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Privileging (some Forms of) Interdisciplinarity and  
Interpretation: Methods in Comparative Law

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## **Abstract**

How should comparative law scholars engage with other disciplines? Which social sciences are relevant for the purpose of comparison? Such questions are important for the process of comparison, as disciplinary self-regulation (and interaction between disciplines) is not a neutral and objective process, and is always informed by embedded political, ideological, ethical preferences. Or, the act of selecting ways of reading, thinking and writing in the service of any task requires the explicit or implicit endorsement of epistemic and hermeneutic authority.

In this essay, I review three recent volumes on comparative law – a companion volume, a book of practice-oriented reflections by scholars who engage in comparative legal scholarship, and a region-specific contribution on Comparative Constitutionalism in South Asia. The approaches adopted in the volumes – concentrating on the science of comparative law, finding a middle way between too much complexity and too little, concentrating on region-specific complexities – do not address the issue of negotiating epistemic and hermeneutic authority posed above. Such negotiation may be facilitated by concentrating on what I suggest is the organising principle of the discipline of comparative law: identifying the construction, perpetuation and functionality of the internal authority of law.

## **Keywords**

Comparative law, legal epistemology, hermeneutics, inter-disciplinarity, legal theory



## Introduction

The International Student Initiative for Pluralism in Economics is a large group of student associations in universities across more than thirty countries seeking a dramatic change in the way economics is taught, researched and practiced.<sup>1</sup> Other social sciences such as sociology are also not free from tumult. Though sociology is often perceived to be more reflexive than some of the other social sciences, some sociologists identify themselves as working at sociology's periphery,<sup>2</sup> and the development of academic sociology as a discipline has been shown to be intimately linked to trends and regimes in political economy.<sup>3</sup> As with the natural sciences, intra-disciplinary discontent and interrogation of expert methods in the social sciences appears to be a problem that can be solved by the philosophy of science. But even in this regard, it may be asked – *what* philosophy of science? As Michael Rosen observes, “[Philosophy has a] tendency to fracture into ‘schools’ and ‘traditions’ that talk past one another. The different traditions disagree not just about foreground substance, but about the background assumptions that must be presupposed to get philosophical discourse going.”<sup>4</sup> Intra-disciplinary fragmentation often becomes an issue of interdisciplinarity; for instance, does economics have a closer affiliation with psychology or evolutionary biology? In addition, different disciplines compete for describing and explaining similar phenomena. Should the question of motivation for action be answered using the experimental methods found in psychology, semi-structured interviews found in sociology and anthropology, or a discipline that is relatively underappreciated within scientific communities, such as an analytical approach derived from memetics?<sup>5</sup>

Clearly, disciplinary self-regulation (and interaction between disciplines) is not a neutral and objective process. This poses a compelling problem for legal scholars (and comparative legal scholars in particular), as deciding on what and how to read materials from other jurisdictions and disciplines is an exercise that does not seem to have a method. The solution, therefore, appears to be to choose allegiance to the theories and methods of a particular discipline, and sub-discipline/s within such discipline. As the issue of intra-disciplinary fragmentation above indicates, an objective or neutral method of reading and writing is a myth, and is always informed by embedded political, ideological,

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<sup>1</sup> An open letter drafted by the association can be found on: <http://www.isipe.net/open-letter/>.

<sup>2</sup> Carolyn Ellis and Arthur P. Bochner, “*Writing from Sociology's Periphery*,” in Stephen Cole ed. *What's Wrong with Sociology* (New Jersey: Transaction Press, 1994).

<sup>3</sup> Andrew Halsey, *A History of Sociology in Britain: Science, Literature and Society* (Oxford: Oxford University Press, 2004).

<sup>4</sup> Michael Rosen, *Dignity: Its history and meaning* (Cambridge, Massachusetts: Harvard University Press, 2012), Preface, XXIII. The universality and scientism of philosophical writings have been questioned by Tamler Sommers who argues that “unlike evolutionary biologists, philosophers have thus far investigated the nature of their topic through an appeal to the intuition of their audience.” Tamler Sommers, *Relative Justice: Cultural Diversity, Free Will and Moral Responsibility* (Princeton, New Jersey: Princeton University Press, 2012), p. 9. It may be worth noting that perhaps the most prominent philosopher of science of the twentieth century, Thomas Kuhn, spent most of his later career ‘distancing himself from the transformatory impact of his work.’ Esther Mirjam-Sent, ‘Thomas Kuhn: The Wrong Person at the Right Place at the Right Time’ 63:2 *The Review of Politics* 390, p. 391 (2001). Perhaps this is a problem with the political use of Kuhn’s work rather than an accusation of the inherent political nature of his work. However, one of Steve Fuller’s claims (who’s book on Kuhn Mirjam-Sent reviews), Kuhn’s work had the political purpose of bridging but retaining the authoritarianism of ‘Big Science’ and the egalitarianism of ‘American Superiority’ in a cold-war era. Ibid. It comes as no surprise therefore that the sociology of philosophical knowledge and social epistemology are disciplines in themselves, with some scholars seeking a bridge between the two. See for instance, Martin Kusch, ‘Social Epistemology’ in S. Bernecker and D. Pritchard eds. *The Routledge Companion to Epistemology* (New York, Routledge, 2011), 873-884.

<sup>5</sup> While memetics is not popular in legal scholarship or comparative legal studies, the use of memetics as integral to legal theory can be found in Jack Balkin, *Cultural Software: A theory of ideology* (New Haven: Yale University Press, 1998).

ethical preferences. Or, the act of selecting ways of reading, thinking and writing in the service of any task requires the explicit or implicit endorsement of *epistemic and hermeneutic authority*.

In this essay, I review three recent edited volumes in the field of comparative law scholarship: a Cambridge Companion, a book of practice-oriented reflections by scholars who engage in comparative legal scholarship, and a region-specific contribution on Comparative Constitutionalism in South Asia. My primary motivation was to assess whether these volumes provided clarity on the issue of negotiating such epistemic and hermeneutic authority in interdisciplinary and inter-jurisdictional scholarship, but I found them wanting on this point. Before I proceed to a discussion on what I mean by epistemic and hermeneutic authority, a brief introduction to the volumes is warranted.

In their introduction to the *Cambridge Companion*, Mauro Bussani and Ugo Mattei stress the need to establish a science of comparison,<sup>6</sup> in order to absolve comparative legal scholars of the accusation that what they do is questionable. As to how they intend to achieve this aim in the volume, they argue that they attempted to make the volume as comprehensive as possible, with contributions from established comparative legal scholars, as well as scholars versed in a particular area of law. Accordingly, they divide the volume into three sections – one on ‘knowing comparative law’ through different disciplines, one on the contribution of comparative law to different fields, and the third on understanding different legal orders through comparative law. Maurice Adams and Jacco Bomhoff begin their introduction to *Practice and Theory of Comparative Law* by highlighting the problem of the ‘missing middle in methodological thinking in comparative legal scholarship,’ where comparative legal scholars adopt the extremes of an ‘anything goes’ approach or are expected to satisfy an impossibly rigorous methodological standard. Their effort to find this middle is by compiling the reflections of scholars and practitioners on ‘constructive methodological choices’ they make ‘in a wide range of projects that make up the discipline.’<sup>7</sup> Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam’s ambition is strictly regional in nature – they seek to fill up a glaring knowledge gap on South Asian constitutionalism, and the volume consists primarily of contributions on particular countries. They trace a brief history of the interest in such knowledge, identifying political forces and primarily the work of particular international scholars that drove this interest notwithstanding the general perception of South Asian nations as ‘the illegitimate children of the Anglo-American political/legal tradition.’<sup>8</sup>

None of these approaches – concentrating on the science of comparative law, finding a middle way between too much complexity and too little, concentrating on region-specific complexities – address the question of negotiating epistemic and hermeneutic authority posed above. Such negotiation may be facilitated by concentrating on what I suggest is the organising principle of the *discipline* of comparative law: *identifying the construction, perpetuation and functionality of the internal authority of law*. To begin with, comparative law should be construed to be a discipline rather than a science, but one that deserves patronage in its own right. Drawing on Douglas Vick, a discipline is characterised by two primary properties: it is a *body of knowledge* designed around ‘internal protocols and assumptions, characteristic behaviours and self-sustaining values’, and it is a *social community* whose members share ‘personal experiences, values and aesthetic judgements’.<sup>9</sup> The primary reason why it should be a discipline in its own right is to avoid being shaped by ‘the internal logic of the

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<sup>6</sup> It may be noted that Mattei has over time been inclined towards adopting a scientific sophistication of the way comparative legal scholarship is conducted. Notably, he has used economic efficiency as a benchmark for doing comparative law. Ugo Mattei, *Comparative Law and Economics* (Ann Arbor, Michigan: University of Michigan Press, 1997). See also Henry Hansmann and Ugo Mattei, ‘The Functions of Trust Law: A comparative legal and economic analysis’ (1998) 73 *New York University Law Review* 434.

