Comparative law, literature and imagination: Transplanting law into works of fiction

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Abstract

This paper discusses comparative law and literature as an approach to studying law culturally, addressing how the study of literature from the standpoint of comparative law identifies one way of coding legal cultural knowledge in literature. The interaction between the worlds of law and culture is addressed through imaginary legal transplants. By transplanting legal ideas from the real world to literature, authors imagine worlds as they construct legal meanings in their storytelling. Whereas a legal transplant is a notion filled with problems and paradoxes, in literature it is far less problematic. Imaginary legal transplants are different from real-world transplants because in the real world legal diffusion takes place in mutant form, transforming transplants into irritants. The legislator never controls the world completely, whereas in fictional literature the creator of a written work controls the created world. In this sense, it is argued, imaginary legal transplants are perfect transplants.

Keywords

Comparative law, law and literature, legal transplant

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.1

1. R.M. Cover, ‘Nomos and Narrative’, 97 Harvard Law Review (1983–84), p. 4.

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1. Introduction

Comparative law demonstrates that laws, legal institutions and legal doctrines do travel regardless of obstacles erected by borders between countries, legal systems, languages and even time. Demonstrating and tracing how law travels is part of what comparative law scholarship is about. For instance, the history of Roman law teaches, if nothing else, that legal ideas travel through time and space. Importantly, the issue of transplantability of legal norms and institutions across different legal traditions is not only a thing of the past, but very much a relevant issue today as well.\(^2\)

Along similar lines, it should not come as a surprise that laws and legal ideas travel from reality into the realm of imagination, for instance into imaginary literature, although a similar phenomenon may also happen in film or theatre.\(^3\) This suggests a connection between comparative law and the study of law and literature.

At first glance, the fields of comparative law and law and literature seem to have very little in common. The deceptively distant relationship appears intuitively correct on the surface because comparative law focuses on the differences and similarities between diverse legal traditions whereas law and literature examines the relationship between law and literature.\(^4\) However, as we know: appearances may be deceptive. Both fields entertain a cultural view towards law but they do not share the same theoretical assumptions as a nationally oriented doctrinal study of law. This paper discusses comparative law and literature as an approach to the study of law culturally, addressing how the study of literature from the standpoint of comparative law may identify one way of coding legal cultural knowledge in literature. This, in turn, tells us about law as a cultural phenomenon.

The connection between comparative law and law and literature is not, however, non-existent, even though it is not well known today. Famous comparative law scholar John Henry Wigmore, who authored the massive three-volume *Panorama of the World’s Legal Systems* in the 1920s, sought to connect comparative law to the reading of poems and novels. Wigmore’s contribution to law and literature movement is acknowledged, yet this feature is not highlighted in comparative law circles.\(^5\) More recent connection between comparative law and law and literature can be found in William Ewald’s comparative jurisprudence, in which he provides insights into the use of literature for the understanding of the intellectual origins of German legal thought.\(^6\) Notwithstanding, law and literature normally plays at most a walk-on part in the comparative law scene.

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2. See, e.g. G. Mousorakis, ‘Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach’, 54 *Acta Juridica Hungarica* (2013), p. 219.

3. One can also find a comparative legal angle in cinema/film studies, see G. Samuel, ‘The Paradigm Case: Is Reasoning and Writing in Film Studies Comparable To (or With) Reasoning and Writing in Law?’, 13 *No Foundations* (2016), p. 17.

4. In fact, it is not always clear what is meant by ‘literature’. For the sake of clarity, in this paper the concept of literature refers simply to ‘the collective noun for the category of verbal art that includes poems, plays, novels, and short stories’, T. Ross, ‘Literature’, in D. Scott Kastan (ed.), *The Oxford Encyclopaedia of British Literature*, 3 vol. (Oxford University Press, 2006), p. 314.

5. See R. Weisberg, ‘Wigmore’s Legal Novels: New Resources for the Expansive Lawyer’, *Northwestern Law Review* (1976), p. 17 and R. Weisberg, ‘Wigmore and the Law and Literature Movement’, 21 *Law & Literature* (2009), p. 129.

