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CHRISTOPHE JAMIN

Saleilles' and Lambert's Old Dream Revisited

(On the occasion of the centennial of the International Congress of Comparative Law, Paris, 1900)

When the first International Congress of Comparative Law (*Congrès international de droit comparé*) took place in Paris between July 31st and August 4th 1900, at the same time as the Universal Exhibition, Raymond Saleilles and Édouard Lambert, who were one generation apart, did not enjoy the same notoriety in the scholarly community.

Saleilles is already a prominent teacher and scholar. He received his doctorate in 1883 and ranked fifth in the *agrégation des Facultés de droit* in 1884. After teaching Legal History in Grenoble and Dijon for a while, he came to Paris in 1895 to join the *Faculté de droit de Paris*, and began teaching Criminal Law, and later Comparative Criminal Legislation, until he took up in 1898 the Chair of Civil Law formerly held by his father-in-law, the influential and recently deceased Claude Bufnoir.[1] A prolific author who writes on range of different subjects, Saleilles already has to his credit a voluminous production that includes several books on the general theory of obligations in the draft German Civil Code (1890), industrial accidents and civil liability (1897) or the individualization of criminal sentences (1898); these books were all quite successful and exercised or would continue to exercise a substantial influence on the evolution of French positive law.[2]

Édouard Lambert obtains his doctorate in law ten years after Saleilles after defending before the *Faculté de droit de Paris* in 1893 an innovative thesis on stipulations for third parties. He ranked first in the *agrégation des Facultés de droit* in 1896. Lambert then joined the *Faculté de droit de Lyon* (where he would stay for the remainder of his career, except for a brief stint in 1906-7 as Director of the *École*

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1. For a general presentation of his life and his works, see M. Deslandres, "M. Bufnoir," 9 *Revue du droit public* 554 (1898); F. Desserteaux, "M. Bufnoir," *Revue bourguignonne de l'enseignement supérieur* 205 (1898).

2. For a presentation of Saleilles' work by the person who was his student and later his colleague, see E. Gaudemet, "Raymond Saleilles (1855-1912)," XXII-4 *Extrait de la Revue bourguignonne de l'Université de Dijon* (1912).

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Khédiviale in Cairo), but he did not yet have any major work to his credit when Saleilles asked him in 1900 to act as general reporter for two of the topics appearing on the agenda of the Congress.[3] The presentation and publication of his report are therefore significant developments in his career for they will likely facilitate his integration as a member of the international academic community.

It is not known why exactly Saleilles, as organizer of the Congress on behalf of the *Société de législation comparée*, chose Lambert to write this report: its importance was considerable for it dealt with the definition, history, methodology, function and teaching of comparative law, and formed part of an academic event whose primary focus was methodology. Saleilles's reasons are a matter of speculation. He must have known Lambert who was a student in Paris prior to his outstanding performance in the *agrégation*. He probably saw him as capable of integrating the small group of academics who were intent on transforming French legal scholarship; after all, in the introduction to his thesis, Lambert had expressed his views about methodology and they coincided with Saleilles's beliefs.[4] It is almost certain that, as early as 1900, Saleilles was aware that Lambert intended to publish a book, which eventually appeared in 1903, on the function of comparative civil law.[5]

Comparative civil law as Lambert understood it was closely intertwined with methodology, a view he shared with Saleilles whom he considered one of his mentors.[6] Saleilles thought that comparative law could be used to design a new methodology capable of prevailing over the methodology then dominant among civil law scholars, thus modernizing classical legal doctrine which both Saleilles and Lambert judged outdated and counterproductive. For them, comparative law was a tool for the fulfilment of a methodological objective ; it had a specific function in the history of French legal thought (I). It follows that, to a large extent, their commitment to methodology would determine the main orientations of comparative law (II).

3. See S. Basdevant-Bastid, "L'Institut de droit comparé de Lyon," in *Introduction à l'étude du droit comparé, recueil d'etudes en l'honneur d'Edouard Lambert* 12 (1938), which specifies that Saleilles did indeed entrust this report to Lambert.

4. See E. Lambert, *La stipulation pour autrui* 5 (1913).

5. See Lambert's report in *Congrès international de droit comparé, procès-verbaux des séances et documents* 39 (1905), which covers work he had been carrying out over several years.

6. Id. at 26, 39 and 50. Moreover, Lambert's work on *La fonction du droit civil comparé* (1903) is dedicated to his "Dear Mentors," Emile Jobbé Duval and Raymond Saleilles.

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I. METHODOLOGICAL OBJECTIVES FOR THE RENEWAL OF CIVIL LAW DOCTRINE

1900 marks the end of an era, that of the great commentators of the Civil Code. They had certainly done what was expected of them. They had familiarized French lawyers with a legislative monument that had radically altered legal practice and French positive law. Those who were about to succeed them, particularly the more creative, thought that the commentators now belonged to the past. The last few years of the century would be devoted not to doctrinal explanations on particular articles of the Code but to the examination and solution of new problems for which the close analysis of codal provisions was of little assistance.

