, supra note 43.

[45] In Locke's view (supra note 43, Second Treatise, §§7, 87-89), for example, the State's only role is the practical one of sanctioning the rights that individuals already possessed in the state of nature. On this view, the only part of law that would not be universal and could thus vary and be compared is its sanctions. (Assuming these would qualify as "law" in the first place, which is doubtful.)

[46] Particularly striking in this respect is Gordley's analogy between law and physics: "[The domestic lawyer] should no more ignore what [foreign lawyers] say than an American physicist should ignore a

Naturalists clearly view law as forming a "system,"[47] that is, "a unified and autonomous whole,"[48] a whole comprised of elements which are somehow related to one another, as opposed to merely juxtaposed.[49] Law is systematic, in their view, in the same sense that Leibniz, Condillac, and Leibniz, among others, supposed philosophy to be. This is to say, law being idea, it is presupposed "pure"—free of the imperfection that plagues facts--and hence naturally subservient to logic. And, while law's logic is implicit and hence not readily apparent to the (imperfect) human mind, this logic can be unveiled through the similarly logical reasoning of rational scholars. Law is systematic, therefore, in the sense that the totality of its knowledge can be synthesized into a single, hierarchical, coherent and complete intellectual structure. In turn, this structure, both, comprises similarly constituted, yet smaller, sub-structures (torts, contracts, etc…) and itself constitutes just one sub-structure among many, similarly constituted others (philosophy, economics, etc…), in the similarly constituted, yet larger, structure of human knowledge as a whole. Hence the label "system-as-synthesis" suggested by Christophe Grzegorczyk.[50]

The problem, however, is that law under naturalism forms just *one* such system—the juridical system. What are commonly known as the world's "legal" systems in fact are *political* systems, which are hopefully, but not necessarily, consistent with the juridical, and thus are not legally relevant in themselves. This is most evident in the "common core" projects,[51] most of which were at least implicitly animated by the naturalist impulse

---

German or an Italian." (Supra note 1, at 611.) In his view, there is only one legal system just like there is only one physical system (id., at 613). In a similar vein, Rheinstein wrote: "Comparative law […] is the observational and exactitude-seeking science of law in general […] it searches for typical collocations, coincidences, and sequences, or, in other words, for 'laws'—[…] laws of the kind of Newton's laws of gravitation […]" (M. Rheinstein, *Teaching Tools in Comparative Law,* 1 AM. J. COMP. L. 95, 98 (1952)). See also W. Fikentscher's "open system" approach to comparative law (METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG), discussed in Zekoll, supra note 4, at 2737.

[47] On the many uses and abuses of the word "system," see: J. Combacau, *Le droit international: bric-à-brac ou système?* 31 ARCH. DE PHIL. DU DROIT 85 (1986).

[48] A.-J. ARNAUD ET AL., DICTIONNAIRE ENCYCLOPÉDIQUE DE THÉORIE ET DE SOCIOLOGIE DU DROIT 596 (2nd ed., 1993). (My translation.)

[49] M. VAN DE KERCHOVE & F. OST, LEGAL SYSTEM BETWEEN ORDER AND DISORDER, 5-6 (1994).

[50] C. Grzegorczyk, *Évaluation critique du paradigme systémique dans la science du droit* 31 ARCH. DE PHIL. DU DROIT 281 (1986). (*Système-synthèse*.) Grzegorczyk distinguishes the system-as-synthesis from the organic system (*système-organisme*), briefly described below (Sections VI and V) and the system-as-calculation (*système-calcul*). Unlike the system-as-synthesis, which presupposes that truth lies in correspondence with reality, the system-as-calculation is "pure" or "ultra-rational," in the sense that it aims to transcend reality and "mathematize" or "formalize" it. (Id., at 283.) Made up of abstract maxims and dogmatic fictions, the system-as-calculation is alternatively described as resting on a view of truth as internal consistency (ibid.) or else as favoring certainty over truth (R. Sève, *Système et Code*, 31 ARCH. DE PHIL. DU DROIT, 77, 78 (1986)). It proceeds from the view that reason, not only frees us from the imperfection of reality, but in fact determines what is real. Heideger and the German Pandectists are prime examples of thinkers falling in this category. (*Id*., at 77-80.) System-as-synthesis, system-as-calculation, and system-as-organism arguably correspond to Kenneth Bailey's "conceptual/pattern," "abstract," and "physical" systems, respectively. K. D. BAILEY, SOCIOLOGY AND THE NEW SYSTEMS THEORY 47-57 (1994).

[51] See supra note 4.

to expose law's universality.[52] The legal rules gathered in these projects have been uprooted from their respective legal systems and re-classified thematically—contracts, family, etc… The origin, the contexts of the rules are significant only insofar as they shed light on the rules' content. From this perspective, the legal context of these rules deserves no greater consideration than their other contexts (social, cultural, etc…). The rules themselves are valuable only insofar as they contribute to the reconstruction of the one and only meaningful system: law's conceptual system.

In sum, while the naturalist conception does present law as a system (the juridical system), which could eventually be compared with other subsystems of human knowledge (the philosophical system, the economic system, etc…), it does not allow for the possibility of law *itself* forming a plurality of systems. It does not, in other words, allow for the possibility of system-based comparisons *within* law.

Of course, comparisons among law's subsystems--better known as "legal fields" or "legal domains"--remain possible. For, as just suggested, these are full-blown "systems" just as much as law itself, under naturalism: in the same way that apples and oranges differ *qua* apples and oranges yet merge as fruit, torts and contracts differ *qua* torts and contracts yet partake of a common kind, namely, that of legal fields. Admittedly, legal fields are not fully autonomous, in that they remain closely tied to one another in law's overall conceptual structure,[53] but neither is law itself, which is similarly tied to other conceptual systems in the larger edifice of human knowledge. This is to say, comparisons *in* law are, under naturalism, not qualitatively different from comparisons *of* law. Now, comparisons among legal fields usually are seen as exercises *in law*, not *in comparative law*. But, remember that naturalists refuse to draw this distinction: in their view, "doing comparative law" is no different than "doing law in general."[54] In sum, whereas system-based comparisons in law in a sense are possible under naturalism, these comparisons, besides not falling within what we instinctively feel comparative law to be about, are not of a kind that would serve to differentiate comparative law from law in general. If anything, these comparisons undermine, rather than fuel, the possibility of comparative law *per se*.

