

# Comparative Law Gets Entitled: The 1900 Paris Congress in Contexts

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B.C.L./LL.B., McGill University, 2016

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## Abstract

### **Abstract**

This thesis examines the intellectual context of the first international congress of comparative law held in Paris, at the occasion of the 1900 World Fair. In particular, it articulates some of the unstated assumptions that made it possible for the conversation of this congress to unfold as it did. Using methods of conceptual history and discursive analysis, the author shows how this constitutive conversation for the discipline of comparative law drew from many discourses including conversations about the prestige of French legal science, claims to disciplinarity and the corresponding search for a scientific method, the desire to master the processes of legal unification arising from international trade, a concern with ensuring the place of France in the hierarchy of nations in a period of national malaise, and a mission befalling France to civilize the rest of the world. In showing how these different conversations shaped the discourse of the first congress of comparative law, the thesis outlines the ways in which they also participated in (re)shaping deeply entrenched conceptions of legal knowledge and legal scholarship.

## Table of Contents

### Table of Contents

Supervisory committee .....	ii
Abstract .....	iii
Table of Contents .....	iv
Acknowledgement .....	v
Introduction .....	1
Chapter 1. Entitling Comparative Law .....	6
Chapter 2. The World Fair of Thought .....	15
Chapter 3. Disciplining Comparative Law .....	28
Chapter 4. Modernity and <i>Le droit à la mode</i> .....	53
Chapter 5. World Peace and the Pacification of the World .....	70
Conclusion .....	90
Bibliography .....	95

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# Comparative Law Gets Entitled: The 1900 Paris Congress in Contexts

## Introduction

July 31st, 1900 was the opening date of the first international congress of comparative law, organized by the *Société de législation comparée* at the occasion of the 1900 Paris World Fair. It was understood at the time, and is still understood, to be a foundational moment of the discipline of comparative law and an important moment in defining some of its projects.<sup>1</sup> Scholars have produced very complete accounts of the origins of the discipline of comparative law over the years. These include an exhaustive study of this Congress and how it shaped and was shaped by Raymond Saleilles' intellectual trajectory,<sup>2</sup> as well as an account of Edouard Lambert and Raymond Saleilles' intention to renovate the legal discipline in France, and the role this Congress played in this project.<sup>3</sup> There is a detailed account of initial methodological debates in comparative law leading to and arising from this Congress.<sup>4</sup> Exhaustive critiques of the discipline of comparative law have also been articulated, whether of its ideal of purity in legal science,<sup>5</sup> its eurocentrism<sup>6</sup> or, more recently, its orientalism.<sup>7</sup> There are also notable general critiques of scientism<sup>8</sup> or internationalism<sup>9</sup> in the legal discipline. Tackling the topic of this Congress and how it can be critiqued therefore deserves some explanation.

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<sup>1</sup> See e.g. R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964), p. 6; B. Fauvarque-Cosson, "Comparative Law in France" in Reimann and Zimmermann (Eds.) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2015), p. 35; R. Sacco, "One Hundred Years of Comparative Law," 75 *Tulane Law Review*, p. 1164; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1977), p. 3.

<sup>2</sup> A. Aragonese, *Un jurista del modernismo: Raymond Saleilles y los orígenes del derecho comparado*. (Madrid: Universidad Carlos III, 2008).

<sup>3</sup> C. Jamin. "Le vieux rêve de Saleilles et de Lambert revisité: À propos du centenaire du congrès international de droit comparé de Paris" (2000) 52 *Revue internationale de droit comparé* 4, pp. 733-751.

<sup>4</sup> G. Resta, "Luttes de clochers en droit comparé" (2017) 62 *McGill Law Journal* 4, pp. 1153 - 1198.

<sup>5</sup> G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar, 2016), p. 45-46.

<sup>6</sup> D. López-Medina, "El nacimiento del derecho comparado moderno como espacio geográfico y como disciplina: instrucciones básicas para su comprensión y uso desde América Latina" (2015) 26 *International Law: Revista Colombiana de Derecho Internacional*, pp. 117-159.

<sup>7</sup> H. Dedek "Kindred Not By Choice: 'Legal Families' and the History of Comparative Law," (2018) *Draft on file with the author*.

<sup>8</sup> See R. Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge: Harvard University Press, 2005).

<sup>9</sup> M. Koskeniemi, *The gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)*, (Cambridge: Cambridge University Press, 2002).

I chose to write about this Congress in order to highlight key contextual elements at play in the constitution of comparative law as a discipline, an enterprise that warrants wider questions about the constitution of law as an academic discipline in the second half of the 19th century. Conceptions of legal knowledge, and corresponding conceptions of the legal discipline and of the role of jurists in society, are at the center of my reading of this Congress in its historical context. In articulating them here, I focused not (only) on the conceptions advocated by the authors of the papers and speeches, but also on the preconceptions evidenced by their practices, choices in vocabulary, and turns of phrase, hence my interest in putting these words and phrases in context.

Rather than interpret Saleilles' or Lambert's words in light of their previous or following works, as some legal historians would do, I have adopted the following methodology. I have first interpreted the practices and texts of the Congress hermeneutically, as practices and literary pieces worthy of analysis on their own.<sup>10</sup> I have further paid attention to the ways in which various papers and speeches echoed, responded to or interacted with each other, creating a conversation itself worthy of hermeneutical analysis.<sup>11</sup> Finally, I have relied on a form of "heuristic contextualism" in seeking to illustrate how certain words and phrases were used at the time in public or scientific discourse. The aim I have pursued is not to positively know what a phrase means or what an author meant, but rather to learn something from how words and phrases were used in different contexts at the same time, an approach that Quentin Skinner has explained as asking after "what it does" to use a word or phrase.<sup>12</sup> I think this method reveals how a specific context is shaped by and shapes thought.

One of the main consequences of using this method is that one cannot presume that phenomena, conversations and discourses are merely self-referential. Scholarly conversations such as the Congress I am about to tackle do not happen in a vacuum. They

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<sup>10</sup> Among the more recently embraced ways of historiography, Hayden White names "discourse analysis" and "deconstruction." H. White, "The Context in the Text: Method and Ideology in Intellectual History" in *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987), p. 185.

<sup>11</sup> H. G. Gadamer, *Truth and Method* (Continuum, London: 2004), pp. 252 and ff.

<sup>12</sup> Q. Skinner, *Visions of Politics: Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002), p. 3.

are of course surrounded with more conversations, cultural phenomena, political struggles, recurring discourses in the press, none of which can be set aside when seeking to show how a set of thinkers were thinking in "their times." In particular, I have tried to work from the assumption that networks generate ideas more than individual authors<sup>13</sup> and that "intellectual discourse" is not independent from "public discourse."<sup>14</sup> My aim, again, is not so much to get it right, but to make an attempt at understanding, which always demands a leap of faith to some degree. I can only hope that what I have produced here is persuasive.

Of course, this method exhibits a number of theoretical commitments, which according to conceptual historian Reinhart Koselleck, is a condition of the possibility of all new historical inquiry.<sup>15</sup> The theoretical choices that make us pay attention to certain things and reject others are crucial to making certain things visible that would not be visible otherwise. Again drawing on Gadamer, I suggest that, just as musical experience allows one to hear what otherwise one could not, theory – from the Greek *theoreo*, "to see" – allows one to see what otherwise would remain unseen.

A brief word on the main source I worked with. I analyzed the practices, papers and speeches as they were recorded in a collection of documents, published in two volumes in 1905 and 1907 by the newly formed *Librairie générale de droit et de jurisprudence*.<sup>16</sup> As will become clear from the following analysis, this collection is not a verbatim account of what happened at the Congress. It is rather heavily edited so as to confer importance on certain speakers and to emphasize certain questions among the ones the Congress was

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<sup>13</sup> An insight derived from Bruno Latour's theory of Actor-Network, as interpreted by French legal historian Frederic Audren. F. Audren, "Comment la science sociale vient aux juristes? Les professeurs de droit lyonnais et les traditions de la science sociale (1875-1935)." in David Deroussin (Ed) *Le renouvellement des sciences sociales et juridiques sous la IIIe République: La faculté de droit de Lyon* (Paris: La Mémoire du Droit, 2007), pp. 3 and ff.

<sup>14</sup> An insight drawn from the cultural theorist Raymond Williams. Williams understands words as forming part of a broader "vocabulary" of culture that permeates thought and public discourse. R. Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford: Oxford University Press, 1995), p. xxvii.

<sup>15</sup> R. Koselleck. *The practice of conceptual history: Timing History, Spacing Concepts* (Stanford, Stanford University Press, 2002), p. 1.

<sup>16</sup> Chevalier-Marescq and co. and F. Pichon formed this new legal editing company, to be the official editor of the *Conseil d'État*, and of numerous academic publications, notably of the *Société de Législation comparée*. This editor still exists, now as part of Lextenso Editions and it still publishes a mix of laws and academic literature.



meant to address. Some portions of the minutes have been redacted, or summarized by the voice of an anonymous narrator.<sup>17</sup> I therefore treated the collection as an exercise in narration,<sup>18</sup> and thus took the shortcuts and omissions of the editors as occasions to reflect on the audience and purpose envisaged for the collection. This factor has influenced my reading of the Congress as an event.

The thesis is composed of five short chapters, each interrogating one of the contexts in which this Congress found itself –needless to say that they are not and cannot be exhaustive. They are my best attempt at rendering a just portrait of the "intellectual context of this Congress," which I interpret to mean everything ranging from cultural phenomena to political struggles and international relations.

Chapter 1 explains the title chosen for the Congress, in the context of previous discussions happening within the French *Société de législation comparée*. Chapter 2 outlines the Congress' ties to its immediate context, the 1900 Paris World Fair. In light of an analysis of the specific organization of the World Fair, the chapter explains how the Congress of comparative law can perhaps best be understood as the World Fair in a microcosm. Chapter 3 touches on the context of professionalization and disciplinary constitution, and it analyzes the search for a "method" for comparative law, specifically through the speech by Edouard Lambert. In particular the chapter shows how concerns around method and disciplinarity arise from a specific conversation on international trade and the role of disciplines in its expansion and facilitation.

Chapter 4 dwells on the anxieties surrounding the political stability and honour of the Third Republic. As I did my research, it became obvious to me that the facilitation of international trade was a sideline of the Congress of comparative law, and that its true object was to create a platform enabling legal innovation in as well as outside France.

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<sup>17</sup> For example, Georges Picot's opening speech does not appear in the publication, making the first speech reported the one Edouard Lambert presented on August 1st, 1900. See "Ouverture" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 22.

<sup>18</sup> On narration as a highly ethical - one might say political - exercise, see H. White, "The Value of Narrativity in the Representation of Reality," in *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987), pp. 1-25.

This project was tied to a wider project of legal renovation of France under the Third Republic. Lastly, Chapter 5 places the Congress' rhetoric in the context of French perceptions of the nation's role in the world at the turn of the century. I note how some of the papers and speeches show France's efforts to work at European peace, but also recall the French *mission civilisatrice*, and France's involvement in wars of civilization.

Articulating the various contexts of the Congress of comparative law will –I hope– shed light onto some discourses, practices and habits of thought that have had remarkable durability. This is true not only for the discipline of comparative law; as I have explained, this Congress did more for the legal academy than found a new subdiscipline of legal science. It was an occasion for legal scholars to articulate their conceptions of legal knowledge, the legal discipline, and the place they imagined for jurists in their internationalizing societies. These have had an impact on the legal discipline beyond the confines of France. Not only is the conference still a point of reference for comparative jurists around the world, one of the foundational myths of comparative law, but the works of many of the congressmen have been translated and published in a number of places, including North America. At least some of its rhetoric<sup>19</sup> still constitutes the discipline's intellectual life today.

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<sup>19</sup> On being constituted by a common rhetoric, see J. B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52 *The University of Chicago Law Review* 3, pp. 684-702.

## Chapter 1. Entitling Comparative Law

"I insist that it is a congress of comparative *law* and not comparative *legislation*. Legislation is what divides us, the law (*le droit*) is what unites us and brings us closer."<sup>20</sup>

Thus spoke Raymond Saleilles in his speech honouring his mentor Claude Bufnoir at the banquet that followed the session of the Congress on August 2nd, 1900. His insistence on word choice warrants a certain attention to the words composing the title of the Congress.

"Congrès international de droit comparé," reads the cover page of the collection of documents. What do these words say in the year 1900? How is one to understand the subsequent claim that this Congress of comparative law was the first of its kind? To what extent can this Congress be described as an "international" congress? What are some of the implications of calling it a Congress of "comparative law," and not one of "comparative legislation" as the name of the *Société* and certain documents bear? In this chapter, I proceed to analyze the title chosen for the Congress in the context of conversations happening in 1898 and 1899 within the French *Société de législation comparée*. As I will show, the words chosen for the title of this Congress, when understood in context, can be seen to have bearing on the constitution of comparative law as an academic discipline, or what I call its *entitlement*. The third part of this chapter, which inspired the title of the thesis, outlines the ways in which the new scientific method desired for comparative law would work to entitle jurists, legal scholars and comparatists involved in the renovation of legal science in France.<sup>21</sup>

### 1. One Too Many First Congresses

Not only was the Paris Congress of 1900 not the first event of its kind, but it was also not the first to be organized as part of a World Fair.<sup>22</sup> Eleven years before, the *Société* had organized, in celebration of its 20th anniversary, a *Session extraordinaire* on the occasion

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<sup>20</sup> Raymond Saleilles, "Discours du banquet du 2 août" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 164.

<sup>21</sup> See C. Jamin, "Le vieux rêve de Saleilles et de Lambert revisité," p. 742. Previously cited.

<sup>22</sup> *Société de législation comparée*, "Le Centenaire de la Société de législation comparée (1869-1969)" (1968) 20 *Revue internationale de droit comparé* 4, p. 756.

of the Paris World Fair in July of 1889.<sup>23</sup> In February of that year, President Claude Bufnoir's speech conveyed to the *Société's* assembly that the program of the conference included of course a banquet, and the president noted that he intended to offer his foreign guests "an authentic intellectual delight where they would nevertheless be asked to pay their share."<sup>24</sup> Indeed, the most important difference between the 1889 *Session extraordinaire* and the Congress of 1900 is that the foreigners presented their own work as part of this "intellectual delight." Everyone therefore took part in the discussion bearing on a question of constitutional law –the powers of Upper Houses of parliament in the matter of finance– and a question of civil law –the causes of suspension of paternal authority. The contributions to the session of 1889 were published after the fact,<sup>25</sup> but it is hard to know how many people actually took part in what was later described as a "celebration of scientific fraternity."<sup>26</sup>

In addition, as early as 1862, the Belgian *Association internationale pour le progrès des sciences sociales* dedicated the first session of its first annual Congress to comparative legislation. Based on the model of the (British) *National Association for the progress of social science*, the Belgian *Association* had the mandate of studying and proposing changes to the national legislation and invited foreign collaborators to a Congress held in Brussels in September of 1862, a meeting at which they discussed various topics of legal philosophy and law reform.<sup>27</sup> There was perhaps nothing new in 1900 in the phenomenon of legal scholars and practitioners assembling to discuss laws comparatively. This has led David S. Clark to speculate that comparative law may not yet have been conceived as a discipline distinct from legal history or the social sciences at the time of the Brussels

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<sup>23</sup> Société de législation comparée. *Bulletin de la Société de législation comparée*, vol. 18, n. 2 (Paris: A. Cotillon, 1889), p. 142.

<sup>24</sup> *Idem*.

<sup>25</sup> Société de législation comparée. *Session extraordinaire de 1889. Célébration du 20e anniversaire de la fondation de la Société de législation comparée*. (Paris : F. Pichon, 1889).

<sup>26</sup> I only know that 128 people attended the banquet. See Société de législation comparée. *Session extraordinaire de 1889*, pp. 247-251. In his December 1889 allocution, the president of the *Société*, Claude Bufnoir, congratulated his colleagues despite the fact that the session attracted less French and foreign contributors than expected. Société de législation comparée. *Bulletin de la Société de législation comparée*, vol. 19, n. 1., (Paris: A. Cotillon 1890), p. 63.

<sup>27</sup> Association internationale pour le progrès des sciences sociales. *Annales de l'association internationale pour le progrès des sciences sociales. Première session congrès de Bruxelles* (Paris: Guillaumin & cie Éditeurs, 1863), p. 132.

conference.<sup>28</sup> My reading of the contributions to the Congress of 1900, however, does not show that comparative law, legal history and social sciences (in particular legal sociology) were conceived as distinct, but that this issue was rather the topic of heated discussion. As Edouard Lambert wrote, "I ask myself if comparative law conceived as a science of manifestations of juridical life, is not legal sociology itself."<sup>29</sup> I doubt anything was clearly distinguished in 1900.

If the Paris congress of 1900 was not the first event of its kind, but was *ex post facto* constructed as first, what would make one desire that this be the case? In her piece on the connection between the practices of international scientific congresses and the phenomenon of World Fairs throughout the 19th century, Anne Rasmussen concluded that congresses as mediums or as public manifestations of thought found their apex at the Paris World Fair of 1900.<sup>30</sup> The *most scientific* Fair to date had been the Paris World Fair of 1889. With its 242 scientific events, more than twice the number of those held in 1889, the 1900 World Fair was the most significant scientific gathering of all times. It was to be, in the words of its general commissary Alfred Picard "a World Fair of Thought."<sup>31</sup>

The World Fair congresses acted as channels by which the authority and approval of the state would be conferred on nascent or uncertain disciplines,<sup>32</sup> and the 1900 Congress of comparative law was part of this official state sponsored program.<sup>33</sup> In the words of Raymond Saleilles, adjunct secretary general of the organizing committee of the Congress, comparative law was "a science still in formation,"<sup>34</sup> and the state, through its official sponsorship of the Congress, would contribute to its establishment in the legal

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<sup>28</sup> D. S. Clark "Nothing New in 2000? Comparative Law in 1900 and Today" (2001) 75 Tulane Law Review, p. 874.

<sup>29</sup> Edouard Lambert, "Rapport sur la conception général et la définition de la science du droit comparé" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 35.

<sup>30</sup> A. Rasmussen. "Les Congrès internationaux liés aux Expositions universelles de Paris (1867-1900)" (1989) 7 *Mil neuf cent*, p. 26.

<sup>31</sup> Alfred Picard. *Rapport général administratif et technique de l'Exposition universelle de 1900* (Paris, Imp. Nationale, 1902-1903), t. vi, p. 5.

<sup>32</sup> Rasmussen. "Les Congrès internationaux," previously cited, p. 32.

<sup>33</sup> *Arrêté ministériel du 27 Novembre 1899*.

<sup>34</sup> Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 9.

discipline. Congresses were therefore not only an occasion for scholars to confirm the status of their science through the state's approval, but they also contributed to a display of the influence of the state.

It is thus as part of the *World Fair of Thought* that the science-in-the-making of comparative law would be seen – at the time and for posterity – to have cemented its methodological contours, under the seal of approval of the Republic herself.

## **2. An International Congress for an International Society?**

The *Société*, in 1899, appears an international body. It had 36 correspondents in foreign countries, approximately 800 members in France and French colonies, and approximately 400 members in 43 other countries.<sup>35</sup> Its members belonged to numerous professions, not all legal in nature. Judges, *conseillers d'État*, law professors, lawyers and law graduates stood alongside professors of other disciplines like Émile Boutmy director of the *École libre des sciences politiques*,<sup>36</sup> as well as great modernist author André Gide, son of the law professor Paul Gide, ex-president of the *Société*.<sup>37</sup>

While it undoubtedly had an international readership for its publications, the international character of the *Société* – to be a Société where jurists from many countries would participate in the production of legal knowledge – was not its underlying purpose. The "international" did not form part of the *Société's* mandate as defined by its regulations and as framed by its president Georges Picot in 1899, although the *Société* did have other presidents who were more sympathetic to internationalist views.<sup>38</sup> In a speech to the *Société's* annual assembly, Picot said:

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<sup>35</sup> In the *Société's Bulletin*, the list of foreign members is organized once in alphabetical order, and once by country of origin, which allows the reader to appreciate at first glance the international readership of the *Société*.

<sup>36</sup> Société de législation comparée. *Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 13.

<sup>37</sup> He is recognizable by his address: 4 Boul. Raspail, Paris. *Ibid*, p. 22.

<sup>38</sup> Notably Edouard Laboulaye and Claude Bufnoir, whom I quote below.

"We are not an international gathering working impersonally in the interest of humanity. We are a French society that studies foreign laws in the interest of discovering and fixing the gaps in our own laws."<sup>39</sup>

The *Société* was therefore understood at least by its president to be a French society, and consequently its *conseil de direction* was composed of 53 Frenchmen, mostly working at the *Cour d'appel de Paris*, *Cour de cassation* and *Faculté de droit de Paris*.<sup>40</sup> I think it is fair to say that, in 1899, the *Société* was an overwhelmingly Parisian organization.

In preparation for the Congress of 1900, the *Société* called on foreign scholars "to bring to Paris their collaboration to a work (*œuvre*, as in a work of art) of progress."<sup>41</sup> Yet, the Congress was not understood to be a work of international collaboration in which France would simply take part, but rather, according to the president of the *Société*, a "virile effort"<sup>42</sup> on the part of French scholars to put themselves on display:

"Foreign Science, invited by us here in Paris, will have to find in our Society, alive and active, the forces that she is accustomed to admire from afar. It is not about showing her our publications, which she knows, nor our books, which she has read; we have to show her *our men, the minds that make the fecundity and the honor of our country*."<sup>43</sup> [My emphasis]

This statement portrays foreign legal scholars as a feminized "foreign science" ("science" is a feminine substantive in French) in awe before the virility and fecundity of French legal scholars. It captures the interest – evident in the press at the time – with concern over the declining fecundity of the French vis-à-vis the Germans.<sup>44</sup> One could almost propose that in this context one of the duties of French legal scholars was to replace biological fecundity with fecundity of ideas. The "international" character of the

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<sup>39</sup> Société de législation comparée. *Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 71.

<sup>40</sup> *Ibid.*, p. 66.

<sup>41</sup> *Ibid.*, pp. 78-79.

<sup>42</sup> *Ibid.*, p. 78

<sup>43</sup> In French: "La science étrangère, invitée par nous à Paris, trouvera dans notre société les forces qu'elle a l'habitude de contempler de loin. Il ne s'agit pas de lui montrer nos publications qu'elle connaît, ni nos livres qu'elle a lus; nous devons lui montrer nos hommes, les esprits qui font l'honneur et la fécondité de notre pays." Société de législation comparée. *Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 79.

<sup>44</sup> See David L. Hoffman, *Cultivating the Masses: Modern State Practices and Soviet Socialism* (Ithaca: Cornell University Press, 2011), p. 35 "In France, concern about depopulation and degeneration, especially in contrast to the fecundity and vitality of Germany, grew immediately out of the Franco-Prussian War."

Congress could thus be understood to form part of a nationalist project to display the manliness of French scholars.<sup>45</sup>

In terms of how the Congress was structured, the ideal appears to have been at work. While 76 scholars from at least 17 countries made submissions to the Congress, all those who presented reports at the Congress were French scholars and legal practitioners. Two rapporteurs were German, one Italian and one British, but they did not present their work at the conference.<sup>46</sup> The foreigners rather held honorific positions like presiding over sessions, which did not involve speaking much. The "international" character of this Congress was thus analogous to the international character of the *Société*: it had an international audience, not an international constitution. In the above-quoted statement, Picot invoked international participation as a necessary element in showing the force of attraction of French legal scholars, an essentially nationalist purpose.

### **3. *Législation Comparée* or *Droit Comparé*?**

When he announced that the *Société* would be organizing an international Congress on the occasion of the 1900 Paris World Fair, Georges Picot called it an international Congress of "législation comparée."<sup>47</sup> Yet, as shown in some of the documents published by the *Société* prior to the Congress, it is clear that the title chosen for the event was "Congrès international de droit comparé."<sup>48</sup> Judging by the procedure outlined in the Congress documents, the *conseil de direction* of the *Société* would have proposed its idea of a Congress and a title for it to the Minister of Commerce and Industry, who then would

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<sup>45</sup> "Devotion to science," in Georges Picot's speech, was itself portrayed as an expression of patriotism. The seed of internationalism that one notices in the title of the congress has to be understood within broader anxieties about the honour of France, a question to which I will return in more detail in Chapter 4. *Société de législation comparée. Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 79.

<sup>46</sup> Having attentively read the minutes of the four days of the congress, I think this was the case.

<sup>47</sup> *Société de législation comparée. Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 78.