The origins of this movement are not well known but it appears to have coincided with changes in legal publishing around the middle of the 19th century[7] and with the emergence of a new generation of legal academics after the first *concours national d'agrégation des facultés de droit* in 1856. The early instigators of this movement have not been identified. While the names of Labbé and Bufnoir are often mentioned, Saleilles would assert that Demolombe was the first leader of the progressive school "so different from the exegetic and geometric school,"[8] yet he would do so only a few years before Bonnecase described Demolombe as the "*prince de l'Exégèse.*"[9] We do not know either whether criticisms directed at this school (or purported school) were justified: although those who wrote classical civil law doctrine had not been well served by a teaching method which, before the advent in 1895 of a principle of interpretative freedom, valued dictation and a narrowly analytical approach to the Code,[10] it is not

7. See in particular, Ledru-Rollin, "Coup d'œil sur les praticiens, les arrêtistes et la jurisprudence," 1 *Journal du Palais* XIX (3d ed., 1837). L.-M. Devilleneuve & A.-A. Carette, "Préface," 1re série, 1791-1830, 1er volume, 1791-an XII, *Recueil général des lois et des arrêts* V (mars 1840).

8. R. Saleilles, "Droit civil et droit comparé," 61 *Revue internationale de droit comparé* 24 (1911).

9. J. Bonnecase, *L'école de l'exégèse en droit civil* 95 (1924).

10. Dessertaux, supra n. 1, at 213, who attributes this reform to Bufnoir's influence, before reproducing article 3 of the decree dated 24 July 1895 : "Each professor remains free to dispense the subjects in his teaching, either in each year or in the whole of the 3-year period, according to the plan and method which he finds to be preferable, merely taking into account the necessity for the students to be prepared for the subjects in question at each examination period." It was at the same time that the reform in Law studies at Degree and Doctorate levels was carried out: A. de Beauchamp, *Recueil des lois et règlements sur l'enseignement supérieur* (1898), t. 5, pp. 463 et suiv. (which includes the important report by the French Ministry of Education). However, it must be admitted that this move towards greater freedom in the teaching of civil law had taken shape several years earlier under the influence of eminent republican jurists (in particular, "Rapport adressé à M. le Ministre de l'instruction publique, des cultes et des beaux-arts au nom de la Commission des études de droit par M. Accarias, nouvelle série," t. 3, *Revue critique de législation et de jurisprudence* 526 (1873-74), whereas a few years beforehand it still had very strong

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clear that their understanding of law was as superficial and monolithic as is often claimed.[11]

But none of this matters much; what did matter was the desire to turn the page on a style of doctrinal commentary still attractive to many academics but which to others was characterized by a reverence for the Code and a love for pointless abstraction. Saleilles intended to move away from commentaries and a mode of reasoning "that sound like pure geometry."[12] He wanted to bring to an end a teaching method oblivious to the social content of law and which focused on abstractions that undermined in Saleilles's mind the study of civil law.[13] Lambert too was highly critical of classical doctrinal writing: "for my part, I see but one flaw in the traditional method, but an overwhelming flaw: its dogma that legislation is perennial, its belief in the code's rigid though indefinite system."[14] According to him, the "magical virtues" attributed to "a short book drafted at the beginning of the century, and which bears the unmistakable imprint of its time, the *Code Napoléon*," prevented French lawyers from adapting civil law to the constant evolution of life.[15] Thus, Saleilles and Lambert speak roughly the same language when they criticize their predecessors: they fault them for thinking that logical reasoning grounded in the Civil Code will suffice to resolve the totality of legal problems. The solutions they offer are not dissimilar.

Saleilles advocates the replacement of exegesis (the traditional method) by what he terms the historical method, not to be confused with the German historical school. Saleilles does not challenge the desirability of a codification. He argues, simply, that the code should be interpreted in light of historical evolution. For him, lawyers, when they interpret the Civil code, must take into account changes which took place over the past century in social *mores* and in ideas.[16] This is the meaning of his celebrated aphorism: "Beyond the Civil Code, but by means of the Civil Code."[17]

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detractors (for instance, M. Sévin, "De l'organisation des Facultés de droit," XXVIII *Revue critique de législation et de jurisprudence* 162 (1866).

11. See Ph. Rémy, "Eloge de l'Exégèse," 1 *Droits* 115 (1985).

12. R. Saleilles, "Le droit commercial comparé – Contribution à l'étude des méthodes juridiques, A propos d'un livre de M. A. Saffra," *5e année Annales de droit commercial* 227 (1891).

13. Saleilles, supra n. 8, at 5.

14. E. Lambert, "Une réforme nécessaire des études de droit civil," 40 *Revue internationale de l'enseignement* 229 (1900).

15. Id. at. 216.

16. See in a general way, R. Saleilles, "Quelques mots sur le rôle de la méthode historique dans l'enseignement du droit," 19 *Revue internationale de droit comparé* 482 (1890); "Ecole historique et droit naturel," *Revue trimestrielle de droit civil* 80 (1902).

17. R. Saleilles, "Préface," in F. Gény, *Méthode d'interprétation et sources en droit privé positif – essai critique* XIII (1899).