6. W. Ewald, ‘Comparative Jurisprudence (I): What Was it Like to Try a Rat’, 143 *University Pennsylvania Law Review* (1995), p. 1889. In a key passage, Ewald notes: ‘I wish to argue that, in order to understand the rules of modern European private law, it is not enough merely to know the black-letter doctrines embodied in the civil code. One must also understand the intellectual background to those doctrines, and grasp the underlying principles that give them their
Studying law culturally opens new points of view towards basic questions about law: what is law, how does it work, how do we acquire information about it and – most importantly – how are the answers to these jurisprudential questions reflected in contemporary culture? Despite the inevitable difficulties, the very thought of cultural legal studies is rooted in the idea that the law possesses cultural power. In this sense, cultural legal studies also implies study of culture. In consequence, it is difficult to outline cultural legal studies without reflecting its relation to cultural studies in general. This brings even more difficulties because the notion of culture is notoriously challenging to define and indeed remains somewhat elusive even for those who engage in cultural studies. Moreover, legal scholarship has struggled in its attempt to define the notion of legal culture. The cultural turn in legal studies has certainly broadened the scope of research in law but it is has not provided a panacea.

By and large, cultural studies as a scholarly arena refers to an interdisciplinary field of research and teaching that delves into how culture produces and modifies the experiences of individuals in their ordinary life, social relations and society as a whole. Cultural legal studies, in turn, addresses and highlights the diverse ways in which law and culture interact and mutually enrich one another. To be sure, cultural legal studies is not a mature field and can perhaps be described as an emanation that has ‘thus far been a relatively sporadic legal movement’. More specifically, cultural studies combine many fields including communication studies, literary studies, sociology and history, to mention but a few neighbouring disciplines. Cultural legal studies seeks to amalgamate legal and cultural studies by working across the porous boundaries among these fields. Arguably, we may regard cultural studies as a field that seeks to understand certain societal phenomena – such as music, cinema, literature or photography – through which societies, communities and individuals learn to live with history, the surrounding reality and possible future events.

From the above it follows that cultural legal studies can be perceived as a rising field that seeks to understand cultural phenomena through the prism of law. This endeavour concerns an attempt to see law in culture. To simplify a great deal, cultural legal studies is essentially about studying law in cultural contexts. This means reaching outside the mainstream view of law as a normative discipline. Clearly, this kind of definition leaves a great deal open qua definition but, paradoxically, that is part of the attraction. The fact that there is something intellectually unfinished residing in the phrase ‘cultural legal studies’ makes it appealing. If cultural legal studies were a lock, stock and barrel kind of discipline, then it would arguably not be the inherently enticing

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7. R.J. Coombe, ‘Critical Cultural Legal Studies’, 10 Yale Journal of Law and the Humanities (1998), p. 479.
8. Different genealogies of the concept of culture within cultural studies, see T. Bennett, ‘Cultural Studies and the Culture Concept’, 29 Cultural Studies (2015), p. 546.
9. See, e.g. D. Nelken, ‘Using the Concept of Legal Culture’, 29 Australian Journal of Legal Philosophy (2004) p. 1 and L.M. Friedman, ‘The Place of Legal Culture in the Sociology of Law’, in M. Freeman (ed.), Law and Sociology (Oxford University Press, 2006), p. 185.
10. Introduction to the concepts, debates and research in the field of cultural studies see, e.g. B. Longhurst et al., Introducing Cultural Studies, (3rd edition, Routledge, 2016).
11. T. Giddens, ‘Book Review of Cultural Legal Studies: Law’s Popular Cultures and the Metamorphosis of Law’, in C. Sharp and M. Leiboff (eds.), Cultural Legal Studies: Law’s Popular Cultures and the Metamorphosis of Law (Routledge, 2016), p. 3.
unorthodoxy that it is. The endeavour to understand law culturally exceeds the limits of black letter law in a way that stirs our scholarly imagination.

This paper discusses comparative law and literature as an approach to studying law culturally. The focus is on analysing how the study of fiction in literature, from a comparative law standpoint, may identify and highlight a way of coding legal cultural knowledge in literature. The interaction between the worlds of law and culture is addressed through what might be coined as an imaginary legal transplant. However, this paper excludes the educational/pedagogical aspect of comparative law and literature even though combining these fields may contribute to the teaching of law. A further caveat is in order before proceeding, because of the fields covered. Numerous journals, handbooks, collections, encyclopaedias and Festschriften have been penned on both comparative law and literature. This means that one cannot aim for exhaustiveness in this paper, but merely seek to review and advance our incipient understanding of cross-cultural legal studies in the field of literature. That is to say, this paper outlines the nascent field of comparative law and literature.