<sup>7</sup> *Practice and Theory*, p. 2.

<sup>8</sup> The editors quote Radhika Coomaraswamy to make this point. *Comparative Constitutionalism*, p. 3.

<sup>9</sup> Douglas Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, p. 166.



sealed system'<sup>10</sup> of a legal order or any other science. The aims and incentives behind comparative legal scholarship are different from those of the practice of law, and also from forms of 'law and' scholarship. In brief, the point of comparison is *to interrogate the construction of the internal authority of a legal order*, or a particular method of understanding or doing law. The incentives behind the practice of law, the teaching of law, or attachment to a particular scientific or social-scientific discipline to understand law on the other hand relate to *the perpetuation of the internal authority of a legal order*, or the discipline used to understand law.

To glimpse at the construction and perpetuation of internal authority, let us briefly consider the operation of the legal academia. Legal scholars often have a teaching component that involves presenting 'correct' understandings of law to their students. More often than not, such teaching caters to the demands of the legal market. I do not suggest that legal scholars are unable to keep their research and teaching apart, but that the authority of a lecturer is linked to her research interests. The use of certain disciplines or understandings of the law to illuminate legal questions also correspond to practice-based trends.<sup>11</sup> To take law and economics for instance, heterodox forms of economics are not popular in law faculties as they have little practical interest for students. Regulators or firms may be interested in students trained in finance, microeconomics or macro-economics. The study of the relationship between economics and evolutionary biology, on the other hand, may have limited practical use for a law faculty. The research interests of legal scholars, therefore, are often shaped by market demand. A deeper concern is how expertise in a particular discipline is constructed. Every social science is susceptible to its own politics, fashions, and incentives. For instance, articles published by economists in journals with high impact factors are marketable indicators of expertise. Using a metric such as 'impact factor' to influence the choice of methods is problematic, but yet more problematic is how the language of economics is altered to correspond to trends of what constitutes expertise.<sup>12</sup>

Building on the above, I seek to show in this essay that some of the contributions to the volumes under review (unlike some others) unfortunately perpetuate the internal authority of law, and methods of approaching law. The perpetuation of such authority is legitimised by the claim that what is being attempted is a reasoned way of comparison. Thus, the distinctiveness of comparative law should not be characterised as its interest in comparing two or more jurisdictions,<sup>13</sup> being a variant of legal practice,<sup>14</sup> or an adjunct to a particular science or social science, but should instead concentrate on the endeavour to understand how the internal authority of law is constituted and represented in the practice of law, as well as in legal scholarship.

To fulfil this endeavour and in order to conduct meaningful comparisons, I suggest that the role of a comparative legal scholar is to understand the construction and perpetuation of epistemic and hermeneutic authority. Most of the contributions under review, on the contrary, privilege certain

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<sup>10</sup> *Ibid.*, p. 179.

<sup>11</sup> Jaakko Husa highlights the difficulties of designing a constructivist curriculum in a law programme, and the requirement to bring about a pedagogic shift if comparative law is to be taught in law schools. Jaakko Husa, 'Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind' (2009) *Comparative Research in Law & Political Economy Research Paper No. 35/2009*.

<sup>12</sup> Angela Rogojanu and George Șerban-Oprescu, 'Meanings and Spreading Patterns of the "Positive" Concept in Economic Thought' (2013) 580, No. 3 *Theoretical and Applied Economics* 83.

<sup>13</sup> Maurice Adams has elsewhere argued that "one of the main reasons why there is something special or distinctive about doing comparative legal research, something which calls for a specific approach and specific methods, is that legal comparatists must, among other things, immerse themselves in a foreign and therefore strange legal system." Maurice Adams, 'Doing What Doesn't Come Naturally: On the distinctiveness of comparative law' in Mark van Hoecke ed. *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart Publishing, 2011), pp. 229-240, p. 230.

<sup>14</sup> This view informs Koen Lemmens' contribution in *Practice and Theory* as discussed in the course of this essay.

epistemic or hermeneutic authorities in areas of practice or scholarship by endorsing them. My conception of privileging epistemic authority draws on Miranda Fricker's work on *Epistemic Injustice*, situated at the interface of ethics and epistemology.<sup>15</sup> If we were to characterize experts as speakers and comparative legal scholars as hearers, there is either a credibility excess or a credibility deficit attributed to such speakers over time and/or space, whereby the hearer makes an unduly deflated or inflated judgment of 'the speaker's credibility, perhaps missing out on knowledge as a result.'<sup>16</sup> According to Fricker, 'pure' power structures condition the credibility attributed to the speaker, and make it difficult for the hearer to actively change the way the speaker is heard.<sup>17</sup> Though the volumes under review are at times mindful of the fact that there is no free market for transplantation and diffusion of law and hence plurality is constrained by power structures, there is no consideration of the fact that this applies to knowledge and interpretation as well. It is this gap that I seek to fill in the following sections.

### **Privileging Epistemic Authority in Interdisciplinarity**

In the introductory chapter to the *Cambridge Companion to Comparative Law*, Mathias Reimann confesses after listing 'transnational law, legal anthropology and economic analysis of law' as disciplines that are related to comparative law that 'any such list is somewhat arbitrary, in particular because it could plausibly be extended, for example by including linguistic studies.'<sup>18</sup> Clearly, the identification of this 'plausible' extension by linguistic studies and identification of neighbouring disciplines is itself an arbitrary act. In light of the 'plausible' extensions, the question is whether there are good reasons to justify the inclusion of some and the exclusion of other disciplines as ways of 'knowing comparative law'.<sup>19</sup> In their editorial introduction to *Practice and Theory of Comparative Law*, Maurice Adams and Jacco Bomhoff avoid explicitly identifying particular disciplines and legal orders that are worth considering, and characterise the volume as 'a collection of reflections on comparative law projects';<sup>20</sup> the endeavour is to document comparative law as 'a disciplined practice.'<sup>21</sup> The epistemic and hermeneutic preferences that inform the disciplining of practice, coupled with the issue of identifying disciplines that are related to comparative law, warrant an analysis of how '(inter)disciplinarity' is approached.

Without stating so explicitly, some of the essays in the volumes under review appear to aim at de-privileging doctrinal law. For instance, observing that the same legal texts can have multiple meanings in different contexts and different jurisdictions, Griffiths and Adams' contribution in *Practice and Theory* analyses the role of religion and non-legal institutions in shaping the law on Euthanasia in Belgium and the Netherlands. The chapter is an act of de-privileging doctrinal legal discourse on Euthanasia and providing an alternative way of 'seeing'<sup>22</sup> the law by adopting sociological methods,

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<sup>15</sup> Miranda Fricker, *Epistemic Injustice: Power and the ethics of knowing* (Oxford: Oxford University Press, 2007)

<sup>16</sup> Fricker, *supra*, pp. 16-17.

<sup>17</sup> Even in particular cases where active agential power cannot be identified, 'pure structure' perpetuates itself passively through 'reason's entanglement with social power' (Fricker 2007, pp. 8-11).

<sup>18</sup> Mathias Reiman, 'Comparative Law and Neighbouring Disciplines' in *Cambridge Companion*, p. 13.

<sup>19</sup> 'Knowing Comparative Law' is the title chosen by the editors of *Cambridge Companion* for the part of the book that concentrates on the relationship with law and other disciplines.