IV. Positivism: The Legal System is Plural but not Unified

Positivist conceptions of law do not fare much better than naturalist conceptions in terms of allowing for the comparability of the legal system, but the reasons are different. Whereas extreme naturalism is too narrow to allow for a plurality of legal systems, positivism is so broad as to preclude these legal systems from being unified in any way.[55]

---

[52] The European unification project is a notable exception in this respect, as it appears to be largely driven by practical harmonization objectives. See: Bussani & Mattei, supra note 4.
[53] See Arnaud's distinction between "legal systems" and "legal domains," supra note 48, at 596.
[54] Supra note 17.
[55] Compare this with William Twining's (yet to be argued) claim that the failure of positivism in this respect lies in its definition of law being so narrow as to allow for no more than a couple of objects for comparison, namely, occidental legal systems, perhaps even only British analogues. (Supra note 38, at 222-223). But see Joseph Raz, for one, who writes of his CONCEPT OF A LEGAL SYSTEM that it is "general

Positivism indeed drains law of all (ideal) content, and defines it by exclusive reference to its facts,[56] in particular, the fact that it is enacted and enforced by States, themselves factually defined in terms of sovereign power and/or a citizenry's habit of obedience.[57] Accordingly, whereas a rule qualifies as "legal" under naturalism insofar as its substance can be logically derived from that of another legal rule proper, under positivism, a rule qualifies as "legal" insofar as it was "validly" enacted, that is, enacted in accordance with the process so-designated by the State.[58]

The sum of a State's valid enactments can be said to form a "system"—a "unified and autonomous whole"[59]--but a different kind of system than the system-as-synthesis of naturalism just described. According to Grzegorczyk,[60] law under positivism models itself on what he calls the "system-as-organism," a systemic model originally articulated by biologists[61] and later transposed, not without friction,[62] upon the human sciences, in particular anthropology and sociology.[63] Imbued with nineteenth-century holism,[64] this model is rooted in an intuition that complex objects may not be fully explained in terms

---

in that it claims to be true of all legal systems." J. RAZ, THE CONCEPT OF A LEGAL SYSTEM—AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 1 (1970).

[56] T. HOBBES, LEVIATHAN (1651); J. BENTHAM, OF LAWS IN GENERAL (1970); J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (1995); H. KELSEN, GENERAL THEORY OF LAW AND STATE (1961); H. L. A. HART, THE CONCEPT OF LAW 181ff (1961). Most notable in this respect is Joseph Raz's CONCEPT OF A LEGAL SYSTEM (supra note 55, at 2), which purports to provide a full and detailed description of the legal system without ever referring to issues of content. Raz's only explanation in this respect is that "[a]nalytical jurists[…] have paid little attention to the problem of content, and as we have chosen to develop our systematic conclusions largely through the critical examination of previous theories it will be convenient to disregard it almost completely."

[57] Hobbes, supra note 56, at 228ff; Austin, supra note 56, at 193-94; Bentham, supra note 56; Kelsen, supra note 56, at 286ff; Hart, supra note 56, at 50ff. In contrast, see, e.g., Hegel's conception of the State as actualized *idea*. G. W. F. HEGEL, PHILOSOPHY OF RIGHT 155-60 (1967).

[58] In Kelsen's words, under naturalism, a norm is binding "because it has a certain content, that is, because it is logically deducible from a presupposed basic norm," whereas under positivism, a norm is binding "because it is created in a certain way… Therefore any kind of content might be law." Kelsen, supra note 56, at 198.

[59] Supra note 48.

[60] Supra note 50, at 284-85.

[61] H. MATURANA & F. VARELA, AUTOPOEISIS AND COGNITION—THE REALIZATION OF THE LIVING (1980); F. VARELA, PRINCIPLES OF BIOLOGICAL AUTONOMY (1979); M. Zeleny, *What is Autopoeisis?* in M. ZELENY, ED., AUTOPOIEISIS—A THEORY OF LIVING ORGANIZATION 4, 6 (1981); L. VON BERTALANFFY, GENERAL SYSTEM THEORY (1968).

[62] Maturana and Varela themselves disagreed on this point. See Maturana & Varela, supra note 61, at 118; Varela, supra note 61, at 54ff. See also: H. Rottleuthner*, Les métaphores biologiques dans la pensée juridique*, 31 ARCH. DE PHIL. DU DROIT 215 (1986); M. Gutsatz, *Les dangers de l'"auto"*, in P. DUMOUCHEL & J. P. DUPUY, L'AUTO-ORGANISATION—DE LA PHYSIQUE A LA POLITIQUE 29ff (1983).

[63] The best example of this perhaps is Herbert Spencer's application of the theory of natural selection in the realm of social organization. H. SPENCER, SOCIAL STATICS (1954). See generally: E. LASZLO, INTRODUCTION TO SYSTEMS PHILOSOPHY (1972); G. M. WEINBERG, AN INTRODUCTION TO GENERAL SYSTEMS THINKING (1972); C. W. CHURCHMAN, THE SYSTEMS APPROACH (1979); S. LICKER, FUNDAMENTALS OF SYSTEMS ANALYSIS (1987); M. L. GIBSON & C. T. HUGHES, SYSTEMS ANALYSIS AND DESIGN (1994).

[64] "Methodological holism" arose in the nineteenth century in reaction to the Cartesian nominalism and Newtonian mechanism that informed its rival-- "methodological individualism." See: E. NAGEL, THE STRUCTURE OF SCIENCE 336-97, 536-46 (1961).

of their constitutive elements, in other words, that the whole may be greater than the sum of its parts. It epitomizes ensembles of interconnected elements that are teleologically self-regenerating, that is, wholes that self-regenerate with a view to fulfilling a certain function.[65] "Self-regenerating" here means that these systems "produce by themselves what they use as units, by means of what they use as units, their unity as system lying precisely in that."[66] This is not to say that an organic system is autistic, however. External elements, be they from the general environment or other systems, can become part of the system, so long as they can be successfully processed through this system's internal matrix. Through this combination of "cognitive openness" and "functional or, in the case of law, normative closure,"[67] organic systems are able to connect with and adapt to their surroundings while retaining their identity as systems.[68] As for exogenous shocks that are too great to be absorbed, they result in the systems' disintegration pure and simple.[69]

The parallels between the system-as-organism and law under positivism indeed are many.[70] To begin with, it clearly is in response to a holistic intuition that positivists directed their quest for legal essence to the legal system as a whole, as opposed to individual legal rules:[71] Kelsen, for one, considered it "impossible to grasp the nature of law if we limit our attention to the single isolated rule."[72] Moreover, the process by which legal materials are produced undoubtedly is self-referential and hence self-regenerating to a point.[73] This is to say,

---

[65] Gibson & Hughes, supra note 63, at 5; Licker, supra note 63, at 5; L. M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 485 (1996-1997).
[66] N. Luhmann, *L'unité du système juridique*, 31 ARCH. DE PHIL. DU DROIT 163, 166. My translation. See also : Maturana & Varela, supra note 61, at 85-9.
[67] Luhmann, supra note 66, at 173. "[N]ormativity lies within the … system itself, it is not determined by the environment." P. Nerhot, *Le fait du droit*, 31 ARCH. DE PHIL. DU DROIT 261, 262 (1986). For a cybernetic analogue, see Ashby's description of systems as "open to energy, but closed to information and control." W. R. ASHBY, INTRODUCTION TO CYBERNETICS 4 (1956).
[68] See generally: H. ATLAN, ENTRE LE CRISTAL ET LA FUMÉE, 41, 56, 87-88 (1979).
[69] Varela, supra note 61, at 32-3, 50ff. This theory found its most famous application in Darwin's theory of evolution, which posited that species « adapt » to new circumstances, not so much through natural genetic manipulation, as had previously been advanced by Lamarck, but rather through natural elimination of the genetically ill-equipped.
[70] See, e.g., R. Sève, *Introduction* 31 ARCH. DE PHIL. DU DROIT 1, 9-10 (1986); F. Ost, *Entre ordre et désordre: le jeu du droit. Discussion du paradigme autopoiétique appliqué au droit*, 31 ARCH. DE PHIL. DU DROIT 133, 141-44 (1986).
[71] S. ROMANO, L'ORDRE JURIDIQUE 7 (2nd ed., Dalloz).
[72] Kelsen, supra note 56, at 3. See also : J. Raz, supra note 55, at 2; M. Troper, *Système juridique et État* 31 ARCH. DE PHIL. DU DROIT 29, 31 (1986).
[73] "[T]he norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm" (Kelsen, supra note 56, at 4); "[a] peculiarity of the law [is] that it regulates its own creation …" (id., at 221); "[the] process, in which law keeps renewing itself, as it were…" (id., at 237); "... law is like King Midas: just as everything he touched turned to gold, so everything to which the law refers assumes legal character" (id., at 278); "[a]ccording to a positivistic theory of law, the source of law can only be law" (id., at 233); "… the individual norms are also 'law,' just as much parts of the legal order as the general norms on which their creation is based" (id., at 232). David Easton calls law's self-referential process "feedback." D. EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 127-29 (1965).