2. Comparative law and literature

The focus of this paper is on comparative law and literature, which means that discussing law and literature plays a minor role for the discussion in this paper. We must first, nonetheless, acknowledge certain rudiments of law and literature before we can discuss comparative law’s relation to literature.

Outside of a core cadre of black letter legal scholars exists freedom from the mainstream. The connection between law and literature has never been part of mainstream legal studies; rules and normativity are not in the focus of law and literature. Notwithstanding, law and literature is not a novel legal discipline in the sense that its subject of study would be wholly modern even though it developed into a specialized field in the 20th century. Relatively late development does not mean, however, that study of law and literature would be limited to the modern period or the last century only. In fact, one can quite naturally study medieval customary law, read literature as law and not focus on contemporary matters alone. Accordingly, one can find openings for critical legal studies and pragmatist strategies for reading medieval texts. That is to say, the connection between law and ‘the humanities’ is certainly not a mere recent invention. Boundaries of time present no insurmountable obstacle for law and literature; besides, the same applies to comparative study of law.

Essentially, studying law and literature is – like all cultural legal studies – an interdisciplinary venture that seeks to examine the relationship between the fields of law and literature. The interdisciplinary nature can be seen clearly in how both of these fields borrow insights and tools of analysis each from the other. The ultimate justification for this kind of specialized field of legal

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13. Concisely about the notion of legal transplant, see J. Fedtke, ‘Legal Transplant’, in J.M. Smits (ed.), Elgar Encyclopedia of Comparative Law (2nd edition, Edward Elgar, 2012), p. 550.
14. M.J. Schenck, ‘Reading Law as Literature, Reading Literature as Law: A Pragmatist’s Approach’, 25 Cahiers de recherches médiévales et humanists (2013), p. 9.
15. K. Stierstorfer, ‘The Revival of Legal Humanism’, in K. Dolin (ed.), Law and Literature (Cambridge University Press, 2018), p. 9.
16. In comparative law scholarship, we can see this in the growth of comparative legal history. See, e.g., O. Moréteau, A. Masferrer and K.A. Modéer (eds.), Comparative Legal History (Edward Elgar, 2019).
stems from the undeniable fact that law and language are inextricably intertwined. 17 Nevertheless, a scholarly perspective on law and literature does not conceive of legal language primarily as professional legal discourse, as judges, attorneys or doctrinal scholars would necessarily do as a part of their profession. Clearly, the grammar and structure of legal and imaginary texts are not similar. 18 Mostly, the study of law and literature seems to embody the desire of legal academics and certain members of the legal profession to transform the study of law into some kind of humanistic enterprise. 19 That said, the study of law and literature is a field that contains many possible approaches, which means that the ‘academic discourse affiliated to law and literature is abundant and varied’. 20 This variety is both a boon and a bane.

Study of law and literature may be separated into three thematic areas, although this simplistic classification is certainly not exhaustive. 21 All the same, it is useful to distinguish various main approaches in order to gain an overall view of the field before we can discuss comparative law and literature. By addressing basic issues in law and literature, it becomes possible to sketch the meld of these fields in what follows.

First, as is well known, law itself may sometimes be the subject matter of literature. This manner of studying literature is based on the idea according to which literature can be read against a backdrop of the value and insights it offers for understanding the nature of law. Second, it may be the case that literature itself has the force of law or it might, at some time in the past, have had the force of law. In this case, the literary narrative root is in the focus of study. In other words, this thematic area is built on a rather sweeping view that it is sometimes difficult to distinguish the ‘law that is, was, or could be, and the various products of our literary imagination’. The third possibility is that legal texts themselves may be studied and read as literature, in which case the focus is on how we extract meanings from legal texts. In other words, the third thematic area aspires to acquire a satisfactory understanding of how literature in general, legal texts included, is read and interpreted. 22

There is little doubt that these three thematic areas cover a great array of approaches. In any case, it seems evident that one can focus on themes of legal relevance that are depicted in literary works. Typically, when law itself is the subject matter of literature, these works are fictionalized accounts that describe court proceedings, typically in a certain jurisdiction. 23 This kind of writing