<sup>20</sup> *Practice and Theory*, p. 2.

<sup>21</sup> *Ibid.*

<sup>22</sup> The metaphor of 'legal vision' could be construed to be no less accurate than 'legal truth' or 'legal analysis' on exploring the authoritative force of legal discourse. Reva B. Siegel, 'In the Eyes of the Law: Reflections on the authority of legal discourse' in Peter Brooks and Paul Gewirtz eds. *Law's Stories: Narrative and rhetoric in the law* (New Haven: Yale University Press, 1996), pp. 225-231.

which facilitates empirical studies of vested social and institutional interests. The preferred sociological disciplinary allegiance is used to demonstrate how comparing the law on Euthanasia needs to go beyond legal doctrine, and how such an approach is superior to the doctrinal method. As Adams & Griffiths demonstrate, doctrinal law would not capture the phenomenon of the same text having completely different (and even contrary) meanings at different points in time either within the same jurisdiction, or in different jurisdictions.<sup>23</sup> Thus, the *privileging of sociological analysis de-privileges the doctrinal method*. To my mind, such a favouring of sociology is informed by two assumptions; firstly, there is an assumption that sociology is a unified discipline, and that it is scientific and apolitical. Yet, assuming the neutral self-regulatory capacity of any discipline is problematic, as normative questions are then examined using the lenses of a pre-selected representation of truth or reality. Second, even if we were to assume the coherence of a discipline, allegiance to a certain discipline shapes the way in which normativity is approached. Given that advocacy is a key element of legal argumentation, a claim to disciplinary authority becomes an exercise in *epistemic advocacy*. Adams & Griffiths observe: ‘All scientific work begins with a question about the world that we live in. Questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible.’<sup>24</sup> As questions in comparative legal scholarship are asked based on the researchers’ disciplinary orientation, the process of how and why such questions are asked inevitably becomes implicated and brings the scientific nature of comparative legal scholarship under scrutiny. The prevalence (or at least the possibility) of intra-disciplinary substantive and methodological disagreement does not feature in a majority of the essays in the books under review, which exhibit instead a subjective understanding of disciplinary coherence.

The absence of an interrogation of intradisciplinary fragmentation leads to the unquestioned adoption of a method and its application to a legal issue. This appears to have happened in Julie De Coninck’s contribution to *Practice and Theory of Comparative Law*. The author proposes the method of ‘(cross-cultural)<sup>25</sup> behavioural economics’ as an appropriate empirical tool to understand private patrimonial law. As ‘(cross-cultural) behavioural economics’ is a novel sub-discipline of economics, De Coninck defines the contours of this sub-discipline, and then uses it to understand legal issues pertinent to private patrimonial law. In this work, as in earlier texts, she critiques the universal applicability of the findings of behavioural economics, and attempts to further develop behavioural economics by injecting a ‘cross-cultural’ qualifier. It appears, however, that she still sticks to universal categories despite her critique of universality. While she notes the importance of ‘culture’ and ‘context’, they are viewed through pre-determined epistemic lenses. As Ralf Michaels commented in a review of her earlier work (admittedly one where the cross-cultural element was not extensively articulated), cultural informants cannot be restricted to mere variation from a universal understanding: ‘De Coninck suggests that the law protects possession because people value possession highly. This sounds plausible, but the opposite may be the case too; it may be that people highly value possession because they have internalised the legal rules that protect it.’<sup>26</sup> The central characteristic of behavioural economics – even when cultural variation is accounted for – is that individual preferences serve as the reference against which law is assessed. The fact that the complexity of context that bears upon human

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<sup>23</sup> Maurice Adams and John Griffiths, ‘Against ‘comparative method’: explaining similarities and differences’ in *Practice and Theory*, p. 284. See also Ralf Michaels, ‘Comparative Law by Numbers? Legal Origins Thesis, *Doing Business Reports*, and the Silence of Traditional Comparative Law’ (2009) *57 American Journal of Comparative Law* 765 (‘If we have learned anything in comparative law, it is that legal rules alone are compatible with a wide variety of ideologies, and that law reform must go much farther than just the adoption of rules’, p. 777).,

<sup>24</sup> *Ibid.*, p. 279.

<sup>25</sup> The interesting use of parentheses may tempt an inquiry into whether the selective use of punctuation may be a comparative method in itself, given engagement with another discipline could be construed to be engaging in comparative law, and the relationship with linguistics is under-theorised. Legrand, *supra*.

<sup>26</sup> Ralf Michaels, ‘Explanation and Interpretation in Functionalist Comparative Law- A response to Julie de Coninck’ (2010) *74 Rabels Zeitschrift für ausländisches and internationales Privatrecht* 351-359, at 354.

behaviour cannot be captured merely by reference to the expression of preferences tested in different settings is being pointed out by psychologists who argue that *critical cultural psychology* is far more inclusive than *cross-cultural psychology*.<sup>27</sup> Just as adopting the lenses of one's own jurisdiction to view the laws of another jurisdiction renders the process of comparison irrelevant, so does reliance on the parameters of a social science<sup>28</sup> restrict any effort to appreciate the context of law in a meaningful fashion.

Similarly, in Nuno Garoupa and Tom Ginsburg's text on 'Economic analysis and Comparative Law' economic analysis of law as a method is restricted to '(i) a positive question concerning the impact of laws and regulations on the behaviour of individuals and the implications of social welfare; and (ii) a normative question concerning the relative advantages of laws in terms of efficiency and social welfare.'<sup>29</sup> This is definitely a clear articulation of the prevailing basis of most law and economics scholarship, which allows law to be subsumed under the explanatory power of economics. However, there is potential for the relationship between economic analysis and comparative law to be more receptive of other disciplines and less visible trends within economics. Theoretical and empirical trends in sub-fields of economics such as institutional economics and socio-economics have for example interrogated the relationship between legal transplants and the power of elites,<sup>30</sup> how welfare can be conceptualised without placing reliance on conventional efficiency considerations,<sup>31</sup> or how social arrangements and rent-seeking collective behaviour<sup>32</sup> may influence the way seemingly equivalent legal relations are structured.<sup>33</sup>

Garoupa and Ginsburg's plea to strengthen the relationship between law and macroeconomics<sup>34</sup> as a step forward is indeed mindful of the potential of strands of economics that so far have been neglected by the Law & Economics movement. It is still not clear what this means for comparative law, or what justifies privileging one strand of economics over another. Perhaps the way forward is to take the analysis by Garoupa and Ginsburg as a starting point and take a step back. In their contribution, the microeconomic basis of legal rules is described by identifying its prevalence in torts, contracts, property and other areas of legal practice. Based on this analysis we may now ask how

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<sup>27</sup> Pointing out the limits of variation in really understanding culture, Joan Miller directs us to cultural practices in identifying categories of emotion when she provides the example of the Minangkabau of West Sumatra. The Minangkabau show the same patterns of autonomous nervous system arousal as Americans do when asked to pose facial expressions linked to happiness, sadness etc. but are less likely to interpret this arousal in emotional terms without the meaningful involvement of another person. Joan Miller, 'Cultural Psychology: Implications for basic psychological theory' (1999) 10(2) *Psychological Science* 85.

<sup>28</sup> Martin Kusch, for instance, interrogates epistemic tensions in psychology following a social-historical approach. Martin Kusch, *Psychological Knowledge: A social history and philosophy* (London: Routledge, 1999). Reviewing the applicability of Kusch's approach for comparative law scholarship requires an intimate study and is beyond the scope of this essay, but the endeavour to understand determinants and structures that mediate and moderate social-science knowledge appears to be a preferable line of inquiry than endorsing the scientism of particular methods or sub-disciplines.

<sup>29</sup> Nuno Garoupa and Tom Ginsburg, 'Economic Analysis of Comparative Law' in *The Cambridge Companion*, p. 57.

<sup>30</sup> Alan Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2001).

<sup>31</sup> Amartya Sen's work is instructive in this regard, but he has been better received by philosophers of law rather than Law & Economics scholars.

<sup>32</sup> Sophie Harnay and Alain Marciano, 'Seeking Rents through Class Actions and Legislative Lobbying: A comparison' (2011) 32 *European Journal of Law and Economics* 293.