> the legal nature of an act can only be established, in the legal system, on the basis of prior legal acts, on the basis of elements already part of the system; once the legality of the act is established, this act will be a new element of the system, which in turn will condition the legality of other acts subsequently submitted to the system.[74]

Precedents guide judges in deciding cases which will themselves become precedents. Judges rely on legislation which is itself drafted in response to judicial decisions. Individuals build expectations based on legal rules which are formulated so as to account for individual expectations. Legal rules are applied to facts whose very relevance is determined by legal rules.[75] And so on. In addition, "cognitive openness" and "normative closure" aptly describe the relation of positive law to its environment, which relation, while real, is mediate rather than immediate: public policy and foreign legal materials alike influence law-makers, but they cannot become "law" unless they are sanctioned as such by these law-makers.[76] Only external shocks that conform to the system's very own matrix can be absorbed by it.[77] Accordingly, a social policy or foreign legal rule endorsed by a court arguably would thereby become "law" in common law systems, but not in civil law systems, at least insofar as judges would be officially deemed law-makers in the former, but not in the latter.[78] Similarly, a doctrinally-endorsed social policy or foreign legal rule might have constituted "law" in the Roman legal system, where scholarly writings were considered a formal source of law,[79] but less likely so in contemporary civil law systems, and clearly not in common law systems of any era. Revolution and enemy occupation, on the other hand, are examples of shocks that are so severe as to defy absorption by any legal system.[80] Rather, they cause the system's matrix to be replaced from the outside, which is tantamount to the system disintegrating altogether. Finally, law under positivism clearly is *teleologically* self-sustaining. That is, it self-regenerates, not aimlessly, for the sake of self-regeneration,

---

[74] Arnaud, supra note 48, at 51. (My translation.) See also: Ost, supra note 70, at 138-41.
[75] This is implicit in Nerhot's reduction of the law-fact distinction to one between "situations which are denied legal effect and situations to which legal effect has been ascribed." Nerhot, supra note 67, at 279. Nerhot further explains (id., at 272) that "the intrinsic end of that which we call 'fact' consists in an operation by which a particular element is extracted, isolated from its own context in order to be immersed into another context that will give it meaning." (My translation.) Husson corroborates this assertion with the example of causation in torts: among the various possible causes in fact, only those relating to a possible contradiction of a legal rule (a "fault") are retained. L. HUSSON, NOUVELLES ÉTUDES SUR LA PENSÉE JURIDIQUE, 220 (1974). See generally: J. PARAIN-VIAL, LA NATURE DU FAIT DANS LES SCIENCES HUMAINES (1966).
[76] "[Wherever] positive law itself delegates meta-legal norms like morals or justice […] these norms are transformed into norms of positive law." Kelsen, supra note 56, at 354.
[77] Kelsen describes the matrix of legal systems as binary ("That which is not legally prohibited is legally permitted." Supra note 56, at 243) and as barring antinomies ("A 'norm contrary to a norm' is a self-contradiction; […] it would not be a legal norm at all." Id., at 267). It seems, however, that this can only be true, under his view, of legal systems which happen to include a formal rule to that effect, i.e., a formal rule that would provide for something like: "In this legal system, rules are to be interpreted in a binary fashion and in a way that avoids contradictions." I would argue that Kelsen lacks any basis for assuming that the matrix of legal systems necessarily are structured in terms of binariness and non-contradiction.
[78] R. C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS—CHAPTERS IN EUROPEAN LEGAL HISTORY 67-113 (1987).
[79] B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962).
[80] Hart, supra note 56, at 114-15.

but rather with a view better to discharge a function, in particular, the function that the State has ascribed to it: "the acts constituting the law-creating facts are […] only the continuations of the process of the creation of the so-called will of the state […]."[81] In short, positivism views law holistically, as a system with a life of its own, rather than just a sum of legal materials. It is self-regenerative and normatively closed, yet cognitively open. And it has a finality: that determined for it by the State. To this extent, it can be described as a system-as-organism.

This system-as-organism contrasts sharply from the system-as-synthesis of naturalism described above. While the system-as-organism of positivism too qualifies as a "unified and autonomous whole," its unity and autonomy are factual, not conceptual. Whereas the unity of the naturalist legal system stems from its elements being interconnected in their substance, the unity of the positivist legal system lies in the fact that the system's elements have all been subjected to the same process of adoption.[82] Corollarily, the legal system is dynamic under positivism, whereas it is static under naturalism.[83] Law is in constant motion under positivism: legal materials are created, used, modified, eliminated, replaced constantly, and the system as a whole changes correspondingly, in content, size, and shape.[84] Under naturalism, in contrast, law is fixed: it is a set of immutable ideas. The understanding and implementation of these ideas by jurists are likely to change, evolve, improve, but not law itself. The autonomy of the positivist legal system similarly is factual, as opposed to conceptual. Remember that, under naturalism, the legal system is a subsystem of human knowledge distinct from other subsystems insofar as it comprises a particular kind of ideas--ideas concerning justice. Under positivism, in contrast, the legal system, being identical with the State,[85] is as autonomous as is the State. The State is autonomous in that it is sovereign: it acts independently from other States with respect to internal law-making.[86] As a result, the positivist legal system also is autonomous in this way. Most importantly for present purposes, this autonomy is directed at other *legal* systems, whereas the autonomy of the naturalist legal system is directed at other *non*-legal conceptual subsystems. This suggests that legal systems are many, under positivism, as opposed to unique, as it is under naturalism. In sum, unlike naturalism, which presents law as forming just one unified and autonomous whole (the juridical system-as-synthesis), positivism presents law as forming as many unified and autonomous whole (systems-as-organisms) as there are States. Hence is the positivist legal system plural.

[81] Kelsen, supra note 56, at 281-82.
[82] On these two kinds of systematicity, see: S. Rials, *Supraconstitutionalité et systématicité du droit*, 31 ARCH. DE PHIL. DU DROIT 57, 71-72 (1986); Combacau, supra note 47, at 86-7; Grzegorczyk, supra note 50, at 289-92
[83] Supra note 60?
[84] Kelsen, supra note 56, at 279: "The doctrine of […] the legal order comprehends the law in motion, in its perpetually renewed process of self-regeneration. It is a dynamic theory of law as opposed to a static theory which attempts to comprehend the law without consideration of its creation, only as created ordre…"
[85] Kelsen, supra note 56, at 286-319 ("§41. The Identity of State and Law").
[86] "[…] *not* habitually obeying the orders of other[States]." Hart, supra note 56, at 25. (Italics in original.)