17. See, e.g. J. Bartelson, ‘The Language of Law and the Laws of Language’, 44 Millennium: Journal of International Studies (2016), p. 250.
18. See R. Hiltunen, ‘The Grammar and Structure of Legal Texts’, in P.M. Tiersma, L.M. Solan (eds.), The Oxford Handbook of Language and Law (Oxford University Press, 2016), p. 39.
19. The intellectual background is in the U.S. legal culture, as Olson points out: ‘I would call to my European colleagues to remember that the Law and Literature movement arose in its most recent manifestation out of a frustration with legal training, interpretation, and practice in America’, G. Olson, ‘De-Americanizing Law and Literature Narratives: Opening Up the Story’, 22 Law & Literature (2010), p. 361.
20. S. Almog, ‘“One Young and the Other Old” – Halakhah and Aggadah as Law and Story’, 18 Canadian Journal of Law and Society (2003), p. 28.
21. The crux of scholarly discourse on law and literature falls outside the scope of this paper. For different perspectives on law and literature see, e.g. J.M and C. Bell (eds.), Tall Stories? Reading Law and Literature (Dartmouth, 1996), K. Dolin, A Critical Introduction to Law and Literature (Cambridge University Press, 2007) and R.A. Posner, Law and Literature (3rd edition, Harvard University Press, 2009).
22. R. West, ‘Literature, Culture, and Law at Duke University’, in A. Sarat, C.O. Frank and M. Anderson (eds.), Teaching Law and Literature (Modern Language Association, 2011), p. 100.
23. There is abundant literature dealing with these. Typical examples are G.D. Green, The Juror (Grand Central Publishing, 1995) and J. Grisham, The Runaway Jury (Doubleday, 1996), in which both plots spin around the U.S. jury system.
may also, as we know famously from Charles Dickens’ *Bleak House*, assume the form of satire.\(^{24}\) The second thematic area mentioned above can be termed ‘law as literature’, which might analyse phenomena such as the rhetoric used by judges when they try to make legal arguments and their judicial opinions intelligible. This kind of analysis conceives important parts of judicial decision-making as rhetoric. Alternatively, as Richard Posner puts it, ‘Judicial opinions, like literature, belong to the branch of communication known as rhetoric, and rhetoric is style.’\(^{25}\) Crucially, this type of reading considers literature as a means of persuasion and builds a bridge to the rhetoric in judicial opinions.\(^{26}\) What is more, law as literature also contains certain educational aspects of actual judicial decision-making as it highlights ways to use and understand judicial rhetoric.\(^{27}\)

The third thematic area addresses the relation between law and literature by comparing and contrasting the methods each discipline uses when interpreting particular texts. Texts that are analysed in this way vary, ranging from addressing a constitution as poetry to considering the depiction of law and legal institutions in *Harry Potter* books.\(^{28}\)

The above observations demonstrate, if nothing else, how far-flung an area of study law and literature is. How does comparative law fit in the above thematic fields of law and literature scholarship? A first impression seems to suggest that the novel merged field of *comparative law* and literature would be a niche field of research even within the specialized non-mainstream field of law and literature. However, it is certainly not unheard of. One connection, though not relevant in the case of legal transplants, is legal aesthetics, which has been useful for its attempts to capture the difference between legal traditions by referring to their distinctive characteristics as ‘style’.\(^{29}\) It is argued that in comparative law, to put it concisely, legal style matters.\(^{30}\) More importantly, law and literature research is, unlike nationally oriented doctrinal study of law, distinctly aware of the differences between legal cultures.\(^{31}\) Consequently, culture-specificity plays an important role. Like law, literature takes place against a backdrop, not in a vacuum of formal law only.