<sup>48</sup> *Société de législation comparée. Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1900) vol. 30, n. 4, p. 373.



have approved the Congress as an official one and constituted the organizing committee.<sup>49</sup>

The choice of *droit comparé* as a title, at a time when this term still co-existed with *législation comparée*, is evidence of a shift in the scientific interests of some of the members of the *Société*. For most of its existence the *Société* had been primarily concerned with publishing translations into French of foreign codes and pieces of legislation and articles bearing on some of their particularities, as well as monitoring legislative activity in various regions identified by their languages (*section de la langue anglaise, langues nordiques*, etc.). At the assembly of 1899, the president of the *Société*, Georges Picot, congratulated the members on their impressive production, comprising 27 volumes of an *Annuaire* (yearbook) of foreign legislation and an additional collection of foreign codes.<sup>50</sup> He also acknowledged in his speech that this impressive volume of publications was made possible by an investment of 140.000 francs of funding by the Republic.<sup>51</sup> Picot reiterated that the *Société* was animated by no other interest but science, the science of comparative *legislation*.

At least for some members of the *conseil de direction* of the *Société* in 1899, "droit comparé" and "législation comparée" were not synonymous. In the memoir he published prior to the Congress, in June of 1900, Charles Lyon-Caen, professor at the *Faculté de droit de l'Université de Paris*, explained that no matter how useful comparative legislation may be, what was truly most useful – to the practice of commercial law specifically – was the study of comparative *law*: the study of legislative texts *and* their application by courts of law.<sup>52</sup> This argument for broadening the scope of materials relevant to the production of legal scholarship in comparative law recalls the work published at the time by François Geny, in his *Méthode d'interprétation en droit privé*

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<sup>49</sup> Because the congress had to be approved first, it is likely that the *conseil de direction* would have been responsible for the proposed name of the congress, and not the minister or the organizing committee. That said, the *conseil de direction* and the organizing committee were largely composed of the same people.

<sup>50</sup> Société de législation comparée. *Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p. 70.

<sup>51</sup> *Ibid*, p.71.

<sup>52</sup> Société de législation comparée. *Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1900) vol. 30, n. 6, p. 506.

*positif* published in 1899 with a Préface by Raymond Saleilles and gifted to the *Société* upon its publication.<sup>53</sup>

In the eloquent piece he dedicated to the contributions of Raymond Saleilles and Edouard Lambert to the Congress of comparative law, Christophe Jamin explained that these two authors were part of a group of French scholars involved in the project of renovating the French civil law, notably by turning legal scholarship away from the literal study of legislation and directing the attention of scholars to judicial decisions.<sup>54</sup> This group of jurists, called "inquiets" (or *disquieted*),<sup>55</sup> was fairly well represented in the *Société de législation comparée*. Geny himself attended the Congress. Another famous disquiet jurist, Bufnoir, Saleilles' mentor, was involved in the *Société* and did not leave significant published work, except his speeches as president of the *Société*, one of which is quoted in the next section.<sup>56</sup> All of this indicates that rather than the project of a couple men, the scholarly project of renovating legal science in France was in fact shared, to various degrees, by a larger group of scholars, and that the *Société de législation comparée* and its Congress would have constituted an important forum for the expression of their ideas.<sup>57</sup>

A turn to *droit comparé* in 1899 indicates a shift to a more "scientific" or "disciplinary" kind of work, to which the president Georges Picot appeared favourable. In his 1899 address, he advocated in favour of such higher scientific ambitions:

"A society like ours should not limit itself to doing translations; these works vulgarize texts and provoke comparisons and put elements of precision in the hands of scholars. It is necessary to go further and instigate *studies*."<sup>58</sup>

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<sup>53</sup> F. Geny, *Méthode d'interprétation et sources en droit privé positif: essai critique*, (Paris: Chevalier Marescq, 1899).

<sup>54</sup> Christophe Jamin argues that Saleilles and Lambert sought a transformation of the French civil law scholarship. I would add that they advocated the same for the work of the *Société*. C. Jamin. "Le vieux rêve de Saleilles et de Lambert" previously cited, p. 742.

<sup>55</sup> Marie-Claire Belleau "Les juristes inquiets : classicisme juridique et critique du droit au début du XXe siècle en France" (1999) 403 *Les Cahiers de droit*, pp. 507–544.

<sup>56</sup> See C. Jamin and P. Jestaz, *La doctrine*, (Paris: Dalloz, 2004), p. 107.

<sup>57</sup> There were others, notably the *Annales de droit commercial français, étranger et international*, a publication led by some of the same people as the *Société de législation comparée*.

<sup>58</sup> *Société de législation comparée. Bulletin de la Société de législation comparée* (Paris: A. Cotillon, 1899), vol. 29, n. 1, p.71.

The turn to *droit comparé*, as the title for both the Congress and the discipline, denotes an ambition to produce more scholarly work. This new scholarly inclination of the *Société* also has to be understood within a greater ambition: the internationalization of legal science. Commenting on the appropriateness of the words "droit comparé," chosen as the title of the Congress Saleilles said: "I insist on comparative law and not comparative legislation. Legislation is what divides us, the law (le droit) is what unites and draws us closer."<sup>59</sup>

### **Concluding Remarks on the Entitlement**

The title chosen for the international Congress of comparative law raises questions about the conversations that were animating the French society of comparative legislation and broader scientific circles at the time. The fact that the Congress was constructed as "first" after the fact points to the specific scientific atmosphere of the 1900 Paris World Fair. I elaborate in the following chapter on the question of how the phenomenon of the World Fair relates to the form of this particular scientific Congress, and the form of the discipline it participates in entitling. Further, the word "international" draws attention to the ambiguous understandings of nationalism and internationalism in French scientific discourse in 1900, a theme that I discuss at length below. For now, it suffices to note that an international Congress meant an international audience more than international participation. Lastly, if indeed a turn to *droit comparé* indicates an ambition for scientific renewal of the discipline of comparative law, the international "title" of the enterprise may have served a purpose of legitimation, working at *entitling* a broader disciplinary renovation.

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<sup>59</sup> Raymond Saleilles, "Discours au banquet du 2 août" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 164. For further discussion of comparative law as an instrument of unification and *rapprochement* between European nations, see Chapter 3.

## Chapter 2. The World Fair of Thought

"It is mainly to become closer (*rapprocher*) to our friends from the outside that we have thought of organizing this meeting, at the moment when France invites the entire world to the great peaceful demonstration of her universal exposition. Our own work (*œuvre*), is it not also a work of pacification and *rapprochement*?"<sup>60</sup>

Thus spoke Claude Bufnoir at the Opening of the *Session extraordinaire*, organized at the occasion of the Paris World Fair in 1889. Bufnoir was inviting the comparison between his scientific congress and the Fair. Eleven years later, the international Congress of comparative law was held in the offices of the *Société de Législation comparée* and in the hall of celebrations of the *Faculté de droit de l'Université de Paris*, both situated in Paris' 6th *arrondissement*, well outside the official grounds of the 1900 Paris World Fair. There is no indication that the general public was invited or attended the event.

One of my questions is therefore to what extent this Congress was a part of the World Fair. Taking seriously Anne Rasmussen's observation on the "conjunction between the form of congress and the phenomenon Universal Exposition,"<sup>61</sup> I propose to compare these two projects to see what understanding can be gained from the immediate context of this Congress. It appears to me that the project of displaying and disciplining the world at stake in the organization of the Paris World Fair of 1900 finds its miniature or microcosm in the "disciplining" project of the Congress of comparative law.<sup>62</sup> The elements I considered in coming to this conclusion were the administrative structure, wording of the invitation, and the reasons given in a preliminary report on the "utility" of this Congress.

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<sup>60</sup> Société de Législation comparée, *Session extraordinaire de 1889*, p. 5.

<sup>61</sup> A. Rasmussen, "Les Congrès internationaux," previously cited, p. 23.

<sup>62</sup> On the "disciplining" function of scientific discourses, see. M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1977).

## 1. Administrative Preliminaries

Parisian World Fairs in the 19th century can be distinguished from other world fairs by the level of involvement of the state in their organization.<sup>63</sup> They were highly regulated events,<sup>64</sup> in which the categorizations of professional trades and their products played an important part and generated much discussion.<sup>65</sup> The classification was not only a matter of categories, but also of hierarchy: in the realm of human activity, fine arts came first, for example. Scientific congresses did not escape these regulatory and encyclopaedic manias,<sup>66</sup> and impressive administrative apparatuses thus formed an important part of their organization.

The international Congress of comparative law was organized with the approval of the Minister of Commerce and Industry,<sup>67</sup> as one of the 127 Congresses granted official approval to form part of the Paris World Fair of 1900.<sup>68</sup> Its organizing committee named by the minister was composed of 63 men, exclusively working at Parisian legal institutions –*Cour d'appel de Paris, Faculté de droit de l'Université de Paris, Conseil d'État, Ministère de la Justice*, etc.<sup>69</sup> The committee adopted a series of regulations. It resolved that the Congress would elect a "Bureau" (approximately 14 people) comprising

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<sup>63</sup> A. C. T. Geppert, *Fleeting Cities: Imperial Expositions in Fin de Siècle Europe*, (New York: Palgrave Macmillan, 2010), p. 76.

<sup>64</sup> The practice of extensively regulating the relationship between the Administration (capitalized in the document) and the exposing parties had existed since the 1855 Exposition. The regulations of 1855 were so precise that they subsequently had to be reduced because too many problems arose in their application. After the 1889 World Fair, several more acts were added, and the regulations in 1900 were 41 pages, and 108 articles long. *Exposition internationale, Actes organiques : exposition universelle internationale de 1900 à Paris* (Paris: République française, Ministère du commerce, de l'industrie, des postes et des télégraphes, 1895), pp. 21-62.

<sup>65</sup> The classification was indeed said to be "one of the most essential elements of universal expositions and one of the most difficult tasks to befall the organizers of these great peaceful demonstrations." *Ibid.*, p. 65.

<sup>66</sup> Rasmussen, "Les Congrès internationaux," pp. 38-39.

<sup>67</sup> Société de Législation Comparée, *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900, Procès-verbaux des séances et document*, tome I, (Paris: Librairie générale de droit et de jurisprudence, 1905), p.1.

<sup>68</sup> This was the number of congresses that were officially part of the Exposition, but the number of congresses held in Paris that year was 242, according to the statistics produced by the Union of International Associations. Rasmussen, "Les Congrès internationaux," p. 24. G. Chasseloup-Laubat, *Exposition universelle internationale de 1900, à Paris. Rapport général sur les congrès de l'exposition* (Paris, Impr. nationale, 1906).

<sup>69</sup> With the notable exception of E. Revillout, a curator at the Louvres. Société de Législation Comparée, *Congrès international de droit comparé*, t. I, pp. 2-4.

at least 3 vice-presidents of foreign origin.<sup>70</sup> It also resolved that the program of the Congress would be fixed in advance, and would comprise a first section dealing with "general theory and method" as well as other sections divided along the subdisciplines of legal science (*droit international privé, droit commercial, droit civil...*).<sup>71</sup> It thus had its own miniature classification aimed at presenting the full spectrum of the importance of comparative law for the various branches of the legal discipline. Not only would the Congress have a general *Bureau*, but each of the disciplinary sections as well, and each *Bureau*, was given the power to make its own rules, allowing in theory for an endless proliferation of rules.<sup>72</sup> For Anne Rasmussen, the "systematic introduction of administrative forms of governance in the scientific world" constitutes one of the peculiarities of World Fair congresses.<sup>73</sup> I wish to further explore what the regulations did in this case, and what kind of disciplinary effects they had.

What strikes me about the regulations adopted for the Congress is that, just like some of the World Fair regulations, they worked to allocate limited space. Indeed, if one accepts that World Fairs and academic congresses are *media* for the diffusion of ideas, one could say that "space" in the first is analogous to *airtime* in the second. The organizing committee of the Congress invited numerous foreign scholars to submit papers bearing on one of the questions identified by the committee.<sup>74</sup> Yet, the regulation prescribed that the people who would actually speak at the Congress would be the secretary-rapporteur of each section, who would present their observations on the various papers submitted in the form of reports.<sup>75</sup> Guests were welcome to intervene, but not more than once per session and not for more than ten minutes.<sup>76</sup> Unlike in the 1889 *Session extraordinaire*, where the attending foreigners mostly presented their own work,<sup>77</sup> and where many legal

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<sup>70</sup> Art. 2. Société de Législation Comparée, *Congrès international de droit comparé*, p. 5.

<sup>71</sup> Art. 8. *Ibid.* p. 5.

<sup>72</sup> Art. 9. *Ibid.* p. 6.

<sup>73</sup> Rasmussen, "Les Congrès internationaux," previously cited, p. 33.

<sup>74</sup> Art. 15. Société de Législation Comparée, *Congrès international de droit comparé*, p. 7.

<sup>75</sup> Art. 10. *Ibid.* p. 6.

<sup>76</sup> Art. 12. *Ibid.* p. 6.

<sup>77</sup> They were, in no particular order: Belgian, Brazilian, Dutch, Swiss, Romanian, Greek, Serb, Austrian, Spanish, British, Italian and Portuguese. Société de législation comparée. *Session extraordinaire de 1889. Célébration du 20e anniversaire de la fondation de la Société de législation comparée*. (Paris: F. Pichon, 1889).

practitioners directly intervened,<sup>78</sup> a great majority of the rapporteurs at the Congress of 1900 were French and the foreign rapporteurs did not present their reports before the Congress. In addition, the overwhelming majority of the people who spoke were professors as opposed to practitioners.<sup>79</sup> *Disciplining* at this Congress was translated into a question of *who could speak*, a question framed as "scientific," but one may ask whether the question of science was not in fact covering other motives.

Similarly, space at the World Fair was very unequally divided. Foreign powers were given insufficient space for their pavilions and all had to share the same space, forming the *Rue des Nations*, on the left bank of the Seine.<sup>80</sup> While many delegations complained, few commented on the fact that France had kept one half of the total space of the exposition to herself and her colonies.<sup>81</sup> In effect, foreign exhibits were given so little importance in proportion to the rest of the Exposition that one could ask about the very purpose of their invitation.

## 2. Ambiguous Invitations

While struggling with the question of *what a World Fair is*, I came across Alexander Geppert's remarks on vocabulary. In German, world fairs are called *Weltausstellungen* (literally world-exhibitions), which raises the ambiguity of whether an exhibit is made *for* the world or whether the world itself is to be put on display.<sup>82</sup> Reading Georg Simmel's analysis of the phenomenon, Geppert notes that only a true world-city (*Weltstadt*) could achieve such an event through its power of *attraction*.<sup>83</sup> The presence of the entire world would have been sought, not so much for the individual contribution of every country,

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<sup>78</sup> Their professions included: lawyers, *Conseillers d'État*, ministers, members of parliament, and legislative counsels.

<sup>79</sup> General secretary-rapporteurs were all French, 6 out of 7 were professors. Special secretary-rapporteurs were 6 out of 10 French, and 9 out of 10 were professors, the last one was a judge. Société de Législation comparée, *Congrès international de droit comparé*, p. 20.

<sup>80</sup> The allotment of space at the World Fair even created tensions, as the Rue des Nations was reserved to "world powers" (*puissances mondiales*), of which the United States was initially excluded. See R. Mandell, *Paris 1900: The Great World Fair* (Toronto: University of Toronto Press, 1967), p. 55.

<sup>81</sup> *Ibid.*, p. 56-57. See also B. Schroeder-Gudehus, A. Rasmussen, *Les fastes du progrès: Le guide des expositions universelles, 1851-1902* (Paris: Flammarion, 1992), p. 132.

<sup>82</sup> Geppert, *Fleeting Cities*, p. 6.

<sup>83</sup> *Ibid.*, p. 57.

but rather to produce a *display of the world* that would show the power of the host city to bring the world within itself.

A similar phenomenon, I suggest, can be read in the official invitation to the 1900 Congress of comparative law. The invitation made clear that it was not limited to members of the *Société de Législation comparée*: it was aimed at all the people who, in France and elsewhere, were interested in questions of comparative legislation.<sup>84</sup> Not only would the Congress be an occasion to draw closer scholars and jurists "of all corners of the world," but it was also aimed to give the science of comparative law a "formula" and "the direction it needed to ensure its development."<sup>85</sup> Yet, it seems this attempt at direction would fail if foreign countries failed to be represented. The organizing committee, therefore, addressed a "pressing call" to foreign scholars and jurists, as the success of its disciplining work depended on "all the nations, in which legal science had achieved some degree of development, being largely represented."<sup>86</sup> As noted in the first chapter, and just like at the World Fair, *attendance* of foreigners at the Congress was more important than their contribution. On it depended the legitimacy of the whole enterprise of disciplinary constitution.

In framing the central project, the circular letter closely mirrored the rhetoric of the World Fair. The work (*l'œuvre*, as in work of art) of the Congress was said in the letter to be first and foremost "a work of scientific actuality," and indirectly perhaps, "a work of international peace and concord," in which the guests were invited to take part.<sup>87</sup> Nineteenth century World Fairs were widely understood to be an occasion for peaceful commercial and industrial competition between the powers of Europe. They invited the juxtaposition of scientific newness and international peace<sup>88</sup> even before academic congresses became a part of their structure in 1878.

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<sup>84</sup> Société de Législation comparée, *Congrès international de droit comparé*, t. I, p. 7.

<sup>85</sup> *Ibid*, pp. 7-8.

<sup>86</sup> *Ibid*, p. 8.

<sup>87</sup> In French: "Une œuvre d'actualité scientifique au premier chef; indirectement aussi, ce peut être une œuvre de paix et de concorde internationales." *Ibid*. p. 8.

<sup>88</sup> In the official catalogue, the President of the Republic called the Exposition "une œuvre de paix, d'harmonie et de progrès," in a guide to the Exposition, it was called "une grande fête de la paix," in his report to the President, the Minister of Commerce called the Exposition "des grandes fêtes pacifiques."



The observation that the invitation to this particular Congress mirrored the rhetoric of the World Fair would be trite, of course, if it were not for the longstanding association of the discipline of comparative law – and of "sciences" more generally<sup>89</sup> – with the language of peace.<sup>90</sup> I therefore ask: *what peace were these jurists imagining for the world?* One possible answer is that it was, in theory, no different from the "peace" of the World Fair: international trade and competition for scientific and industrial refinement as an alternative to war in measuring a nation's degree of progress compared to others. This *Parisian peace* was a very particular concept of peace; one that presupposes a specific order and hierarchy of peoples, and a specific role for scientists – notably legal scientists – in the advancement of a nation in this strict hierarchy.

### 3. Utility and Urgency

The Organizing Committee of the Congress asked Raymond Saleilles –then an eminent chair of civil law at the *Faculté de droit de l'Université de Paris*– to produce a prospectus on the "utility, aim and program" of the 1900 Congress. This report set out in great detail the arguments for disciplining the practice of legal comparisons. Notably, it argued the urgency to be the first to do it. The main argument, however, was one of utility: if legal

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Exposition internationale universelle de 1900. *Catalogue général officiel* (Lille: L. Danel, 1900); H. Lapauze, et al. *Le guide de l'Exposition de 1900* (Paris: E. Flammarion, 1900); Exposition internationale, *Actes organiques*, previously cited, p. 5.

<sup>89</sup> See, e.g. B. Schroeder-Gudehus. *Les scientifiques et la paix: La communauté scientifique internationale au cours des années 20* (Montreal: Presses de l'Université de Montréal, 1978).

<sup>90</sup> Edouard Lambert, one important character of this congress, eventually founded in Lyon the Institute for International Peace and Cooperation. Gunther Frankenberg speaks of the discipline as still suffering from an "overdose of humanity" in its insistence on producing international peace. Indeed, it is not rare for jurists in the discipline today to write sentences like "the development of comparative law in France and elsewhere must overcome nationalistic attitudes. It must embrace the prospect for peace among states..." Lastly it is even common for jurists to connect their current understanding of peace to a more or less distant past of their discipline, e.g. "Still, this ideal of being an instrument of peace remains perfectly valid, and we can dream that the IALS [Institute of Advanced Legal Studies] now plays a similar role [to the one played during the Cold War] in the relations between the North and the South." See, in this order, F. Audren, "Comment la science sociale vient aux juristes? Les Professeurs de droit lyonnais et les Traditions de la science sociale (1875-1935)" in David Deroussin (Ed) *Le renouvellement des sciences sociales et juridiques sous la IIIe République: La faculté de droit de Lyon* (Paris: La Mémoire du Droit, 2007), pp. 3 and ff; G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Edward Elgar, 2016), p. 47; B. Fauvarque-Cosson. "Development of Comparative Law in France" in Reimann and Zimmermann (Eds.) *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2015), online; Xavier Blanc-Jouvan. "Centennial World Congress on Comparative Law: Opening Remarks" (2001) 75 *Tulane Law Review* 4, pp. 860-861.

comparisons and legal importations were inevitably going to happen, legal scholars should seek to master them in order to harness their potential and limit their negative aspects. Saleilles' understanding of the "international exchanges" of legal doctrines was bound up with a discourse about international trade proper to a World Fair ideology. In this discourse, trade was something to be both enabled and controlled, and Saleilles proposed that the discipline of comparative law could offer a way of doing both.

Sent out together with the official invitation, along with a copy of the regulations, Saleilles' letter started thus:

"Gentlemen,  
At a time when we organize such a large number of congresses on scientific matters that have long been defined and given precision, [...] it seems even more necessary to provoke between French and foreign scientists, exchanges of views, a type of international consultation, concerning sciences that are in the process of formation [...] This is the case of comparative law."<sup>91</sup>

The first thing that strikes me about the opening of this report is the tone of urgency. The legal scientific community cannot wait for conversations to arise of themselves; it must "provoke" them. Saleilles understood the defining character of "first moments" for scientific disciplines, as he noted that the sciences he called "well defined" continued to "move forward following their traditional orientation."<sup>92</sup> There is here a disciplining tone: the discipline cannot simply go anywhere; it needs direction –not only a trajectory, but also a directory.

And for this, international agreement – or rather *consultation* – was deemed necessary. Yet, further in his report, Saleilles raised another matter of potential urgency when he wrote that it would be the "honour" of the *Société française de Législation comparée* of having taken this initiative<sup>93</sup> – an honour here not bestowed, of course, but taken.<sup>94</sup>

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<sup>91</sup> Raymond Saleilles, "Rapport à la commission d'organisation" in *Société de Législation comparée, Congrès international de droit comparé*, p. 9.

<sup>92</sup> *Ibid.*, p. 9.

<sup>93</sup> *Ibid.*, p. 15.

<sup>94</sup> In particular, an honour to be taken back after military defeats against the Germans and British, after the scandal of the Panama Canal, and especially during the Dreyfus affair. See M. Johnson. *The Dreyfus Affair: Honour and Politics in the Belle Époque* (New York: St. Martin's Press, 1999).

Another reason to urgently organize this Congress could have been that if it were not done right away, someone else than the French *Société* would dictate the rules first.

In his report, Saleilles pressed the necessity of a new science of comparative law by accentuating the inescapability of legal comparison and legal borrowings as a practice. For him, legal comparisons, and the "consequences" jurists were now starting to derive from them, were a natural consequence of jurists' observations of foreign laws: "A man cannot register the facts of social life without asking after the profit, which has to result for the progress of science and of civilization in general."<sup>95</sup> Scientific activity was understood as the production of a system of knowledge, an understanding that could be contrasted with other or earlier ones.<sup>96</sup> Indeed, one may have to conceive of scientific activity as a "production" in order to ask after its "profits." This analogy drawn between scientific activity and economic production is not natural, and it may well have been tied to an anxiety about other "productions" and "profits" in an internationalizing world.

This search for scientific profits through comparisons, wrote Saleilles, was already being done in teaching, in some branches of the legal discipline – from which he explicitly excluded civil law.<sup>97</sup> Where academics have finally succeeded in distancing their teaching from the pure exegesis of legislation,<sup>98</sup> he wrote, it has become *impossible* not to resort to the comparison of legal solutions.<sup>99</sup> This comparative method, he said, was at once *dangerous* and nevertheless inescapable (*d'un emploi forcé*).<sup>100</sup> Therefore, he concluded, research was necessary as to when and where the comparative method should be applied, as well as research on the conditions under which the consequences jurists

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<sup>95</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 15.

<sup>96</sup> For examples, other understandings of science include science understood as a "repository" or archive of found knowledge, or even science as the habitus of the scholar. See R. Stichweh "Scientific Discipline, History of" in Neil J. Smelser and Paul B. Baltes (Eds) *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2001), p. 13728. On the rise of legal academia as a "body of knowledge" (*corps de science*) composed of individual scholars in France, see C. Jamin and P. Jestaz, *La Doctrine*, previously cited.

<sup>97</sup> Raymond Saleilles, "Rapport à la commission d'organisation", p. 10.

<sup>98</sup> Saleilles was probably thinking of his predecessors and colleagues who taught and continued to teach civil law, using the method of the exegesis of the civil code. On this topic, see C. Jamin. "Le vieux rêve de Saleilles et de Lambert," previously cited, p. 733.

<sup>99</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 10.