In fact, one might be tempted to ask whether there would not be *more* legal systems than there are States under positivism. For, as under naturalism, the legal system under positivism can be divided into subsystems (albeit material, rather than conceptual ones). Indeed, insofar as law is identical with the State and the State is itself materially dividable along territorial or personal lines, so is the legal system.[87] And thus is the law of Quebec, for example, often considered independently from that of the other Canadian provinces, just like the laws applicable exclusively to Canadian aboriginals can be distinguished from those applicable to all Canadians.[88] However, such subsystems are not full-fledged "systems" on a par with the Canadian legal system. As they are all rooted in the same matrix of validity—that of Canada--[89] they do not boast the kind of mutual autonomy that Canada enjoys with other countries.[90] Not surprisingly, such subsystems usually are labelled "jurisdictions," not "systems,"[91] and their comparison more likely qualifies as an exercise in "law," than as one in "comparative law."[92] In conclusion, there does appear to be just as many legal systems as there are States, under positivism. No more, no less.

---

[87] Even Kelsen, who insisted that there could only be one legal system in force on any given territory (supra note 56, at 181), agreed that systems can be divided so long as the place and status of each division can be justified by appeal to the system's rules of organization: H. KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 99 (1992).

[88] For a similar, yet much more detailed description of Africa, see Vanderlinden, *supra* note 32, at 384-85.

[89] Hence are civil law and common law contents in Quebec "structurally determined." Palmer, supra note, at 8. See also: H. P. Glenn, *Quebec:* Mixité *and Monism*, in Örücü, Attwooll, & Coyle, supra note 32, at 1 and 3. (Referring to "structured *mixité*.")

[90] The cybernetic organic model of the legal system accordingly qualifies as "weak legal pluralism" (J. Griffiths, *What Is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1 (1986)), also known as "vertical" (G. GURVITCH, THE SOCIOLOGY OF LAW 181 (1942)) or "old" (G. Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism,* 13 CARDOZO L. REV. 1443, 1451 (1992)) legal pluralism. "Strong", "horizontal" or "new" legal pluralism corresponds to the post-modern view rejected above (supra note), whereby "law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields […]." (Griffiths, at 39.) In contrast, "weak", "vertical", or "old" legal pluralism "is merely a particular arrangement in a system whose basic ideology is centralist." (Griffiths, at 8.) "In this ('weak') sense a legal system is 'pluralistic' when the sovereign (implicitly) commands (or the grundnorm validates, and so on) different bodies of law for different groups in the population […] defined in terms of features such as ethnicity, religion, nationality or geography […] Within such a pluralistic legal system, parallel legal regimes, dependent from the overarching and controlling state system, result from 'recognition' by the state […]." (*Id*., at 5; underline in original.) See also: D. Goldberg & E. Attwooll, *Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence* in Örücü, Attwooll & Coyle, supra note 32, at 315; M. G. Smith, *Some Developments in the analytic framework of pluralism* in L. KUPER AND M. G. SMITH, EDS., PLURALISM IN AFRICA, 415 (1969).

[91] This is to say, while all "systems" of positive law also qualify as "jurisdictions" ("Canada has *jurisdiction* over all of its territory"), not all "jurisdictions" are "systems," and the label "jurisdiction" usually is reserved for jurisdictions that are not systems. See e.g. the reference to Quebec, Louisiana, Scotland, among others, as "mixed jurisdictions" in V. V. PALMER, MIXED JURISDICTIONS WORLDWIDE—THE THIRD LEGAL FAMILY (2001). But see: Örücü, Attwooll, & Coyle, supra note 32.

[92] For example, relating federal, provincial, and aboriginal law to one another clearly is part of doing Canadian constitutional law. Admittedly, comparisons between Quebec and Ontario law are more difficult to classify. While these clearly qualify as exercises in "comparative law" at one level, I would argue that this is the case precisely because Quebec and Ontario are genealogically related to different legal "systems" proper, namely, the French and the English. Indeed, comparisons between Ontario and Manitoba law (two common law provinces) would not as easily qualify as exercises in comparative law.

So the legal system clearly is plural under positivism. Yet, as explained in Section II, plurality alone is not enough: if the legal system is to be comparable, it must be both plural and unified. And while the above discussion shows legal systems under positivism to be *internally* unified, it does not show them to be unified *among themselves*. (Recall that apples and oranges are comparable because they are unified as fruit, i.e., because they are *inter*connected, in addition to forming separate, internally unified objects.) In fact, the above discussion shows legal systems to be entirely *dis*connected from one another. If the ultimate function of the positivist legal system is, as just submitted, whatever the State wishes it to be, and if state wishes vary from State to State, as state sovereignty suggests they might,[93] then legal systems differ absolutely from one another.[94] And just like apples and airplanes, they are incommensurable.[95]

Of course, all legal systems still share the procedural quality of originating from a State. But this common quality is not sufficient to support meaningful inter-system comparisons. Comparisons conducted on that basis alone would yield no deeper conclusions than: "These legal systems differ because they were enacted by different States." This is like saying of apples and airplanes that they differ because they are different objects, which is not false, but trivial, for true by hypothesis. More meaningful would be to say that apples and airplanes differ because the first is a fruit whereas the second is a machine. Correspondingly, one could conclude of two legal systems that they differ because one was intended to foster individual liberty, whereas the other was designed to solve social problems efficiently. But this last conclusion would imply that we have probed the intentions of these systems' respective programmers—these programmers' ideas--which are not part of the positivist legal system. As a result, a positivist would have to designate this kind of comparison, not an exercise in comparative *law*, but rather one in comparative political philosophy, political economy, or social policy, among other possibilities. In other words, while positivism allows for a variety of comparative enterprises, comparative *law* is not one of them.

---

[93] Or else, should State intentions happen to coincide, it would be for reasons that are contingent, i.e., not legally significant.

[94] « Il n'y a donc pas réellement de droit comparé : il n'y a tout juste […] que des droits comparés, puisque l'essence du droit le condamne, sur le plan des contenus, à demeurer éclaté, divers, pluriel à l'infini : concrètement, il n'y a que des droits et non plus un droit, si ce n'est cette structure normative précisément vide de tout contenu, et dont la substance juridique doit rester totalement creuse afin de rester ouverte à tout contenu possible arbitrairement déterminé par les souverainetés étatiques ou législatives … » Picard, supra note 1, at 905.

[95] What is known among comparativists as "functionalism" emerged as a response to this positivistic perception of legal systems as being incommensurable. As the means by which these legal systems solve social problems seemed too far apart to bear direct comparison, it was suggested that the comparative exercise instead center upon these problems, which in contrast were clearly the same for all legal systems. See: B. MARKESINIS, FOREIGN LAW AND METHODOLOGY, 4-6 (1997); A. T. von Mehren, *The Comparative Study of Law*, 6/7 TUL. CIVIL L. FOR. 43 (1991-92); Kötz, supra note 11, at 758; de Cruz, supra note 13, at 37-9; Zekoll, supra note 4, at 2726-27; Dehousse, supra note 13, at 768; V. A. Tumanov, *On Comparing Various Types of Legal Systems,* in W. E. BUTLER & V. N. KUDRIAVTSEV, EDS., COMPARATIVE LAW AND LEGAL SYSTEM: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES, 69, 76 (1985). Functionalism does not help here because it implies that law, and thus also comparative law, is a means to solve social problems, rather than as an end in itself. As Alan Watson has suggested (supra note 1), under functionalism, comparative law accordingly is a sociological, not legal, inquiry.