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24. See G. Watt, *Equity Stirring* (Bloomsbury, 2013), p. 47 et seq.
25. See R.A. Posner, ‘Law and Literature: A Relation Reargued’, 72 *Virginia Law Review* (1986), p. 1376.
26. Of course, there are several types of legal texts and judgments are only one specific genre. See M. Galdia, *Legal Linguistics* (Peter Lang, 2009), p. 90.
27. Literary presentation can be seen, for example, as a certain way of reading and evaluating judicial opinions critically. See J. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, 1990).
28. See, e.g., S.J. Levine, ‘The Constitution as Poetry’, 49 *Seton Hall Law Review* (2019), p. 737 (compares constitutional interpretation to biblical and literary interpretation) and J.E. Thomas and F.G. Snyder (eds.), *The Law and Harry Potter* (Carolina Academic Press, 2010).
29. See H. Dedek, ‘The Splendour of Form: Scholastic Jurisprudence and “Irrational Formality”’, 5 *Law and Humanities* (2011), p. 361 (uses the notion of legal aesthetics as a specific view on law that is preoccupied with the aesthetic dimension of the law itself).
30. C. Valcke, ‘Comparing Legal Styles’, 15 *International Journal of Law in Context* (2019), p. 274–296.
31. For example, Olson, in G. Olson, 22 *Law & Literature* (2010), p. 338, compares German, U.S. and British understandings of law and literature, regarding law as a cultural practice that is not similar around the globe. Her warning is akin to the basis of contemporary comparative law scholarship when she says that ‘We need to be careful of a tendency to universalize our scholarly narratives when talking about Law and Literature in general and remember that particular preoccupations are in fact endemic to the American setting’ (ibid., p. 361). An associated problem that concerns in particular American legal scholarship in general is the fact that legal scholars are monolingual, see V.G. Curran, ‘The Role of Foreign Languages in Educating Lawyers for Transnational Challenges’, 23 *Penn State International Law Review* (2005), p. 779.
If one chooses the path of studying law culturally, then one must assume that as a human creation law is unavoidably culture-specific in a way that is reflected – among other things – in literature. It is not a surprise, then, that under the wide umbrella of cultural studies lies a comparative subfield of cross-cultural studies, which deals with various research designs that compare human behaviour across two or more cultures. Comparative literature studies is not a tightly defined field and, like comparative law, it is difficult to conceive of it as a single discipline. Cross-cultural studies is about making comparisons between different cultures, aiming to understand variations in human behaviour as influenced by the cultural context. Consequently, comparative law and literature is a cross-cultural field that draws comparisons between and among literature from different legal traditions, aiming to understand variations of law as they are influenced by the cultural context. Comparative law and literature is about linking laws and contexts as cultural products, along with the economies of their production, legislators and courts as law-creators, audiences, languages of law, politics and the circulation of power that creates the complex texture of interrelated legal knowledge systems that encompass the planet.

Where does the above outline of comparative law and literature place legal transplants? At first, the question may seem unlikely or at least far-fetched. Crucially, there is apparently no real discourse on legal transplants against the backdrop of comparative law and law and literature. This paper addresses the issue of legal transplants and ‘law in literature’ based on the assumption that law in literature is a form worth unpacking in cross-cultural legal studies. What is more, as has been suggested, ‘some methods useful within comparative literary analysis can also illuminate comparative law’. This is an important point with far-reaching consequences. It is not only a question about methods, though; a comparative law-informed approach to literature might reveal how legal cultural knowledge is encoded in literature. Essentially, this is about specific ways to convert legal reality from the realm of law into another form of written human expression.

In what follows, it is argued that the study of imaginary legal transplants highlights legal-cultural engagement with a diverse range of legal traditions, as they can be addressed against the backdrop of comparative law scholarship. In other words, what follows is an outline of the emerging field of comparative law and literature.

3. Legal transplants

The fact that law and literature has been virtually dominated by U.S. scholarship poses uneasy questions as to the relation between comparative law, on the one hand, and law and literature on the

32. See J. Edmond, ‘No Discipline: An Introduction to “The Indiscipline of Comparison”’, 53 Comparative Literature Studies (2016), p. 647 (‘if disciplines are only apprehended through interdisciplinary practices, then not only is comparative literature not a discipline, but there is no discipline as such’, ibid., p. 651).
33. S. Papayiannis and X. Anastassiou-Hadjicharalambous, ‘Cross-Cultural Studies’, in S. Goldstein, J.A. Naglieri (eds.), Encyclopedia of Child Behavior and Development (Springer, 2011), p. 438.
34. In comparative law, there are rivalling notions that each seek to analyse and classify the world’s legal systems. It falls, nevertheless, outside the scope of this paper to discuss these. See for more detailed discussion, M. Pargendler, ‘The Rise and Decline of Legal Families’, 60 American Journal of Comparative Law (2012), p. 1043 and J. Husa, ‘Macro-Comparative Law – Reloaded’, 131 Tidsskrift for Rettsvitenskap (2018), p. 410.
35. This formulation is an adaption of S. Tőtősy de Zepetnek and T. Mukherjee, ‘Introduction’, in S. Tőtősy de Zepetnek and T. Mukherjee (eds.), Companion to Comparative Literature, World Literatures, and Comparative Cultural Studies (Cambridge University Press, 2012), p. vii.
36. E. Heinze, ‘The Literary Model in Comparative Law: Shakespeare, Corneille, Racine’, 9 Journal of Comparative Law (2014) p. 26.
other. The key issue concerns the balance between the objects of comparison. If a monoculturally embedded view is prioritized over others, then comparative balance is lost. In a serious comparative study of law, the main challenge is to build a balanced research frame. In practice, this means that one should not give any particular legal culture an epistemic upper-hand position in relation to others that are studied. The comparative law scholarship-related question that needs to be addressed here is thus: What happens when texts discussed are not U.S. texts in English but texts from other legal traditions?