<sup>33</sup> The utility of such scholarship – drawing on the work of political scientists concerned with economic issues such as Elinor Ostrom – in re-evaluating the application of economic analysis to legal questions has started to influence scholars of European law. Josephine A. W. van Zeben, 'Research Agenda for a Polycentric European Union,' Indian University Maurer School of Law Working Paper 2013, Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2261006](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261006).

<sup>34</sup> Garoupa and Ginsburg, *supra*, pp. 70-71.

microeconomics attained the status of epistemic authority. If we take property for example, the stalwarts of Law & Economics such as Ronald Coase and Hernando de Soto rely on the centrality of property rights to legal relations. While Coase showed how an economic analysis of property rights points to an alternative to the uncertainty of conflicting rulings at different points in time in the common law system,<sup>35</sup> de Soto studied the costs of obtaining and enforcing property rights as a primary barrier to development in Latin America, concentrating on Peru.<sup>36</sup> In addition to its appearance in different jurisdictions and across different contexts, the universal appeal of the centrality of property rights derives from the explanatory power of property rights with regard to the arrangement of social relations, which cuts across societies and epistemologies. Notable in this regard is Harold Demsetz's famous study on the organising potential of property rights across space and time, as he considers anthropological evidence on social recognition of rights of action.<sup>37</sup> To appreciate the authority and reproduction of such iconic studies, what is crucial is assessing the *comparative instrumentality* of the economic analysis of property rights in explaining the operation of law in different contexts, and its superiority over approaches offered by other disciplines, or sub-disciplines within economics.

Another way of identifying epistemic authority is through economics itself – economic analysis may offer an empirical method of determining the privilege accorded to Law & Economics, for example by identifying the incentives that motivate the construction of interdisciplinarity by the legal publishing industry.<sup>38</sup> Once privilege – or ‘credibility excess’ of some sub-disciplines and ‘credibility deficit’ of others – has been identified, then it is possible to assess whether institutional economics or socio-economics offer contrasting perspectives on the same issues<sup>39</sup> and societies under scrutiny. The motivation behind identifying privilege lies in the fact that the prevailing practice for a legal scholar (or a practitioner, or even lawmakers such as regulators and judges) is to consult the top peer-reviewed journals in a field.<sup>40</sup> However, the best journals within a certain discipline privilege some intra-disciplinary trends, and some interdisciplinary influences over others.<sup>41</sup>

In addition to the politics of intra-disciplinarity (and indirect privileging of some interdisciplinary interactions), another question is why legal scholarship should rely on the explanatory power of a particular discipline at the cost of others? Is there a credibility excess of some disciplines? Roger Cotterrell observes that he prefers sociology over other disciplines as it allows for a systematic and empirical approach to legal questions without compromising self-reflexivity. Further, his emphasis is on interpretation: ‘...the enterprise of sociological interpretation of legal ideas is not a desirable supplement but an essential means of legal understanding.’<sup>42</sup> The reflexivity accorded by sociology may lead to the relaxation of the internal authority of disciplinary attachment. However, in response to Cotterrell, David Nelken argues that disciplinary attachment is inevitable even in the case of

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<sup>35</sup> Ronald Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1990).

<sup>36</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

<sup>37</sup> Harold Demsetz, ‘Towards a Theory of Property Rights’ (1967) 47 *American Economic Review* 347.

<sup>38</sup> Oren Gazal-Ayal, ‘Economic Analysis of “Law and Economics”’ (2007) *Capital University Law Review* 787.

<sup>39</sup> It is unclear, for instance, how the property rights paradigm takes into account the bargaining power of the parties who negotiate property rights. For this purpose, reference can be made to ethnographic and anthropological studies that concentrate on this question. See for instance, Robert C. Ellickson, *Order Without Law: How neighbors settle disputes* (Harvard, Massachusetts: Harvard university Press, 1994); William Cronon, *Changes in the Land: Indians, colonists and the ecology of New England* (New York: Hill & Wang, 1983).

<sup>40</sup> See Cass R. Sunstein, ‘From Technocrat to Democrat’ (2014) Harvard Public Law Working Paper No. 14-10.

<sup>41</sup> See Rik Pieters and Hans Baumgartner, ‘Who Talks to Whom? Intra- and Interdisciplinary Communication of Economics Journals’ (2002) 40:2 *Journal of Economic Literature* 483.

<sup>42</sup> Roger Cotterrell, ‘Why Must Legal Ideas be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171.

sociology, as ‘it is not so easy to become un-disciplined.’<sup>43</sup> While agreeing with Nelken, I suggest that the sociological imagination could be construed to be especially helpful for comparative law owing to its concentration on the identification of the power structures that constitute the internal authority of law, and identify alternative forms of authority. However, there is no justification for privileging sociology over other disciplines<sup>44</sup> that seek to study power relations and the politics of representation in any of its manifestations, be it textual or otherwise. This seemingly infinite epistemic space does put comparative law in a difficult spot, as there appears not to be the ‘middle ground’ that Adams and Bomhoff endeavour to identify. Having said that, the *knowledge structures* and *social community* that constitute the discipline of comparative law could concentrate on identifying normative authority as an organising principle.

The epistemic authority attached to social science disciplines to understand legal arguments can be considered to be an American feature where, unlike in Europe, legal scholars are often trained in a particular discipline other than law.<sup>45</sup> The method of asserting epistemic authority by European legal scholars appears to be allegiance to the language of a legal system and ‘practitioner-speak’ to understand facets of the law other than doctrinal law.

Koen Lemmens in his contribution argues that ‘the methodology of comparative law is very similar to that (if any) which lawyers apply in their own legal system.’<sup>46</sup> This argument is buttressed by his endeavour to ‘explain how positive results can have been obtained’ from legal comparison and to allow ‘students to deal with comparative law in their course papers.’ Referring to Pierre Legrand, Lemmens observes that comparatists need to ‘have a profound and intimate knowledge of the culture of the legal system.’<sup>47</sup> As to how this is to be achieved, Lemmens identifies ‘foreign language competence’ as an essential signifier of ‘the cultural dimension’: ‘Understanding a foreign culture, not to mention developing the foreign *mentalité* presupposes mastery of the foreign language at C2 level (the highest non-native language proficiency described in the Common European Framework for Reference of Languages).’<sup>48</sup> He laments that this difficult task has not been embraced by the comparative legal community who prefer ‘Globalish’ even though a good deal of law and the legal scholars he prefers have not been translated.<sup>49</sup> Arguing that comparative legal research needs to remain achievable, Lemmens reflects on his own PhD research where he felt most comfortable with ‘those legal systems and culture he knew intimately,’ he used American, German, Spanish and Italian law as ‘obiter dicta’ to ‘sustain the argument’ on Belgian press law.<sup>50</sup> He identifies ‘enquiry’ as one of the two crucial elements (with ‘communication’ being the other) of comparative legal methodology. According to Lemmens, enquiry refers to finding ‘relevant information’ where the ‘imminent danger

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<sup>43</sup> David Nelken, ‘Blinding Insights? The limits of a reflexive sociology of law’ (1998) 25:3 *Journal of Law and Society* 412.

<sup>44</sup> Without going into the preference for some sociological methods over others, the limits of sociological theory in understanding legal phenomena can be found in accounts of how social legitimacy drawing on a Weberian tradition has limited evaluative power for legal issues. Alan Hyde, ‘The Concept of Legitimation in the Sociology of Law’ (1983) *Wisconsin Law Review* 379. The assessment of moral legitimacy has been used to complement social legitimacy for considering the legitimacy of constitutional decisions. Richard Fallon Jr., ‘Legitimacy and the Constitution’ (2005) 118 *Harvard Law Review* 1787.

<sup>45</sup> Rob van Gesteel and Hans Micklitz, ‘Revitalising Doctrinal Legal Research in Europe. What about Methodology?’, in Ulla Neergaard et al. (eds.), *European Legal Method. Paradoxes and Revitalisation* (Copenhagen: Djoeff Publishing, 2011), p. 25-73.