Just like naturalism, therefore, positivism fails to allow for the legal system's comparability, but for opposite reasons. Whereas the legal system is unified but not plural under the ideal account offered by naturalism, it is plural but not unified under the factual account advanced by positivism. Again, what is required is something in between: a definition of the legal system that is sufficiently broad to accommodate a plurality of systems, but not so broad as to preclude all forms of unity among them.

V. LAW AS JURISPRUDENCE: THE LEGAL SYSTEM IS UNIFIED AND PLURAL

Law as jurisprudence is just what we need. Remember that, under this conception, law comprises facts *and* ideas. Indeed, it comprises all of the facts that make up law under positivism, but it also includes the ideas underlying these facts, the ideas that make up law under naturalism. As such, I here argue, it entails a conception of the legal system that combines the factual and ideal dimensions of the positivist and naturalist conceptions, and hence also their respective unity and plurality.

Insofar as law as jurisprudence is state-enacted, it entails, like law under positivism, a plurality of legal systems. Unlike under positivism, however, law here is not identical with the State, and thus not just any kind of state enactments: it is state enactments … of juridical ideas. In other words, law as jurisprudence entails that the law-making power of States is constrained, not by other States, but by law's own ideas.[96] Specifically, under law as jurisprudence, a State true to its calling[97] must aim to enact rules that, taken together, provide the best possible account of juridical ideas.[98] In this sense, a dictatorship run without any concern for justice, for example, would not qualify as a "legal" system proper.[99] Therefore, whereas there are but one legal system under

[96] I. KANT, DOCTRINE OF RIGHT (Part I of THE METAPHYSICS OF MORALS §45 (M. Gregor, ed. 1991)); Hegel, supra note 57, at §§257-258; Picard, supra note 1, at 911. See also Jules Freund's description of law as "the mediation between the moral and the political," where "the moral" refers to the part of morality that specifically concerns law. *Droit et Politique. Essai de définition du droit,* 16 ARCH. DE PHIL. DU DROIT 15, 17 (1971). (My translation.)

[97] Some might argue that a State *not* "true to its calling" simply does not qualify as a "State." See, e.g., Hegel, supra note 57.

[98] What counts as a "juridical" idea need not be specified here. For now, suffice it to say that "[j]ustice is a notion more or less vague that men form at a given time and place of that which is just or unjust. The notion of just and unjust is infinitely variable and changing, but the feeling of just and unjust is a permanent feature of human nature." L. DUGUIT, TRAITE DE DROIT CONSTITUTIONNEL, Vol. I, at 50, quoted in L. Valcke, *La problématique juridique de G. Del Vecchio* 23 SCIENCES ET ESPRIT 201, 213 (1971). (My translation.)

[99] This is not to say that the laws embodying juridical ideas must themselves be elaborated on a strict juridical basis: laws elaborated on the basis of, say, efficiency still qualify as "laws" proper, so long as they are *about* justice. For example, inquisitorial and adversarial trial procedures could be viewed, either as competing best interpretations of some abstract ideal of due process, or as efficiency-based applications of this same idea that differ merely because the political, cultural, economic circumstances of continental and Anglo-Saxon societies also differ. Under either view, they would qualify as "legal" because they are *about* due process. See, e.g., J. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121 (2001); *Standing to Raise Constitutional Issues* 50 AM. J. COMP. L. 437 (2002) (arguing that different States have interpreted juridical ideas differently in part due to the differing "economies" of their respective polities).

naturalism and as many legal systems as there are States under positivism, there are many legal systems, but perhaps not as many as there are States, under law as jurisprudence.[100]

Within each such system, are merged the synthetic systematicity of law under naturalism and the organic systematicity of law under positivism. This is to say, each such system is factually and conceptually unified, as well as factually and conceptually autonomous. It is factually unified, like law under positivism, in that all its materials have been subjected to one and the same adoption process, and these materials also are conceptually unified, like law under naturalism, in that they represent interconnected, mutually consistent ideas. Each system also is factually autonomous, like law under positivism, in that its materials have been enacted by States acting independently from one another, as well as conceptually autonomous, in that the ideas underlying these materials share a kind that distinguishes them from the rest of the intellectual environment.[101]

It must be emphasized that synthetic and organic systematicities here are *merged*, as opposed to merely *juxtaposed*. Indeed, apples and oranges are comparable because they *simultaneously* are "apple/orange" and "fruit." That is, they are "apple/orange" through and through, as well as "fruit" through and through. Apples and oranges would not be comparable if each instead comprised two separate parts: one "apple/orange" and one "fruit." If law is to be comparable, therefore, it must similarly be *simultaneously* plural and unified. Under law as jurisprudence, this means that each legal system must be fact through and through, as well as idea through and through.

As "systems" in their own right, the systems of law as jurisprudence indeed are more than just the juxtaposition of the synthetic and organic legal systems of naturalism and positivism. They are the amalgamation, the seamless fusion of these two systems into a third. This third system can be described as an organic system, but of a different kind than the organic system of positivism. For organic systems come in two flavours, "cybernetic" and "autopoieitic,"[102] and law as jurisprudence arguably resembles an autopoieitic organic system, whereas law under positivism is closer to a cybernetic organic system.

Cybernetic and autopoieitic systems alike, as organic systems, are "wholes that self-regenerate with a view to fulfilling a certain function."[103] But, whereas the function being fulfilled is external to the system in the case of cybernetic systems, this function is

---

[100] Possible subsystems are not included in this assessment for the same reason that they were not under positivism, namely, that they are not as autonomous as the legal system as a whole, and hence fail to qualify as full-fledged "systems" on a par with it. Supra, text accompanying notes 87 to 92. See also: Luhmann, supra note 66, at 172.
[101] See, on this point, Ewald's insistence upon the autonomy of law (as jurisprudence) from other disciplines, in particular legal philosophy: Ewald, supra note 1, at 1944, 1956ff, 2115; Ewald, supra note 22, at 705. More generally, see: J.-L. BERGEL, THÉORIE GÉNÉRALE DU DROIT 4 (2nd ed., 1989); Samuel, *supra* note 32, at 823.
[102] Grzegorczyk, supra note 50, at 285.
[103] Supra, text accompanying note 65.

internal in the case of autopoieitic systems.[104] Big Blue is an example of a cybernetic organic system: it constantly self-regenerates with a view to improving its chess game, a function which was externally imposed upon it by--and hence is modifiable at the whim of--its ultimate programmer. A rabbit is an example of an autopoieitic organic system: it constantly self-regenerates with a view to becoming … a better rabbit, that is, better at "finding food, surviving, and reproducing."[105] As the ultimate function of the autopoieitic system—its finality--lies within it, it is functionally (or normatively) closed, circular, and seamless. That is, it boasts neither inputs and outputs, nor clear beginnings and ends, and all its elements have equal weight. In contrast, the finality of the cybernetic system lies beyond it, and this system accordingly is functionally (or normatively) open, linear, and hierarchical: it displays inputs and outputs, beginnings and ends, and the weight of its elements vary.