<sup>100</sup> *Idem*.

derive from it are *legitimate* and *justified*.<sup>101</sup> I notice here that legal legitimacy and justification are merged with their scientific homologues, a movement of professionalization described by Koskenniemi as the "scientific ambition" of the discipline of international law during the same period.<sup>102</sup>

Saleilles' argument, like most discussions on international trade, has a rare matter-of-fact tone to it: legal comparisons would happen whether one liked it or not, and one should therefore seek at least to regulate this practice through a set of "rational," "reasoned" disciplinary rules.<sup>103</sup> However, he noted, changing from a register of caution to one of opportunity, comparative law also revealed a practical aspect of considerable "interest."<sup>104</sup> It would allow a study of the influence of foreign laws on the development of national law.<sup>105</sup> The simplest aspect of this influence, noted Saleilles, was legislative borrowing – by which a state willingly borrows a legal regime from a neighbouring state.<sup>106</sup> Yet, there were "more empirical processes" by which concepts and doctrines – the most "vigorous" ones – were being adapted by scholars from one jurisdiction to another, and being sanctioned by judicial interpretation of national laws.<sup>107</sup> "*Mores* now move ahead of laws," he wrote.<sup>108</sup>

While he acknowledged that these social facts probably belonged to the discipline of sociology more than law, Saleilles contended that once a concept was adopted in the canon of interpretation<sup>109</sup> of legal texts, it presented itself as an "evolution of the texts

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<sup>101</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 10.

<sup>102</sup> Koskenniemi, *The Gentle Civilizer*, previously cited, pp. 24 and ff.

<sup>103</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 11.

<sup>104</sup> *Idem*.

<sup>105</sup> *Idem*.

<sup>106</sup> *Idem*.

<sup>107</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 12. The law Saleilles is most likely to see borrowed by French legal scholars in 1900 is German law.

<sup>108</sup> *Idem*.

<sup>109</sup> "Interpretation" was an important keyword for Saleilles and other French legal scholars at the time. François Geny, then a professor of civil law at Dijon and a member of the *Société de Législation comparée*, had just published the first edition of his *Méthode d'interprétation et sources en droit privé positif: essai critique*, (Paris: Chevalier Marescq, 1899) with a preface by Raymond Saleilles. Interpretation, here, was an interpretation freed from the obsession for the will of the lawmaker, an important scholarly innovation attributed to Saleilles' friend.

themselves."<sup>110</sup> For Saleilles, these inexorable "evolutions" once again raised the *exclusively legal question* of "legitimacy."<sup>111</sup> A truly scientific science of comparative law, he implied, would pay attention to these natural "empirical processes" of foreign influence on domestic lawmaking and would seek to assess the legitimacy of those legal importations. The discipline here was being erected as a checkpoint on the ways of exchange of an increasingly international legal practice and legal scholarship.

One last site of foreign influence on national law, Saleilles remarked, was the practice of explicit and implicit international understandings (*ententes internationales*), particularly made in the context of international trade.<sup>112</sup> He asked:

"Does one not feel a general movement of legal unification on the matters bearing on questions of international trade, thus forming some sort of common law of civilized humanity (*droit commun de l'humanité civilisée*)?"

Saleilles' rhetorical question, particularly its last phrase, is possibly the most commonly cited phrase of the entire Congress papers. As Aragonese found, it is often cited as a summary of Saleilles' scientific project as a whole,<sup>113</sup> but I have failed to find a convincing analysis of it. As Resta noted, the "civilization" criteria denotes a logic of exclusion of certain uncivilized nations,<sup>114</sup> but it is perhaps necessary to contrast "civilization" with one of its linguistic others, to touch on its connotations. In a piece on the international influences on the Deutscher Juristentag, Stefan Geyer noted that in their work on the unification and codification of German law, the members of this association used a similar yet different expression; they spoke of *Kulturstaaten* (*states of culture, cultured states*).<sup>115</sup> Helge Dedek has outlined the distinction between *Civilization* and *Kultur* in 19th century European legal thought. Essentially, the concept of civilization, inherited from the Enlightenment, does not admit a plurality of ways to "cultivation,"

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<sup>110</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 12.

<sup>111</sup> *Idem.* On the use of the language of "inexorable evolution," Giorgio Resta points out that Eduard Gans, one of Hegel's disciples, had already developed an evolutionist theory of law from the study of primitive societies, one that we will see further at play in the Congress papers. G. Resta, "Luttes de clochers en droit comparé" p. 1178.

<sup>112</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 13.

<sup>113</sup> Aragonese, *Un jurista del modernismo*, previously cited, p. 111.

<sup>114</sup> G. Resta, "Luttes de clochers," previously cited, p. 1185.

<sup>115</sup> S. Geyer, "Fonds juridique commun et naissance du droit national" in Le Yoncourt, Mergey, Soleil (Eds) *L'idée de fonds juridique commun dans l'Europe du XIXe siècle: Les modèles, les réformateurs, les réseaux* (Rennes: Presses Universitaires de Rennes, 2014), pp. 223 and ff.

which is why the term culture was preferred by counter-enlightenment romantics such as Johan Gottfried Herder.<sup>116</sup> *Civilization* is an ideal proper to French (and perhaps British) internationalism and its concept of "humanity" – one could say that the British preferred "Empire" – as following one common path to civilization.<sup>117</sup>

Saleilles continued with questions: to what extent does a movement toward unification of law *exist*? To what extent is legal unification possible, and according to which "scientific orientation" (*orientation scientifique*) should it be endorsed or limited? For Saleilles, one of the tasks of the new science of comparative law would be to provide such "scientific laws,"<sup>118</sup> enabling jurists to judge the legal implications and, by implication, to govern the internationalization of laws governing commercial relations.<sup>119</sup> However, he noted, "nothing had been done" in this area of research so far.<sup>120</sup> Unconscious of the potential of their study, his colleagues studied the past but failed "to deduce the laws that will preside over what would come."<sup>121</sup>

"This friendly contest between peoples," Saleilles concluded, bringing us back to the phenomenon of the World Fair and its occasion for international exchanges (scientific and others), was therefore an occasion to lay the groundwork of a "necessary science," the practical applications of which were "universally needed."<sup>122</sup> Saleilles thought that, just as the World Fair would discipline the world by displaying a "world we want," the Congress of comparative law could discipline the world of legal comparisons and borrowings by displaying a science at the top of its game, with its own set of scientific guidelines.

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<sup>116</sup> H. Dedek, "When Law Became Cultivated: 'European Legal Culture' between Kultur and Civilization," in G. Helleringer & K. Purnhagen (eds), *Towards a European Legal Culture* (C.H. Beck/Hart, Munich-Oxford, 2014), pp. 355-356.

<sup>117</sup> I will touch further on the topic of civilization in Chapter 5.

<sup>118</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 13.

<sup>119</sup> International Law scholar David Kennedy contends that comparative law is a merely scientific discipline, that it concerns itself with taxonomies and has no ambitions of global governance. D. Kennedy, "New Approaches to Comparative Law" (1997) *Utah Law Review* 2, p. 548.

<sup>120</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 13.

<sup>121</sup> *Idem*.

<sup>122</sup> *Ibid.*, p. 14.

In Saleilles' argument, the World Fair offered at once an example of the paradigm of a new *internationalizing* legal reality in which jurists already operated, *and* constituted the occasion for disciplining juristic practices, with a view to harnessing the potential advantages and limiting the negative outcomes of internationalization. *Discipline*, in the form of comparative legal expertise, was presented as the key to engaging more carefully and profitably in the internationalization of law warranted by increasing international trade. For this, a direction, a scientific *method*, would be crucially needed.

Thus, the program divided the Congress in several sections, the first on "theory and method" was meant to "direct investigations" and "orient discussions."<sup>123</sup> This section was said to form the central point of the Congress.<sup>124</sup> The schedule was organized so as to ensure that everyone could attend it.<sup>125</sup> The reports of this particular section, unlike the others, would even be produced in advance in order to direct the investigations made for the Congress. Again, I see this as a disciplinary maneuver aimed at governing the practices of legal comparisons even prior to the opening of the event that was to create those very rules. The other sections of the Congress, bearing on questions of practical application of comparative law in several branches of legal practice, were meant to demonstrate the practical outcomes that could be derived from these methods. They would result in an "experiment," for which foreign scholars would provide the "factual data" in their papers, to be theoretically analyzed by the rapporteurs of their section, i.e. a French scholar.<sup>126</sup> A clear hierarchy was thus established between who would *do the comparing* and who would *be compared*.

### **Concluding Remarks on the World Fair**

The international Congress of comparative law thus appears to have been part of the 1900 Paris World Fair in a most intimate way. Indeed, the disciplinary aspects of its organization and stated aims seem to be tied at once to the form of the World Fair as a state-regulated display of the world and to its stated ideology of a unifying and pacifying

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<sup>123</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 16.

<sup>124</sup> *Idem*.

<sup>125</sup> *Idem*.

<sup>126</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 17.

progress story. Legal science, in Saleilles' report on the *utility* of the Congress, was not only a tool enabling international trade, but also necessary to preserve a nation's sovereignty over its laws, since it would help scholars in judging the legitimacy of foreign legal influences on a domestic legal system. Legal scientists involved in comparative law as a discipline would be the guardians of state sovereignty in an internationalizing world, and could also be involved in proposing ways of adapting a nation's legal system to enable or control international trade.<sup>127</sup> The disciplinary structure of this Congress in addition reveals an adherence to a hierarchy of nations engaged in the production of legal knowledge, at the top of which rested French legal science.<sup>128</sup>

Scientific hierarchies and some anxieties about the place of France in a hierarchy of nations are discussed in detail in Chapter 4. For now, the present section has aimed to show the intertwining of disciplining and displaying, inherent in the project of Universal Exposition and in this Congress of comparative law. In a world where the unruly practices of trade can be governed by science, *who gets to speak on science* and *who gets to discipline and display the world* became questions themselves governed by the rules of a well-disciplined international scientific community. The Congress of comparative law can be seen as a World Fair of law, a display of the laws of the world, seeking to discipline scholarly engagement with them.

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<sup>127</sup> Christophe Jamin's finding that legal scholars sought to elevate themselves as a lawmaking authority, usurping the position of lawmakers, could be explained by an overarching purpose of state preservation in defending national doctrines and laws against illegitimate foreign influences. See Jamin. "Le vieux rêve de Saleilles et de Lambert," previously cited.

<sup>128</sup> While it has been noted that western hegemony and colonialism underlie the disciplination of human sciences in the context of World Fairs, such a statement remains to be made for law. See C. Demeulanaere-Douyère, "Exotiques expositions" in Demeulanaere-Douyère, C. (Ed.) *Exotiques Expositions... Les expositions universelles et les cultures extra-européennes, France, 1855-1937*, (Paris: Archives nationales/Somology, 2010), pp. 7-21, and C. Demeulanaere-Douyère, L. Hilaire-Pérez, L. (Eds.) *Les expositions universelles: Les identités au défi de la modernité* (Rennes: Presses Universitaires de Rennes, 2014).



### Chapter 3. Disciplining Comparative Law

"Can there and should there be a science that has for an object not only to observe a movement that comes from nature and from man, but also to regulate it (*de le régler*), to discipline it (*de le discipliner*), to direct it (*de le diriger*) if possible?"<sup>129</sup>

Saleilles put the question thus in his closing address to the Congress, echoing the thoughts he explored in his preliminary report. In this chapter, I argue that the Congress was aiming to do the same with the discipline of comparative law itself: to regulate it and direct the course of its enquiries. As I have shown above, my reading of the Congress papers brings me to see it as an occasion to discipline scholars already engaged in the practice of legal comparisons. This disciplining exercise had specific purposes.

The Congress was meant to answer questions such as: What are the proper topics of enquiry of comparative law as a discipline? How should they be determined? What should the function of the discipline be? How would comparative law be distinguished from other disciplines? These questions and the answers provided for them at once opened and closed off avenues for the discipline: they served to *entitle* comparative law in a way that would impede alternate possibilities. In a word, they erected boundaries and effected a form of discursive closure.<sup>130</sup> In this section I examine the speech delivered by Edouard Lambert on conception and method in the discipline of comparative law, paying specific attention to how it erected boundaries, how it disciplined a conversation already in existence and how it sought to regulate a discipline in the future.

The specific question to be explored in this chapter is how the aim of "disciplining" comparative law – establishing its proper method and function, making it more scientific – could have been tied to a desire to make it an instrument of international trade. My thesis is that Lambert's proposed constitution of the discipline worked to commodify

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<sup>129</sup> Raymond Saleilles, "Discours de clôture" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 143.

<sup>130</sup> See generally R. Stichweh "Scientific Discipline, History of" previously cited. The edification of boundaries is one of the main performances of modern science, including legal science. See H. Dedek, "Stating Boundaries: The Law Disciplined," in Helge Dedek and Shauna Van Praagh *Stateless Law: Evolving Boundaries of a Discipline* (Ashgate: 2015), pp. 9-22.

"legal products" of several jurisdictions. The discipline would work to place them next to each other as products were in a World Fair: so that they could be compared and assessed according to their degree of advancement. It would then be easy to choose which one would be appropriate for all countries, which would in turn encourage legal unification for the purposes of international trade. Lambert's use of language in his submission reveals that he borrowed from the rhetoric of commercial law congresses, and placed the facilitation of international trade at the center of his method and of the hierarchy he sought to erect between various legal productions.

This chapter is therefore concerned with Lambert's attempt to restrict and direct the focus of comparative law, to make it a useful instrument in facilitating international trade. Indeed, most questions put by the organizers of the Congress to the congressmen were informed by the desire to reach international agreement on various legal questions relevant to international trade, be these communication of information regarding foreign law, rules on judicial competence to enforce foreign judgements, the legal status of foreign corporations in various countries, or reaching uniformity of legislation on bills of exchange.<sup>131</sup> Some of those questions – notably the question on bills of exchange – had been the topic of previous congresses bearing specifically on commercial law.<sup>132</sup> I develop further how the legacy of previous congresses and publications of commercial law informed the conversation in this one.

In this chapter, I first read Lambert's speech on method in the context of previous conferences and publications of commercial law. Second, I ask how other congressmen *performed* comparative law as a new discipline of legal commodification, how did they imagine it as a practice? I also touch on the important question of whether Lambert's assumptions about the right method or the right function were *shared* by other congressmen, and come to the conclusion that both Lambert's chosen method and function – and their underlying assumptions – were persuasively resisted by a number of them.

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<sup>131</sup> "Programme et rapporteurs," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, pp. 18-19.

<sup>132</sup> *Actes du Congrès international de droit commercial d'Anvers* (Brussels: Ferdinand Larcier, 1886).

## 1. Boundaries of Science and Legal Exchanges

On August 1st, Edouard Lambert was given the task to make a presentation about the submissions to the Congress touching on the "conception" and "method" of comparative law. This speech is one of the most cited texts of this collection and possibly of the discipline. Authors who refer to this Congress as a point of origin of the discipline of comparative law do so by citing Lambert's ideal of a "common legislative law," while ascribing it to "the Congress" in general.<sup>133</sup> Their attention has been focused on what this text sought to accomplish for the discipline. Zweigert and Kötz, authors of an important textbook of comparative law, attributed to "the Paris congress of 1900" the "European focus" of the discipline advocated by Lambert in this speech.<sup>134</sup> This was a departure from a previous understanding of comparative law aimed at encompassing world legal history,<sup>135</sup> and it was later criticized as Eurocentric.<sup>136</sup>

Critical readings of Lambert's accomplishments are not lacking. Günther Frankenberg has called Lambert's project "misplaced universalism" and underscored that Lambert saw the enterprise of codifying a "scientific method" as blameless, thus overlooking its ties to the colonial project.<sup>137</sup> Christophe Jamin chose to read Lambert's speech by highlighting its project to renovate French civil law doctrine and legal education.<sup>138</sup> Finally, Resta noted that Lambert also had a project to renovate comparative law, which meant getting rid of the historically inclined projects of legal ethnography in favour of studying modern legal systems.<sup>139</sup>

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<sup>133</sup> René David starts his account of the history of comparative law by saying that in 1900, comparative law was about "creating a common legislative law," a phrase taken from p. 38 of this speech as published in this collection. See R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964), p. 6.

<sup>134</sup> K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Clarendon Press, 1977), p. 58.

<sup>135</sup> R. Sacco, "One Hundred Years of Comparative Law," previously cited.

<sup>136</sup> D. López-Medina, "El nacimiento del derecho comparado moderno," p. 152.

<sup>137</sup> G. Frankenberg, *Comparative Law as Critique*, pp. 45-46.

<sup>138</sup> C. Jamin, "Le vieux rêve de Saleilles et de Lambert revisité," p. 736. As Jamin states in the piece, Lambert had written on the reform of legal education at the time.

<sup>139</sup> G. Resta, "Luttes de clochers en droit comparé," pp. 1185-1186.

My close reading of Lambert's speech proposes to shift attention from "what" Lambert did or "what project" he carried, to "how" he did it.<sup>140</sup> In doing so, I will try to expose influential contextual elements for the speech, specifically a series of assumptions about the nature of the legal discipline (here called "legal science"). These assumptions derived from the context of the world fair and from the general disciplinary foundation that accompanied it. Authors who have sought to define or criticize some of the numerous projects that can be attributed to Lambert have mostly overlooked these assumptions.

In the afternoon of August 1st, Edouard Lambert started his speech—the longest presentation made at this Congress –by honouring "his master" Saleilles.<sup>141</sup> After a three-page-long survey of the various papers submitted to the Congress on the question of method, an enumeration concluding with mention of Mordché Rapaport's paper on Talmudic law, he stated that their number and diversity sufficed as reasons not to analyse them in detail.<sup>142</sup> He thus set out analytically to expose "conclusions" and "personal observations" on the proper conceptions of the *function, method, history* and *teaching* of comparative law.<sup>143</sup> Lambert's language worked mostly to situate the discipline in a modern setting rather than a historical one, and his numerous *dismissals* of previous scholarship or of his colleagues' submissions can each be seen as attempts to construct boundaries or moments of rupture. Like Sacco and Resta, I read these ruptures as an effort to renovate the discipline of comparative law at the expense of the contribution of German jurists in particular.

Lambert proposed to examine "function" first because it would determine everything else. He argued that without reaching an agreement on function, methods and histories would diversify and the congressmen would not be able to reach an agreement on the

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<sup>140</sup> A shift from the question of 'what' to the question of 'how' is generally attributed to Michel Foucault's theory of knowledge, and the power dynamics at play in its "discourses." See M. Valverde, "Specters of Foucault in Law and Society Scholarship" (2010) 6 Annual Review of Law and Social Science, pp. 45–59.

<sup>141</sup> Edouard Lambert, "Rapport sur la conception général et la définition de la science du droit comparé" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 26.

<sup>142</sup> *Ibid*, p. 28.

<sup>143</sup> *Idem*.

importance of comparative law in legal education.<sup>144</sup> Yet, he said, he was not optimistic that such an agreement would be reached: the "divergences of views" were so great that it was unlikely that the "dream" of an agreement would materialize, hence the necessity to organize the Congress in the first place.<sup>145</sup> Lambert's language of "reaching agreements" recalls words used in earlier congresses, such as the congresses of Commercial law organized by the Belgian Government in Anvers in 1885 – also at the occasion of a World Fair – and in Brussels in 1888. These congresses were organized "for the purpose of reaching the unification of commercial laws on the points where a general agreement is judged to be possible."<sup>146</sup> Presented as scientific events, these congresses were nevertheless an occasion for governments to send delegations – academic or not – to discuss various possibilities for legal unification.<sup>147</sup> Lambert's understanding of congresses as an occasion to "reach an agreement" thus seems to replicate for the new discipline of comparative law a form of congress imagined for commercial law.

Lambert's argument on the necessity of reaching such an agreement on function was that unless one could be reached, comparative law would not form a *unified* branch of legal science. He wrote: "under the same tag, one finds the most varied products."<sup>148</sup> Drawing on the typical World Fair's obsession with classification of the products of human activity, Lambert decided to frame disciplinary divergences in terms of a "problem of classification."<sup>149</sup> Thankfully, noted Lambert, "the inquiry conducted by the commission of organization of the Congress" allowed him to reject at least one type of studies that did not belong in the general category of Comparative law at all: the studies that merely

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<sup>144</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 28.

<sup>145</sup> *Ibid*, p. 29.

<sup>146</sup> *Actes du Congrès international de droit commercial d'Anvers* (Brussels: Ferdinand Larcier, 1886), p. 1. I note that the unification of the law on bills of exchange was also a topic at the first of these conferences. This congress discussed questions that were previously discussed at these conferences of commercial law, and thus placed itself in their conversations.

<sup>147</sup> On international congresses of commercial law, see C. Ciancio, "Les congrès internationaux de droit commercial: un réseau de commercialistes européens à la recherche d'un droit uniforme" in Le Yoncourt, Mergey, Soleil (Eds) *L'idée de fonds juridique commun dans l'Europe du XIXe siècle: Les modèles, les réformateurs, les réseaux* (Rennes: Presses Universitaires de Rennes, 2014), pp. 253 and ff.

<sup>148</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 29.

<sup>149</sup> *Idem*.

provide an account of foreign law.<sup>150</sup> This reclassification allowed him to exclude a great part of the scientific publications done by the French, British, and German scientific associations and scientific journals as not *belonging to the field*.<sup>151</sup> While he recognized the contributions of these works, Lambert noted that they had been wrongly thought to form the core of the discipline.<sup>152</sup> Solving this "confusion" allowed him to exclude the works that merely "juxtaposed" the legislation of various states on a specific topic.<sup>153</sup> There was "close to unanimous agreement," he said without citing anyone, that these works did not constitute comparative law.

Lambert thus started to level the ground for his own edifice, which he called a "work of coordination and conciliation." He referred to a German scholar – Friedrich Bernhöft who was not participating in the Congress – who had identified three directions of comparative law: the ethnological, the historical and the dogmatic.<sup>154</sup> Having equated ethnological and historical approaches, Lambert concluded that there were really two conceptions of the discipline.<sup>155</sup> He thus divided his colleagues' contributions into two groups: those which assigned to the discipline a purely scientific, "merely speculative" aim, making it analogous to a social science, a science of language or a science of religions, and those who conceived of it as an element of positive law.<sup>156</sup> As for "the exclusively scientific" conception, he admitted that it had long proven its vitality and fecundity, in particular in the works of German and British scholars throughout the 19th century, who had endeavored – in words attributed to the Swiss jurist Georg Cohn – to

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<sup>150</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 29.

<sup>151</sup> *Ibid*, pp. 29-30.

<sup>152</sup> *Ibid*, p. 30.

<sup>153</sup> Which means that he notably excluded the work done in the field of commercial law by de Saint-Joseph, Colfavru and Levi in the mid 19th century. See J.-C. Colfavru, *Le droit commercial comparé de la France et de l'Angleterre suivant l'ordre du code de commerce français* (Paris : Cosse, Marchal, 1863); A. de Saint-Joseph, *Concordance entre les codes de commerce étrangers et le code de commerce français* (Paris : Videcoq père et fils : Delamotte, 1844); and L. Levi, *Commercial law, its principles and administration, or the Mercantile law of Great Britain compared with the codes and laws of commerce of the following mercantile countries : Anhalt, Austria, Baden... and the Institutes of Justinian* (London : W. Benning, 1850-1852).

<sup>154</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 31.

<sup>155</sup> *Ibid*, p. 32.

<sup>156</sup> *Idem*.

study an "Urrecht," an originary law.<sup>157</sup> He then attributed the critique of this branch to his colleagues Gabriel Tarde and Adhémar Esmein: this branch of comparative law had *neglected* to compare the law of *modern societies*.

According to Lambert, German and British scholars had been solely preoccupied by the demonstration of "the evolution of human societies," and had been obsessed with proving the idea that societies all have to go through specific "stages" of evolution of human history.<sup>158</sup> He found this idea to be particularly prominent in the contribution to the Congress of his German colleague, Josef Kohler. Once again, he attributed the critique of this conception to the legal sociologist Gabriel Tarde, a critique grounded in the diverse trajectories of "social life."<sup>159</sup> Since there is not one but several paths of evolution, the task of comparative law should rather be one of classification, analogous to the work of botany or zoology, and Lambert noted that for himself, he had trouble distinguishing this form of comparative law from sociology.<sup>160</sup>

I read Lambert's critique as participating in the epistemological tensions in the philosophy of science at the end of the 19th century. Broadly understood, Darwin's teachings on evolution and the rise of a nascent sociology gave rise to a critique of the progress narrative in both natural and social sciences. The idea that "change" does not always equate to "progress," and the consequent possibility of *decline*, would have given rise to a tension informing the philosophy of science.<sup>161</sup> Lambert's questioning of a unique path of progress, and his consequent insistence on classification – i.e. a selection of species of law worthy to be bred with ours – was aimed at undermining the scientific standing of what he called the "historical" branch of comparative law, which presumed a common path of humanity towards progress. Lambert's movement towards zoology

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<sup>157</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 33.