<sup>46</sup> Koen Lemmens, ‘Comparative Law as an Act of Modesty: A pragmatic and realistic approach to comparative legal scholarship’ in *Practice and Theory*, p. 304.

<sup>47</sup> *Ibid.*, p. 307-308.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, pp. 309-310.

<sup>50</sup> *Ibid.*

today is that we choose the path of least resistance and that easily accessible information in English overshadows or indeed pushes out all other information.’<sup>51</sup>

I set out Lemmens’ arguments in some detail to explain why comparative legal studies should not be considered to be a variant of the practice of law. The approach adopted by Lemmens is to ‘modestly’ refer to several jurisdictions, the importance of different languages, the importance of culture, scholars such as Legrand, and then proceed to subsume all into an internal point of view. As he tells us, the utility of different legal orders in his PhD research was to refer to them as *obiter*, and then proceed with his own *ratio* integral to Belgian law, the ‘culture’ with which he was intimately associated. The key to being intimately associated with a legal culture appears to be competence in a language. He warns us that Globalish obstructs legal enquiry, and that knowledge of other languages would provide us access to foreign scholarship and laws. French is clearly important. There are quotes, references and usage of French phrases in his text which require knowledge on part of the reader. While lamenting the spread of Globalish in the comparative legal community, the use of French is accepted and even encouraged.<sup>52</sup> Yet, to my knowledge Legrand has not argued that language proficiency is required to understand a culture. On the contrary, Legrand argues that ‘what informants find difficult to verbalise is more important, more fundamental, in the cultural organisation of ideas than what they can verbalise.’<sup>53</sup> The concept of *mentalité* in Legrand’s framework is neither ‘foreign’ nor dependent on a particular language as it is the ‘outcome of...unconscious aspirations or expectations.’ For Legrand, psychoanalysis and social theory are better languages for understanding *mentalité* than English or French.

Other scholars provide a more nuanced account than Lemmens of the relationship between language and comparative law. Barbara Pozzo in her contribution to the *Cambridge Companion* identifies what in law can be translated, and what cannot, as well as how a national legal language is constructed.<sup>54</sup> Anne Lise Kjær describes legal language as an interaction between practice, discourse and text,<sup>55</sup> pointing to the utility of discourse analysis, which is not confined to the socialisation into a particular language (at ‘C2 level’ or otherwise).

Lemmens clearly has a point in that such nuance may not be feasible for the legal practice and law students, but this is precisely why comparative legal studies should not be tied to the incentives and institutional demands of national legal practice and conventional legal education. His ‘modest’ reduction or redefinition of comparative theory and methods to satisfy the alleged purpose of finding a ‘middle ground’ is an exercise in rendering comparison impossible and instrumental in perpetuating a ‘cultural’ national lawyerly self. This is precisely why scholars such as William Twining seek to adopt a critical stance towards their own scholarship of a legal field tied to a particular legal tradition when they engage with questions regarding comparison or normative pluralism.<sup>56</sup>

I do not view Lemmens’ method of engagement as a problem if a scholar seeks to situate his work within the discourse of a specific community<sup>57</sup> or to assist with a certain way of practising law. Yet, to

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<sup>51</sup> Ibid, pp. 313-314.

<sup>52</sup> Ibid, p. 308.

<sup>53</sup> Pierre Legrand, ‘Comparative Legal Studies and the Matter of Authenticity’ (2006) 1 *Journal of Comparative Law* 365, p. 376.

<sup>54</sup> Barbara Pozzo, ‘Comparative Law and Language’ in *Cambridge Companion*, pp. 88-113.

<sup>55</sup> Anne Lise Kjær, ‘A Common Legal Language in Europe?’ in Mark van Hoecke ed. *Epistemology and Methodology of Comparative Law* (Portland: Hart Publishing, 2004), pp. 377-398.

<sup>56</sup> See William Twining, ‘Normative and Legal Pluralism: A global perspective’ (2009) 20 *Duke Journal of Comparative and International Law* 473.

<sup>57</sup> Or a ‘tribe’ of scholars as Balkin would put it. Jack Balkin, ‘The Proliferation of Legal Truth’ (2003) 26 *Harvard Journal of Law and Public Policy* 5.

derive insights for the field of comparative law it would be a misleading exercise, as comparison requires a relaxation of the internal authority of a legal system, and its perpetuation by agents wedded to such authority.

### **Privileging Hermeneutic Authority in Interpretation**

I have tried to show above that the identification, definition and application of other disciplines inevitably result in epistemic privileging, which prompts the suggestion for an expansive epistemic space premised on the identification of authority. It may be asked, given this broad mandate, whether comparative law is useful at all for the purpose of legal interpretation or decision-making, which necessarily entails some amount of reductionism in order to make a hermeneutic choice.

Indeed, the exercise of comparison may unsettle our understanding of what constitutes law and why some institutions, actors or ways of reasoning are attributed normative authority. There appears to be no reason why comparative legal scholarship should be turned to for guidance on legal interpretation or decision-making; on the contrary, in contrast with the practise of law and forms of legal scholarship that are parasitic upon practice or are tethered to specific disciplines, the academic capital of comparative legal scholarship could build upon the interpretive de-privileging of epistemic and hermeneutic internality.

Geoffrey Samuel argues that if the epistemology of comparative law is to be rendered free of ideology, then it is necessary to move into an era beyond the hermeneutic: 'For every definition of law there is an alternative. For every theory of harmonisation there is an opposed alternative. And for every identified and asserted comparative law method there is always an alternative. The present epistemological stage cannot, therefore be labelled hermeneutical since, thanks to social science theory, there is always an alternative scheme of intelligibility.'<sup>58</sup> The practice of law and legal scholarship necessarily has to privilege some of these alternatives in making an argument, or developing a normative understanding, and has to therefore limit an epistemology of infinite comparison. It is tempting therefore to agree with Jan Smits that 'comparative analysis as such can never inform us about which rule or outcome to adopt...this requires a policy decision.'<sup>59</sup> Having said that, I shall seek to demonstrate in this section that comparative law does have a role to play in the decision-making process as well; this role presents itself due to the need to interrogate the use of hermeneutic authority in the process of interpretation. The argument goes that if comparative analysis has to defer to institutional decisions, then it may appear that there is no comparative *law* as such but only an indulgent body of scholarship,<sup>60</sup> which may explain why comparative law is confined to being only of persuasive value in legal decision-making. Given this difficulty, it could be argued that legal decision-making should rely on analytical methods without resorting to interdisciplinarity. That concentration, therefore, should be on methods internal to law. This line of reasoning motivates Michael Forster's critique of Brian Leiter's view that law is not a science.<sup>61</sup> Forster argues that law *does* have an internal logic of its own; it *is* a science, just not like other sciences such as natural or social sciences, but *an evaluative* science. The method that can be identified is an evaluative reasoning process. The centrality of evaluative reasoning clearly holds good for legal practitioners and scholars

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<sup>58</sup> Geoffrey Samuel, 'Epistemology and Comparative Law' in Mark van Hoecke ed. *Epistemology and Methodology of Comparative Law* (Portland: Hart Publishing, 2004), pp. 35-78, at 76.

<sup>59</sup> Jan Smits, 'Rethinking Methods in European Private Law' in *Practice and Theory*, p. 185.

<sup>60</sup> As Hendry observes, the comparatist's view that law is 'an outrageous and heterogeneous collage is an insightful, but perhaps not particularly useful one.' Jennifer Hendry, 'Contemporary Comparative Law: Between Theory and Practice: Review of Esin Örüçü & David Nelken's *Comparative Law: A Handbook*' (2008) 9 *German Law Journal* 2253.

<sup>61</sup> Michael Ishi Forster, 'Scepticism about scepticism: A defence of legal objectivity' (2009) 15 *UCL Jurisprudence Review* 1.



who reason instrumentally, in pursuit of an objective, or to make a particular point. The difficulty arises when Forster attempts to elaborate what this process is. His only answer is “Just as right answers in the legal realm are the product of everyday argumentation, right moral answers can be the product of ordinary argument.”<sup>62</sup> He does not explain what an ‘ordinary argument’ is, or on what basis ‘everyday argumentation’ can be assessed; not every ‘ordinary’ person is considered capable of providing ‘right answers in the legal realm.’