As just suggested, law under positivism more closely resembles an organic system that is cybernetic. At the outset, the finality of the positivist legal system is whatever its programmer (the State) intends it to be, and intentions, as ideas, by definition are external to the system. This in turn causes this system to be normatively open, linear, and hierarchical. Its openness can be explained as follows. The fact/idea distinction which drives the positivist conception of law manifests itself within the legal system through a hard divide between so-called "easy" and "hard" cases, that is, between cases where law ostensibly comes readily interpreted and applicable, and cases where law must be interpreted before it can be applied.[106] In cybernetic terms, the system's matrix appears self-explanatory in easy cases, whereas further instructions are needed in hard cases. In these cases, judges have no choice but to attempt to reconstruct the programmer's motives, and reprogram the matrix accordingly. At that point, however, they are dealing in ideas; they no longer are operating from within the system.[107] In this sense, the positivist legal system is open.[108] This system also is linear. In easy cases, facts are

[104] On the difference between cybernetic and autopoieitic organic systems generally, see: Maturana & Varela, supra note 61, at 80-1; F. Varela, *L'auto-organisation: de l'apparence au mécanisme*, in Dumouchel & Dupuy, supra note 62, at 149-53; Luhmann, supra note 66, at 170-1; Nerhot, supra note 67, at 261. With respect to functional closure or openness, in particular, Nerhot explains: "When we describe a system as autopoieitic, we essentially mean (and that is the crucial difference with traditional systemism or with cybernetics) that it is the system itself that determines what is and what is not part of it…" *Ibid*. (My translation.)

[105] LoPucki, supra note 65, at 485.

[106] Hart, supra note 56, at 121ff; Dworkin, supra note 31, at 81.

[107] "But the judge too creates law, and he too is relatively free in this function. […] So far as in applying the law a cognitive activity of the law-applying organ can take place, beyond the necessary ascertainment of the frame, within which the act to be performed is to be kept, it is not cognition of positive law, but of other norms that may flow here into the process of law-creation—such as norms of morals, of justice …" Kelsen, supra note 56, at 353. In the same sense, see Hart's admission that the values guiding judges in hard cases are not themselves "legal," (supra note 56, at 131), and his and Kelsen's admission that their respective Rule of Recognition and Grundnorm necessarily are partly transcendental. (Kelsen, supra note 56, at 193-221; Hart, supra note 56, at 97-107.)

[108] This, despite Kelsen's professed ambition "to understand all law […] as one closed whole." Supra note 56, at 328. Kelsen and Hart alike attempted to close law's circle by describing the highest norm as at least partially determined by acceptance from the system's lower organs, but their success in this respect is mitigated at best. See: Troper, supra note 72; Ost, supra note 70, at 143; Rials, supra note 82, at 57.

processed into judgments that merely reproduce the existing matrix: these judgments just are the last of a chain of entries into the system's data bank. In hard cases, the requisite reprogramming of the matrix often involves retracing the whole sequence of the original programming, from the most general piece of information (the Constitution or its equivalent), through mid-level documents (case law, legislation, regulations, ordinances), to the most particular materials (individual contracts, wills, etc…).[109] In easy and hard cases alike, therefore, the positivist legal system proceeds linearly. Finally, this system is hierarchical just like the State itself: as one moves from the general to the particular, one also moves from the highest to the lowest state organs, and thus also down in authoritativeness.[110] The positivist legal system hence is normatively open, linear, and hierarchical; it has inputs and outputs, beginnings and ends, and elements of variable weight.[111] To that extent, it can be described as a cybernetic organic system.

The legal system of law as jurisprudence, in contrast, contains its own finality. Its finality is not whichever the State may wish to ascribe to it, but rather--like the old rabbit--to become a better legal system, a better representation of juridical ideas, a representation of juridical ideas that is both more accurate and better tailored to its particular polity. As juridical ideas are law's own ideas, the system's finality can be said to lie within it.[112] This in turn allows it to be normatively closed, circular, and seamless. This system is closed in the sense that, its ultimate point of reference (law's ideas) being internal to it, the production of legal materials never entails looking beyond it. This system is circular, moreover, in that legal materials, being the representation of interconnected ideas, are themselves (conceptually) interconnected at all levels, rather than merely linearly (factually) connected, upward, to their immediate originators and, downward, to their immediate offsprings.[113] The consistency of particular materials with the rest of the legal system thus constitutes as good a test of these materials' membership in the system as does their procedural pedigree.[114] And, when reconstructing the law applicable to their case, judges accordingly can rely upon legal materials at all levels; they need not confine their gaze to higher ones. Finally, the legal system of law as jurisprudence is fully integrated; it is seamless. As facts and ideas are smoothly interwoven, there are no "easy" and "hard" cases: all cases involve some measure of

---

[109] "[Law] proceeds from the general (abstract) to the individual (particular); it is a process of increasing individualization and concretization." Kelsen, supra note 56, at 237.
[110] Kelsen, supra note 56, at 221-24.
[111] "The heart of the system is the way it turns input into output. The structure of the legal system is like some gigantic computer program, coded to deal with millions of problems that are fed daily into the machine. Rules of organization, jurisdiction, and procedure are part of the coding. Equally important are the substantive rules of law. They are the output of the system, but one that serves to cut future outputs to shape." Friedman, supra note 21, at 12.
[112] See Morris Cohen's designation of "the part [of law] that appeals to us as inherently just or natural" as the "internal" part. Cohen, supra note 24, at 250.
[113] A "web" may thus be more apposite than a "circle" here. Nonetheless, insofar as all of the elements of a web have equal pull, webs naturally tend to be circular…
[114] See Peter Benson's discussion of "validation through fit" in *The Idea of a Public Basis of Justification for Contract* 33 OSGOODE HALL L. J. 275, 325-26 (1995).

interpretation, and all of them beget a certain degree of reconfiguration of the system.[115] Moreover, interpretation and application are not separate tasks, as they are under positivism and naturalism alike.[116] From a normative standpoint, neither facts, nor ideas, have meaning in isolation from the other, under law as jurisprudence. Law's ideas take on meaning when they are pressed through concrete circumstances; legal materials similarly become meaningful only in the light of their underlying ideas.[117] Interpreting law entails applying it, therefore, and applying it entails interpreting it.[118] Hence can the legal system aspire to become, simultaneously and without contradiction, a more accurate representation of law's (abstract and immutable) ideas and one better tailored to (concrete and contingent) circumstances: an accurate representation of law's ideas *necessarily* is one that is tailored to circumstances, and vice versa. This is just one of the many paradoxes that are easily diffused by the seamlessness of the fact/idea fusion under law as jurisprudence. Another, concerns the system being simultaneously dynamic and static: while the production process of legal materials clearly is dynamic,[119] this process nonetheless retains the static quality of being conceptually anchored in a particular kind of ideas. Yet another, pertains to legal materials being simultaneously "wrong" and "valid:" a rule or institution inconsistent with the rest of the system can be criticized as legally wrong, while still being considered legally valid.[120] In sum, as the legal system of law as jurisprudence contains its own finality, it is normatively closed, circular, and seamless; it is devoid of inputs and outputs, beginnings and ends, and its element are all equally weighty.[121] To this extent, I would boldly[122] suggest that it qualifies as an autopoieitic organic system.

---

[115] "The environment in which law-related systems function is constantly in flux, continuously altering the optimal system configuration." LoPucki, supra note 65, at 487.

[116] On the interpretation/application dichotomy under positivism, see supra, text accompanying notes 106 to 107. The same dichotomy exists under naturalism, but, there, it is interpretation, not application, that qualifies as properly "legal." See supra, text accompanying notes 49 to 51.