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Having taken position in favor of a departure from the literal or exegitic interpretation of the code, Saleilles anticipates what is contemporaries will say: his method, they will argue, is a surrender to what Saleilles calls "purely individualistic subjectivism."[18] He must therefore promote a method which will avoid this pitfall, for he has no desire to be assimilated with the German school of *freiesrecht* and at the same time he disagrees with the theory that wise judges are the repository of sound law. In his opinion, the dichotomy between evolutionary interpretivism and "legal certainty as a necessary social bulwark" must be overcome. To this end, he wants to "start from this idea, or rather this fact, that law is above all a rational science." Those who will be called upon to resolve problems will be required to provide an explanation of codal provisions "with concepts and theoretical constructs rooted in reason."[19] Theoretical constructs are therefore at the core of his thinking for they alone enable lawyers to avoid arbitrary. He defines them as follows: "A juridical construct is the enunciation as a positive formula of rational ideas, drawn from social perspective, and reduced to specifics which eliminate, as far as is possible, any form of arbitrary."[20] But Saleilles appreciates that, in order to avoid the mistakes of the classical school "when it attempted to deduce from these rational concepts conclusions governed by strict logic," care must be taken not to carry the method he advocates to extremes. This can only be accomplished by not forgetting that "in legal matters, no concept and no principle stands entirely by itself . . . all concepts are interrelated and mutually limiting, and they merge in a harmonious whole resting on a fine balance and compromise." Harmony and balance are central to his thought. They will enable him to interconnect the new methodology he supports with comparative law.

The harmony of the whole cannot be achieved unless due regard is given to "all those breaths of change which penetrate and invigorate the evolution of national law."[21] Among these influences are foreign laws. Not long thereafter, Saleilles defines what he calls "a national science of comparative law," his preferred approach.[22] Its object is the study of comparative law in light of national law and its needs. In his view, when national legislation appears defective or counter-productive, inspiration can be found in foreign laws applying different solutions to similar problems, and all along appropriate steps must be taken not to confine the enquiry to a superficial description of existing legislation. Saleilles favors "a close study of the operation of a particular institution in one or several items of leg-

18. Saleilles, supra n. 8, at 10-11.
19. Id. at 18, for the last three quotations.
20. Id. at 20.
21. Id. at 22, for the last three quotations.
22. Id. at 30.

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islation, with a view to understanding its practical significance, weighing its advantages against its disadvantages, and inquiring into its results." Once an in depth study of this sort has been carried out, it becomes possible to determine the extent to which foreign solutions may be reconciled with national traditions.

This is the methodology Saleilles promotes: comparative law thus becomes an instrument for the improvement of civil law. No longer "an unconscious influence, it is a reasoned and truly scientific factor in the development of the civil law."[23] In 1901, when Saleilles takes over the course on comparative law at the *Faculté de droit* in Paris, he adopts the same approach in his teaching and in various publications based on legal comparisons. The methodology pervades his voluminous work on the German law of obligations, where the study of German law is undertaken to determine exactly how it might improve French law.[24] Two important articles on the assignment of debts[25] and on *exceptio non adimpleti contractus*[26] adopt this approach and argue for the introduction into French law of two distinct German legal institutions. It is thus apparent that comparative law for Saleilles, both as a method and as a source of substantive inspiration, is a way of raising interest in French civil law and is an instrument for its betterment.

Lambert shares this desire to renew the civil law but sees things slightly differently. He publishes a foundational article on the subject in 1900:[27] a very lengthy review of Gény's substantial monograph on methods of interpretation and sources in private positive law, which had appeared in print a year earlier.[28] Gény at the time still teaches at the *Faculté de droit* in Dijon. Lambert agrees almost entirely with his colleague's analysis of the shortcomings of the classical method. He considers that the book makes its most remarkable contribution as a critique (which he calls its "*oeuvre de destruction*"); for Lambert, this critique is the definitive word on the subject.[29] On the other hand, he is skeptical about the book's "*oeuvre de reconstruction.*"

Lambert does not spare his criticisms. For example, to Gény's system of literal interpretation, Lambert prefers Saleilles's method of historical or evolutionary interpretation. He also disagrees with Gény's analysis of *jurisprudence*, being of the view that it plays a decisive part in the elaboration of law. These criticisms are minor in

23. Id. at 31, for the last two quotations.
24. *De la déclaration de volonté – contribution à l'étude de l'acte juridique dans le code civil allemand* (1901).
25. "De la cession de dettes," 4 *Annales de droit commercial* 1 (1890).
26. "Les théories allemandes sur les droits qui, au cas du contrat synallagmatique, appartiennent à la partie poursuivie en paiement lorsque son adversaire, de son côté, n'exécute pas son engagement," 6 *Annales de droit commercial* 287 (1892).
27. Lambert, supra n. 14.
28. Gény, supra n. 17.
29. Lambert, supra n. 14, at 225, for the last two quotations.

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comparison to Lambert's main objection, which he levels at the *"libre recherche scientifique."*[30] Gény believed that this approach could replace the classical method but Lambert remained unconvinced. He thought it impossible to ascertain with a sufficient degree of objectivity "the positive nature of things," that which Gény's method was meant to uncover and which Gény described in these terms: "all the elements of social life which in any society meet and interrelate naturally before the emergence of positive regulation." Lambert does not take the position that the positive nature of things does not exist; he argues, simply, that it is indecipherable because "this so-called 'necessary relationship' manifests itself to the mind in a manner which reflects our religious or political convictions. While in theory only one such complex of interrelations may exist, it will take in practice as many forms as there are observers to perform the research."[31] Nor does Lambert believe that anything worthwhile can be derived from the study of new social sciences mentioned by Gény in support of his method: sociology, social psychology, public law theory and even political economy remain too embryonic to produce "the kind of firm conclusions which would overcome the range of individual opinion on controversial issues arising from social life."[32]