Forster implicitly endorses H.L.A. Hart’s view that a legal actor’s claim to authority (as against the common man) is her ‘sharpened awareness’. In Hart’s framework, the existence of primary rules as a property of law is not a property independent of their operation by officials.<sup>63</sup> While it could be (albeit problematically) argued that primary rules (such as constitutions) precede their operation, the intelligibility of primary rules is restricted to the internal actors of law who operationalise them. Interestingly, this aspect of internality spills onto legal scholarship as well. Per Hart’s view what distinguishes a legal scholar from a common man is that she has a ‘sharpened awareness’<sup>64</sup> of folk behaviour. This sharpened awareness allows her to reach a privileged understanding of behaviour, which in turn allows a privileged normative utterance. Undoubtedly, lawyers and legal scholars need to think and act on behalf of others while they are left to their own devices, to help negotiate their preferred worldview and preferences. This does not, however, justify why the conducting of such negotiation should be intelligible only to those who have the authority to do so, especially when such authority is legitimised by an awareness of folk behaviour. The collapsing of justification into authority is found in Ronald Dworkin’s work as well: though Dworkin is often pitted against Hart for his understanding of interpretation as being central to law, he too attributes the exclusive right of interpretation to internal actors.<sup>65</sup> As I try to show below, reliance on the ‘sharpened awareness’ of legal actors could lead to a self-legitimising discourse by institutional or scholarly elites.

Recently, the Supreme Court of India in *Suresh Kumar Koushal v. Naz Foundation*<sup>66</sup> reversed a Delhi High Court judgement<sup>67</sup> re-affirming the constitutionality of criminalising ‘carnal intercourse against the order of nature’ between consenting adults under Section 377 of the Indian Penal Code. While there has been a flurry of literature against this judgement, there hasn’t been much interrogation of the discourse on ‘foreign law’ and ‘culture’ or contingent national particulars the Supreme Court uses to justify its decision.<sup>68</sup> Using its attitude towards foreign law as a point of departure from the high court, the Supreme Court opined that ‘in its anxiety to protect the so-called rights of LGBT [lesbian, gay, bisexual and transgender] persons, the High Court extensively relied upon the judgements of other jurisdictions’ in a ‘blindfolded’ manner to decide the ‘constitutionality of the law enacted by the Indian legislature’.<sup>69</sup> It could be argued that the Supreme Court is making a clear choice regarding the scope of judicial review in privileging legislative will over foreign law in deciding upon

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<sup>62</sup> Ibid, p. 6.

<sup>63</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford university Press, 2<sup>nd</sup> edition, 1994).

<sup>64</sup> Ibid, Preface, vi.

<sup>65</sup> Roger Cotterell, ‘Liberalism’s Empire; Reflections on Ronald Dworkin’s Legal Philosophy’ (1987) 2&3 *American Bar Foundation Research Journal* 509. See also the exchange between Ronald Dworkin and Michael Walzer, primarily Walzer’s response to Dworkin regarding the difficulty of subjecting normative pluralism to Dworkin’s characterisation of legal actors (primarily judges) as ‘Hercules’. Michael Walzer, ‘Spheres of Justice: An exchange’ (with reply by Ronald Dworkin), *New York Review of Books*, July 21, 1983.

<sup>66</sup> *Suresh Kumar Kaushal v. Naz Foundation* [2014] 1 Supreme Court Cases 1.

<sup>67</sup> *Naz Foundation v. Union of India* [2009] 160 Delhi Law Times 277.

<sup>68</sup> But see Madhav Khosla, ‘The Courtly Way- it must be asked if equality is possible here,’ *The Telegraph*, Tuesday, December 17, 2013. See also See Arun K. Thiruvengadam, ‘Forswearing “Foreign Moods, Fads or Fashions”?’ (2014) 7 *NUJS Law Review* (forthcoming; available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2465370&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465370&download=yes)).

<sup>69</sup> *Suresh Kumar Kaushal v. Naz Foundation*, *supra*, paragraph 52.

constitutionality. Drawing on Frankenberg's survey of theories of constitutionalism,<sup>70</sup> this is a difficult position to grasp as constitutional law could be argued to operate in a separate 'sphere of justice'<sup>71</sup> as compared to other national laws.

Specifically in relation to Indian constitutional history, the Supreme Court has been selectively activist, and has often found constructive ways of working against legislative *Diktat*. This is evident in the judicial broadening of standing in constitutional matters through public interest litigation, or the unique creation of a constitutional basic structure that is immune to legislative amendment.<sup>72</sup> In *Suresh Kumar Koushal*, the Court proclaimed that it did not defer to legislative will 'blindfolded', but justified such decision based on its understanding of national contingent factors that influence LGBT rights. Its sociological/anthropological/cultural understanding of non-discrimination is as follows: 'a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in more than 150 years less than 200 persons have been prosecuted (as per the reported orders).'<sup>73</sup> This leads the Court to the conclusion that they have not been discriminated against. It could be argued that rights are not contingent upon an assessment of cultural particulars, but such an argument might betray an adherence to the rights-based discourse of the liberal Western legal tradition. But it could be asked, on what basis are contingent specifics assessed? It appears that the number of people affected informs the Court's understanding of the LGBT community, which in turn informs the assessment of discrimination. Thus, while the Court is suspicious of universalist discourse, it is confident of its particularist discourse; or, an internal 'model' is preferred to a universalist 'muddle'.<sup>74</sup> Sujit Choudhry's chapter<sup>75</sup> in *Comparative Constitutionalism in South Asia*, written prior to the Supreme Court judgement, analyses the Delhi High Court judgement. The chapter is an important contribution to the book as Indian constitutional law is frequently "borrowed" by other countries in South Asia, as the chapters on constitutional identity in Sri Lanka,<sup>76</sup> Bangladesh,<sup>77</sup> Bhutan,<sup>78</sup> Nepal<sup>79</sup> and Pakistan<sup>80</sup> suggest. Choudhry argues that the High Court's reasoning followed 'dialogical interpretation', which is preferable to both 'universalist' and 'particularist' interpretation. Choudhry offers dialogical interpretation as a way of maintaining a 'distinct constitutional identity' without lapsing into cultural nationalism.<sup>81</sup> Unfortunately, the way such dialogical interpretation is done by legal actors is determined by pre-determined internal notions of the universal and the particular, and in

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<sup>70</sup> Gunter Frankenberg, 'Comparative Constitutional Law' in *Cambridge Companion*

<sup>71</sup> I borrow this term from Walzer. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Oxford University Press, 1983).

<sup>72</sup> See Gary J. Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia: India, Sri Lanka and secular constitutional identity' in *Comparative Constitutionalism*, pp. 180-218.

<sup>73</sup> *Suresh Kumar Kaushal v. Naz Foundation*, *supra*, paragraph 43.

<sup>74</sup> This rhetorical tool is common among scholars who invoke a one-sided critique to support a particular policy instrument. See Edwin Woerdman, 'What is the role of cap-and-trade schemes in reducing CO2 and other greenhouse gas emissions?' *Comment Vision*, February 7, 2013; See also Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1997).

<sup>75</sup> Sujit Choudhry, 'How to do Comparative Constitutionalism in India: *Naz Foundation*, same-sex rights and dialogical interpretation' in *Comparative Constitutionalism*, pp. 45-85.

<sup>76</sup> Gary J. Jacobsohn and Shylashri Shankar, 'Constitutional Borrowing in South Asia', *supra*.

<sup>77</sup> Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh', in *Comparative Constitutionalism*, pp. 303-340.

<sup>78</sup> Richard W. Whitecross, 'Separating Religion and Politics? Buddhism and the Bhutanese Constitution' in *Comparative Constitutionalism*, pp. 116-144.

<sup>79</sup> Mara Malagodi, 'Constitutional Developments in a Himalayan Kingdom: The Experience of Nepal', in *Comparative Constitutionalism in South Asia*, pp. 86-115.

<sup>80</sup> John H. Mansfield, 'Religious Freedom in India and Pakistan: The matter of conversion' in *Comparative Constitutionalism*, pp. 303-340.