[117] "[I]deal and real […] involve each other when applied to any significant activity." M. R. COHEN, REASON AND NATURE 165 (1931); "Such pictures [of what judges ought to do] are actualities quite as much as the materials of legal precepts or doctrines upon which or with which they work." R. Pound, *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 700 (1931). On the unmistakable Aristotelian flavor of this argument, see: Grzegorczyk, supra note 50, at 298.

[118] The skeptic could retort that we all understand what "freedom of contract" means in the abstract, that is, that this idea can be severed from its concrete applications and still retain meaning. I would respond that it is because we have, at some point, come across the concrete applications, and thus are in a position to conjure them up when told about the idea in the abstract, that we indeed feel we understand this idea.

[119] Arnaud, supra note 48, at 51; Ost, supra note 70, at 138-41; Luhman, supra note, at 172-77.

[120] For example, George Bush's special military tribunal for prosecuting suspected terrorists would qualify as wrong, insofar as it is inconsistent with the rest of the due process-inspired U.S. legal system, while nonetheless constituting valid U.S. law, insofar as it was adopted through the right institutional channels. LoPucki gives other examples of legal institutions clashing with "system imperatives. Supra note 65, at 493; *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 N. W. U. L. REV. 1498, 1526, n. 139 (1996). In contrast, a naturalist would say that this tribunal is wrong, and hence not valid law; while a positivist would say it is valid law, and only *morally* wrong.

[121] As such, it would indeed qualify as "legal" proper, as opposed to just "law-related," in LoPucki's typology. He explains (supra note 65, at 489) that systems of law that would serve "goals primarily associated with law," and whose important elements all would be legal in nature, would qualify as "legal" (although he does not think that such systems exist), while systems of law viewed as serving goals that are external to them must instead content themselves with the label "law-related."

The legal systems of law as jurisprudence thus are "systems" in their own right, that is, systems that combine, rather than merely juxtapose, the synthetic and organic systematicities of law under naturalism and positivism. As such, they constitute wholes that are, simultaneously and without contradiction, separate and unified. They are separate because enactors of juridical ideas are separate; they are unified because the ideas being enacted partake of one and the same, juridical kind. While all legal systems are animated by the same finality—becoming better representations of juridical ideas--which finality defines them as "legal" systems proper, this finality materializes distinctly in distinct polities. The content of the ideas underlying the various legal systems hence may vary along with these systems' particular polities,[123] but the form of these ideas,

---

[122]This suggestion is bold in that it does not easily square with the current accounts of the legal system as an autopoieitic system. See, e.g., G. TEUBNER, ED., AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 335 (1988); LoPucki, supra note 65, at 479; Ost, supra note 70, at 133; Luhmann, supra note 66; Arnaud, supra note 48. As these are sociological accounts, they altogether ignore the ideal dimension of law, or else collapse it into law's factual dimension. Law's ideas hence translate into "communications" or "messages" (Luhmann, at 168-70; Teubner, supra note 90), and law's normativity similarly is reduced to aimless functionality, self-regeneration for the sake of self-regeneration. Luhmann, at 173 ("Law's normativity has no external goal. Its function consists in its possibility to recreate itself continuously, instant by instant, case by case, stroke by stroke, and it is precisely destined not to find an end."); id., at 174 ("The laws are normative rules *only because* they are to be applied in judgments, in the same way that these judgments are normatively to resolve situations *only because* that is provided for by the laws.") (my emphasis); Teubner & Willke, *"Kontext und Autonomie,"* 6 ZRSOZ 4, 20 (1984), cited in Rottleuthner, supra note 62, at 237 ("Law's positivity means that it is exclusively by reference to the internal context that new norms are created.") I would nonetheless argue that the model of the autopoieitic system is sufficiently abstract to accommodate, not just systems in an array of different disciplines (Von Bertalanffy, Foreword to Laszlo, supra note 63, at xvii-xviii.; Weinberg, supra note 63, at 35-8), but also systems made up of elements that combine ideal and factual dimensions. For, saying of law that it forms an autopoieitic system is saying no more than "that it is law itself, considered as system, that says what is and what is not law" (Nerhot, supra note 67, at 261), that "normativity lies within the legal system itself, it is not determined by the environment." (Id., at 262.) Indeed, "one can accept the theory of self-generating systems while defining law's function as different than that which is here presented." Luhmann., at 181. All that this model entails, therefore, is that law have its own function, let it be whichever function it may. Id., at 183. (All translations are mine.)

[123] It has been suggested, to the contrary, that legal systems cannot be compared unless they are defined by appeal to juridical ideas with at least minimal content. See: Picard, supra note 1, at 910 (comparison is possible only among systems of rules that share the principles of judicial impartiality, non-retroactivity, and basic freedom of expression, among others); Fuller, supra note 43, at 33-94 (qualifies as "law" only that which meets his eight procedural canons of legality—although Fuller here is not concerned with comparative law). Even some fervent positivists admit that these canons, or some minimal version thereof, partake of law's definition: Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 UNIV. OF PENN. L. REV. 668, 669 (1965); Cohen, *Law, Morality and Purpose*, 10 VILLANOVA L. REV. 640, 648 (1965); Hart, *supra* note 56, at 202. Ewald rightly disagrees (Ewald, supra note 22, at 705): "This theory [comparative law as comparative jurisprudence], notice, imposes no substantive restrictions on the content of the ideas studied." (Emphasis in original.) Indeed, while it may be the case that comparison is easier between systems with similar contents (Gutteridge, supra note 12, at 73; but see: M. ANCEL, UTILITÉ ET MÉTHODES DU DROIT COMPARÉ 66 (1971)), our purpose is to identify the minimal, not optimal, conditions for the comparability of legal systems: "[we need] a conception of law that makes no claim to serve any purpose beyond those of comparative law" (Ewald, supra note 1, at 1950-51). From this perspective, all that our definition needs to say about law's ideas is that they be of a same kind. Any specification of content would narrow our definition beyond what is minimally required for legal systems to be comparable. More severe specifications of kind (limiting the

their being *juridical*, necessarily is constant:[124] the abstract ideal of "due process" indeed translates into an inquisitorial procedure in some polities and an adversarial procedure in others.[125] Just like apples and orange are distinct *qua* apples and oranges, yet unified *qua* fruit, therefore, the French and the English legal systems are distinct in their respective French- and English-ness, yet unified in their legal-ness.

In sum, the ideas of law supply the unity needed for comparison, the common core without which law cannot be law; its facts provide the plurality, the various ways in which law can be law. In this sense, law as jurisprudence combines the respective unity and plurality of naturalism and positivism, and in this sense also comparative law can be understood as comparative jurisprudence, as the exploration of the different ways in which juridical ideas have materialized in different polities.

VI. CONCLUSION

For the legal system to be comparable, it must simultaneously be unified and plural. Under a naturalist conception of law, the legal system is strictly ideal—a system-as-synthesis. It is unified, but not plural. Under a positivist conception of law, in contrast,

---

comparison to civil or common law systems, for example), moreover, would similarly be unduly constraining: that the ideas be "juridical" is, in light of our present purpose, the least constraining specification of kind with which we can get away.