Interestingly, law and literature echoes some of the experiences in comparative law in the sense that comparative study of law has been so strongly Western and even more so Anglo-American. We can see this tendency in making language and cultural aspects more intelligible to the Western view of law even in translations of such literature genres as detective stories. An epistemic problem in comparative study of law has always been a tendency to look at others from one’s own epistemic viewpoint. For instance, discourse on legal orientalism highlights only too well how Western scholars have read Chinese law and legal history through a culturally conditioned prism. However, due to practical constraints the discussion here does not address the history of imperialism that could be seen as an important factor related to legal transplants.

Indeed, one of the constant problems with comparative law has always been its implicit focus on Western law, which Twining coined as ‘Our Country and Western Tradition’ that has made the field of comparative law ‘vulnerable to charges of parochialism and ethnocentrism’. This has meant, in practice, focusing heavily on Western capitalist societies in Europe and the United States, with minimal consideration of former and surviving socialist countries, poorer countries

37. See R. Weisberg, ‘What Remains “Real” About the Law and Literature Movement? A Global Appraisal’, 66 Journal of Legal Education (2016), p. 37.
38. In a broader view, this is about trying to reach a balance between looking at similarities and differences. See G. Dannemann, ‘Comparative Law: Study of Similarities or Differences?’, in M. Reimann and R. Zimmermann (eds.), Oxford Handbook of Comparative Law (2nd edition, Oxford University Press, 2019), p. 390.
39. This question is posed by Porsdam, who puts it like this ‘To someone from a civil-law country, this makes one wonder what “Law and Literature” looks like in a civil-law context. What happens when the texts discussed are Scandinavian, Dutch or Polish, and what happens when these texts interact, not with the common law but with the civil law?’, H. Porsdam, ‘A Review of A Critical Introduction to Law and Literature by Kieran Dolin’, 2 Law and Humanities (2008) p. 137.
40. Even here, we can detect a clear difference between the European West and the American West. As Stierstorfer, in K. Stierstorfer in K. Dolin (ed.), Law and Literature, p. 23 puts it: ‘The European culture, with its very diverse legal traditions – in particular the profound difference between the case law focus predominant in the United States and England as against the civil law tradition widely prevalent in continental Europe – provides a very different cultural context from the American hotbed which bred the law and literature movement.’
41. L.-L. Hu, ‘Challenging the Supernatural in Chinese Traditional Law – Comparison of Judge Dee and van Gulik’s Translation’, 12 Law and Humanities (2018), p. 52.
42. Legal orientalism – based on and continuing Edward Said’s orientalism to the realm of law – discusses Western (European) analytic categories explaining how they are not universal but a matter of an ‘ongoing legacy of European imperialism’, which is both ‘indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations’, T. Ruskola, Legal Orientalism. China, the United States, and Modern Law (Harvard University Press, 2013), p. 15. See also S. Seppänen, ‘After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law’, 68 American Journal of Comparative Law (2020), p. 186.
43. See, e.g. M. Solinas, ‘The Nature of Legal Transplants – Inspirations from Postcolonial Scholarship’, 22 New Zealand Association of Comparative Law Yearbook (2016), p. 179.
44. W. Twining, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press, 2009), p. 10.
and the richer countries of the Pacific Basin.\textsuperscript{45} Twining’s view is, however, gradually becoming less pertinent as comparative law scholarship has evolved. To that end, today’s pluralist comparative law scholarship no longer accepts the parochial and ethnocentric tradition.\textsuperscript{46} It is against the backdrop of today’s comparative law scholarship that the nascence of such a field as comparative law and literature can be sketched, if it is to be sketched at all.