<sup>158</sup> *Idem*. An idea one can recognize as one of Eduard Gans, Hegel's disciple, and a precursor of comparative law. See also L.-J. Constantinesco, *Traité de Droit Comparé*, t.1 *Introduction au droit comparé* (Paris: Librairie générale de droit et de jurisprudence, 1972), p. 79-82.

<sup>159</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 35.

<sup>160</sup> *Idem*.

<sup>161</sup> See, notably, A. Rasmussen, "Le progrès en procès" (1996) 14 *Mil neuf cent*, pp. 5-14; D. Becquemont "Herbert Spencer: progrès et décadence" (1996) 14 *Mil neuf cent*, p. 77.

would have further worked to undercut the authority of the German and British elements of the discipline's ancestry: *exit* Eduard Gans, Hermann Albert Post, and Henry Sumner Maine, for example. In that sense, Lambert's renovation of the discipline took the form of a demolition.

Without transition, Lambert shifted his focus to the second category he had created: the authors who viewed comparative law as an element of positive law. Glossing over the traditional roles of comparative law in providing inspiration for legislative reform or fertilizing internal doctrines,<sup>162</sup> he arrived at what he called:

"The only variety of conceptions that erects comparative law as an independent discipline, and assigns it a proper scientific function: to provoke a continuous *rapprochement* of legislation and extract, from under the apparent diversity, a common ground of institutions."<sup>163</sup>

Lambert named this "common legislative law" (*droit commun législatif*), but the word he attributed to Bernhöft was "Weltrecht," or law of the world. As an immediate unification would likely not be desirable, he concluded that to "progressively erase any accidental diversity" would be the right purpose of the new discipline.<sup>164</sup> This would be the work of legal unification.

Invoking a universalist understanding of legal science, Lambert proceeded to rewrite the history of comparative law. It was no longer the discipline born in the nineteenth century inspired by comparative linguistics. He stated rather that, "all the illustrious jurists [...] who have collaborated on the elaboration of a common customary law of France have been comparatists."<sup>165</sup> He claimed the same for those who worked on the germanization of German law. "Why would we not accomplish, with the national laws that lend themselves to it, tied as they are by a kind of kinship, the same work of fertilization and *rapprochement*?" This led Lambert to call codification of law "a mere step" toward

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<sup>162</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 37.

<sup>163</sup> *Ibid.*, p. 37-38. In French: "cette fonction est de provoquer un rapprochement continu entre les législations qui forment l'objet du travail de comparaison, de dégager, dessous la diversité apparente des législations, le fond commun d'institutions et de conceptions qui y est latent."

<sup>164</sup> *Idem.*

<sup>165</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 40.



unification of national laws.<sup>166</sup> In my view, to write this in the first year of existence of a German civil code – an accomplishment of at least fifty years of legal scholarship<sup>167</sup> – was disparaging.

Lambert's conception of comparative law thus worked at putting the French and German codifications in a broader historical project of progressive legal unification. He felt the need to ground his new science in the distant past of the unification of local customs. Disparaging another important strand of German scholarship, he noted that the local customs and laws had indeed courageously resisted "the tyranny of Roman law," which had poorly played its role as a common law of Europe in the past.<sup>168</sup> While he intended to renovate the discipline of comparative law by emphasizing its role as an instrument of *rapprochement* for the project of "unification now," he could not resist the need to place it within a new narrative of evolution, in other words, he could not dispense completely with the historicist conception of legal scientific knowledge at this time. However, while he did place the foundation of his new discipline in a distant past,<sup>169</sup> in doing so he worked to justify the study of "modern legislation" *instead* of ancient ones.

Indeed, while he said that both comparative law "as a social science" and "as an instrument of *rapprochement*," had a right to existence,<sup>170</sup> he insisted that the latter had to be freed from the former: "until now, comparative law as a social science of the legal phenomenon has had a prejudicial effect on comparative law as an instrument of *rapprochement*."<sup>171</sup> Whereas the first studies every living or dead law, the second should orient itself to the study of "laws that belong to the same stage of evolution, or to the

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<sup>166</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 41.

<sup>167</sup> On the research conducted by the Deutscher Juristentag from 1860 to 1900, see S. Geyer, "Fonds juridique commun et naissance du droit national" in Le Yoncourt, Mergey, Soleil (Eds) *L'idée de fonds juridique commun dans l'Europe du XIXe siècle: Les modèles, les réformateurs, les réseaux* (Rennes: Presses Universitaires de Rennes, 2014), pp. 223 and ff.

<sup>168</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 44.

<sup>169</sup> On the legal significance of "placing the grounds of law" in a distant past, see P. Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), p. 12.

<sup>170</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 46.

<sup>171</sup> *Idem*.

same legal family."<sup>172</sup> He emphasized, for example, as Giorgio Resta noted,<sup>173</sup> that neither Muslim nor Judaic law, "both profoundly opposed to the spirit of our legislation," were suitable to the exercise of a scientific comparison of laws.<sup>174</sup> Lambert also rejected the Slavic laws and expressed serious doubts about British law's fitness for comparison, known as it was for its particularism and conservatism.<sup>175</sup> Essentially, his redrawing of the boundaries of modern comparative law would focus on the task of comparing laws of Latin and Germanic traditions, and regard all the rest as archaic.

Further performing his more or less natural selection, Lambert distinguished the method of the "comparatist historian" and "comparatist jurist",<sup>176</sup> thus implying that those who devote themselves to legal history or legal ethnology are not acting as jurists. The comparatist *jurist*, he insisted, "looks for solutions, their spirit and their reasons. He went so far as to task the jurist with *weighing* the intrinsic value of the various legal solutions he would encounter and noted that, when in doubt, "the findings of political economy"<sup>177</sup> would provide decisive reasons to choose *one*. He also raised the possibility that a simple look at the history of institutions would reveal some of them as outdated, i.e. "their character of survival from stages now behind us of juridical evolution."<sup>178</sup> In other words, it would be obvious if an *outmoded* institution needed to be replaced. I note here again, that while critiquing other jurists' reliance on a progress narrative, Lambert made quite a sustained appeal to the rhetoric of "evolution" when he had to justify his principle of selection or classification of institutions. While some could read this as a contradiction, I choose to adopt Antoine Compagnon's finding that such tensions are inherent in

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<sup>172</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 46.

<sup>173</sup> G. Resta, "Luttes de clochers en droit comparé," p. 1186. See also H. Dedek "Kindred Not By Choice," (2018) *Draft on file with the author*.

<sup>174</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 48.

<sup>175</sup> *Ibid*, p. 49.

<sup>176</sup> *Ibid*, pp. 49-50.

<sup>177</sup> *Idem*.

<sup>178</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 50.

modernity's struggle with its own concepts.<sup>179</sup> Lambert's renovation project had a circular form of justification: the new was good because it was new.

In a word, while paying lip service to a historicist (Darwinian, evolutionist) understanding of legal science, Lambert was rejecting the aspects of legal scholarship having to do with explaining a historical trajectory. Interestingly, the rejection of this function did not lead Lambert to adopt a purely scientific goal for the discipline, but rather one that would serve the interest of commerce. His new model of comparative legal scholarship was one that treated law as a *commodity* or *product*, ready to be changed or exchanged, based on conceptions of economic efficiency and "newness" as a value in itself.<sup>180</sup> I touch further on the question of modernity and newness in the next chapter.

While he paradoxically sought to put into question the validity of comparative law as ethnology or social science by calling it "a modern" science in a pejorative sense, he insisted that the practice of comparative law as the extraction of a common juridical ground and following unification was *much older*, dating back centuries.<sup>181</sup> This is consistent with one of the numerous paradoxes of modernity: while rejecting historical works as not forming the core of the discipline, Lambert insisted that the study of modern law be grounded in the context of a long history of progressive unification. Yet, the historical justification here appears weak, almost fake, when compared to the "social interest" Lambert identified for the new discipline: *its beneficial impact on commerce*.<sup>182</sup>

Christophe Jamin has argued that Lambert wished his observations on the discipline of comparative law to resonate with his colleagues as well as to redirect the course of legal

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<sup>179</sup> Literary theorist Antoine Compagnon chooses to present us modernist authors as deeply paradoxical, ridden with ambiguities in their understanding of modernity, notably as it relates to its romantic historicist past. A. Compagnon, *Five Paradoxes of Modernity*, pp. 22 and ff.

<sup>180</sup> Regarding novelty as one of the most basic requirements of the capitalist markets see M. North, *Novelty A History of the New*, (Chicago: Chicago University Press, 2013), p. 149.

<sup>181</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 53.

<sup>182</sup> *Ibid.*, p. 54.

studies and legal scholarship in France.<sup>183</sup> "We cannot breathe in the closed horizon of the civil code," Lambert wrote.<sup>184</sup> "We feel the need to follow the spontaneous movements of the law, to understand them and to exercise control over them."<sup>185</sup> I read these sentences as expressing the need to renovate legal science in France – a topic discussed in the next chapter – but I would like to add that this renovation was bound up with Lambert's understanding of legal science, which made "political economy," "statistics,"<sup>186</sup> and the imperatives of "the new" the measure for legal solutions, and the "interest of commerce" as final arbiter of this scientific renovation. This view of legal science worked to displace the romantic historical search for the universal origins of law, prominent throughout the 19th century. It worked to replace it with an instrumental view of history as that which "grounds"<sup>187</sup> a present situation, or what justifies its legitimacy. Lambert thus used his new history of the discipline to justify turning away from the study of ancient institutions, and towards the study of modern legal institutions with the view to bring about legal unification. This displaced, as Jamin understood, a very deeply entrenched understanding of legal scholarship.

After Lambert's presentation, the French constitutionalist Leon Duguit objected that comparative law would then not really be *a science*. Lambert responded that he did not care to decide the question of whether it was a science. His only aim was to distinguish the study of the evolution of institutions and what he called an "element of positive law."<sup>188</sup> Perhaps comparative law would not be a science, but at least *it would be law*. Again, one hears in this sentence a connection between the new "scientific" method of comparative law and the grounding of its "legal" legitimacy, or "entitlement," that this disciplining process was understood to provide.

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<sup>183</sup> C. Jamin. "Le vieux rêve de Saleilles et de Lambert revisité," p. 734.

<sup>184</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 55.

<sup>185</sup> *Idem*.

<sup>186</sup> *Ibid*, p. 56.

<sup>187</sup> Indeed, Lambert says that his new comparative law would offer a practical "application" for the mandatory course in legal history, thus giving it a semblance of relevance in the curriculum. *Ibid*, p. 58.

<sup>188</sup> "Minutes of the session of August 1st," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 60.

The discussions were adjourned to the next day, when we are told that a foreign congressman named Mr. Triantaphyllidès –with no title mentioned– argued that he did not think some legislation could be excluded from comparison, since they all had their own interesting and useful aspects. The French professor Adhémar Esmein answered him that for the sole purpose of ethnography, this was the case, but not for the purpose of a *rapprochement* between modern legislation.<sup>189</sup> The session is said to have ended there, but one can appreciate from this exchange the way in which Lambert's proposed dual definition of the discipline would have been perceived, even at the time, as a device excluding the study of most foreign legislation as irrelevant to the work of the unification of laws,<sup>190</sup> and that some degree of dissent was expressed about the desirability of this exclusion.

## 2. A "Common Law of Europe"?

The section that followed Lambert's speech exemplified some of the problems encountered in the project of legal unification in Europe. This session examined the possibility of reaching an international agreement on the question of the enforcement of foreign judicial decisions. There, Charles Lachau – a lawyer at the Paris Court of Appeal – invoked the numerous failures of the Association for the Codification of the Law of Nations to bring about such an agreement, and argued that perhaps the time was not yet ripe for more than nation-to-nation treaties such as the one recently signed between Belgium and France.<sup>191</sup> Mr. Uppström, a Swedish professor, presented the Swedish rules on the matter, which the editors of the collection did not transcribe in the collection. Louis Renault, a law professor and French delegate at The Hague Conference the year before, proposed that each state should work on its own rules of enforcement before treaties could be made.<sup>192</sup> This is all that was said at the session according to the editors.

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<sup>189</sup> "Minutes of the session of August 2nd," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 95.

<sup>190</sup> While critiqued as "Eurocentric," his conception would actually exclude a lot of European laws from the spectrum of relevance. On eurocentrism, see D. López-Medina, "El nacimiento del derecho comparado moderno," previously cited, p. 152.

<sup>191</sup> *Traité franco-belge du 8 juillet 1899*.

<sup>192</sup> "Minutes of the session of August 1st", in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 61.

I think it is helpful to read at least part of Lambert's speech in light of this conversation. Part of the intellectual context of the Congress was the regular attempts to bring about treaties and agreements facilitating international trade – e.g. an agreement on the enforcement of foreign judgements. Reaching these agreements was hard. It is therefore striking that in Lambert's account of how "common legislative law" would come into existence, *comparatists* – presumably legal scholars – would have to make decisions, based on the findings of political economy or simply the "newness" criterion,<sup>193</sup> about what changes to domestic law should be made for legal harmonization to happen between two or more states. This method would not formally require any *agreement* between diplomats of various national states, although Lambert did say it would require an agreement on method among scholars.<sup>194</sup> Lambert's proposed way of achieving a common law of Europe would significantly downplay the importance of the political component of the decisions on legal unification, leaving to political actors the task of implementing the legal scientist's judgment of the best and newest legal solution.

An earlier section offered a good example of how this classification of legal solutions on an evolutionary scale would work in practice. The members present were tasked with discussing the variations in the legal treatment of foreign corporations in various states. In France, general authorizations were issued on the basis of the legal regime in place in the corporation's state of origin, i.e. country by country. This system was contrasted with the more restrictive approaches in force in Germany, Russia and Austria, which required state authorization to each corporation on an individual basis.<sup>195</sup> "It seems that this system is dated [...] and that it places very onerous responsibilities on governments. That is why France has abandoned it since 1857," wrote Professor Percerou in his report.<sup>196</sup>

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<sup>193</sup> This insistence on "newness" is discussed further in the next chapter.

<sup>194</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 29.

<sup>195</sup> So claimed the French scholar who presented his report. Whether this was a correct assessment of the law in Germany can be doubted. See Ludwig Fuld, "Sur la situation juridique faite, en Allemagne, aux sociétés de commerce étrangères" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. pp. 530-535.

<sup>196</sup> Jean Percerou, "Rapport sur la situation juridique faite, dans chaque pays, aux sociétés de commerce étrangères" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 65.

Percerou contrasted these approaches with the "more liberal" approach taken by Belgium and Italy, which was to authorize all corporations constituted legally according to the law of their country of origin to operate and do business in Belgium or Italy – he only mentioned England in the footnote, saying that this system "appeared" to be in place there too.<sup>197</sup> Then, he wrote:

"Of this very quick review of the various legislative systems, a trend appears to show itself among European laws, to become more liberal in their dealings with foreign corporations. *The common law of Europe* on this matter seems to change according to an evolution that has a point of departure in a special authorization regime, and concludes, after a transitional stage in our regime of general authorization [per country], in the regime of Belgium and Italy of the general acknowledgement and free admission of foreign corporations."<sup>198</sup> [*My emphasis*]

In a long editorial footnote, however, Percerou nuanced his seemingly enthusiastic finding on "the common law of Europe." He explained that he "contented himself with observing a fact, without having the pretention to give advice to the legislators."<sup>199</sup> He wrote that he was not insinuating, "that France should abandon its system to adopt the theoretically more liberal one."<sup>200</sup> Indeed, Percerou noted that it would be unfair if German corporations could do business in France freely, while the French required authorization to do the same in Germany.<sup>201</sup> He nevertheless wrote that the system adopted by Belgium and Italy (again he omitted England) "seems to us to be an ideal towards which it would be appropriate for European laws to orient themselves, on the condition that they march on it at an equal pace."<sup>202</sup> I find significant that, in a scholarly analysis based on the classification and commodification of "most advanced legal solutions," questions of justice and reciprocity between nations ended up in the footnotes.

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<sup>197</sup> English law was extremely difficult to understand to continental scholars and jurists at the time, and still is.

<sup>198</sup> Jean Percerou, "Rapport sur la situation juridique faite, dans chaque pays, aux sociétés de commerce étrangères," p. 66.

<sup>199</sup> *Ibid.*, p. 66, footnote #2.

<sup>200</sup> *Ibid.*, p. 66.

<sup>201</sup> *Idem.*

<sup>202</sup> *Idem.*, footnote #2.

### 3. Echoes and Dissonances

Numerous congressmen echoed Lambert's idea that the study of comparative law should be oriented towards bringing about legal unification – or "the work of legal assimilation" as Edmond-Eugène Thaller called it<sup>203</sup> – which would then facilitate international trade. Raymond Saleilles, Henri Levy-Ullmann and Charles Lyon-Caen, and more prominent French jurists attending the Congress, endorsed Lambert's idea that a common scientific project of legal comparison could remedy a defective and slow diplomatic process, especially in the area of rules governing international trade. However, besides his fellow countrymen already sharing his vision of the role of the discipline, few congressmen agreed with Lambert's statement on method. This section outlines the kinds of echoes and dissonances that made up the chorus of the Congress on the question of the basic assumptions and function governing the discipline of comparative law.

I refer to echoes and dissonances here, but it is less than certain that Lambert's speech was not itself an echo of the work of his more senior colleagues attending the Congress. Raymond Saleilles, Charles Lyon-Caen, Edmond Thaller and their German colleague Josef Kohler had been participating in a conversation about the unification of commercial and private law in Europe since the beginning of their involvement with the *Annales de droit commercial français, étranger et international* in the 1880's and early 1890's. The section on comparative law in the *Annales* was there since the inception of the journal in 1886-1887.<sup>204</sup> In 1892, Saleilles published an article on German theories in the *Annales*, in which he acknowledged the influence of Jhering on French jurisprudence, and noted that comparative law might well give rise to a "universal adhesion," especially in the area of commercial law.<sup>205</sup> Thaller was less enthusiastic; he noted that the Convention of Bern integrating the transportation by rail of merchandise in Europe had simply "cut to a

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<sup>203</sup> Edmond-Eugène Thaller, "De la nécessité en droit comparé d'étudier les doctrines juridiques et nationales des institutions; application à la lettre de change" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 603.

<sup>204</sup> E. Thaller (Ed) *Annales de droit commercial français, étranger et international* (Paris: Arthur Rousseau, 1886).

<sup>205</sup> See Raymond Saleilles, "Les théories allemandes" in E. Thaller (Ed) *Annales de droit commercial français, étranger et international* (Paris: Arthur Rousseau, 1892), p. 288.



German pattern all European transportation."<sup>206</sup> Legal unification, at the Congress and before, was not deemed by all to be good news, but the flexibility and adaptability of commercial law was already being praised in comparison with the stiffness and traditional character of the civil law.<sup>207</sup> Perhaps one can read Lambert's speech in light of this: a plea for making French civil law as supple and adaptable as commercial law.

That said, in his closing speech to the Congress on August 4th, Raymond Saleilles echoed with caution Edouard Lambert's predictions on the possibility that the discipline of comparative law might bring about elements of legal unification in Europe. He wrote:

"Comparative law must not have for its object the universal unification against all odds. Nothing would be more antisocial and antiscientific. It must discover the institutions that are ripe for such an attempt at *rapprochement* and must, conversely, research those that resist any such tendency and of which one must demonstrate the proper individuality and traditionality. It is this selection and this parsing that must be the immediate object of comparative law, and not a doctrinaire or sectarian pretention to forced unification."<sup>208</sup>

As Lambert's older and more established colleague, Saleilles perhaps attempted to temper his enthusiasm. He did not indeed give an account of a discipline where "it would be obvious" which new and more modern institution would replace ancient ones. Saleilles instead thought that the social and scientific character of comparative law as a discipline that would depend on the *comparatists'* capacity to judge which institutions were ripe for unification and which were not. Most importantly, he did not, like Lambert, frame this question in evolutionary terms: it is not because of their lesser degree of evolution that institutions could (or should) not be merged, but because of their proper *individuality* – a word here used as a synonym of originality – and *traditionality*, a word here used with a positive connotation. Attached to a more historicist understanding of legal scholarship,

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<sup>206</sup> E. Thaller, "Du transport en droit international" in E. Thaller (Ed) *Annales de droit commercial français, étranger et international* (Arthur Rousseau, Paris: 1887), p. 142.

<sup>207</sup> See F. Garnier "Edmond Thaller," in Hakim et Melleray, *Le renouveau de la doctrine française* (Paris: Dalloz, 2009), p. 181; See E. Thaller (Ed) *Annales de droit commercial français, étranger et international* (Arthur Rousseau, Paris: 1892), p. 148-151.

<sup>208</sup> Raymond Saleilles, "Rapport de clôture" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 146.

and insisting that comparative law should first serve the national law<sup>209</sup> – rather than legal unification – Saleilles was keeping open the possibility that jurists might be attached to their traditional legal institutions. Lambert had pushed this possibility aside in his enthusiasm for legal unification.

Reporting on the work of the civil law section of the Congress, Henri Lévy-Ullmann echoed Lambert's "universalist enthusiasm,"<sup>210</sup> but not necessarily his proposal for the function and method of comparative law. He wrote:

"The work of the civil law section seems to give reason to those who believe that, despite the apparent divergence of positive legal texts, there exists among civilized peoples a community of law (*communauté de droit*), of which doctrine, jurisprudence and practice are the main factors..."<sup>211</sup>

When contrasted with Lambert's "droit commun législatif," the end point of an evolutionary process led by jurists involved in the scientific project of legal comparison, Lévy-Ullmann's acknowledgement of an international legal community already in existence brings out a different nuance. Community – rather than unity – for him *existed despite difference*. It was not necessarily a project for jurists or legal scholars, but rather something that was already constructed through various legal practices including scholarship, legal decisions and "the supple contracts of legal practice, modeled on the needs of life, which are almost everywhere the same."<sup>212</sup> The best example of this he gave was the adoption by French legal practitioners, justices and scholars alike of the German theory of legal personality, which had happened – according to him – without intentional intervention. *Community*, argued Lévy-Ullmann, would exist irrespective of conscious work of unification, insofar as the law as a very broadly framed activity would

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<sup>209</sup> As Christophe Jamin explains, Saleilles was committed to a historical approach to legal scholarship and had a strong attachment to the French civil law. Jamin, "Le vieux rêve de Saleilles et de Lambert," p. 739.

<sup>210</sup> J.-L. Halpérin, "Lévy-Ullmann" in Hakim and Melleray, *Le renouveau de la doctrine française* (Paris: Dalloz, 2009), p. 95-122. This observation was made about Lévy-Ullmann's participation in the congress of comparative law, see p. 104. Lévy-Ullmann would later speak of the Congress of 1900 as a "moment of method" citing Saleilles, Pollock, Esmein and Zitelman, without referring to Lambert, see p. 113.

<sup>211</sup> Henri Lévy-Ullmann, "Rapport sur les travaux de la section de droit civil" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 131.

<sup>212</sup> *Idem*.

continue to respond to the exigencies of social life.<sup>213</sup> The comparatist therefore did not have to exercise Lambert's enthusiastic decisionism, since an important part of the community's constitution, in the sense of its *making* – i.e. through usual legal practice – would remain out of his control.

The author who most closely echoed Lambert's speech on legal unification was his commercialist colleague Charles Lyon-Caen. Seen from the point of view of commercial law, it seemed most likely that the function of the new discipline of comparative law would be Lambert's famous *rapprochement*, wrote Lyon-Caen, comparative law's "most practical and edifying aim."<sup>214</sup> Indeed, the commercialist noted, the commercial legislation of Turkey, Egypt and even a country of what he dubbed the "extreme-orient," Japan, had now adopted Western commercial laws, in indigenous courts as in mixed ones.<sup>215</sup> These borrowings contributed little by little to the general project of unification of laws. He admitted:

"This *rapprochement* or uniformity of commercial laws, resulting from mutual borrowings between various legislations, is more easily realizable than a uniformity brought about by means of international conventions."<sup>216</sup>

Of course, Lyon-Caen was not proposing that borrowings between, say French and Egyptian law would be mutual. It was obvious to him which countries could borrow laws or have their laws borrowed. Again, I believe it is no coincidence that Lambert's "general function" for comparative law – to classify laws and determine which ones would be most desirable – would accord with that of his commercialist colleague. His emphasis on the reform of positive law, through rationalized borrowings from countries having achieved the "highest degree of civilization," implied that the "evolution" of commercial law in an era of ongoing globalization or internationalization should be the model of legal scholarship. Lambert's speech, through its ties with the rhetoric of the *Annales de droit*

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<sup>213</sup> This is what mainly distinguished the two authors, in their approach to the discipline, according to Marc Ancel, "Politique législative et droit comparé" in *Faculté de droit et des sciences économiques de Toulouse, Mélanges Maury*, t. II (Paris: Dalloz et Sirey, 1960), p. 21.