<sup>81</sup> Sujit Choudhury, *supra*, pp. 46-57

service of affirming ‘a distinct constitutional identity’.<sup>82</sup> When the Supreme Court chooses to selectively use and interpret ‘foreign’ cases and finds them wanting, it could be claimed that such result is achieved by employing dialogical interpretation as well, and while affirming India’s constitutional identity. Interpreting and adjudicating cases instrumentally to preserve a constitutional identity is problematic; such identity is a fiction, subject to political abuse and should be amenable to change.<sup>83</sup> As Weiler remarked in relation to the identification of Member State identity in the EU, “defending the constitutional identity of the state and its core values turns out in many cases to a defence of some hermeneutic foible adopted by five judges voting against four.”<sup>84</sup>

The difficulty, I argue, is to leave the ‘particularist’ identity or cultural perspective relatively unexamined while universalism is subjected to critical scrutiny. Choudhry voices the concern that the universalist perspective may ignore ‘cultural relativism, which holds that moral and political values are not universal but tightly connected to particular cultural contexts.’<sup>85</sup> In his view, the High Court paid heed to the ‘particular cultural context’ of India by drawing an analogy between untouchability and sexual orientation.<sup>86</sup> However, such analogies to ‘particular cultural contexts’ can easily play out the other way with the consequence that “unnatural sexual acts” are considered to be irreconcilable with Indian culture as demonstrated by the subsequent Supreme Court decision. It would be important to critically question the identification of ‘national identity’ or ‘constitutional identity’ with a ‘particular cultural context’. The process of identifying what constitutes culture is amenable to self-legitimation, and the tools of interpretation employed seem to support, rather than guard against such self-legitimation.

Given that both Choudhry and Indian judges refer to ‘foreign’ judgements, avoiding the distinction between national identity and foreign law might have allowed consideration of the internal tools of interpretation usually employed by different legal orders. For instance, though the Indian Supreme Court has considered the substance of judgements by the European Court of Human Rights (ECtHR),<sup>87</sup> it has never attempted to consider the merits of the principles and tools of interpretation that have been employed, even with respect to the criminalisation of sodomy<sup>88</sup>: evolutionary interpretation, the principle of effectiveness and teleological interpretation.<sup>89</sup> In fact, critique<sup>90</sup> of the Supreme Court judgement suggests that *evolutionary interpretation* might have allowed a form of reasoning which acknowledges that law needs to be interpreted differently as times change and ‘intercourse against the order of nature’ may not have the same social understanding as it did when the Indian Penal Code was

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<sup>82</sup> Sujit Choudhry, *supra*, p. 48.

<sup>83</sup> The identification and perpetuation of a constitutional identity is amenable to be used by political authorities to compromise citizens’ dignity and equality. Dimitry Kochenov, ‘Citizenship Without Respect: The EU’s troubled equality ideal,’ *Jean Monnet Working Paper* 08/10, 2011.

<sup>84</sup> J.H.H. Weiler, ‘Federalism and Constitutionalism: Europe’s *Sonderweg*’: in in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford: Oxford University Press, 2001), p. 65.

<sup>85</sup> Sujit Choudhry, *supra*, p. 83.

<sup>86</sup> *Ibid.*

<sup>87</sup> For a review, see Valentina Rita Scotti, ‘India: A critical use of foreign precedents in constitutional adjudication’ in Tania Groppi and Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013), pp. 69–96.

<sup>88</sup> *Dudgeon v United Kingdom* 4 EHRR (1982) 149.

<sup>89</sup> Shai Dothan, ‘Judicial Tactics in the European Court of Human Rights’ (2011) *University of Chicago Public Law & Legal Theory Working Paper* No. 358.

<sup>90</sup> See Danish Sheikh and Siddharth Narain, ‘Struggling for Reason: Fundamental rights and wrongs of the Supreme Court’, *Economic and Political Weekly*, Vol. XLVIII, No. 52, December 28, 2013.

drafted in 1860.<sup>91</sup> *Effectiveness* conventionally understood as the *effet utile* doctrine may be a tool specific to the interpretation of treaties in the European legal order.<sup>92</sup> However, given that recent cases demonstrate a shift towards a dynamic ‘living interpretation’ approach,<sup>93</sup> the effectiveness of a legal provision implies an hermeneutic openness to changes in ethical and moral standards in favour of interpretively expanding substantive rights integral to ‘human values and dignity.’<sup>94</sup> While the High Court took into account the effect that criminalising of homosexuality had in enhancing the vulnerability of the LGBT community with regard to custodial torture and violence, discrimination in different walks of life, and public health (as criminalisation increases the incidence of AIDS), the Supreme Court ignored the effectiveness of this law in relation to the enhancement of human dignity.<sup>95</sup> A *teleological interpretation* may have taken into account the role of public interest litigation as part of the Indian constitutional *telos*.<sup>96</sup> Through judicial creativity, public interest litigation has been recognised as a tool of collective action to contest structural social ills that are not arrested in individual rights-based litigation; this aspect was also not considered.

*Suresh Kumar Koushal* does not consider ECtHR cases, but the method of reasoning adopted appears to be remarkably similar<sup>97</sup> to Justice Scalia’s dissent in *Lawrence v. Texas*.<sup>98</sup> Explicitly addressing the thicker<sup>99</sup> similarities and dissimilarities with cases from other jurisdictions may explain the nature of the influence and relevance of ‘foreign’ judgements. Admittedly, the political nature of the European legal order may define the parameters of its pluralistic constitutionalism, but surely the identification and representation of concerns regarding the LGBT community within a legal framework is not an exclusively European or Indian privilege. To clarify, I do not advocate transplanting the reasoning of the ECtHR upon Indian constitutional interpretation, but merely that the parameters of comparison need not be restricted to a pre-defined internal constitutional identity and a foreign ‘other’ which is viewed through the lenses of a static normative ‘self’.

Unfortunately, the approach of several chapters in *Comparative Constitutionalism in South Asia* is to attribute a coherent identity to a geographical or State entity. The need to interrogate geographical demarcations in determining the contours of comparative legal scholarship becomes clear from Teemu

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<sup>91</sup> The Supreme Court did not accept the Delhi High Court argument that there is no ‘presumption of constitutionality of a colonial legislation.’ *Naz Foundation*, para 105.

<sup>92</sup> This is the sense used in some of the earlier scholarship on effectiveness. See for instance Nial Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1993) 20 *Fordham Journal of International Law* 656.

<sup>93</sup> “It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.” *Scoppola v. Italy (no. 2)*, Grand Chamber, no. 10249/03, para. 104, 17 September 2009.

<sup>94</sup> For a review, see Daniel Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty *Sui Generis*’ (2009) 79 *Nordic Journal of International Law* 245.

<sup>95</sup> Danish Sheikh and Siddharth Narain, ‘Struggling for Reason’, *supra*, p. 16.

<sup>96</sup> The meta-teleological nature of constitutional interpretation as a reflection of its constitutional *telos* is discussed in Miguel Poiaras Maduro, ‘Interpreting European Law: Judicial adjudication in the context of constitutional pluralism’ (2007) 2 *European Journal of Legal Studies* 1.

<sup>97</sup> See Arun K. Thiruvengadam, ‘Forfeiting “Foreign Moods, Fads or Fashions”?’ *supra*, p. 14.

<sup>98</sup> *Lawrence v. Texas* 123 S Ct 2472 (2003) is the Supreme Court of the United States’ judgement holding a Texas anti-sodomy law as a violation of the right to privacy and the Equal Protection Clause of the Fourteenth Amendment.

<sup>99</sup> To take one example of a thicker understanding of interpretation specifically in relation to the comparability of *Dudgeon* and *Lawrence*, Legrand writes: “...Lawrence had to do with substantive due process, rational-basis review, fundamental rights, strict-scrutiny review, and judicial deference for statutes while Dudgeon concerned privacy, necessity, pressing social need, proportionality and Europeanisation.” Pierre Legrand, ‘On the Singularity of Law’ (2006) 47 *Harvard International Law Journal* 517, 519.