In short, for Lambert, "attempts to finalize the methods of a new school of thought are premature." Furthermore, there is a more urgent task at hand: "furthering the recognition that the civil law is an empirical science and reinstating its true object, the complex and dynamic legal system of the day."[33] To this end, jurists must relinquish the study of the Civil Code and turn their attention to the study of *jurisprudence*, which constantly evolves even where it appears stable. How may they participate in this evolution? By reconciling two preoccupations: "on the one hand, a concern desire for simplicity of elucidation and the stability of jural relations, and on the other hand a need for legal adaptability commensurate with the exigencies of social and economic evolution."[34] What then may guide the growth of *jurisprudence*? The science of Comparative Civil Law (or *droit commun législatif*).[35] Indeed, Lambert is convinced that a unity of general purpose exists in similar legislation from different states, even though no such unity may be detected at the level of rules embodied in the legislation. It is thus possible to discern a *droit commun législatif* on various questions. Where no unity of general purpose is apparent, the reliance on supporting methodologies, such as statistics and fieldwork, may demonstrate the superiority of one legislative solution

30. Gény, supra n. 17, at 457.
31. Lambert, supra n. 14, at 236, for the last three quotations.
32. Id. at 237.
33. Id. at 238.
34. Id. at 239.
35. Id. at 240.

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over others, in which case this preferable solution merits "*le caractère de disposition de* droit commun legislative."[36]

So once again the assistance comparative law is sought in the construction of national law. Once again comparative law is required to fill a void, that which results from the abandonment of the classical method purportedly based on logical abstractions drawn from the Code itself. Lambert, it seems to me, goes even further: he appears to believe that comparative law, and more specifically the search for a *droit commun législatif*, will provide what is missing in the *libre recherche scientifique* and in the new sciences on which it relies: a way of identifying objective solutions. The following sentence makes the point: "What history and political economy have been unable to achieve will be accomplished, I have no doubt, with the teaching of comparative law."[37]

Saleilles and Lambert therefore share the same dream. But there is more. At the time they enlist comparative law in a renewal of legal interpretation, the effect of which will be to give priority to the search for fundamental principles and the preservation of the inherent harmony of the legal system over literal interpretation, those same authors radically transform the hierarchy of sources in French law and confer upon doctrinal analysis a function that will significantly enhance its position.

Let us look again at Saleilles. He offers law professors a prominent place in the legal establishment by replacing analytical interpretations with the elaboration of legal constructs. Saleilles does not doubt that it will be for *la doctrine* to invent and continuously refine these constructs in light of social events. On this last point, he ventures one caveat: it might have been tempting to rely on judges for the refining of these constructs. He writes, however: "Judges declined to exercise this new power; they shunned the toga of the Roman praetor and the wig of the Lord Chief Justice of England for they were frightened by the honour that could be bestowed upon them."[38] Saleilles offers the following explanation. Judges know that they are only called upon to decide specific cases, an activity which does not lend itself to the elaboration of general constructs; in the performance of this particular function, it is not possible for them to take into account "the totality of national law, considered as a whole, as evidence of its inherent coherence." Judges, on the other hand, appreciate that basing their decisions solely on the dictates of their own conscience greatly increases the risk of arbitrary decisions. It follows that "the designated system-builders will be the representatives of *la doctrine*, legal theorists and scholars." Their role is not what it once was: in-

36. Id. at 242.
37. See Lambert, supra n. 5, at 26.
38. Saleilles, supra n. 8, at 22.

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stead of acting as guardians of an immutable order and of canonic texts, who must stand in the way of judicial innovations denounced as illegitimate, they will now engage in a new constructive science. Their actions will spearhead rather than delay legal progress.[39]

And so, in a single sweep, the theory of sources in French law is reorganized at a time when it was only beginning to take shape. It is already apparent that the function of legislation is of secondary importance: its literal meaning quickly becomes outdated and soon thereafter what governs is a aggregate of evolving interpretations based on legal constructs. At that stage, *la doctrine* takes over since its role consists in the elaboration of legal constructs and their improvement over time. As for judges, even when legislation is silent, they must abide by the authority of *la doctrine* and implement its theories in the context of particular cases. Saleilles is explicit on this point: "If there arises on a given question a convergence of doctrinal opinions, judges will have no choice but to adopt these views as part of their own method of interpretation."[40] The converging opinions of scholars are thus endowed, if only implicitly, with the vaunted objectivity so sought after by the critics of the classical school . . . .

Lambert shares the views of his mentor, though perhaps not with the same degree of awareness. He believes that it is implicitly though necessarily the task of *la doctrine* to engage in the study of comparative law and he will never deviate from this belief. Once he had asserted that *jurisprudence* must find its inspiration in the *droit commun législatif*, he turned towards the *jurisconsultes* (a word frequently found under his pen) and reproached "the interpreters of the Civil Code for having forgotten throughout the last century their traditional social mission," a mission which was not limited to the adaptation of law to society as it evolved, but which also extended to the more important task of "causing positive laws to interpenetrate, so as to consistently reduce the number of distinct territories applying different laws, as well as divergences within national *jurisprudences*."[41] It is for the *jurisconsultes* to build the *droit commun législatif* in order to provide guidance for the *jurisprudence*.