<sup>214</sup> Charles Lyon-Caen, "Rôle, fonction et méthode du droit comparé dans le domaine du droit commercial" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 344.

<sup>215</sup> *Ibid*, pp. 344-345.

<sup>216</sup> *Ibid*, p. 345.

*commercial*, would have made the case for a legal science as "supple" in its adaptations and as rigid in its implicit hierarchies as commercial law.

One voice, contrasting more than others with Lambert's strict hierarchy of systems, was Bernardino Alimena, an Italian comparatist who specialized in criminal law. Alimena urged comparatists to study the criminal law of India, the Caucasus and the Balkans. Inspired by Sumner Maine, who had demonstrated years before the existence of a "primitive law common to all indo-european races,"<sup>217</sup> Alimena insisted that comparative law, helped by History and Ethnology, could serve a comprehension of criminal law "as a juridical and social phenomenon."<sup>218</sup> Thus, the criminalist had to take as his object of study "the criminal legislation of the most different and most foreign peoples."<sup>219</sup> For Alimena, the potential for learning resided in valuing differences, not unification. After discussing the laws of India, China and Japan, he wrote:

"Thus, under the eyes of the criminalist lies an enormous geological map, in which one observes numerous limitrophic terrains of a same nature: the Latin, the Scandinavian, the Teuron, the Anglo-Saxon, the Slavic. In the midst of these terrains, some rocks appear to be tied to more foreign terrain: in the middle of the Slavic and Anglo-Saxon terrain emerge the Latin rocks of Romania and Scandinavia. More rarely, in the midst of these terrains, one finds fossils, witnesses of another era..."<sup>220</sup>

Further, he argued that the horizon kept expanding as one learned that "opinions we had grown accustomed to" kept being challenged by new discoveries.<sup>221</sup> He repeated several times that the horizon keeps expanding and it "cannot be wide enough" for comparative law.<sup>222</sup> Despite an acknowledgement that knowing of the laws of others can serve the purpose of imitation, his view of legal science was very far from Lambert's contention that Latin and Germanic laws only were worthy of study, and only for the purpose of

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<sup>217</sup> H. Sumner Maine, *Ancient Law: Its Connection to the History of Early Society, and Its Relation to Modern Ideas* (London: John Murray, 1863).

<sup>218</sup> Bernardino Alimena, "Fonction de la science du droit comparé par rapport à la criminologie" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 393.

<sup>219</sup> *Ibid*, p. 393.

<sup>220</sup> *Ibid*, p. 395.

<sup>221</sup> *Ibid*, p. 396.

<sup>222</sup> *Ibid*, p. 398.

unification. Lambert's strict hierarchy found itself disrupted by a conception of comparative law as an opportunity to understand law as a social phenomenon, as opposed to an instrument of legal unification for commercial purposes. "Learn from differences" Alimena seemed to urge.

One strikingly strong echo of Lambert's speech in the other papers submitted to the Congress is his evolutionary narrative. Alimena is no exception, referring indeed to "fossils" of the past that one finds in isolated peoples' laws.<sup>223</sup> In their obsession with producing science, almost all congressmen used the language of "discerning the laws of evolution" of legal phenomena as the aim of a comparative study of law.<sup>224</sup> British legal historian Frederick Pollock reflected, in his paper, on the emergence around 1860 of a new intellectual force: the theory of evolution.<sup>225</sup> According to him, ten years later the language of evolutionary theory and comparative method had become commonplace.<sup>226</sup> As discussed in the first section of this chapter, Darwin had not only revolutionized biology, but had also transformed the way in which people thought about and spoke of science in many other disciplines.

In the papers of the Congress, this Darwinian influence often takes the form of references to the influences of "race" and climate on the spirit of laws.<sup>227</sup> The mention of "climate" is of course a reference to Book XIV of Montesquieu's *Spirit of Laws*,<sup>228</sup> but while Montesquieu discussed at length the influence of climate on a people's character and their laws, he did not use the concept of "race" in this sense. The concept of race instead belongs to the 19th century explorations of the science of biology and its corresponding

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<sup>223</sup> Bernardino Alimena, "Fonction de la science du droit comparé par rapport à la criminologie," p. 395.

<sup>224</sup> See the submissions of Raoul La grasserie, p. 218. Josef Kohler, p. 231. And Louis Josserand, p. 238 in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1.

<sup>225</sup> C. Darwin. *On the Origin of Species* (London: John Murray, 1859).

<sup>226</sup> Frederick Pollock, "Le droit comparé, prolégomènes de son histoire" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 258.

<sup>227</sup> See the submissions of Charles Chausse, at p. 339, André Weiss, at p. 352, and Maksim Kowalevsky, at p. 421 in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1.

<sup>228</sup> Charles Louis de Secondat de Montesquieu, *De L'Esprit des Loix*, Nouvelle Edition, Première Partie (Geneva 1749), livre XIV.

outgrowths of sociology and ethnography.<sup>229</sup> Some even understood this connection between comparative law and biology to guarantee the scientific grounding of the legal discipline altogether: "To trace the roadmap of the natural evolutions of laws is the task of a general science of law. Science has to work, like Darwin's biology on Cuvier's classification," wrote sociologist Gabriel Tarde in his submission to the Congress.<sup>230</sup> The congressmen's prominent use of the concept of "race" in their papers, together with the recourse to evolutionary narratives to explain variations in the laws of different peoples, were therefore surely tied to their scientific ambitions.

Nonetheless, it is likely that the popularity of Darwinian selections and classifications were tied to factors other than those strictly related to science. Of course, there have been countless readings of Darwin as proposing a political theory of species – which included for some theorists human "races." For Hannah Arendt, the success of Darwin's theory of the natural selection, especially in the social sciences, was due to the fact that it followed the old *might-right doctrine* and contributed to providing a scientific explanation for British imperialism and its European counterpart.<sup>231</sup> Given the numerous references in the Congress papers to "evolution" as a form of economic development, I see no reason to reject such a political reading of Darwin's theory as the participants to this Congress endorsed it. In Chapter 5, I return to the effects of the rhetoric of "evolution" on the constitution of comparative law, and develop further the colonial and racist understandings it carried. For now, I will only note that one paper struck me as deeply resisting these evolutionary narratives.

In his submission on Judaic jurisprudence, the rabbi and jurist Mordché Rappaport explained that while laws may vary according to their degree of evolution or civilization, they could also vary in the "ideal" they were seeking to realize.<sup>232</sup> This, he explained, was the case in Judaic law, which did not differ from other laws in its degree of civilization,

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<sup>229</sup> Sera-Shriar, Efram. "Race" in Mark Bevir (Ed.) *Historicism and the Human Sciences in Victorian Britain* (Cambridge: Cambridge University Press, 2017), p. 70.

<sup>230</sup> Gabriel Tarde, "Le droit comparé et la sociologie" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., pp. 437-445.

<sup>231</sup> H. Arendt, *The Origins of Totalitarianism* (San Diego: Harvest Book, 1973), pp. 178 and ff.

<sup>232</sup> Mordché Rappaport, "L'esprit du Talmud et son influence sur le droit judaïque" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 311.

but rather in its ideal. He wrote: "The law serves to elevate the people it governs in the spirit of its ideal, and to maintain the people in it."<sup>233</sup> In asserting that more than one ideal was possible, Rappaport demanded from his fellow congressmen that differences in legal norms and legal knowledge not be automatically assessed in terms of degrees of evolution, but instead appreciated in terms of a people's aspirations. He thus challenged one of the main scientific tropes of the Congress (and of his times). In response to Rappaport's demand that the congressmen broaden their understanding of legal science to admit Talmudic jurisprudence, Lambert simply stated:

"It is inconceivable to accept, among the elements of the work of [legal] comparison, Muslim law on which its religious origins have imprinted similar traits to that of Judaic law, the opposition of which to the spirit of our legislation is underlined in the paper presented by Mr. Mordché Rapaport [sic]..."<sup>234</sup>

This quote is incredibly revealing. Most noteworthy are the rejection of Muslim and Judaic law together, by reason of their "religious origins" (as if French, German and British law had no religious origins). It is not at all clear what Lambert meant by "the opposition of the spirit" of Judaic and French law, but that opposition was not outlined in Rappaport's paper, which rather argued that the two were comparable. At play seems to have been a mixture of Darwinian evolutionism – away from "religious origins"<sup>235</sup> –, a positivist opposition to a law that does not take the legislative form,<sup>236</sup> and even a measure of orientalism – in its rejection of Judaic and Muslim law *together* as foreign to a Latin and Germanic ideal.<sup>237</sup> These are some of the elements that transpire in this quote.

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<sup>233</sup> Mordché Rappaport, "L'esprit du Talmud et son influence sur le droit judaïque", p. 311.

<sup>234</sup> Lambert had also excluded the study of Slavic customs, but for the reason that they "bepfit civilizations and economic circumstances foreign to ours." Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 48.

<sup>235</sup> Although Darwin himself was not explicit about his position with respect to religion, Clémence Royer, Darwin's first French translator and a philosopher of science, put forth a supremely anti-clerical reading of Darwin. See C. Royer, "Préface à la première édition" in Charles Darwin, *De l'origine des espèces par sélection naturelle ou les lois de transformation des êtres organisés* (Paris: Guillaumin et cie, 1870), pp. xxvii-lxxi.

<sup>236</sup> One of the positions taken in Rappaport's report is that Judaic law does not need to be legislated or abrogated by man. See Mordché Rappaport, "L'esprit du Talmud et son influence sur le droit judaïque" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 314.

<sup>237</sup> While this is a strange position to take in a post-1948 world, there is no reason to exclude that anti-semitism as an orientalism would have targetted Jewish and Muslim people alike. See E. Said, *Orientalism* (Vintage Books: New York, 1979), p. 27-28.

In addition, I find that Lambert's preconceptions about the role of comparative law in unifying law for the benefit of international trade, and the rigid evolutionist hierarchies that he adopted for that purpose between "ancient" and "modern" laws, were at play in his rejection of Judaic and Muslim law. In essence, his paradigm of comparative law – in which only "worthy species" of law could be allowed to breed with his own – operated as a form of "legal eugenics." As we have seen, however, at least some congressmen did not accept this offhand rejection.

### **Concluding Remarks on Discipline**

In the present chapter, I outlined the various intertwined ways in which the science of comparative law, its method and function, were rearticulated or redisciplined to become an instrument of international trade. Analyzing Lambert's proposal for the (re)foundation of the discipline, I tied his language to the language of earlier congresses of commercial law, and emphasized that his insistence on studying "modern laws" – as opposed to ancient ones – was aimed at making comparative law an instrument of *rapprochement* between Latin and Germanic law, for the purposes of trade. I pointed out his disposal of historically oriented scholarship and of the "foreign origins" of the discipline, and I noted his effort to downplay the importance of a new German civil code by rewriting the history of the discipline of comparative law into a longer narrative of progressive legal unification. Lastly, I argued that this unification narrative, and the hierarchies derived from it, only made sense at this time in the context of a larger project of enabling international trade.

In light of other debates and presentations, I further interpreted Lambert's speech to be offering the discipline of comparative law as an alternative to a diplomacy seen as defective. Again, I focused on the role imagined for legal scholars in comparing laws "scientifically," in order to progressively erase differences between various national laws and bring about legal unification as warranted to enable international trade. Using mostly Percerou's report on the treatment of foreign corporations in various countries, I gave an example of how other congressmen perceived Lambert's method operating at the level of identifying some legal framework as "the most advanced legal product" and thus



constituting what he called "the common law of Europe." I then raised my concerns about the consequences of this commodification of law on questions of justice and reciprocity between nations.

Lastly, I showed how some of the congressmen who seemed to share Lambert's view of the role of comparative law for legal unification actually introduced a range of different tonalities in this discourse. Most did not agree with Lambert's conclusions on method and function, or even on the broader aim of the discipline. Indeed, taken as an intellectual enterprise – aimed at, say, *learning* – rather than as an instrument enabling trade, it did not make sense for the discipline to exclude the traditions that Lambert tried hard to exclude in his attempt at disciplining comparative law.

## Chapter 4. Modernity and *Le droit à la mode*

"Comparative law, as we understand it today, is among the most modern sciences."<sup>238</sup>

"The science of comparative law is a product of modern legal science."<sup>239</sup>

A number of congressmen agreed that the science of comparative law could claim the status of an absolutely modern science.<sup>240</sup> This chapter is concerned with the question of what it means, in 1900, to call a science "modern." To what extent were the congressmen men of their times when they made such a claim? In looking at the questions put to the congressmen, I was struck by the fact that a large portion of them did not focus on recommending legal solutions to problems arising from international trade.

The "other" group of questions they addressed was so diverse that it did not appear to have any focus. Issues such as the evolution of matrimonial regimes, the evolution of the doctrines of legal personality of associations, transformations of the parliamentary system, the progress of proportional representation, the progress of penitentiary regimes, and the "new trends" in criminal matters, would raise any reader's eyebrows. What could possibly connect these questions?<sup>241</sup> The observations outlined above about how this Congress was informed by the Paris World Fair prompted me to understand these other questions as composing a display – like a Fair – of "legal innovations" from various jurisdictions. Indeed, these legal regimes could be laid out before the *comparatists* who could then classify them according to their degree of refinement. They were meant to offer, in addition to the catalogue recensing solutions to problems posed by international trade, a catalogue that presented a range of legal innovation meant for the reform of the domestic law of any state.

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<sup>238</sup> Frederick Pollock, "Le droit comparé: Prolégomènes de son histoire," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 248.

<sup>239</sup> Josef Kohler, "De la méthode du droit comparé," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 227.

<sup>240</sup> Constantinesco, *Traité de Droit Comparé*, t.1, previously cited, p. 50.

<sup>241</sup> "Programme et rapporteurs" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 19.

Indeed, questions tackling "evolutions," "transformations," "progress," and even *trends* reflect a concern with "the new" that most would not recognize as characteristic of legal or scholarly concerns at the end of the 19th century. As Léontin-Jean Constantinesco observed, the consciousness of change is probably what prompted jurists to attend to comparison in the first place, since "what is understood as *atemporal* does not need to be compared."<sup>242</sup> One of my questions was therefore: Why – and perhaps *since when* – were these jurists concerned with "the new?"

This question took me on a journey exploring the anxieties of French legal scholars under the Third Republic. This chapter puts the question of legal innovation in the context of the renovation of law and legal science in France. Anxieties about the place of France in a changing and internationalizing world and about the political stability of the Third Republic are shown to be a factor of this thirst for scientifically led legal change. In addition, the place of some jurists in governing this legal innovation is shown to have inspired a specific role for *comparatists* in legal reforms and what would today be called "global governance."

### **1. Modern Law or *Le Droit à la Mode***

While the new was probably not a concern to most jurists in the 19th century, it had been a concern of the *Société de législation comparée* since its inception in 1869. It was at the heart of the *Société's* mandate to translate laws and to report on legislative "innovations" in various linguistically organized regions of the world. More generally, it was a concern of its administrators that the world was changing, and it was said that these changes provoked the curiosity of scholars to discover the foreign.

"Since commerce and industry have reunited the peoples, trains have made them closer, and *expositions have gotten them to know each other* [and] *have mixed their interests and ideas*, it is natural that all would have felt the need to know the law and the way of life of their neighbours."<sup>243</sup> [My emphasis]

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<sup>242</sup> Constantinesco, *Traité de Droit Comparé*, t.1, previously cited, p. 66.

<sup>243</sup> Société de Législation comparée. *Bulletin de la Société de Législation comparée*, t.1. 01/03/1869 (Paris: Cotillon et Fils, 1872), p. 1.

Thus spoke Edouard Laboulay, first president of the Société, in his opening speech to the first meeting of the société in 1869. A consciousness of change brought about by more frequent contact between people of different countries prompted scholars to examine the question of legal change and developed their curiosity for the foreign. The French entered the contest for legal modernity in 1869, as British, American, German and Belgian legal scientists already had scientific societies and publications on the topic of the comparison of laws.<sup>244</sup>

This contest for modernity acquired more significance for the French academy following the defeat of the French in the Franco-Prussian war. As noted by Yanick Favélavaki, the documents of the *Société*, in particular the speeches made at its annual assembly in November of 1871, point to the Franco-Prussian War and ensuing civil conflict (*la Commune*) as another foundational moment for the *Société's* work.<sup>245</sup> Indeed, the *Société's* administrators perceived their role as helping France regain its pride of place among civilized nations, through their scientific work. One can read in Edouard Laboulaye's speech of November 28th 1871 that the search for the "new" in the infancy of the *Société's* work was also a search for a new France "rebuilt," "repaired" and "regenerated."

"No matter how painful our grief and our anger, we are not here today to recriminate against the past, but to learn from it lessons for the future, and to work together, tirelessly, at the work (*œuvre*) of reparation that will give back to France its strength and its rank in the world. In this work (*œuvre*) of regeneration, the *Société de législation comparée* has a role to play. Our problems come mostly from our ignorance, and among the notions we lack, one has to cite first law and justice. [...] To make the legislator respect Justice and to make the citizens respect the law (*loi*), that is the aim of law (*droit*)."<sup>246</sup>

I read this mention of "law and justice" as notions France lacks as a reference to the Paris Commune. In light of the previous century of French contribution to the thinking on law

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<sup>244</sup> Société de Législation comparée. *Bulletin de la Société de Législation comparée*, 01/03/1869 (Paris: Cotillon et Fils, 1872), p. 1.

<sup>245</sup> Y. Favélacki, "Le réseau constitué autour de la Société de législation comparée (1869-1900)" in Le Yoncourt, Mergey, Soleil (Eds) *L'idée de fonds juridique commun dans l'Europe du XIXe siècle: Les modèles, les réformateurs, les réseaux* (Rennes: Presses Universitaires de Rennes, 2014), pp. 277 and ff.

<sup>246</sup> Société de Législation comparée. *Bulletin de la Société de Législation comparée*, 01/12/1871 (Paris: Cotillon et Fils, 1872), p. 1

and justice, I do not think such a statement can be read otherwise. In Laboulaye's words, the work of the *Société* thus had to do with the "reparation" and the "regeneration" of France. In the same speech, Laboulaye addressed the members of the *Société* as a military unit, assessing the number of people "now missing in our ranks" and concluding that the losses were not fatal.<sup>247</sup>

The newly elected president of the *Société*, Renouard, further said in his speech:

"If it wants to heal, France must question herself seriously, know her flaws better, and courageously take advantage of her qualities. [...] No more of this vanity that contents itself with seeing nothing but itself and knows not the others, but for that in which they are inferior. There is no people (*peuple*) that is not, in some points, inferior to its neighbours: let us learn to know, and let us admit to ourselves, in what ways we are inferior. This is the condition of progress."<sup>248</sup>

Renouard, like Laboulaye, concluded his speech on a military tone, by inviting the young people "to march" in line with the noble traces of French jurists, and to "fight without discouragement, and without pride."<sup>249</sup> It was not the first nor the last time that this striking amalgamation of a scientific project and a military one – here, defending the honour of the Third Republic – were made. We will see it at work again in the rhetoric of the Congress of 1900, in our discussion of the French discourse surrounding foreign policy and its influence on the articulation of this new science of comparative law.

The mainstream narrative on the modernization of law and legal thought in France is that it started much later than 1871 and was not directly related to the defeat of France.<sup>250</sup> My

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<sup>247</sup> *Bulletin de la Société de Législation comparée*, 01/12/1871 (Paris: Cotillon et Fils, 1872), p. 2.

<sup>248</sup> *Ibid.*, p. 5.

<sup>249</sup> *Idem.*

<sup>250</sup> André-Jean Arnaud has situated this turn in 1880, because "to speak of 1870 could, in France, pass for a reference to the events of the fall of the Second Empire and to the Commune, whereas, for us, it is not by reference to these circumstances that one should situate this chronological cut." Halperin's focus on legislative reforms lead him to choose 1879 as the start of this turn to reform, because it is at this time that the Republican jurists came to power under the Third Republic. Indeed, these liberal lawyers did make new laws, and also purged the courts and conseil d'État. Jamin and Jestaz situate this turn before 1880, but do not acknowledge explicitly that some changes in juridical thought were motivated by the outcome of the war. It is only recently that some have acknowledged the importance of the outcome of the war for the renovation of legal science in France. See, in that order, André-Jean Arnaud *Les juristes face à la société du XIXe siècle à nos jours* (Paris: Puf, 1975), p. 21; Halperin, *Histoire du droit privé français depuis 1804*

research in the scientific journals of the *Société* led me to question this narrative. In his essay of cultural history on the city of Paris in 1900, Christophe Prochasson noted that the rhetoric of "the foreign" as a rival that one must get to know in order to surpass it was still prevalent in the Parisian press in 1900. This discourse would have gained valence as France suffered a series of embarrassments, including notably the Panama Canal scandal in 1892, the Dreyfus affair starting in 1894, and the defeat of French troops by the British at Fashoda in 1898.<sup>251</sup> The documents indicate that there is no reason to separate legal scientists from their peers, who saw it as their role to be the most faithful *soldiers* of the Third Republic, to restore its honour and build France anew.<sup>252</sup>

Yet, a concern for the "new" in legal science perhaps expresses more than a desire for a renovated France. If the word *modernity* first appeared in the dictionary under the Third Republic, *modern* is much more ancient. It comes from the Latin *modo*, translated as "just now" or "recently now." As literary theorist Antoine Compagnon remarked, fashion – *la mode* in French – is never far from the modern.<sup>253</sup> The concern with transformations, evolutions, trends and the "new" in law may therefore not only be understood as a call for the renovation of France, but also, as obeying the imperative of modern art as later phrased by the poet Ezra Pound: "Make it new!"<sup>254</sup> As one of the congressmen, Maurice Deslandres, observed, "humanity always demands novelty."<sup>255</sup> Christophe Prochasson explains that concerns for fashion or innovation and the renovation of a declining nation were intertwined in the discourses at play in 1900 Parisian publications. As he writes, the promise of "modern happiness" would have come to be offered in response to the anxiety surrounding "national decline."<sup>256</sup>

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(Paris: PUF, 2012), p. 169; Philip Nord, *The Republican Moment: Struggles for Democracy in Nineteenth-Century France* (Cambridge: Harvard University Press, 1995), p. 136; C. Jamin and P. Jestaz, *La doctrine* (Paris: Dalloz, 2004); N. Hakim and F. Melleray, "Introduction" in Hakim and Melleray (Eds) *Le renouveau de la doctrine française* (Paris: Dalloz, 2009), p. 4.

<sup>251</sup> C. Prochasson, *Paris 1900. Essai d'histoire culturelle* (Paris: Calmann-Lévy, 1999), p. 95.

<sup>252</sup> A. Rasmussen, "Des critiques du progrès aux pensées de la décadence" (1996) 51 *Vingtième Siècle*, revue d'histoire, pp. 146-148.

<sup>253</sup> A. Compagnon, *Five Paradoxes of Modernity* (New York: Columbia University Press, 1994), p. 5.

<sup>254</sup> See E. Pound, *Make It New* (Yale University Press, 1935).

<sup>255</sup> Maurice Deslandres, "Observations sur la fonction de la science du droit comparé par rapport au droit public," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 355.

<sup>256</sup> Prochasson, *Paris 1900*, previously cited, p. 94.

Perhaps a concern for the renovation of legal science cannot escape the political context of the Third Republic and the place of jurists seeking to protect its fragile stability. These language games perhaps reveal something important about the *modern*, as our jurists at their Congress proposed to examine and evaluate the most modern law, or *le droit à la mode*. *Le droit à la mode*, another project of the new discipline of comparative law, not only aimed to equip a nation with the most advanced legal institutions. It was also imagined as an instrument of global government meant to address legal problems affecting more than one nation.

## **2. French Law *Au goût du jour***

Many of the questions put to this Congress suggest that its aim was – at least partially – to engage with the possibility of renovating French law on a series of problematic questions. This was notably the case for the recognition in France of the legal personality of corporations. In 1900, the recognition of legal personality was still a judicial innovation dating from 1891, which spurred a great doctrinal debate.<sup>257</sup> At the session discussing this topic, we are told that about thirty members were present, including mostly scholars of French civil law, Gaudemet, Tissier, Geny, Lyon-Caen, Pic, Demogue, and Lévy-Ullman. Saleilles was absent. It is possible that the session was the occasion for a very interesting discussion on this question, but the record is incomplete. We are told in the collection of documents that Lévy-Ulmann presented a report at the session on legal personality, but it is not transcribed in the minutes.<sup>258</sup> The report on the evolution of penal doctrines was similarly excluded from the minutes.<sup>259</sup> The omission of a particularly important French debate suggests an attempt to preserve the "international" character of the Congress as recorded in the published collection. These questions however gave rise to very detailed papers submitted to the Congress (recorded in the second portion of the collection). Reading this portion of the papers at times feels like reading a detailed catalogue – again, not unlike the catalogue of the World Fair – telling the reader all about the finest legal products available on the market.