Ruskola's contribution<sup>100</sup> in the *Cambridge Companion*. He is apologizes for embarking on a summary of the East Asian legal tradition, and interrogating the usually assumed meanings as to what constitutes East Asia and 'legal tradition'; he clarifies that his analysis is limited to the 'classical legal tradition' described as 'the sphere of influence of Chinese culture'<sup>101</sup> that shapes the way in which 'East Asia' is viewed. In the introduction to *Comparative Constitutionalism in South Asia*, the editors observe that South Asian nations are 'illegitimate children' of the Anglo-American legal tradition. They indicate that such path-dependence may be affected by the fact that 'most South Asian law faculties and political science departments face a shortage of funds and resources...many scholars perceive little recognition or incentive in surveying regional developments.'<sup>102</sup> Perhaps the answer as to why using social-science scholarship (as is popular in American legal studies) or appreciating the role of language in legal discourse (as is popular in Europe) in understanding law lies here – there are few incentives to question and provide alternative accounts of legal discourse and the practice of legal actors, or even limited incentives for researching legal issues within the sciences, humanities and social sciences.<sup>103</sup>

Earlier on in the paper, I argued that the identification of authority could be the organising principle for comparative law. However, in the above discussion, I sought to demonstrate that there is a meaningful role for comparative analysis in the hermeneutic space of legal decision-making; the identification of authority is an incomplete ontology – the implicit task is *identifying the justification behind the construction and exercise of authority*. Going back to the basic concern of most comparative legal scholars of how laws of foreign countries can be meaningfully appreciated and transplanted, the focus of comparative law should be to work towards a method of providing alternatives to a static internal legal identity. It seems unusual, therefore, for the volumes under review to not address this concern.

### **De-privileging authority as a functional end of comparative law scholarship?**

In the previous sections, I have tried to demonstrate that comparative analysis allows for the justification and questioning of privilege in interpretive acts by internal actors. Thus, though pre-determined privileged methods of inquiry and reflecting about practice does violence to this purpose of comparative analysis, interrogation of such privilege could enhance the utility of comparative law. While law, legal scholarship, social science scholarship (as well as other disciplines such as philosophy) are bound to their own ideologies and politics of internality, it is not necessary for comparative law scholarship to follow in the same path. It should rather fashion itself as a discipline external to other disciplines including law, but interested nonetheless in legal questions.

Thus conceptualised, integral to the practice of comparative analysis is the de-privileging of the internality derived from epistemic and hermeneutic authority. Such de-privileging leads us first to examine the way a certain discourse is privileged over others, to identify the institutional informants of such discourse, as well as the incentives of legal practice and scholarship integral to the representation and advocacy of internal authority. This process of interrogation would inform the way questions are asked as well as how methods are chosen from different disciplines. As internal epistemic authority may rely on a particular science or discipline, it would be essential to understand the basis of such

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<sup>100</sup> Teemu Ruskola, 'The East Asian Legal Tradition' in *The Cambridge Companion*, pp. 257-277.

<sup>101</sup> Ibid, pp. 257-258.

<sup>102</sup> Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam, Introduction: Reviving South Asian comparative constitutionalism' in *Comparative Constitutionalism*, p. 3.

<sup>103</sup> See for example Partha Chatterjee, 'Institutional Context of Social Science Research in South Asia,' *Economic and Political Weekly*, Vol. XXXVII No. 35, August 31, 2002.

authority. The trend in American jurisprudence commenced in *Daubert v. Merrell Dow Pharmaceuticals*<sup>104</sup> (and gradually being followed in several other jurisdictions) as to how scientific (including behavioural<sup>105</sup>) and ‘non-scientific’<sup>106</sup> evidence can be moderated by judges prior to its presentation to a jury illustrates how the construction of epistemic authority may be approached. Epistemic authority is a factor in identifying legal and disciplinary privilege. It should come as no surprise that the most influential figures of comparative legal studies rely on materials found in critical social theory, cultural psychology, discourse analysis, literary studies, poststructuralism, and cognate disciplines. References to Jacques Derrida by Pierre Legrand and Gunter Frankenberg may be understood as indicative of intellectual fashions, but they are also instrumental in understanding how normative identity is constructed in and through textual representation. Reliance on this line of research may not prove to be particularly useful for a practising lawyer, or legal scholarship undertaken in the service of advocacy, but as discussed earlier, they may indicate why the discipline of comparative law deserves patronage in its own right.

As argued in this essay, identifying what constitutes law, or endorsing the normativity of a discourse is an exercise in privileging by making a choice. Such privileging explicitly or implicitly involves a claim to functionality. According to Frederick Schauer, the question as to ‘why constitutions matter’ needs to be answered keeping in mind the effects of constitutional decisions.<sup>107</sup> Even scholars who claim that constitutional law should be assessed by its ‘input legitimacy’<sup>108</sup> rather than its consequences privilege the upholding of democratic participation and values as an essential feature of constitutionalism. For some of the contributions in the volumes under review, comparative law involves identifying the implicit functionality of a legal statement or decision.<sup>109</sup> Comparative legal scholars have critiqued the identification of an orthodox functional method as the yardstick against which laws need to be understood.<sup>110</sup> Such critique does not preclude them from identifying the implicit functionality of a legal decision. Thus, in Arun Thiruvengadam’s analysis of public interest litigation, the inclination of the Indian Supreme Court in the 1970s and 1980s (prior to the onset of economic liberalisation in the 1990s) to relax standing and evidence of direct injury was motivated by the desire to give voice to the ‘depressed classes’ influenced by the personal experiences of influential judges. Absent such purpose, the current trend of public interest litigation serves ‘advantaged persons’.<sup>111</sup> Public interest litigation in India thus implicitly serves a function in relation to the constitutional *telos*. Once the underlying functional purpose of an interpretation of internality is problematised, then it is possible to consider alternatives that may better satisfy the intended function

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<sup>104</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>105</sup> Henry F. Fradella, Adam Fogarty, and Lauren O’Neill, ‘The Impact of *Daubert* on the Admissibility of Behavioral Science Testimony’ (2003) 30 *Pepperdine Law Review* 3.

<sup>106</sup> The notion of ‘non-scientific expertise’ and specialised knowledge was at issue in deciding on the science of engineering in *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999).

<sup>107</sup> Frederick Schauer, ‘Comparative Constitutional Compliance: A research agenda’ in *Practice and Theory*, p. 212.

<sup>108</sup> J.H.H. Weiler, ‘60 Years since the First European Community: Reflections on Messianism’ (2011) 22 *European Journal of International Law* 303.

<sup>109</sup> Catherine Valcke identifies ‘legal functions’ as a ‘common point of entry’ into multiple legal systems. Catherine Valcke, ‘Reflections on Comparative Methodology – Getting Inside Contract Law’ in *Practice and Theory*, p. 48.

<sup>110</sup> The primary criticisms have been levelled against an ‘orthodox’ functionalism formulated in Zweigert and Kotz’s *An Introduction to Comparative Law* who claimed that law has the function of solving universal problems. While Adams and Griffiths find such a formulation ‘simplistic and unfortunate’, they agree that the idea of function makes it ‘possible to achieve some kind of comparability in rules, institutions and ...behaviour.’ Maurice Adams and John Griffiths, *supra*, pp. 283-190.

<sup>111</sup> Arun K. Thiruvengadam, ‘Revisiting The Role of the Judiciary in Plural Societies’ in *Comparative Constitutionalism*, pp. 341-369.

sought to be achieved by such interpretation.<sup>112</sup> Analysing the functionality of a legal decision, social institutions, or even the use of expert scholarship may operate as a heuristic device for appreciating the justification of authority.

In brief, comparative legal scholars appear to enjoy a valuable luxury that practitioners of law or legal scholars working in other fields of law may not have because of their internal incentive mechanisms and validation by their social community: the prerogative to identify, analyse, and if necessary, bite the epistemic hands that feed.

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<sup>112</sup> Jan Smits argues that interrogating the functions rules and institutions fulfil can guide towards understanding the relevance of such rules and institutions in a ‘post-national society’ as well as ‘forces the researcher to consider non-legal solutions’. Jan M. Smits, ‘Rethinking Methods in European Private Law’ in *Practice and Theory*, p. 185.