While *doctrine* must fix its attention on *jurisprudence* and "observe its most minute changes"[42] with a view to systematically organizing its normative output, it does not follow that *jurisprudence* takes precedence over *doctrine*. *La doctrine* gains priority of rank because its function is now to provide ultimate guidance to *la jurisprudence* by means of broad legal constructs rather than a mere exegesis of canonic legal texts. There would be no point in substituting a *posi-*

39. Id. at 23, for the last two quotations.
40. Id. at 24.
41. Lambert, supra n. 4, at 240, for the last two quotations.
42. Id. at 223.

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tivisme de la jurisprudence to what had become a *positivisme légaliste*. Systematizing the normative output of *jurisprudence* will be the first steps towards a more fundamental task: the elaboration of doctrinal constructs capable of qualifying as scientific observations to the precise extent that they arise from a study of *la jurisprudence*. Lambert is very firm on this point. "I fear, he writes, that in his ardent desire to challenge legal constructs, Mr. Gény will inspire in his readers a contempt for legal constructs."[43] This is regrettable, for such constructs are essential to an orderly development of *la jurisprudence*, they only can prevent an anarchistic growth of judge-made rules. All legal systems, notes Lambert, need "guiding principles, . . . general rules and legal constructs around which specific solutions will gravitate."[44] Without such conditions, it will not be possible to preserve as far as possible "the general harmony of the law."[45]

To summarize, a careful study of *la jurisprudence* enables the interpreter to take into account social and economic exigencies. A systematic approach is needed, however, in order to draw from *la jurisprudence* principles which will apply to future cases without breaking the overall harmony or coherence of the law.[46] As a powerful factor of harmonization capable of underscoring movements towards unification, comparative law may also guide the evolution of *la jurisprudence* and do so, as it were, from outside.

Saleilles and Lambert used comparative law to put in motion a renewal of French legal thinking; in so doing, they assigned to civilian *doctrine* a plan of action and a research method good for the next century.[47] Comparative law would fill the void left open when the literal method of interpretation so characteristic of 19th century authors fell into disfavor. It would expand the scope of legal constructs

43. Id. at 228. We know that Gény never lost the taste for legal constructs, even though he managed to prompt some authors to scorn them. In particular, this was the case of Demogue, which led him to being harshly reproached by Gény: F. Gény, "Comptes rendus critiques," *Nouvelle revue historique de droit français et étranger* 110 (1911), about an essay written in 1911 by Demogue on the fundamental notions of private law (*Les notions fondamentales du droit privé – essai critique*, 1911).

44. Id. at 229.

45. Id. at 239.

46. We understand under these conditions why Lambert was subsequently an attentive observer and to a certain extent and admirer of the case method inaugurated in the US by Dean Langdell: the latter somewhat became an instrument of freedom for French jurists, by enabling them to take as the starting point the study of *jurisprudence* while not at all rejecting the importance conferred on principles. See in particular, E. Lambert, "Le rôle français d'un recueil de cas juridiques choisis," in *Espèces choisies empruntées à la jurisprudence* XIII (1924). Also, E. Lambert & M. J. Wasserman, "The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law," 39 *Yale L. J.* 1 (1929).

47. See in a characteristic manner, J. Bonnecase, *Les destinées de l'œuvre de Demolombe au temps présent* (1929), which concludes that the way not reproach Demolombe's work, notwithstanding his reputation as being "le prince de l'exégèse" with an absence of doctrinal nature, after demonstrating that it was not lacking of "principles".

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generated by a search for fundamental principles, which search would itself replace the analytical study of legislation, and it would confer upon these principles the degree of objectivity that jurists were so anxiously looking for. Comparative law is used as a tool to rearrange the hierarchy of sources and *la doctrine* owes to comparative law its discreet promotion to the top of the latter, a promotion justified by the fact that only *la doctrine* can create comprehensive legal constructs (all this despite Gény's demotion of *la doctrine* to the level of persuasive authority).[48] This instrumentalization of comparative law would inevitably determine its future orientations.

II. USING THE MAIN ORIENTATIONS OF COMPARATIVE LAW AS PART OF THE NEW METHODOLOGY

What comparative law must no longer be is a matter of shared conviction for Saleilles and Lambert. It must not limit itself to the mere presentation of foreign legislation. Legislation does not account for the law in force in a foreign country, no more so than French legislation by itself does justice to the complexity of French law. Saleilles writes with great clearly: "I do not see what benefit we have derived so far from the practice of describing separately and in a more or less superficial way the contrast among foreign legislations, presented in the form of summaries after every question of domestic law." A scientific approach to comparative law requires of jurists that they study foreign case law and that they familiarize themselves with legal constructs employed in the countries they are interested in. Only this approach will enable them to move beyond the mere juxtaposition of foreign law with French law, and will persuade them that there exists "a mutual penetration of all national legal fields, from which a kind of doctrinal unity may be achieved, which dominates all individual legislations and from which these legislations are all derived."[49] The method advocated by Saleilles for domestic law also applies to comparative law: it is incumbent upon jurists to acquaint themselves with the dynamics of social life by means of *la jurisprudence* and they pay attention to legal constructs so as to transcend local idiosyncrasies.