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<sup>257</sup> Halpérin, *Histoire du droit privé*, previously cited, p. 198.

<sup>258</sup> "Minutes of August 2nd," p. 68

<sup>259</sup> *Ibid*, p. 86

The debate on legal personality would go on for at least ten years across the fields of French civil and administrative law.<sup>260</sup> This Congress could have been seen as an occasion to gather French scholars and discuss the issue, keeping in mind the various ways in which other traditions had conceptualized legal personality, while producing a collection of papers demystifying foreign legal conceptions and weighing their advantages and disadvantages in order to articulate better what a French working doctrinal conception would look like, and thus advance the debate.

Another such topic was matrimonial law. In 1900, the feminist movement and more generally the demands of women for control of their property and the products of their labour demanded the reform of the law of marriage. The papers submitted on the question of "evolutions in the matrimonial regime" – five in total – dealt mostly with the rights that women had in marriage, notably conceptions of "the family" with respect to the unity of property (of the husband). Raymond Saleilles is said to have taken an interest in the question of women, and to have attended the congress on the condition of women at the World Fair.<sup>261</sup> As the papers did not really take a position that was favourable to women's demands for more autonomy in managing family property, one cannot assume that Saleilles' interest would have signified that he held one such favourable position.

From this collection of papers, one can infer a desire to have scholars reflect critically on the new legal developments taking place in France as in many European countries. One of the purposes of this collection, especially for French legal scholars, could have been to encourage the renovation of certain aspects of French law, or to discourage it. The insistence on monitoring "trends" indeed could speak to a desire for trendy law, *le droit à la mode*, a desire to make sure French law was *au goût du jour* (up to date), or even *dernier cri* (in the latest fashion). But if this is the impression conveyed by the formulation of some of the questions, one should not forget that another possibility was

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<sup>260</sup> It is known for the publication of L. Duguit, *L'État, le droit objectif et la loi positive* (Paris : A. Fontemoing, 1901); M. Hauriou, *Précis de droit administratif* (Paris : L. Larose et Forcel, 1893); L. Michoud, *La théorie de la personnalité morale* (Paris: Librairie générale de droit et de jurisprudence, 1906); and R. Saleilles, *De la personnalité juridique* (Paris: Arthur Rousseau, 1910).

<sup>261</sup> Aragonese, *Un jurista del modernismo*, previously cited, p. 39.



that of a negative trend. The promise of modern innovation also coincided with fear of national decline. One should perhaps read the papers with this lingering anxiety in mind.

One of the reports in which this anxiety was made clearest was Saleilles' report on the decline of the parliamentary system. A detailed reading of this report is useful – I think – in outlining a further responsibility imagined for the new discipline of comparative law. Beyond encouraging legal unification on points of law understood to facilitate international trade, *comparatists* were being invited to take an active role in identifying positive or negative trends in European countries and deliberating scientifically about how to intervene in them. In a word, they were invited to engage in what would later be called a form of "global governance." This responsibility of jurists to govern draws on the context of the particularly prominent role of some jurists in renovating legal and governmental institutions under the third republic.<sup>262</sup> I will show, using Saleilles' speech on parliamentarism, how the discipline could perform this governance work. First this chapter shows how *le droit à la mode* responded to a set of anxieties of some French legal scholars about the place of France in the world. Then the final chapter will uncover some of the ramifications of this discourse for both projects of world peace and colonial projects.

Put simply, comparative law was meant to set trends just as much as it was meant to identify them. Unlike international law, which aimed to impose a common set of norms on states, comparative law would aim to govern the most intimate aspects of domestic legal development in any country at any moment. If international law sought to establish a bottom line, governing the behaviour of "civilized states,"<sup>263</sup> comparative law was about becoming comparatively *excellent*, or *incomparable* on a scale of legal civilization.

### 3. A Little Disciplinary Parliament

Raymond Saleilles was one of the major French jurists of the turn of the century – or even of all times – whose work has been studied inside and out. However, I have not

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<sup>262</sup> P. Nord, *The Republican Moment*, previously cited, pp. 135 and ff.

<sup>263</sup> This is the story Koskenniemi tells in *The Gentle Civilizer*, pp. 132 and ff.

found an analysis of the text I am about to discuss. Aragonese did make allusion to it in his book on Saleilles and Modernism, noting that Saleilles, Esmein and more of their colleagues did not approve of legislative reforms, and sought to balance the legislative assembly's power with the scientific authority of the legal academy.<sup>264</sup> Indeed, there is a general admission to the effect that Saleilles and some of his colleagues were not enthusiastic about numerous liberal reforms adopted under the Third Republic.<sup>265</sup> The following close reading of Saleilles' speech on the parliamentary system seeks to nuance this view.

Insisting (again) on the form of Saleilles' critique of parliamentarism, I show how for him the discipline of comparative law was meant to offer an alternative to political representation in recommending legal solutions to problems affecting more than one country in Europe. This is what I have called comparative law's "global governance" mandate, notably in response to David Kennedy's assertion that there is no such thing.<sup>266</sup> In doing so, I pay attention first to Saleilles' case for treating a nationally contentious issue in an international and scientific forum, thus inviting us to think of the Congress and the discipline as such a forum. Then, I show how Saleilles addressed the Congress of comparative law as a little international parliament, tasking the congressmen with providing a response to what he identified as the negative trends of parliamentary democracy in Europe.

It would be an understatement to say that Saleilles spoke about parliamentarism with unease.<sup>267</sup> He introduced the decline of the parliamentary system as "a delicate, perhaps

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<sup>264</sup> A. Aragonese, *Un jurista del modernismo*, previously cited, p. 122.

<sup>265</sup> A.-J. Arnaud *Les juristes face à la société*, p. 122; C. Jamin and P. Jestaz, *La Doctrine*, p. 104; On the conflict between jurists and the parliament in particular, see M.-J. Redor, "'C'est la faute à Rousseau...'. Les juristes contre les parlementaires sous la III<sup>e</sup> République" (1995) 8 *Politix* 32, n. 4, pp. 89-96. These innovations, unpopular among Catholic jurists notably included changes to the divorce law; changes to the regime of savings banks (to the rights of married women); changes affecting the right of "puissance paternelle" (the powers of a father on his children); changes to labour laws, notably concerning the regulation of the labour of women and children. In the early 1900's, writes Halpérin, the legislative assembly was already in a fight against religious congregations. See Halpérin, *Histoire du droit privé*, p. 170-171.

<sup>266</sup> D. Kennedy, "New Approaches to Comparative Law" (1997) *Utah Law Review*, pp. 545 and ff.

<sup>267</sup> On "Unease" (or *Inquiétude*) as a hallmark of the French critical legal tradition, see Marie-Claire Belleau "Les juristes inquiets : classicisme juridique et critique du droit au début du XX<sup>e</sup> siècle en France" (1999)

perilous question that the Commission had chosen to put to the congress" and that "the Committee" had assigned to him.<sup>268</sup> Recalling that this was "not a congress of public law or political law" and that this was "not a national congress," he emphatically claimed, "we are an International Congress of comparative law."<sup>269</sup> Saleilles was thus making his claim to the application of the "comparative method" –a scientific method– together with his claim to "international" neutrality in discussing a nationally contentious issue.<sup>270</sup> The Congress' task, he stated, was not to theorize about what the parliamentary system should be, but rather to observe the workings of this system in various social circumstances.<sup>271</sup> I argue that the care Saleilles took in justifying the Congress' competence in tackling the issue could indicate that he was perhaps already thinking of the discipline of comparative law as a governing body.

In this sense, one of Saleilles' most revealing denials was that "we are not a little international parliament, who would want to give advice to national parliaments."<sup>272</sup> He affirmed that "we simply seek to extract the general laws, or if we prefer, the social laws, of historical development,"<sup>273</sup> a formulation reflecting the historicist understanding of society that permeated various scientific discourses throughout the end of the nineteenth century.<sup>274</sup> "This is the guideline that must discipline our conversation," concluded Saleilles.<sup>275</sup> I argue, however, that it was precisely *as a little international parliament* that Saleilles addressed the Congress, and I will show how this aspect of his speech was tied to his understanding of the new discipline of comparative law as providing a forum in

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403 Cahiers de droit, pp. 507–544.

<sup>268</sup> In fact, he says, "dont le comité a bien voulu me charger," introducing the ambiguity of whether they tasked him with it or accepted that he would take it on. I note that Saleilles was the adjunct secretary to both these organs and played a major role in organizing this Congress, it is likely that he spoke about whatever he wanted. Raymond Saleilles, "Rapport sur la question du parlementarisme" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 69.

<sup>269</sup> *Ibid.*, p. 70.

<sup>270</sup> I read this bearing in mind Mikhaïl Xifaras' observation that Saleilles fantasized about a depoliticized legislative process, made by scientists. See M. Xifaras, "La vérité iuris selon Raymond Saleilles: Remarques sur un projet de restauration du juridisme" (2008) 47 Droits 1, pp. 127-128.

<sup>271</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 70.

<sup>272</sup> *Ibid.*, p. 71.

<sup>273</sup> *Idem.*

<sup>274</sup> Mark Bevir, "Historicism" in Mark Bevir (Ed.) *Historicism and the Human Sciences in Victorian Britain* (Cambridge: Cambridge University Press, 2017), pp. 1-20.

<sup>275</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 71.

which to address issues such as the decline of the (French) parliamentary system, as well as other "trends" he claimed to have identified.

Having spent three pages justifying the competence of the Congress in tackling the question of parliamentarism, Saleilles went through the ritual of enumerating the papers received by the Congress on this topic, insisting this time on their states of origin: Haiti, France, the Netherlands, Belgium, Switzerland, and Italy. Only the British and the Germans had declined to participate, he noted; Mr. Burgess of Columbia University had written a report on the system of the United States.<sup>276</sup> Without apparent connection, Saleilles then spent two pages commenting on the assassination, two days before, of Umberto I the King of Italy, describing "the totality of nations of European civilisation" as having between them "*a profound solidarity*"<sup>277</sup> that they should never forget."<sup>278</sup> He described Europe as "touched at the heart" and "all of the civilized world" as "united by the same sentiments."<sup>279</sup> He carried on about feeling "comforted to find a humanity having only one heart and one soul," and about the feelings that "unite it."<sup>280</sup> I would like to note that an archaic use of the word *parlement* is a place where the notables of a kingdom are invited to an exchange on public affairs.<sup>281</sup> Here, I would say that Saleilles had in effect constructed a little international parliament *in words*.

To his little parliament, Saleilles presented a rather gloomy portrait of the future. He denounced a phenomenon that he called "fureur d'imitation."<sup>282</sup> For him, the spread of the

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<sup>276</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 72.

<sup>277</sup> *Solidarity* was Leon Bourgeois keyword at the Peace Conference in The Hague in 1899, according to Koskenniemi. However, one has to be careful, as the word was also very popular at the time in various scientific, political and legal conversations. According to Bruno Karsenti, it travelled from Auguste Comte's work, to Bourgeois, to Bouglé, and to Duguit by Durkheim's influence. I touch on this further in Chapter 5. See Koskenniemi, *The Gentle Civilizer*, p. 284; B. Karsenti, "La naissance de la sociologie et ses effets dans la pensée du droit" in O. Jouajan and E. Zoller (Eds) *Le moment 1900 : critique sociale et critique sociologique du droit en Europe et aux États-Unis*, (Paris: Éditions Panthéon-Assas, 2015), p. 23-34

<sup>278</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 73.

<sup>279</sup> Later in his speech, Saleilles noted that parliamentarism *must rest on a unity of sentiments* in a people (*unité de sentiments*). *Idem*.

<sup>280</sup> *Idem*.

<sup>281</sup> This is true of the word "parlement" in French since the 13th century at least. See the entry "Parlement" in *Trésor de la langue française informatisé*, Online, accessed June 6th, 2018.

<sup>282</sup> This can be translated as "fury" or "mania" of imitation. "Fureur" in French also strangely connotes popularity, in the expression *faire fureur*, to make sensation.

parliamentary form of government in Europe would also mean the spread of its transformations: "the world orients itself toward the identity of political forms, because humanity *fatally* orients itself towards the identity of social conditions."<sup>283</sup> [my emphasis] I note here that Saleilles' historicist understanding of change also participated in a critique of progress: all nations, he believed, were potentially, with France, on a common path to decline. The Congress thus had a "scientific duty" to apply the comparative method to this problem, and to discuss the "political future of humanity."<sup>284</sup> So Saleilles concluded, veiling his unease with grand language.

Saleilles then named what he was afraid of: "the oppressive domination of the electorate."<sup>285</sup> His historicist reading of the situation of parliamentary regimes in Europe ascribed successes and failures to the "circumstances" the regimes were brought about by.<sup>286</sup> In England, he noted, the historical circumstances were embedded in the regime, whereas in France and Italy, parliamentary regimes had been "imported," and the natural factors of parliamentary regimes had been reversed. In France, the populace wanted to lead, and people insisted that the executive branch be subject to the parliament, instead of the different powers remaining separate. "We are colliding with a public spirit which does not understand sovereignty other than, in the words of Rousseau, as individual sovereignty," wrote Saleilles.<sup>287</sup> He was concerned that the state was not inspiring order in the people.

In response, he proposed two solutions. First, he affirmed that, "a parliamentary regime should rely on a *unity of sentiment* on all the great questions that serve as ties of cohesion for social life." In a word, Saleilles was looking for a "common ground" (*fonds commun*).<sup>288</sup> Yet, this was not enough for a regime to work. In times of crises, he wrote, "we need regimes that can be to politics what surgery is to therapeutics." Not only was Saleilles wishing for a more cohesive society where agreement would be achieved about

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<sup>283</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 74.

<sup>284</sup> *Idem*.

<sup>285</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 75.

<sup>286</sup> Thinkers working within historicist assumptions were preoccupied with circumstances. See Mark Bevir, "Historicism," previously cited, p. 2.

<sup>287</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 78.

<sup>288</sup> *Idem*.

fundamental matters, but he was also openly in favour of more authoritarian rule. Whereas Arnaud described this attitude as a general "fear of socialism," Jamin and Jestaz prefer to call Saleilles and some of his colleagues "men of order, obsessed with legal security."<sup>289</sup> I adhere to the latter reading.

Yet, Saleilles was not asking his little parliament to find a way of reforming the parliamentary system. Instead, he insisted that one should not treat *parliamentarism* as an ideal to achieve: "there is no ideal," he wrote, "only transitory forms, flexible and varied."<sup>290</sup> Saleilles' pessimism led him to reject the "ideal" and its underlying assumption about a singular "progress." He thus opened the door to a modernist fracturing of possible trajectories and outcomes. The *fact* of decline, however, was clear and possibly inevitable: either parliamentary governments governed too much, or in times of crises, "they did not govern anymore."<sup>291</sup> The causes of this decline for Saleilles were at once psychological – mass psychology<sup>292</sup> which only left space for passion – and intellectual – education and opinions<sup>293</sup> – as well as "social and political causes," of which he only named one: the extension of suffrage before the completion of the nation's democratic education.<sup>294</sup> Saleilles could only be in favour of a government effectively governed by *the elite*, and it is not impossible that, for him, the legal academy as represented at this Congress constituted that elite.

While refusing to posit anything as a new ideal, Saleilles turned his gaze toward the newly formed Swiss federation and to the United States. He boldly predicted that the future would be one "of great States composed of autonomous parties, like federal

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<sup>289</sup> See Arnaud, *Les juristes face à la société*, previously cited, p. 124; Jamin and Jestaz, *La Doctrine*, previously cited, p. 145-146.

<sup>290</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 79.

<sup>291</sup> *Idem.*

<sup>292</sup> "Psychology of the masses" had become a science in the Third Republic, where an organic imagery of society had brought scientists to see moments of crisis or social disorder as pathological, especially for the people who had become "collective psychologists." See R. A. Nye, *The Origins of Crowd Psychology: Gustave LeBon and the Crisis of Mass Democracy in the Third Republic* (London: Sage, 1975), p. 63-64.

<sup>293</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 81.

<sup>294</sup> *Idem.*

states,"<sup>295</sup> countries where, "not only the law, but also the spirit of association would be in full bloom, so that most of the civic duties now performed by the state would be performed by the grouping of free collectivities."<sup>296</sup> He went on to speak of "a country with a popular education so high that the free citizens would know how to freely provide, in a noble and fertile competition, for all their general essential needs,"<sup>297</sup> thus perhaps confessing his nostalgia for some of the early promises of the Third Republic.<sup>298</sup> In essence, he suggested, the model of a more *peaceful* society would be "association."<sup>299</sup> He wrote:

"To associate is to submit to laws, to accept a new yoke (*joug nouveau*); it is to realize, in the spirit of legality, and also through sacrifice, the social function that constitutes the role of all those who believe in *patrie*, and as the Americans say, of all those who believe in God and the Gospel."<sup>300</sup>

Despite his earlier denials of "giving advice" or "positing ideals," Saleilles presented to his little international parliament a vision of government modeled on a *corporation*, where people would accomplish their individual functions and submit to the rule of the elite, in the name of *patrie* and religion. Apart from the observation that the speech finished one sentence short of "God bless America," I want to point out that Saleilles posited as the aim of this government-association "a more peaceful society." This type of peace differs from the understanding of peace among nations or states that I tackled in the second chapter, where I exposed the rhetoric of peace of the World Fair. Here Saleilles'

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<sup>295</sup> I will return to these great "federal states," a term that recalls Kant's *Project for Perpetual Peace*, in Chapter 5.

<sup>296</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 84.

<sup>297</sup> *Ibid.*, p. 85.

<sup>298</sup> The speeches of Léon Gambetta portray a society where free individuals are striving, through education, towards the acquisition of property. See Robert Gildea's summary in R. Gildea, *The Third Republic from 1870 to 1914* (New York: Longman, 1988), p. 1-9.

<sup>299</sup> An extremely ambiguous term in French that one could recognize from the theory of the "contract of association," one of the theories on the nature of corporations. The person who wrote of government as "association" and "quasi-contract of association" in 1890s was again Léon Bourgeois, someone Saleilles would have probably never voted for, as he was from the anti-clerical radical party, but whose words would have circulated a lot at the time. L. Bourgeois, *Solidarité* (Paris: Armand Colin, 1896), p. 55. I note that Saleilles' understanding of "Association" seems much more authoritative than Bourgeois' "natural association of men."

<sup>300</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 85.

peace is one called in French "la paix sociale," which is best translated not as "social peace," but as "law and order."<sup>301</sup>

The discussion that followed Saleilles' speech seems to have been highly divisive. Some spoke of the "ruin" of the parliamentary system rather than "decline,"<sup>302</sup> some refused to speak of the regime as "sick," some asked to be given a definition of parliamentarism, some refused the identity of parliamentarisms.<sup>303</sup> One group of French scholars attempted a definition.<sup>304</sup> Finally, Georges Picot, the president of the Société and of the Congress, stated that the cause of decline in France had been "the extension of suffrage to uneducated masses," and someone else agreed.<sup>305</sup> Truly, the reader gets quite a taste of the little parliament of the world.

However, throughout his speech, Saleilles made clear that his only task was to expose the problems while leaving it to the congressmen to propose solutions: "I will expose problems without trying to solve them, which would infringe on the role that belongs to you,"<sup>306</sup> "it will be for you to discuss, analyze, and reform the formulas that I propose to you,"<sup>307</sup> and "it belongs to you to search for the solution to this problem."<sup>308</sup> If one visualizes Saleilles' speech to the Congress, the "you" unambiguously refers to the congressmen in attendance. That said, if one doubts that Saleilles had any sort of faith in the actual assembly he was addressing, one could also see the audience of the publication as a "you," inviting hypothetical *comparatists* of the future to engage in a new discipline of comparative law, understood as a form of international government.

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<sup>301</sup> One of the institutional sources of the discourse on "paix sociale," was the work of catholic social scientist Frederic Le Play. In response to a fear of social unrest, the "mouvement de la paix sociale" sought to find an alternative to socialism through labour, patrie, and religion. While Saleilles was not an active member of this movement, he did cite Le Play on the definition of social science in his submission to the Congress on method. See Raymond Saleilles, "Conception et objet de la science du droit comparé" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 176; F. Audren, "La belle époque des juristes catholiques (1880-1914)" (2008) 28 *Revue Française d'Histoire des Idées Politiques* 2, p. 270.

<sup>302</sup> "Minutes of August 2nd," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 85.

<sup>303</sup> *Ibid*, p. 86.

<sup>304</sup> "Minutes of August 2nd," p. 86.

<sup>305</sup> *Idem*.

<sup>306</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 69.

<sup>307</sup> *Ibid*, p. 77.

<sup>308</sup> *Ibid*, p. 82.



### **Concluding Remarks on Modernity**

The discipline of comparative law, as it was founded at the Congress of 1900, was a product of the Third Republic. In a context of distrust of political institutions and fear that the cabinet – the main legislative organ – would come to be controlled by the parliament, itself controlled by the populace, it became important for the legal academy to claim a symbolic power to decide, on the basis of "comparative expertise," what the appropriate legal reforms would be. Saleilles' little international parliament, in this context, was not only to make pronouncements on useful legal adjustments for the purpose of enabling international trade. It was also meant to debate very intimate questions of domestic law: like the status to be awarded to corporations in France, French matrimonial law especially with respect to women's property, and even the very structure of the state in France. What I call *le droit à la mode* is here not only an approach to law that commodifies it, by making a world-fair-like catalogue of legal products, but also a commodification that is undertaken in order to provide – or seem to provide – a manual of various solutions addressing profound anxieties about legal reform under the Third Republic.

One of the ways in which French legal scientists could be the soldiers working to secure the standing of the Third Republic in a world competing for the honour of nations was to entitle an international scientific discipline of law. This discipline would be at once an instrument of diplomacy, recommending solutions to the legal problems arising from an increasing international trade, and a deliberative body that could come up with solutions to any domestic legal problem arising in more than one country in Europe. This body of legal scientists would be international and use the "scientific" comparative method to reflect on these issues, and thus would claim neutrality in deliberating on these contentious national and international issues. Thus, one of the proposed advantages of founding this international legal discipline for French legal scholars would be to give scientific pedigree and an air of neutrality to their project of renovating both the law and the legal discipline in France, i.e. in persuading some of their own colleagues to embark on this much-needed renovation.

For French scholars to create this discipline "for the world" – appropriating the discourse of scientific internationalism – was a key component of restoring the honour of France, in a context where her international standing still suffered from the outcome of the Franco-Prussian War, the Panama Canal scandal, the Dreyfus affair and the defeat of French troops at Fashoda.<sup>309</sup> Just as the World Fair was meant to fill everyone's eyes with the greatness of France, the international Congress of comparative law and what it was said to achieve for the world – notably a forum where one could scientifically discuss any domestic legal problem and draw on a wide body of international experience to propose solutions – was meant to participate in the same "internationalism" to contribute to the prestige of France. This narrative reflects an important element of the French foreign policy at the time, a topic I explore further in the following chapter.

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<sup>309</sup> On how deep run the roots of this narrative around national perception, see R. Gildea, "Eternal France: Crisis and National Self Perception in France (1870-2005)" in S. Carvalho, F. Gemenne (Eds) *Nations and their Histories: Constructions and Representations* (New York: Palgrave MacMillan, 2009), pp. 139 and ff.

## Chapter 5. World Peace and the Pacification of the World

"We ought to draw from the purest sources of knowledge and solve the enigmas put to us by the Universe. All of us must, notably, seek to fortify the power of Humanity and to make more accessible to it *the domination of the world*."<sup>310</sup>

In the last chapter, I explored some of the anxieties tied to the status of the Third Republic and some of the ways in which comparative law was constituted in response to those anxieties. The project of renovating French law, by proposing ways to modernize it, was at least in part rooted in jurists' discomfort with the disorderly innovations of the parliament under the Third Republic.<sup>311</sup> In the present chapter, I want to explore further the parallels that can be drawn between the rhetoric of the Congress of comparative law and the discourse surrounding international affairs in France in 1900. While the first four chapters of the present piece have been dedicated to problematizing this reading – by showing notably that this Congress was primarily about the place of France in the world – this fifth chapter seeks to address this narrative directly. It therefore asks: how precisely was this Congress about peace in Europe?

First I will show how some of the congressmen – in particular Saleilles – made efforts so that this Congress would implicitly be compared with the Peace Conference held in The Hague in 1899. Indeed, the Congress of comparative law was indebted to the discourse of The Hague, and not only for the language of "international parliament." Numerous other words and practices recall the Peace Conference, in particular the French delegation's contribution to it. Second, I will show how some congressmen were drawn to present the project of comparative law in a language recalling the colonial discourse of *mission civilisatrice*, the Third Republic's justification of its colonial pursuits, shared by scientists in more countries. The project of mastering the world through (legal) science, and bringing about the progress of Humanity understood as a responsibility of (legal) scientists mirrors essential aspects of the French colonial discourse.