With comparative law, we face a scholarly embarrassment of riches. There can be little doubt that generalizing about the present condition of comparative law scholarship leads ineluctably to simplifications. Notwithstanding, certain general trends may be described without the risk of being obnoxiously delusory. Comparative law today is a field of legal studies which, if defined as broadly as possible, investigates organized human communities with a focus on law as a normative phenomenon.\textsuperscript{47} At the core of comparative study of law stand the differences and similarities between diverse legal traditions such as common law, civil law, Islamic law, Hindu law and mixed law.\textsuperscript{48} In its pluralist contemporary form, law considered, not as autonomous but as intimately connected to its human environment.\textsuperscript{49} As a result, like law and literature, comparative law is also fundamentally an interdisciplinary venture.\textsuperscript{50} How do legal transplants fit into this discussion?

Although legal transplants are certainly not a novel notion, they remain very much at the heart of comparative law discussions even today. The debate concerning the possibility or efficacy of copying law outside its original jurisdiction is an inherent part of comparative law scholarship.\textsuperscript{51} Comparatists still discuss and debate legal transplants, that much is clear. It would be arduous to maintain otherwise with any credibility even if one were critical, as many are, over the notion itself. Why the debate on transplants is so relevant for comparative law is easy to understand because it concerns one of the core issues in the field; understanding the relationship between law and society.\textsuperscript{52} Here epistemic choices come with consequences. Abandoning a black-letter view means embracing various non-legal contexts of law, as the debate on legal transplant substantiates.

\textsuperscript{45} This has to do with the linguistic factor too, as there is a similar fear among legal comparatists and literary comparatists: ‘A recurrent fear felt by comparatists, and also by many specialists in individual languages, is that the growing hegemony of global English will swallow up other languages and literary cultures’, D. Damrosch, ‘Afterword Comparative? Literature?’, in R.Y. Raj (ed.), Educationist and Bilingual Creative Writer (Foundation Books, 2012), p. 280.

\textsuperscript{46} See M. van Hoecke, ‘Is There Now a Comparative Legal Scholarship?’, 12 Journal of Comparative Law (2017), p. 271. Van Hoecke reviews recent comparative law books and concludes that the ‘new approach is clearly characterized by pluralism – pluralism as to the kinds of legal systems compared (not just State law) and a methodological pluralism’ (ibid., p. 280). Or as Berman puts it, ‘the fields of comparative law and legal pluralism form a natural partnership’, P.S. Berman, ‘A Brief Note on Legal Pluralism and Comparative Law’, 31 Windsor Yearbook of Access to Justice (2013), p. 221.

\textsuperscript{47} J. Husa, A New Introduction to Comparative Law (Hart Publishing, 2015), p. 1.

\textsuperscript{48} Glenn distinguished major legal traditions that are chthonic (or indigenous) law, Talmudic law, civil law, Islamic law, common law, Hindu law and Confucian law; H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law (4th edition, Oxford University Press, 2014). See also T. Duve, ‘Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History’, 6 Comparative Legal History (2018), p. 15.

\textsuperscript{49} See, e.g., G. Samuel, An Introduction to Comparative Law Theory and Method (Hart Publishing, 2014); J. Husa, A New Introduction to Comparative Law, and M. Siems, Comparative Law (2nd edition, Cambridge University Press, 2018).

\textsuperscript{50} See M. Reimann, ‘Comparative Law and Neighbouring Disciplines’, in M. Bussani and U. Mattei (eds.), The Cambridge Companion to Comparative Law (Cambridge University Press, 2012), p. 13–34 (points out, however, that all lists of related areas of study are necessarily ‘somewhat arbitrary’, at p. 27).

\textsuperscript{51} Cf. R. Leckey, ‘Review of Comparative Law, 26 Social & Legal Studies (2017), p. 3–24.