Lambert offers the same message. It is not enough, he writes, to carry out "work whose object is to familiarize the jurisconsults of one nation with the legislation or with the caselaw of one, several or even the aggregate of foreign countries."[50] A jurist who engages in comparative law must track down "the ultimate sources of every foreign le-

48. Gény, supra n. 17, at 438.
49. Saleilles, supra n. 12, at 219, for the last two quotations.
50. Lambert, supra n. 5, at 29.

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gal system."[51] Clearly, Lambert targets the activities of the *Société de législation comparée* and points to the limitations of its scientific work, focused since the creation of the *Société* in 1896 on descriptions of foreign law; Lambert's other target is the *Comité de législation étrangère* of the *Ministère de la Justice* which since 1876 limits itself to translating foreign codes and legislation. But Lambert carries the criticism further. Even the in depth study of foreign law does not by itself provide a raison d'être and a programme for comparative law.[52] The General Report he completes in 1900 joins Saleilles's introductory remarks in faulting comparative studies of foreign legislation for being nothing more than "a mere association or juxtaposition of institution, without the slightest attempt to develop an analysis of the scientific laws that give a meaning to comparisons or to the mutual penetration of laws." In comparative law too, it is time for science to take over from exegesis.

As a second point, comparative law must not be confused with historical comparisons. Saleilles makes the point at the opening of the Congress in 1900 and specifically criticizes studies of this type because they are purely speculative: it cannot be that "from a reconstitution of what once was the case, it will be possible to deduce the laws which in the future will determine was will be the case."[53] Saleilles will reiterate this criticism in 1911, adding that this method is somewhat adventurous. It is apparent that he does not believe it possible to shed light on the legal history of one people "from what is known of the institutions of another people from the same civilization."[54]

Lambert stands close by. For him, this branch of comparative law, much prized among German scholars, has several aims: "exposing for the benefit of jurisconsults the natural laws which govern those parts of social life that together make up the law, making jurisconsults aware of what causes legal changes and how these changes are interconnected, enabling them to discover the forms which each institution will take at different stages of development in a given society or in various economic systems."[55] While he believes that considerable work has been accomplished with this method, he expresses three criticisms against it.[56] First, its object is much too

51. Id. at 30. Comp. E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux etats-unis* 256-57 (1921), in which the author contends that one must surpass the study of *jurisprudence* to take an interest in notarial and administrative practices, customary business practice, the byelaws and disciplinary rules of conflicting social groups, etc.

52. Id. at 30-31. See in the same sense, Lambert, supra n. 6, at 8, in which the author takes up and develops this theme.

53. Saleilles, supra n. 5, at 13, for the last two quotations.

54. Saleilles, supra n. 8, at 26.

55. Lambert, supra n. 5, at 32.

56. Id. at 33.

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narrow, having apparently been limited so far to ancient and prehistoric laws. But the conclusions thus derived are also questionable. Proponents of this method are guided by the idea that, despite differences of detail, all human societies, moving at different paces, go through a similar series of changes. Lambert vigorously challenges this assumption and invokes Gabriel Tarde who "rose against the hypothesis of a single growth curve in the legal evolution of societies generally."[57] Finally, as did Saleilles,[58] Lambert expresses the view that historical comparisons practised in this manner belong to the sociology of law, a branch of the social sciences, rather than to legal science (*la science juridique*).

This critique is crucial. Saleilles and Lambert want to situate comparative law at the core of legal science by assigning to it a purpose that is not limited to observation and discovery but that encompasses action.[59] They are promoting a non-speculative conception of comparative law. This brand of comparative law will cease to be a purely intellectual discipline. It will necessarily have practical objectives and it shall not be turned to the past but shall build the future. Only if these conditions are met will comparative law emerge from its relative isolation and become a useful tool for all jurists capable of replacing the classical method of interpretation. In other words, no other conception of comparative law can serve a useful purpose in the renewal of French legal thinking. At this point, however, Saleilles and Lambert begin to part ways. The latter wants to try out these new methodological ideas; the former deliberately adheres to a more mainstream approach.

Saleilles sees himself as the direct heir to Bufnoir who summed up his own intellectual legacy when he stepped down as president of the *Société de législation comparée* late in 1890.[60] Bufnoir thought that legal history had performed a signal task in the aftermath of codification by encouraging interpretive practices which did not completely break with the *Ancien Régime*. But legal history was now in need of a new mission: tracing the history of legal institutions to their origins so as to "break the secret of their transformation." In so doing, legal history will join with comparative law, a discipline which is no longer confined to the study of foreign legislation for immediate and practical purposes but must now devote itself to the observation of what different peoples do with their respective institutions. For Bufnoir, it follows that "legal history . . . is but one form of the science of comparative law, that which draws analogies between legal doctrines in the successive iterations of a single legislation. Similarly, it

57. Id. at 35.

58. Saleilles, supra n. 8, at 25, who considers that "taken from this point of view, the science of comparative law is only a branch of sociology".

59. Lambert, supra n. 5, at 35. Also, Lambert, supra n. 6, at 914.

60. 20 *Bulletin de la Société de législation comparée* 65 (1890-1891).