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<sup>310</sup> Josef Kohler, "Conception et méthode du droit comparé," p. 237.

<sup>311</sup> These are listed in the third section of Chapter 4.

Lastly, I show how some of the congressmen themselves understood their civilizing endeavour by analogy with an important military campaign of the time: the expedition of the Eight Powers against the Boxers' anti-imperialist uprising in China. While this might appear marginal to the scientific content of the Congress, I argue that some of the remarks made at a Congress dinner on August 2<sup>nd</sup> 1900 are crucial to defining its scientific and political project.

## 1. The Hague in Paris

When Tsar Nicholas II invited all nations to a Conference on Peace in The Hague, which lasted from May 18th to July 28th of 1899, an important precedent was set in international relations.<sup>312</sup> Questions discussed at this conference included setting a limit on the national spending on armaments, the possibility of setting up a permanent body for peaceable dispute settlement, and the laws governing rightful conduct in war. French commentators noted that while Britain, Germany, Austria and Italy made nothing but trouble at this conference, France and Russia were undoubtedly *trying* to engage in some form of world government.<sup>313</sup> The year after The Hague, Saleilles' "little international parliament" was an ambitious comparison: indeed, who would think of a scientific congress as a world parliament? By its enthusiasts, the Hague Conference was both called "international parliament" and "federation of the world."<sup>314</sup> The "federation of free states"

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<sup>312</sup> If a lot of historians of military and political affairs have considered The Hague to be a footnote in the chain of events leading to the Great War, legal historians continue to treat The Hague Conference (1899) as an event of importance to the legal community. M. Abbenhuis, "Introduction" in M. Abbenhuis, C. Ernest Barber, A. R. Higgins (Eds) *War, Peace and International Order?: The Legacies of the Hague Conferences* (London: Routledge, 2017), p. 4.

<sup>313</sup> According to the French commentators F. Despagne and A. Mérignhac, "Opinion sur la Conférence de la Haye et ses résultats" (1900) *Revue générale de droit international public*, pp. 879, 881; M. Koskenniemi, *The Gentle Civilizer*, p. 284-285. Anne Rasmussen reads the Internationalism of the French participation at The Hague as one of the numerous sources of scientific internationalism in relation to a community of "experts/technicians." A. Rasmussen, "Tournant, inflexions, ruptures: le moment internationaliste," (2001) 19 *Mil neuf cent*. 1, p. 35.

<sup>314</sup> See Despagne and Lapradelle, "La conférence de la paix," in *Revue générale de droit international public* (1900), pp. 7-8. See also Martens' speech on July 19th 1899, in *International Peace Conference. Proceedings of the Hague Peace Conferences: Translation of the Official Texts*. (Buffalo: William S. Hein & Co., 2000), p. 641; W. T. Stead (Ed.) *The Parliament of Peace and its members* (London: William Thomas, 1899), p. 13; A. Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* (Leiden: Martinus Nijhoff Publishers, 1999).

invoked by Saleilles, using the words of Immanuel Kant himself,<sup>315</sup> had great evocative power in the legal community at the time Saleilles made his speech. By using the words "international parliament" and "federation of states," he was implicitly comparing the project of comparative law with that of the Peace Conference.

The Hague's Parliament was made up of delegations comprising influential diplomats and international lawyers, the latter's presence being deplored by the former.<sup>316</sup> The Congress of comparative law welcomed similar delegations representing governments from around the world – ministers, *conseillers d'état*, members of parliament, professors and justices.<sup>317</sup> Some scientific associations were also represented, among which were listed the London Society of Comparative Legislation, the Berlin International Association of Comparative Law, the Society of Swiss Jurists, the Royal Academy of Presbourg, the London Law Society (Lincoln's Inn), and the Association of the Young Bar of Montreal.<sup>318</sup> In its pompous enumeration of dignitaries, the account of the opening of the Congress recalls an account of an important conference of international law.

In addition, Saleilles' language and some of his suggestions for the Congress closely mirrored the language and policy of the French delegation at The Hague. "Solidarity between nations" was one of the important phrases used by Leon Bourgeois, one of the French representatives at the Peace Conference.<sup>319</sup> Bourgeois sought to ground the duty of states to offer help in negotiating the end of armed conflict involving neighbouring states in what he called a "solidarity that unites the members of a society of civilized

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<sup>315</sup> I. Kant, *On Perpetual peace* (Peterborough: Broadview Press, 2015), p. 36 (See the 2nd Definitive Article). The word Kant chose in German was *Föderalism*, not *Bundesstaat*, which could indicate that he does not envision a world state, but truly an association of free states.

<sup>316</sup> A. Eyffinger, *The 1899 Hague Peace Conference*, previously cited, p. 6.

<sup>317</sup> "Minutes of July 31st," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 22.

<sup>318</sup> The delegate of the *Jeune barreau de Montréal*, an association modeled on the name of a parisian legal elite who came to govern the Third Republic as of 1877, was Édouard Fabre-Surveyer, who (like the author) was a twenty-five-year-old graduate of the McGill Faculty of Law. Notice biographique, *Fonds Édouard Fabre-Surveyer*, Greffe des Archives de Montréal, Online: <http://archivesdemontreal.com/greffe/guide-archives.pdf-catalogues/BM12.pdf>

<sup>319</sup> Koskenniemi, *The Gentle Civilizer*, p. 284. While the word "solidarity" was admittedly ubiquitous in French legal, political and scientific discourses at this time, I suggest that "solidarity between nations" was not, and that it refers to a very specific understanding of international relations that was not shared by most jurists in France or elsewhere in Europe.

nations."<sup>320</sup> The language of "Europe united" – deployed in reaction to the death of the Italian king – was possibly modeled on La Grasserie's language in his works on international law.<sup>321</sup> La Grasserie also attended the Congress of comparative law and his language appears to have been shared by numerous other commentators of the Peace Conference. Felix Stoerk, in his commentary, also wrote of "the intimate union existing between civilized states, on the topic of legal consciousness,"<sup>322</sup> and described the Peace Conference as "a great work of union of peoples by peace and law."<sup>323</sup> Saleilles' language of unity and union reproduced this rhetoric.

Saleilles' further suggestion that the Congress should constitute a consultative body recommending solutions or resolving legal conflicts recalls the French proposition at The Hague of a Permanent Court of Arbitration. In reproducing elements of the discourse and propositions of the French delegation, as well as the rhetoric of the commentary on the Peace Conference, Saleilles reminded his colleagues of a promise derived from The Hague: that jurists and men of science could bring peace to the world. He was also inviting *comparatists* to engage in the practice of world government, conceived as a series of congresses and conferences. While the outcome of its deliberations was not in the form of a convention, the Congress did attempt to speak in one voice and formulated "wishes" (*voeux*) for states to consider, such as this one on the rules of evidence surrounding foreign law:

"The congress of comparative law expresses the wish that all civilized states commit, by international agreement, to apply uniform rules ensuring the evidence in judgment of foreign laws and their just application."<sup>324</sup>

It is unlikely that such wishes would be formulated without an intent to influence the legislative decisions of states.

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<sup>320</sup> See, later, L. Bourgeois, *Pour la Société des nations* (Paris: E. Fasquelle, 1909), p. 48.

<sup>321</sup> R. de la Grasserie, *Des Moyens Pratiques pour Parvenir à la Suppression de la Paix Armée et de la Guerre* (Paris: Félix Alcan, 1894); S. A. Keefer, "Building the Palace of Peace: The Hague Conference of 1899 and Arms Control in the Progressive Era" (2006) 8 *Journal of the History of International Law*, pp. 1–17.

<sup>322</sup> F. Stoerk. "La conférence de la paix: La Haye, 18 mai-29 juillet 1899" (1900) *Revue générale de droit international public*, p. 201.

<sup>323</sup> *Ibid.* p. 203.

<sup>324</sup> See Francesco Contuzzi's submission; Francesco Contuzzi, "Des modes d'information relatifs à la connaissance et à l'application des lois étrangères," in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 499.

In the formulation of this wish, the mention of "all civilized states" also recalls the rhetoric of the Peace Conference, as well as that of the World Fair (a gathering of "all civilized states"). The famous Martens clause adopted as part of one of the conventions signed at The Hague defined the principles of international law as those that "result from the usages established between civilized nations, the laws of humanity and the requirements of the public conscience."<sup>325</sup> One of the main critiques of the Peace Conference formulated by Despagne, one of the French commentators at The Hague, was that Tsar Nicholas II had only invited the nations who had representatives at the imperial court in Moscow, as opposed to all civilized nations.<sup>326</sup> In turn, the organizers of the Congress of comparative law tried, as I noted in the first chapter, to ensure that "all nations having achieved some degree of civilization" would be represented at their Congress.<sup>327</sup> Defining this "civilization" or "civilized behaviour" seems to have been one of the main focal points of both the Congress of comparative law and the Peace Conference. This evokes a potential parallel between the Congress of comparative law and another aspect of the discourse surrounding international relations under the Third Republic: the *mission civilisatrice*.

## 2. Jurists and their Civilizing Mission

As I explored in the previous chapter, the discourse around modern innovation and scientific prowess and the renovation of France by *le droit à la mode* came about in response to deep anxieties related to the decline of France in the hierarchy of nations. The representation of France as a beacon of scientific achievement in the West –instantiated in the organization of this Congress– was also articulated in terms of a responsibility to be the missionaries of science around the world. As French historians Bancel and Blanchard have found, Jules Ferry's "duty to civilize inferior races" was not at all perceived to be at odds with the democratic ideals of the Third Republic. On the contrary,

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<sup>325</sup> Preamble, *Convention on the laws and customs of war on land* (The Hague I), July 29th, 1899.

<sup>326</sup> Despagne deplored the exclusion of most American states, of Transvaal (the Boer Republic), and of the Vatican, notably. Despagne, "La conférence de la paix," previously cited, p. 7.

<sup>327</sup> Namely: "all the nations, in which legal science had achieved some degree of development." "Circular letter," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 8.

it was an essential "grand narrative" told to maintain the national unity and harmony within France.<sup>328</sup> Indeed, the *liberals* advocated for colonization as a way to ensure the enduring grandeur of France – while conservatives, militarists and clericals were busy preparing the *revanche* against Germany.

In the context of this research, it is helpful to consider France's *mission civilisatrice* not as a mere rhetorical device enabling accumulation of resources and the enslavement of peoples, but also as a "humanitarian project" grounded in a belief in the scientific superiority of the West and an obligation to bring about a mastery of the world through science.<sup>329</sup> In other words, some people genuinely adhered to and believed in this discourse. Moreover, as Alice Conklin aptly observed, there is no reason to believe that this ideology only shaped French policy outside of France or a European policy outside of Europe. Indeed, many national and European projects proposed or led by the Third Republic can be understood in terms of this *mission*.<sup>330</sup> In this section, I therefore ask: was there a *mission civilisatrice* for jurists? In what terms was it articulated? And how did it influence the constitution of the new discipline of comparative law?

Reading the various papers submitted to the Congress, I was struck by the obligations and responsibilities they defined for jurists. As Günter Frankenberg observed, the congressmen frequently used the word "humanity" and invoked the duties owed to "humanity." For Saleilles, this duty was nothing less than:

"The extension of history, [...] not through an unconscious and fatal evolution humiliating for humanity, but through a conscious and willed direction susceptible of being scientifically oriented."<sup>331</sup>

For him, jurists could not simply sit back and observe the changes happening around them. They had to predict and *preside over* the development of the world, which meant

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<sup>328</sup> N. Bancel and P. Blanchard. "Le colonialisme: un anneau dans le nez de la République" (2000) 1228 *Hommes et Migrations*, p. 83.

<sup>329</sup> A. L. Conklin, *Mission to civilize. The republican idea of Empire in France and West Africa, 1895-1930*, (Stanford University Press, 1997), p. 5.

<sup>330</sup> *Ibid*, p. 3. This understanding of a "civilizing mission" unfolding inside Europe is an insight I borrow from Norbert Elias' reading of civilization. See N. Elias, *The Civilizing Process* (Hoboken: Wiley, 2000).

<sup>331</sup> Raymond Saleilles, "Conception et objet de la science du droit comparé," p. 179-180.



"humanity" as a whole. This mission Saleilles imagined for jurists, and its attendant "duties," were indebted to the broader national mission and duties of France.

The congressmen thus articulated the discipline of comparative law from the point of view of the need to consolidate the comparatist's mastery over legal diversity and legal change. For Jossierand, the new discipline of comparative law would "constitute an inventory of the legal riches of the world" from which comparatists would have the task of revealing an orientation.<sup>332</sup> For La Grasserie, it would be to constitute the "collection of laws," from which the scientific laws of a legal sociology and social dynamics could be derived.<sup>333</sup> While this classification mania could be understood as an intention to produce a catalogue – like the catalogue of the World Fair – lining up the legal products of the civilized world for an assessment of their degree of advancement, one could also see it as a form of colonial "inventory of riches," assembled for the purpose of disciplining the world's perceived "evolution," "movement" or "change."

The idea that universal laws could be deduced from the discipline of sociology reminds one of Auguste Comte's *Treatise on sociology*.<sup>334</sup> The French criminalist Le Poittevin, in particular, wrote that jurists had to undertake to identify doctrines "true for the entirety of the peoples of humanity."<sup>335</sup> This sentence has accents of Comte's claims that he had discovered (in sociological positivism) the "true religion" that could lead peoples on the path to civilization.<sup>336</sup> The legal scientists at this Congress thus inherited from Comte a duty to identify, and to articulate or *posit* the laws of the world or, in essence, to govern it.

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<sup>332</sup> Louis Jossierand, "Conception générale du droit comparé" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1. p. 237.

<sup>333</sup> Raoul de la Grasserie, "Concept général et définition de la science du droit comparé" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 206.

<sup>334</sup> See A. Comte, *Système de politique positive, ou Traité de sociologie, instituant la religion de l'humanité* (Paris: L. Mathias, 1851).

<sup>335</sup> A. Le Poittevin, "Fonction du droit comparé par rapport à la criminologie" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 389.

<sup>336</sup> Comte's treatise on sociology, *Système de politique positive*, bore the fitting subtitle "instituting the religion of Humanity," and was indeed concerned with finally exposing "the true religion" based on the "universally true standpoint" found by Comte through his sociological inquiries on society.

Some of the submissions to the Congress showed a great deal of enthusiasm for this project, in particular the ones of liberal, pacifist and internationalist persuasion. Consider for example this passage opening André Weiss's paper:

"One of the beautiful victories of this ending century, whose triumphal apotheosis we contemplate from of the banks of the Seine, has been the widening of the human horizon."<sup>337</sup>

Like Saleilles, Weiss made comparative law "a living history" a "history in action," continually being made by the work of heroic jurists. His enthusiasm was partially due to his belief that comparative studies in law would produce peace. As he wrote, "[t]he study of foreign laws is in the first row of works contributing to the mutual penetration of peoples and social harmony."

On the omnipresence of "harmony" in the discourse on the civilizing mission, Bancel and Blanchard note that French officials' enthusiasm for "harmony" was tied to their projection on the world of their own anxieties about France's internal conflicts.<sup>338</sup> I do not see a reason to exclude jurists or legal scientists, and their enthusiasm for harmony, from this statement. This "trajectory towards harmony" was indeed not necessarily being achieved in France, as much as through the progressive "pacification" of French colonies. In a word, a civilizing mission for jurists, when conceived as a pacification of the world, can perhaps only mean a colonial mission.

France of course had by no means an exclusive claim on colonial rhetoric. In the above-quoted passages, however, it is striking that the civilizing mission outlined by French jurists, unlike in British colonial rhetoric, adopted the language of "humanity" in lieu of the language of "Empire." The *mission civilisatrice* championed in these passages appears to derive from the scientific internationalist discourse at the turn of the century.<sup>339</sup> La Grasserie (quoted above), did some of his work on the possibility of an

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<sup>337</sup> André Weiss, "Rôle méthode et fonction du droit comparé dans le domaine du droit civil" in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 347.

<sup>338</sup> Bancel and Blanchard, "Le colonialisme," previously cited, p. 90-91.

<sup>339</sup> On the rise of the discourse of scientific internationalism, see A. Rasmussen. "Tournant, inflexions, ruptures: le moment internationaliste," previously cited.

international language. He wrote: "With hatred gone, war would tend to disappear. An international language would thus be the most potent instrument of *a new civilization campaign*."<sup>340</sup> Here again, there is no reason to assume that France's civilizing campaign only applied outside of France or outside of Europe. And bearing in mind that the project of scientific internationalism was not exclusive to French scholars, there is no reason to believe that foreign scholars did not also take part in the civilizing mission imagined for jurists at this Congress. Indeed, while civilization did function as a logic of "exclusion-inclusion" when it came to excluding African, Oriental or Aboriginal peoples,<sup>341</sup> it also functioned within Europe and European nations as a greatly detailed hierarchy of "degrees of civilization."

The colonial implications of the discourse on "world peace" are most clearly visible in the submission to the Congress of Josef Kohler, an eminent German pacifist jurist, who contributed to the fields of international law, comparative law and legal philosophy alike, and whose works were translated into English and published in the United States.<sup>342</sup> I considered Kohler's language specifically in light of Günter Frankenberg's critique of the virginal, peaceful and scientific origins of comparative law. Citing Kohler specifically, Frankenberg writes:

Rather than addressing and confronting the law's role in sustaining or at least facilitating colonialism and imperialism, the heroes of the discipline invoked what they understood to be the faultless program of humanism and -some of them- cosmopolitanism. *Of course, they did not directly assist the powers that be in subjugating tribes, countries and continents and did not justify the civilizing mission of the European nation-states.* Instead, *fin de siècle* comparatists set out to look at legal phenomena in the modality of philosophical speculation to "feel the pulse that trembles through all peoples." Their academic enterprise was guided by a clean-handed humanitarian rhetoric of truth and objectivity; and their scientific project was based on the assumption that "the general spirit of humanity reappears in the special spirit of each people." The spirit of humanity was the fountain of their innocence and clouded their politics.<sup>343</sup> [My emphasis.]

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<sup>340</sup> R. de la Grasserie, *De la possibilité et des conditions d'une langue internationale*, (Paris: J. Maisonneuve, 1892), p. 55.

<sup>341</sup> See M. Koskenniemi, *The Gentle Civilizer*, pp. 127 and ff.

<sup>342</sup> Notably, one of his best-known works, J. Kohler, *Philosophy of Law*, (New York: Macmillan, 1914).

<sup>343</sup> G. Frankenberg. "The Innocence of Method Unveiled: Comparison as an Ethical and Political Act,"

The quotes in this passage are from works by Kohler that were not submitted to this Congress. Yet there are passages in Kohler's submission to the Congress of comparative law that *do* provide justification for colonial expansion. While this might appear to contradict Frankenberg's observation that *comparatists* did not directly assist in or justify a civilizing mission of European powers, the reading that follows merely completes a picture that Frankenberg started to draw by bringing the humanitarian mission of the discipline into conversation with the colonial project. For Kohler specifically, the role of the discipline of comparative law – and consequently of *comparatists* – was to produce legal "geniuses," great colonizing figures who would lead entire peoples and eventually the world on the road to civilization. What Frankenberg identified as an "overdose of humanity," intertwined as it was with the rhetoric of peace, worked to justify "world domination."

Many submissions to the Congress of comparative law were grounded in race-thinking. This was the case for Kohler's. For him, an individual's personal ability to take part in the work of legal innovation or legal evolution, depended on "whether the race to which he belongs is gifted with more or less ability to penetrate the law."<sup>344</sup> Comparative law as Kohler understood it was a branch of legal ethnology – a branch of the legal discipline more prominent among German and British scholars during the 19th century, and somewhat challenged as merely academic by Edouard Lambert's report to this Congress.<sup>345</sup> Like the discipline of ethnology, legal ethnology was based on the racist idea that physiological differences accounted for differences in social behaviour, which ethnologists ascribed to "degrees of ability,"<sup>346</sup> or in Darwinian language, degrees of evolution.

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(2014) 9 *Journal of Comparative Law*, p. 224.

<sup>344</sup> Josef Kohler, "De la méthode du droit comparé," p. 227.

<sup>345</sup> One example of this body of work is H. Sumner Maine's treatise *Ancient Law*, previously cited. For a more detailed account of the influences on Kohler's work, see H. Dedek "Kindred Not By Choice," (2018), previously cited.

<sup>346</sup> On "race" as a particular key word or concept of nineteenth century scientific disciplines, see E. Sera-Shriar. "Race" in Mark Bevir (Ed.) *Historicism and the Human Sciences in Victorian Britain* (Cambridge: Cambridge University Press, 2017), pp. 70 and ff. These were prominent assumptions in the disciplines of ethnology and anthropology, but not everyone adhered to them, Franz Boas notably critiqued them in Franz Boas, "The Limitations of the Comparative Method of Anthropology" (1896) IV *Science* 103, pp. 901-908.

The comparative method was at the center of both biology and ethnography. One of the main practices of ethnology took the name "comparative anatomy," the process by which physiological characteristics were identified to account for differences in culture or behaviour. At the extreme of this practice was the pseudo-science of phrenology, a discipline that sought to identify common physiological traits to explain personality, and notably criminal behaviour.<sup>347</sup> These comparative studies were deemed "scientific" because they were more empirically grounded than the philological enquiries that preceded them in European studies on "other peoples."<sup>348</sup> Kohler's use of the language of race and his methodological ties to the discipline of ethnology bear witness to comparative law's relationship to colonial science.

The same can be argued for his language of "evolution." As discussed in the third chapter, the language of "evolution" was virtually omnipresent in submissions to the Congress. The legal evolution that Kohler envisaged was a task for "humanity" as a whole, "all the peoples," "everywhere."<sup>349</sup> In his submission, Kohler normalized "conquest" and "reception" as processes analogous to legal "borrowing," placing them in the same narrative on legal evolution.<sup>350</sup> His evolutionary narrative was not even bound to planet Earth. He wrote: "even the last man living on this earth will be ready to develop, as citizen of another star, the flag of humanity in the infinite spaces of the sky."<sup>351</sup> There is a striking parallel between this phrase and the famous quote of Cecil Rhodes "I would annex the planets if I could."<sup>352</sup> For Kohler, the "if" had become a "when." That the last man should do this in the name of "humanity" shows that for Kohler, scientists (in this case legal scientists) had a responsibility to spread "civilization" across humanity as a whole.<sup>353</sup> He thereby provided "justification" for colonial

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<sup>347</sup> I am thinking of the classic by Cesare Lombroso, *Criminal Man* (Durham et Londres, Duke University Press, 2006), a book initially published in 1876, of which five editions were produced between then and 1897.

<sup>348</sup> E. Sera-Shriar, "Race," p. 71.

<sup>349</sup> Josef Kohler, "De la méthode du droit comparé," p. 228.

<sup>350</sup> *Ibid.*, p. 233.

<sup>351</sup> *Ibid.*, p. 228.

<sup>352</sup> S. G. Millin, *Rhodes*, (London: Chatto and Windus, 1933), p. 138.

<sup>353</sup> Kohler's insistence on the rule of experts is not unlike what Koskenniemi described as a movement of professionalization that came to govern international law.

expansion, and did so by using scientific, internationalist discourse and its appeal to "humanity."

Kohler placed what he called "the science of comparative law" at the head of what he called a "law of all peoples."<sup>354</sup> The prospect that the study of comparative law would lead slowly but surely to a "law of the world" – in German *Weltrecht* – was at the heart of several other communications, notably Edouard Lambert's speech on method discussed in Chapter 3. A particularity of Kohler's submission was that he placed "jurists" – in particular "students of comparative law" – at the head of this entire process of legal evolution.<sup>355</sup> Kohler understood the development of nations to constitute the responsibility of "a small number of individuals" that he called "geniuses," people capable of making "the chariot of Humanity progress on its way."<sup>356</sup> For him, the *comparatist* would be such a genius.

The word "genius" also echoes racist scientific experiments. For Thomas Huxley, who happened to study "geniuses," intelligence was hereditary and *racially determined*.<sup>357</sup> Kohler appeared to adhere to this belief, common among social scientists at the time. In Kohler's submission, the *comparatist* thus constituted the colonizing figure *par excellence*, responsible for forcing humanity forward, even the "races" who – according to him – did not have the ability to "penetrate the law." Just like his colleague Edouard Lambert, Kohler clearly stated that it would be misguided to compare the laws of peoples who had not achieved the same "degree of civilization."<sup>358</sup> That some laws were not to be deemed worthy of comparison had not been a significant feature of the discipline in the past. Indeed, this was one of the main methodological assumptions introduced at this Congress,<sup>359</sup> especially through Edouard Lambert's speech.

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<sup>354</sup> Josef Kohler, "De la méthode du droit comparé," p. 227.