[124] Surprisingly, Ewald here disagrees. It is not just the content of law's ideas that he refuses to determine *a priori* (supra note), it is also their kind: "[law's ideas] can be ideas about economics, or about sociology, or about witchcraft and magic … [I]n most societies the concept of law is bound up with normative questions about justice […] but *this* link […] is a purely contingent one" (Ewald, supra note 22, at 705; emphasis in original). The very notion of what counts as "law" and "legal" is left undetermined in his analysis: "at the end of our investigations we may find that we are left with […] distinct conceptions of law […] There would then be no single answer, even in principle, to the question, 'What is law?'" (Ewald, supra note 1, at 1950-51.) See also: R. David, *The Different Conceptions of the Law* in INT'L ENC. OF COMP. L., chap. 3, (1981), at 3; Griffiths, supra note 90; W. Twining, *Globalization and Legal Theory: Some Local Implications*, 49 CUR. LEG. PROB., 1, 21, 36-9 (1996); *Mapping Law*, 50 NORTHERN IRELAND LEG. Q. 12 (1999).) This position seems untenable. Aside from the fact that the common juridicity of legal systems is, in the above analysis, required for their being unified and hence comparable (Nader, supra note), it is not logically possible for a definition of law simultaneously to be a premise for, and the product of, comparative analysis. See: J. P. DUPUY, ORDRES ET DÉSORDRES. ENQUÊTE SUR UN NOUVEAU PARADIGME, 226 (1982) (suggesting that, even in Hofstader's example of the "self-modifying" chess game, the meta-rule that the players' moves determine the rules of the game itself must be fixed *a priori*.) Take informal systems of social norms, for example. (B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); E. A. HOEBEL, THE LAW OF PRIMITIVE MAN—A STUDY IN COMPARATIVE LEGAL DYNAMICS 28 (1954); M. BARKUN, LAW WITHOUT SANCTIONS 92 (1968); R. C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).) Such informal systems are so different from State legal systems as to be incommensurable with them. (Zweigert and Kötz, supra note 32, at 9; de Cruz, supra note 13, at 7; Gutteridge, supra note 12, at 73; Schmithoff, *The Science of Comparative Law*, 7 CAMBRIDGE L. J. 94, 96 (1939).) Hart agrees that informal norms fail to qualify as "legal systems," but not so much because they are not "legal" proper, as because they cannot be said to form "systems" proper. At most, they form "sets," which are characterized in his view by the similarity of its elements (as opposed to their inter-connectedness.) (H. L. A. HART, THE CONCEPT OF LAW 234 (1994).) (See contra: Goldberg & Attwooll, supra note 90, at 315.)

[125] Supra note 99.

the legal system is strictly factual—a cybernetic organic system. It is plural, but it is not unified. In contrast to both these conceptions, law as jurisprudence stands for the proposition that law is State-enacted juridical ideas and that a legal system is one particular State's enactment of juridical ideas. The legal system under law as jurisprudence is akin to an autopoieitic organic system that would combine a factual dimension, the organic systematicity of positivism, and an ideal dimension, the synthetic systematicity of naturalism. As such, it also combines the respective plurality and unity of the legal system under these conceptions. As ideal system, it is one: the juridical system. As factual system, it is many: the legal systems of the world. In this sense, law as jurisprudence allows for the comparability of the legal system.

As the legal system is comparable under law as jurisprudence, it is possible to take up Ewald's suggestion and think of comparative law as comparative jurisprudence, as "the comparative study of the intellectual conceptions that underlie the principal institutions of one or more foreign legal systems."[126] As such, comparative law indeed stands a chance to buck its instrumental destiny and blossom into a self-standing academic discipline, one that is distinct, in particular, from law in general and legal philosophy. Whereas jurists seek to decipher, apply, and develop law in their respective legal systems, comparatists would aim to uncover the different ways in which jurists do this in different legal systems. And whereas legal philosophers "ask[] questions about law in general, and consider[] specific legal systems primarily in order to illustrate its general theses, [comparatists would] stud[y] the institutions and practices of a particular legal system, as embodied at a particular time and place."[127] In sum, under comparative law as comparative jurisprudence, comparatists would be to jurists what linguists are to grammarians, and to legal philosophers what linguists are to philosophers of language.[128]

---

[126] Supra note 32. The reference to "*one or more* foreign legal systems," suggests the possibility to compare, not just more than two legal systems among themselves, but also groups of legal systems. Indeed, the fact that the legal system here is adopted as the unit for comparison does not rule out the possibility of conducting supra-national comparisons between groups of legal systems. The sharing of certain features by a plurality of legal systems indeed has spurred their grouping into "legal families" and "legal traditions." De Cruz, supra note 13, at 27-28; J. H. MERRYMAN, THE CIVIL LAW TRADITION (1977). On legal families, see: Zweigert & Kötz, supra note 32, vol. I *The Framework* (legal systems grouped into the Romanistic, Germanic, Anglo-American, Nordic, Socialist, Far Eastern, Islamic, and Hindu families); R. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (1974) (although David labeled his groups « the great legal *systems* »). On legal traditions, see: H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 11 (2000) (discussing the chtonic, Talmudic, civil law, Islamic, common law, Hindu, and asian legal traditions). Interestingly, Thomas Kasulis affirmed, in direct contradiction to what is argued here, that "[t]he difference among traditions derives not from variance in inherent thinking patterns, but from differences in what is thought about." (*Reference and Symbol in Plato's* Cratylus *and Kukai's* Shojijissogi, 32 PHIL'Y EAST AND WEST 404 (1982).) Kasulis's affirmation was not meant to apply to *legal* traditions, however.

[127] Ewald, supra note 1, at 2115. At 1950, similarly: "in comparative law we seek to discover the truth about the most significant opinions of foreign jurists, let the truth of those opinions be what it may. But plainly nothing I have said compels me [as comparatist] to assert that any of the opinions under study is true […]." See also: Sauser-Hall, supra note 32, at 81.

[128] The analogy between law and language is by now almost cliché. See e.g.: Kahn-Freund, supra note 19, at 60; Curran, supra note 16, at 661; Picard, supra note 1, at 894; Sacco, supra note at 5; W. Stoffel, *L'enseignement du droit comparé en Suisse*, 4 R. I. D. C. 729, 735 (1988).

More thinking must take place before this can happen, however.[129] Comparative law *per se* requires, not just an intrinsic object, but also a specific methodology and an identifiable body of knowledge, *inter alia*. In addition, it may be that some obstacles to comparing law lie with the comparing agent (the comparatist), rather than with the object compared (law). Hermeneutic[130] and epistemological[131] obstacles readily come to mind. These would also need to be cleared before law can actually be compared. In short, law being comparable is a far cry from law actually being compared.

[129] Ewald, supra note 22, at 706-07.

[130] In particular, the issue to the extent to which the internal standpoint advocated by Ewald in the realm of legal studies (supra note) can be transposed onto comparative legal studies. See generally: Hart, supra note 56, at 55-6, 86-8; N. MACCORMICK, H. L. A. HART 29, 33-43 (1981); A. AARNIO, ON LEGAL REASONING, 297-8 (1977); V. Villa, *Legal Science Between Natural and Human Sciences*, 4 LEG. STUD. 243 (1984); V. C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 57 (1983).

[131] See, e.g., P. LEGRAND, FRAGMENTS ON LAW-AS-CULTURE (1999) (arguing that the perspectival obstacle to understanding another juridical *mentalité*, which he elsewhere describes as the "cultural unconscious" (supra note 41, at 1056), is insurmountable.) See also: D. Jutras, *Énoncer l'indicible: le droit entre langues et traditions* , 781, 786, 792-793 R.I.D.C. (2000); G. HOFSTEDE, CULTURE'S CONSEQUENCES 5 (1980) (arguing that this obstacle is not fatal).