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can be said that comparative legislation is a form of legal history which shows how successful are legal institutions in different contexts."[61] In other words, legal history and comparative law share the same object: comparisons in time with the former, in space with the latter. The following year, Saleilles borrows word for word from Bufnoir and refers to Ihering who "showed the deficiencies of the historical method which purports to limit itself to national traditions."[62] Saleilles sees comparative law as a way of enhancing the historical method, now in a position to confront the classical, exegetic method.

But Saleilles also invokes a lesser known *jurisconsulte*, Boissonade.[63] Seen by some as the father of modern Japanese law,[64] Boissonade published is views on the function of comparative law in little-read articles which remained largely unkown until they were republished in the *Bulletin de la Société de législation comparée* of July 1891.[65] Boissonade posits first that comparative law must contribute "to the continued and progressive improvement of our own laws." Saleilles does not dispute this assertion for he too considers that comparative law is a tool to be used in domestic law. Turning his attention especially to commercial law, Boissonade argues in the second place that comparative law must contribute to "a convergence (*un rapprochement*) among nations."[66] A word of explanation is in order on this point. In the French law faculties of the time, Boissonade also played a leading role in the development of political economy as a discipline, an inclination which brought him closer to liberal authors favorable to free trade.[67] Thus, he speaks of "a genuine international market place" (*bazar* is the word he uses) which will produce "a universal association of peoples to which each will bring for the benefit of all its particular genius and its natural resources."[68] While it is unlikely that Boissonade had any real influence on Saleilles in this respect, it is noteworthy that Saleilles will speak with insistence of the possible unification of commercial law, a theme proximate to liberal economic thought. The "universal *droit commun*" mentioned by him concerns first and foremost "legal relations pertaining to trade and

61. Id. at 66, for the last two quotations.

62. Saleilles, supra n. 12, at 219.

63. Id. at 217, in which the author "notes, in connection with the views outlined here, the ideas put forward on several occasions by Mr. Boissonade. . .".

64. Y. Okubo, "Gustave Boissonade, père du droit japonais moderne (1825-1910)," *Revue historique de droit français et étranger* 29 (1981). This article takes up and provides a synthesis of the analyses made by the author in his work in Japanese: *Boissonade, père du droit japonais moderne* (3d ed., 1998).

65. 20 *Bulletin de la société de législation comparée* 637 (1890-1891), which reproduces three articles published in 1865, 1866 and 1868.

66. Id. at 367-68.

67. See on this lesser known aspect of his work, Ch. Jamin, "Boissonade et son temps," 44 *Archives de philosophie du droit* 301 (2000).

68. "L'économie politique et la jeunesse des écoles," *Journal des économistes* 10 (janvier 1872).

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commerce."[69] But he remains extremely cautious on thie idea of universalism: if a "universal commercial law" finally emerges, it will only be through the experimental observation of social facts. Saleilles does not dream of "a legal cosmopolitism that would shatter all local lifestyles in law;" on the other hand, he does believe that "the normal course of social life tends towards cohesiveness and unity." Finally, the brand of universalism he has in mind can only exist "insofar as it refers to the civilized world."[70] Universalism is already at the time a firmly held belief for some French jurists: behind a modest man like Boissonade, cited by Saleilles, one discerns Boissonade's mentor, the influential Laboulaye, founder of the *Société de législation comparée*, who would write in 1855, when the *Revue historique de droit français et étranger* first appeared in print, "we do not dream of a single code for the whole of Europe, no more than we dream of a single language; but we feel that the inevitable mixing of peoples reduces every day the measure of diversity among them, that a common foundation of legislation will gow consistently over time and that no one can determine in advance what will be the limits of this convergence."[71]

Laboulaye, Boissonade and Bufnoir: this is Saleilles's lineage and he is an inheritor more than a founding father. The kind of comparative law which he advocates must, above all, serve the growth of domestic law by importing foreign legislations, and legal doctrines which legislation inspires everywhere. That is what he means when he speaks of comparative civil law. But he also adds that comparative law ought one day to foster a convergence of hiterto diverse commercial laws, which will merge into a universal law of civilized peoples so long as practical minds prevail over philosophical minds and the experimental method prevails over "a concept of natural law superior to all domestic laws and which would be the aim of all laws."[72]

This summary of Saleilles's doctrine points to what distinguishes him from Lambert. A few years later, it is true, Lambert will write that he is "more than ever convinced that the essential mission of comparative law is one of economic peacemaking, the realization of an international economic *entente*,"[73] but at the turn of the century he is intent on showing that the idea of a *droit commun législatif* is valid for all branches of law, including those which seem the most idiosyncratic. And that is why in his introductory work on the function of comparative civil law he chooses to deal with the law of successions: "throughout time, the subject-matter of successions has

69. Saleilles, supra n. 12, at 222.

70. Id. at 220-21, for the last three quotations.

71. "De la méthode historique en jurisprudence et son avenir," 1 *Revue historique de droit français et étranger* 22 (1855).