<sup>355</sup> *Idem*.

<sup>356</sup> *Ibid.*, p. 232.

<sup>357</sup> E. Sera-Shriar, "Race", p. 72.

<sup>358</sup> It is in this context that Lambert excluded the relevance of the study of Judaic and Muslim law. See Edouard Lambert, "Rapport sur la conception général et la définition de la science du droit comparé," p. 48, and Josef Kohler, "De la méthode du droit comparé," p. 231.

<sup>359</sup> I analyse this piece at length in the third chapter.

The proposed colonization of each nation and eventually of humanity as a whole *through legal science* was tied to Kohler's project for world peace. I read this project as a kind of civilizing mission in its own right. Nations, he wrote, have an obligation to "cooperate in the development of the general progress of humanity."<sup>360</sup> He insisted: "reception [of foreign law] must bring about harmony in international relations; as universal relations are the aim of Humanity."<sup>361</sup> Harmony, again, was a colonial fantasy. Indeed, one finds among Kohler's numerous imperatives the following passage:

"We ought to draw from the purest sources of knowledge and solve the enigmas put to us by the Universe. All of us must, notably, seek to fortify the power of Humanity and to make more accessible to it *the domination of the world*."<sup>362</sup> (My emphasis)

Comparative law and legal science, in the eyes of some of the congressmen, would bring about a very specific kind of peace. This peace was not an end in itself, but only a step towards further scientific colonization of the world. Again, the ideal of the scientific mastery of the world was one of the liberal and *progressivist* aspects of the French civilizing mission. And there is no reason to believe that pacifist and internationalist scientific discourse would have been immune to the influence of this mission.

Another of the main proponents of "legal science" as an instrument of civilization was Maxime Kowalewsky (also written Maksim Kovalevsky), who was member of the Saint-Petersburg Academy of Sciences and already one of the main figures of sociology in Russia at the time of this Congress. Kowalewsky's work was about ancient and modern legal customs in Russia,<sup>363</sup> and followed a method that he referred to as "legal ethnology," which incorporated classical legal history as well. In his paper, he outlined the role that sociology had to play in identifying what he called "stages of sociability" which corresponded to other congressmen's stages of civilization.

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<sup>360</sup> Kohler, "De la méthode du droit comparé," p. 227.

<sup>361</sup> *Ibid.*, p. 236.

<sup>362</sup> *Ibid.*, p. 237.

<sup>363</sup> See Maksim Kovalevsky, *Modern Customs and Ancient Laws of Russia* (Union: Lawbook Exchange, 2000).

The word "sociability" as an alternative formulation of "civilization" connotes another conversation: the rise of sociology as a way of knowing society, and the concurrent transformation of the ways in which law was understood to "act on" or "react to" social phenomenon. Foucault's disciple François Ewald explains that the turn to sociology in understanding society caused jurists to stop pretending that the law could eradicate social evil. The goal became "reducing" a "rate" of affliction.<sup>364</sup> This is a key element for understanding, notably, the criminal law section of this Congress, which touched on "new trends in criminal matters," the most important topic of which was German "Kriminalpolitik". The central question put to the section was whether it would be preferable to engage in the *management* of criminal activities or other anti-social behaviour, rather than aim at their absolute suppression.<sup>365</sup> This new philosophy of criminal law, encouraging a pragmatic pacification of societies over chaotic witchhunts, and its scientific basis in "stages of sociability" – applied to populations living in Europe as well as in the rest of the world – suggests that a *civilizatory mission* was well under way *inside* Europe.

Kowalewsky was a social evolutionist. He believed that sociology would reveal "the laws that govern the evolution of human solidarity,"<sup>366</sup> and his model for sociological scholarship was also August Comte. For Kowalewsky, the evolution of societies was understood in a necessary relationship to biology, as "one cannot contradict the physical or psychic nature of man" as revealed by biology.<sup>367</sup> He thus followed a Darwinist or rather Spencerian approach to social science. In essence, sociology had to embrace all phenomena of sociability, beginning with those produced in the animal kingdom, and finishing with those common to humanity as a whole, and "especially to its elite: Europe."<sup>368</sup> Essentially, Kowalewsky was proposing a hierarchy that he called an "order of progression" identifying the "stages of sociability" and classifying them on an

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<sup>364</sup> F. Ewald, *L'État providence* (Paris: Bernard Grasset, 1986).

<sup>365</sup> "Minutes of August 2nd," previously cited, p. 86.

<sup>366</sup> Maxime Kowalewsky, "La sociologie et l'histoire comparée du droit," in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 416.

<sup>367</sup> *Ibid.*, p. 417.

<sup>368</sup> *Ibid.*, p. 418.



ascending scale.<sup>369</sup> For him, comparative law would have to take part in this classification task.

However, Kowalewsky's understanding of major phases of evolution, as he detailed them in his paper, was not as detailed as one might expect for someone who said that his thinking was grounded in "observation" or in a "careful application of the comparative method." He really only distinguished between two stages: before and after the advent of the state.<sup>370</sup> Peoples adopting the political forms of "clan" or "commune" as opposed to the state were, in his paper, relegated to being objects of study of the disciplines of history and ethnology.<sup>371</sup> If sociology had to encompass "all sociability," Kowalewsky wrote, it nevertheless would be useless or even "dangerous" to compare Europe's institutions to those of the peoples living in stages of evolution anterior to the state.

In Kowalewsky's paper evolution was analogized to an "ascending march of individualism and statism (étatisme),"<sup>372</sup> or to the natural succession (or even *accession*) of the state, understood as the "natural heir" of the powers once held by the chiefs of clans or communes.<sup>373</sup> Despite the numerous mentions of "observations," "comparison," and "natural phenomena" and reference to markers of biological and sociological influences in Kowalewsky's submission, one is in the end left with a rehashed version of Hegel's narrative on the advent of the state in the *Philosophy of Right*. Hegel's distinction between state and stateless societies was based on his belief that the "idea of the state" was that which actualizes itself through the "process of world history."<sup>374</sup> His philosophy, expanded in his *Lectures on the Philosophy of History*, thus understood some societies as "lying out of the pale of history" altogether.<sup>375</sup> Calling Hegel "a metaphysician of

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<sup>369</sup> Kowalewsky, "La sociologie et l'histoire comparée du droit," p. 420.

<sup>370</sup> *Ibid.*, p. 420.

<sup>371</sup> *Ibid.*, p. 421.

<sup>372</sup> *Ibid.*, p. 424.

<sup>373</sup> *Ibid.*, p. 425.

<sup>374</sup> G.W.F. Hegel, *Hegel's Philosophy of Right* Translated: with Notes by T. M. Knox (London: Clarendon Press, 1952), p. 236.

<sup>375</sup> G.W.F. Hegel, *Lectures on the Philosophy of History* (Kitchener: Bartoche Books, 2001), p. 118.

genius,"<sup>376</sup> Kowalewsky confessed that his method may well have been about Comtian social dynamics, but his overarching narrative was good old German idealism.

The more philosophical of the Congress papers thus show themselves to be the product of the strangest theoretical syncretism. Paying attention to Kowalewsky's paper, one sees an intricate mix of Darwinian evolutionism steeped in Comtian positivism, and culminating in the embrace of Hegelian metaphysics. In the context of justifying a "civilizing mission," the "ascending march of individualism and statism" – perhaps a positivist version of Hegel's "the march of God in the world, that is what the state is"<sup>377</sup> – set its rather martial tone in the midst of a conversation on world peace, a question I tackle directly below.

### 3. An "Army of the Civilized World"

These observations on the influence of the Peace Conference, the *mission civilisatrice* and on the role imagined for legal scholars as colonial geniuses to 'oversee' the evolution of the world would not be complete without a short account of what was said at the banquet following the Congress sessions of August 2<sup>nd</sup> 1900. If the Congress put on airs of the Peace Conference, and generated a profusion of reflections on legal harmony and world peace, the progressive unification of Europe and of the civilized world were also discussed in a completely different context: the context of war.

In a speech thanking the foreigners for attending the Congress, Georges Picot, the president of the French *Société de législation comparée* and president of the Congress, referred to "times of universal emotions," when "hearts feel united" beating for "our comrades in the extreme orient."<sup>378</sup> Georges Picot was referring to the expedition launched by six European powers, plus the United-States and Japan, against the Boxers, anti-imperialist insurgents in China. The Boxer Rebellion was an important event, many

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<sup>376</sup> Kowalewsky, "La sociologie et l'histoire comparée du droit," p. 429.

<sup>377</sup> Hegel, *Hegel's Philosophy of Right*, p. 232.

<sup>378</sup> Georges Picot, "Discours au banquet du 2 août" in *Société de législation comparée. Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1., p. 160.

reports of which in the western press were as gruesome as they were fabricated.<sup>379</sup> It is an event of distorted historiography, the focus of which is almost always the Boxers as "emblematic of the range of negative associations Westerners in the twentieth century have had about the non-West in general."<sup>380</sup> They were hostile to Christianity, resistant to modern technology, and were thought to represent fiendish cruelty, xenophobia, and superstition.<sup>381</sup> In the West, they were invoked as a perfect example of the kind of people who remained to be eradicated, in order for the western cosmopolitan project to see the light of day.

While often cited as a founding moment of modern Chinese nationalism, the Boxer Rebellion is seldom invoked as a moment of formation of a "European consciousness," an observation inspired by Edward Said's observation that the fabrication and perpetuation of "orientalist clichés" are truly about constructing not Asia but Europe, through the imagination of Asian "otherness."<sup>382</sup> Interestingly, Picot's speech emphasized what this war of Western nations on the Boxers meant for Europe. He spoke of "united flags, and hearts assembled toward one same goal of progress and civilization."<sup>383</sup> These passages of Picot's speech can inform our understanding of the project of the Congress as a moment where Europe's legal scientists felt united in what they thought resembled a formidable campaign against "barbarity."

Just as the civilizing mission of France in the *Afrique-Occidentale française* was as much a military mission as one of proselytization, the mission outlined at the Congress of comparative law was not unilaterally peaceful in its articulation. Rather, the newly consolidated European peace of The Hague was invoked as an opportunity to make war. The delegate from the Bar of London, Mr. Crackanthorpe, rose last of all to present a

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<sup>379</sup> D. Preston. *The Boxer Rebellion: The Dramatic Story of China's War on Foreigners That Shook the World in the Summer of 1900* (New York: Berkley Books, 2001), p. xi.

<sup>380</sup> See especially, P. A. Cohen. *History in three keys: the Boxers as event, experience, and myth* (New York : Columbia University Press, 1997), p. 15-16.

<sup>381</sup> *Ibid*, p. 15.

<sup>382</sup> Edward W. Said, *Orientalism*, previously cited, p. 7. "Orientalism is never far from what Denys Hay has called the idea of Europe, a collective notion identifying "us" Europeans as against all "those" non-Europeans..."

<sup>383</sup> Georges Picot, "Discours au banquet du 2 août," p. 160.

speech of thanks and remarked on the banquet attendees as "truly representative of all civilized nations."<sup>384</sup> Commenting on the success of the Congress he said:

"[This reunion] is a symbol of the unity and fraternity that must always exist between those nations. Never have we experienced more strongly the need for such unity than at the current times. We live in times troubled with storms. A year has not yet passed since the international conference at The Hague, called for by his Majesty the Emperor of Russia, and we are now in the middle of an armed conflict, the causes of which are so serious and the proportions of which are so great, that they have united all the civilized nations in a single great army: *the army of the civilized world*. I hope that the result of this military campaign will be the same as that of our reunion, that is, to consolidate European peace."<sup>385</sup> [My emphasis]

Crackanthorpe concluded his speech with the Latin locution, *Cedant arma togae*, followed with the statement that "today arms and robes walk together." It is unclear whether he was intending to adapt or correct the locution, which means literally "arms *cede* to the robes."<sup>386</sup> In any case, the conversation that took place at this Congress was not only indebted to the rhetoric of the Peace Conference, but also to the discourse surrounding the Eight Powers' military expedition against the Boxers. "Peace," in the context of the Congress, of The Hague and of France's civilizing mission, therefore notably meant – at least to some congressmen – Europe *united* against the uncivilized world.

These remarks made at dinner might appear marginal to the articulation of the scientific project of the Congress of comparative law. Indeed, one could argue that the banquet does not really count as a session of the Congress. However, I take the position that the banquet speeches, while appearing marginal, are material to articulating fully the project of the Congress. Historian Modris Eksteins suggests that, one should perhaps do history from the margin,<sup>387</sup> inquiring what happens to the ostensible main story when the margins are brought to the centre. The question then is how the story of the Congress of

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<sup>384</sup> Mr. Crackanthorpe, "Discours au banquet du 2 août," p. 165.

<sup>385</sup> *Idem*.

<sup>386</sup> *Idem*.

<sup>387</sup> M. Eksteins, *Walking Since Daybreak: A Story of Eastern Europe, World War II and the Heart of Our Century* (New York: Houghton, 2000), p. xi. "But how does one tell a tale [...] where the margin is by definition the middle?"

comparative law appears when it is told not from Paris, but from Beijing. What if, to get a full picture of the scientific project of this Congress – the edification of peace in Europe and the progressive pacification of World – one has to know about the punitive massacres conducted against the Boxers and Chinese civilians by an *army of the civilized world*?<sup>388</sup>

If this Congress was not only thought of as a Peace Conference, but also as a military campaign – both understood as civilizing *missions* in their own right – an inquiry into casualties becomes part of the account.

### **Concluding Remarks on Pacification**

In this chapter, I have proposed a reading of some of the Congress' practices, speeches and other submissions in light of the discourse surrounding France's international relations at the time. These practices and speeches reveal the indebtedness of the Congress of comparative law to the Peace Conference held in The Hague in 1899. Specifically, they show how the vocabulary used to describe the Congress, and even some of the suggestions and their formulations, adopted words and phrases used at the Peace Conference. The notion of "civilized nations" was central to both the Congress and Peace Conference, in the conceptions underlying their organization.

The French discourse around a *mission civilisatrice* was also of influence on some of the Congress papers, which would perhaps be better read as outlining a mission of jurists to civilize the world. The rather long exposé I offered here focused on showing the particular theoretical syncretisms that made the science of comparative law an intrinsic part of the colonial project. Noteworthy in this study of colonial rhetoric is the challenge it allows to the assumption that the scientific colonial civilizing discourse was only mobilized for projects outside of Europe, and shows how the disciplining of European societies (through sociologically deduced laws of sociability or evolution) was also a project for *comparatists*.

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<sup>388</sup> On the Boxer War understood in the context of a study of mass violence in the 20th century, see T. Klein, "The Boxer War The Boxer Uprising" (2008) *Violence de masse et résistance réseau de recherche*, Online, accessed 10/05/2018.

Lastly, in its articulation, the civilizing *mission* imagined for jurists on the occasion of this Congress had, at once, a proselytizing tone, and a more martial or aggressive one. Analyzing the comparison made by some congressmen between this Congress and the Peace Conference, it became obvious that this comparison could not be properly understood without a concurrent comparison with the Eight Powers' military expedition against the Boxers. In forming their little international parliament, some of the congressmen at the Congress of comparative law perhaps already constituted a scientific "army of civilization."

## Conclusion

The conclusion to a research project like this is bound to resemble a confession, because it admits the ways in which it does not achieve what historical works in the legal discipline could be desired to achieve. As the premise of this piece reflects the pursuit of something other than traditional legal history work, it is worth restating the rationale for approaching the topic as I did.

This project constitutes a history of the first international Congress of comparative law. However, it is not a narrative of the events leading to or following from it, and it therefore fails to reveal relationships of causality tying this Congress to the work of certain individuals or institutions. This history focused instead on the discourses and practices of the Congress and showed how these can be situated with respect to other discourses and practices at the time. It showed that the discourses and practices that constituted the first Congress of comparative law cannot be distinguished from conversations about the prestige of French legal science, claims to disciplinarity and the corresponding search for a scientific method, the desire to master the processes of legal unification arising from international trade, a concern for ensuring the place of France in the hierarchy of nations in a period of national malaise, and the mission imagined for (French) jurists to "civilize humanity."

Two objections might be raised against such an approach. The first is that this approach has produced a statement of the obvious: that a specific conversation is better understood in its context. The second is that, in placing this kind of emphasis on "discourses," "practices" and "conversations," the observations I have produced remain distant from the intellectual projects and biographical trajectory of each author who was involved in the Congress, as well as from the influence of specific institutions (the state, courts and law faculties) in shaping these discussions.

On the first point, my goal has indeed been to articulate what might appear "obvious": the assumptions that constituted the conditions of possibility of the conversations that unfolded at the 1900 Congress of comparative law. I have tried to put into words what

went without saying. On the second point, I have distanced myself from individual intellectual projects and biographical trajectories as well as from the influence of the legal institutions in order to discern these mostly shared assumptions. Had I sought to explain everyone's utterances in relation to their individual lives or to institutional circumstances, I would have lost the capacity to say something meaningful about what these utterances produced together: the particular rhetoric, conversations and practices that composed this Congress of 1900. Individual trajectories and institutional commitments participate, of course, in shaping the shared assumptions that in turn allow for conversations to happen and for ideas to be articulated. However, a focus on how each life or each institution was at play in making possible what happened would have distracted from a search for assumptions embedded in shared discourses and practices.

My account of this Congress, called "Comparative Law Gets Entitled," looked at once at the context that led to comparative law being given a new title, no longer to be called "comparative legislation," and at the process by which some French *comparatists* sought to avail themselves of the authority, international recognition and prestige necessary to influence the course of legal science and legislative innovation both in France and other countries.<sup>389</sup> Their new entitlement was the product of a carefully crafted discourse of scientific internationalism, which until then had only scarcely penetrated the legal discipline in France. The new "entitlement" sought by these French legal scholars in 1900 was no longer one that some legal scholars had enjoyed under the "legal positivism" that had characterized legal scholarship in France in the first half of the 19<sup>th</sup> century. Instead, they sought to avail themselves of a new kind of authority derived from a "scientific positivism,"<sup>390</sup> deemed superior in its claim to truth, hence jurists' new obsession with "method" and "comparison" as basic requirements for scientificity. Internationalism was an important component of this new "entitlement."

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<sup>389</sup> C. Jamin. "Le vieux rêve de Saleilles et de Lambert" previously cited, p. 742.

<sup>390</sup> For a different account of this tension, which takes better into account the German sources, see G. Resta, "Luttes de clochers en droit comparé" (2017) previously cited, p. 1160.



The scientific internationalism mobilized or inhabited by these French legal scholars in 1900 was articulated in reference to the cultural phenomenon of World Fairs.<sup>391</sup> Accordingly, while this discourse expressed the necessity of generating an understanding between various nations, it placed a special emphasis on the capacity of France, and thus of French legal scientists, to produce such an understanding. Just like the World Fair, this "friendly contest between nations,"<sup>392</sup> the science of comparative law as it was articulated at the Congress of 1900 aimed at reinforcing a pre-existing hierarchy among nations, and the position of France or of French legal science near the top of this hierarchy. The discipline was also said to serve the protection of France's economic interests and the integrity of her legal system in the face of increasing international exchanges.<sup>393</sup> One can therefore ask to what extent this Congress of comparative law and its World-Fair-Internationalism should be called an internationalist moment for the legal discipline at all.

The inquiry into the kind of "internationalism" fostered by the Congress of 1900 revealed an interesting paradox within the ties between a "new" discipline of comparative law and an attempt at controlling international trade. While the "entitlement" of the new discipline was sought through a claim to an international scientific pedigree, the topics of inquiry of the discipline were being drastically narrowed so that legal scientists would now focus their attention on finding universal solutions to legal problems arising from international trade. The question was then raised: what part of its "scientific" self would be left of the discipline of comparative law?<sup>394</sup> Indeed, all the historical and social-scientific aspects of the discipline were now relegated to an illustrious past, no longer forming the core of the discipline.<sup>395</sup> Thus, the emphasis of this 1900 Congress on the problem of legal unification for the purpose of enabling trade had the somewhat perverse effect of drastically limiting the scope of the new "scientific" discipline of comparative law as regards which questions to ask, which traditions to study, and which type of scholarship to undertake.

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<sup>391</sup> A. Rasmussen, "Les Congrès internationaux," previously cited, p. 23.

<sup>392</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 14.

<sup>393</sup> *Idem*.

<sup>394</sup> See Leon Duguit's objection that comparative law would then no longer be a science: 394 "Minutes of the session of August 1st", p. 60.

<sup>395</sup> Edouard Lambert, "Rapport sur la conception générale et la définition de la science du droit comparé," p. 49-50.

These questions in turn warrant a remark on the place the congressmen imagined for jurists in society. While legal scientists perceived themselves to be a powerful lobby in favour of internationalization and as the scholarly force capable of anticipating and governing its effects,<sup>396</sup> they failed to see that it was their science, their learning and their scholarship that were being reduced or restricted unduly so as to pursue their ambitions. As much as they ascribed to themselves roles like concluding international agreements<sup>397</sup> or running an international scientific parliament,<sup>398</sup> this discourse contrasts with another rhetoric, which rather describes them as "soldiers": either the true soldiers defending the honour of the Third Republic in times of national uncertainty,<sup>399</sup> or the soldiers of an Army of Civilization.<sup>400</sup> While relying heavily on a rhetoric presenting them as statesmen, jurists seemed easily to accept their true position as henchmen.

Legal historian Frederic Audren has suggested that a "1900 moment" was constructed *ex post facto*, after the trauma of the Great War, as a "promise that jurists could bring peace and order to the world."<sup>401</sup> The history I presented here completes or complements by offering a counterpoint to this view in that it shows that one can read this promise as carrying a somber authoritarian undertone. I have argued that this promise at once carried the implication of colonial atrocities committed in foreign lands and of plans of pacification conducted by the state and the legal elite on disorderly "populations" within European countries.<sup>402</sup> This last nuance is important in that it acknowledges the impact of colonial missions on ideas of governance for European nations,<sup>403</sup> making governance

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<sup>396</sup> Raymond Saleilles, "Rapport à la commission d'organisation," p. 13.

<sup>397</sup> *Traité franco-belge du 8 juillet 1899*. See "Minutes of the session of August 1st", in Société de législation comparée. *Congrès international de droit comparé Procès verbaux des séances et documents*, t. 1, p. 61.

<sup>398</sup> Raymond Saleilles, "Rapport sur la question du parlementarisme," p. 71.

<sup>399</sup> *Bulletin de la Société de Législation comparée*, 01/12/1871 (Paris: Cotillon et Fils, 1872), pp. 2 and 5.

<sup>400</sup> Georges Picot, "Discours au banquet du 2 août," p. 160; Mr. Crackanthorpe, "Discours au banquet du 2 août," p.165.

<sup>401</sup> Audren, F. "Le « moment 1900 » dans l'histoire de la science juridique française" in O. Jouajan and E. Zoller (Eds) *Le moment 1900 : critique sociale et critique sociologique du droit en Europe et aux États-Unis*, (Paris: Éditions Panthéon-Assas, 2015), pp. 57.

<sup>402</sup> Generally the lower classes, but also the institutionalization of sex workers, or of mentally ill people, and eventually the management by states of Roma, Jewish, migrant communities, etc.

<sup>403</sup> Conklin, A. L. *Mission to civilize. The republican idea of Empire in France and West Africa, 1895-1930*, (Stanford: Stanford University Press, 1997), pp. 5-10.

more authoritarian and using sciences as means of social control. My reading of this "promise of peace" also seeks to acknowledge the effect on legal scientists of the Third Republic of their anxieties about "peace and order" in France, which then fuelled a control fantasy which can be called colonial. *Who was really to be civilized* is therefore another question raised by the account I offered.

This history has thus attempted to trace the responsibility of jurists in leading and bringing about a scientific project of "pacification" on their own peoples and others.<sup>404</sup> Intertwined with this legal pacification project were a number of strands of ideology masquerading as a "true" *episteme*; notably, Darwinian narratives of biological "evolution," Comtian positivism and its "true religion" that discarded forms of knowledge irreconcilable with its scheme, and Hegelian metaphysics with its pretention to a teleology of history. Deeply entrenched in the discourse of the legal discipline at the time of the 1900 Congress, these ideological affirmations helped edify a strict hierarchy of nations and peoples, and informed the justificatory rhetoric supporting the colonial project proper to the discipline of comparative law. Yet, these beliefs were not so pervasive as to silence the few dissenting voices that were raised at the 1900 Congress to resist them.

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<sup>404</sup> That is a question I have raised in another piece, inspired by the work of Liliana Obregón. See Fournier, M. "Comparaciones implícitas y educación jurídica: Relato de unas conversaciones Andinas" in J.P.S. Calderon, H.J.Campos Bernal, P. Urteaga (dir.) *La persistente relevancia del derecho comparado* (Lima: PUCP: Centro de Investigación, Capacitación y Asesoría Jurídica, *Forthcoming* 2019).

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