72. Saleilles, supra n. 12, at 222.

73. Lambert, supra n. 51, at 240.

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provided the most fertile ground for the development of particularities."[74]

Lambert does not accept the universalist function of comparative law advocated, if cautiously, by Saleilles. Of course, he writes: "From now on, we should direct our energies towards a *rapprochement* between our legislation and germane legislations, that is, those legislations which have reached approximately the same level of scientific elaboration as ours, and which govern peoples that have achieved the same stage of social and economic development as we have." This sounds like the *droit commun* of the civilized world so dear to Saleilles. But we must see that Lambert immediately excludes the English from his statement. England, he knows, is alone in resisting codification. Lambert has more to say on the topic: "What makes its laws so particular, including its archaic and conservative mentality, precludes any convergence between this system and those of other European countries in all but a few rare instances."[75] Lambert does not much appreciate the English and he dislikes the disorderliness of their law.[76] The incident of the École Khédiviale in Cairo illustrates the problem. Appointed director of the École in 1906, Lambert will only last until 1907; his stormy resignation comes after months of quarrels with the English authorities who in Lambert eyes conspire to deprive the French of one of the last remaining fields where they might exert their influence in Egypt.[77] This acrimonious attitude towards the English accounts for a promising new direction in comparative law favored by Lambert and which will become highly successful among French comparatists.[78] Lambert argues that "efforts favoring the convergence of national laws will confirm the existence of several groups of legislation, groups which give different answers to identical questions or which proceed from opposite views." Next to a *droit commun législatif*, there may therefore exist "a group-based *droit commun* specific to each group."[79] Clearly, in Lambert's view, the common law is such an anomalous group; continental jurists should only study it for incidental purposes.[80]

74. Lambert, *La fonction du droit civil comparé*, supra n. 6, at 2.

75. Lambert, supra n. 14, at 241, for the last two quotations.

76. Id. at 228-29, in which he reproaches the English legal system with a lack of principles and general rules.

77. See for a precise description of what became a major diplomatic incident between France and Britain, M. Millet, *Les professeurs de droit citoyens. Entre ordre juridique et espace public, contribution à l'étude des interactions entre les débats et les angagements des juristes français (1914-1995)*, 59 (2000), doctoral thesis in Politics, Paris II, typewritten.

78. See in particular, R. David & C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (10th ed. 1992), who recognize a purely national function in comparative law (at 5), but who set themselves the main task of grouping together laws into "families" (at 15).

79. Lambert, supra n. 14, at 242, for the last two quotations.

80. Lambert, supra n. 5, at 49.

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Lambert's work on groups of laws is what Saleilles sees as specific to his interests and what distinguishes him from the approach to comparative law through domestic law to which Saleilles intends to dedicate himself. The "new science of comparative law" to which he explicitly associates his colleague from Lyon is meant "to describe objectively (assuming it may be so) and not from the vantage point of a particular legislation, the respective laws, or perhaps more accurately the respective institutions, existing in different nations from a same civilization, to gather them into homogenous categories, and to determine among those diverse types which one best captures the present state of civilization and is likely therefore to dominate the others."[81]

The difference between Saleilles and Lambert may not be as pronounced as appears from the last limb of this long sentence. Identifying the groups in question is not purely descriptive or speculative. Comparative law in this conception belongs to the world of action and Lambert does not wish to limit himself to comparative historical studies having a current resonance. It is imperative that his work have an impact on national laws, even if this is only a result of "the natural law of collective imitation" borrowed by Saleilles from Tarde's theories.[82] Once again, the real and declared purpose here is "to encourage the mutual penetration of positive laws,"[83] it being understood that this only occurs between "germane legislations."[84]

Nevertheless, Lambert remains much more ambitious than Saleilles, for whom the exigencies of international trade and commerce provide the principal justification for convergence (*rapprochement*). In 1929, for example, Lambert expressed the view that comparative law must reinforce in a certain class of individuals who are part of the international community their awareness that "they belong to this community by virtue of a kind of citizenship;"[85] later, in 1940, he asserted that two conceptions of law were locked in a struggle, the first representing "national selfishness" and the other "the humanistic mind striving in the legal sphere to develop international cooperation in intellectual and economics terms."[86] But Lambert's thought has not yet reached this point in 1900. The convergence of national laws goes without saying, he thinks, for that is what jurisconsults ought to do. Here again and for the last time, we see the renewal of French legal thought coinciding with the birth of a

81. Saleilles, supra n. 8, at 28.
82. Id. at 27.
83. Lambert, supra n. 14, at 240.
84. Id. at 241.
85. Lambert, "Le droit comparé et la formation d'une conscience juridique internationale," V *Revue de l'Université de Lyon* 441 (1929).
86. Lambert, "Le rôle du droit comparé dans l'ensemble des disciplines juridiques et ses domaines d'action," in *Mélanges juridiques dédiés à m. le professeur Sugiyama* 157 (1940), for the last two quotations.

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modern conception of comparative law. Lambert reminds his contemporaries that *la doctrine* must work against the dispersion of law and counteract the impact of a previous generation only interested in exegesis. The history of French and of German law is instructive here. These two societies were able to codify their laws only after painstaking doctrinal work had made it possible and much thinking had been given to the similarities and convergences in existing customs. In this sense, the *droit commun législatif* is a successor to the "*droit commun coutumier*"[87] and the art of comparison is a way of reestablishing a link with a doctrinal tradition that jurisconsults should never have abandoned. As Lambert will subsequently write: "In seeking a universal reach for their art, they (jurists) simply divert to new ends a function which their predecessors fulfilled every time legal knowledge blossomed in the past."[88] He could hardly have found a more effective means to slaughter the 19th authors and their method than by reducing them to a mere parenthesis in French doctrinal history.

87. Lambert, supra n. 14, at 240.
88. Lambert, supra n. 85, at 446.

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