\textsuperscript{52} M. Siems, ‘The Curious Case of Overfitting Transplants’, in M. Adams and D. Heirbaut (eds.), The Method and Culture of Comparative Law (Hart Publishing, 2014), p. 133.
Legal historian and comparatist Alan Watson introduced the concept of the legal transplant in 1974. He was certainly not the first to express the idea of law’s ‘moving’, yet his conceptualization has grown peculiarly influential in the field. In Watson’s thesis, it is important for a legal transplant to be based on a historical connection between the legal systems concerned or, more precisely, between the formal (private) laws of those systems. In other words, it is not a question of reception where what has been adopted from a foreign law could be specifically indicated, when the adoption took place, and how the transfer actually happened, and so on. What is essential is the ‘relationship of one legal system and its rules with another’. By the process of moving, Watson simply meant moving a rule or a system of law (mainly of Roman private law origin) from one country or region to another. Of course, there is no need to accept Watson’s narrow view, which underlines black-letter law. Yet, for the present discussion on imaginary legal transplants, it is an important view if one is to understand what the notion of the legal transplant is about.

Even though the notion of the legal transplant is still in wide use by comparative law scholars, it is a contested notion. Criticism of the transplant thesis was severe from the early stage. Otto Kahn-Freund presented an early criticism that turned out to be seminal. According to Kahn-Freund, the whole concept of transplants was out of place in the world of law, although it was possible to metaphorically compare it to a surgical operation in which a kidney from one individual is transplanted to another person. However, ‘we cannot take for granted that rules or institutions are transplantable’. In brief, the context of law matters when law is moved. We simply cannot cut out the societal surroundings and focus on mere legal text without damaging an attempt to conceive the law comparatively.

This criticism makes one important point crystal clear. It is crucial to pay attention to the societal environment of law, or the result could be transplant rejection in the receiving system. In the case of a legal transplant, the reality is that influence normally takes place in mutant form. Notwithstanding, a mutated transplant is still a transplant although in some respect it is because of necessity a transplant gone wrong. Be that as it may, the success of a transplant is not the same as creating a transplant as such because one can certainly copy a rule or an institution from another country. Comparative legal history tells us stories of transplants that are based on studies of circulating legal ideas among domestic systems. Whether the result of transplanting will prove a success or not is a different question altogether. It is also important to note that in the real world

53. A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edition, University of Georgia Press 1993).
54. For example, Pound noted in 1938 that ‘History of a system is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law’, R. Pound, *The Formative Era of American Law* (Little, Brown & Co, 1938), p. 94.
55. A. Watson, *Legal Transplants: An Approach to Comparative Law*, p. 6.
56. The number of different types of transplants is abundant and cannot be discussed here; see for more detailed discussion J.M. Miller, ‘A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process’, 51 *American Journal of Comparative Law* (2003), p. 839.
57. For a detailed analysis of the 40 years of history of legal transplants, tracing reactions to it and how it became a classic of comparative law, see J.W. Cairns, ‘Watson, Walton, and the History of Legal Transplants’, 41 *Georgia Journal of International and Comparative Law* (2013), p. 637.
58. See O. Kahn-Freund, ‘On Use and Misuse of Comparative Law’, 37 *Modern Law Review* (1974), p. 1 (‘its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context’, ibid., p. 27).
59. Ibid., p. 9.
60. J.-L. Halpérin, ‘Spatializing Law in a Comparative Perspective of Legal History’, 40 *Extême-Orient Extrême-Ocident* (2016), p. 207.
of law, legal transplants take place whether comparative law scholars like it or not. Jurists in
different countries seem to simply assume that there is no point in reinventing the wheel, so to
speak. No copyright protects legal inventions, as lawyers are open to copy over the borders
although sources of legal borrowings are not necessarily openly disclosed.

Kahn-Freund has certainly not been the sole critic of legal transplants. Other scholars have since
come up with different sorts of elaborate critique. One radical strand argues that legal transplants
are altogether impossible. Other scholars have suggested different kinds of conceptualizations in
order to avoid the difficulties attached to the notion of the legal transplant. These suggestions
include the terms legal irritant, transposition, translation, diffusion, borrowing and migration. All
of these later conceptualizations accept that copying legal rules, institutions or doctrines is possible
but the process and difficulties involved were seriously undermined by Watson, who relied on a
kind of surgical understanding of legal borrowing (at least on a metaphorical level). Overall, we
can safely argue that ‘literature on legal transplants has achieved a high level of complexity’.

Specific reasons explain why using the notion of transplant in this paper is appropriate. How-
ever, one may wonder whether the notion of legal transplant really is helpful here. It could be
argued that taking inspiration from ‘real life’ laws is hardly specifically about legal issues because
works of fiction also take inspiration from such things as architecture, nature, food and so on. Why
narrow the phenomenon of drawing inspiration from ‘real life’ to law only? From the literature
studies standpoint, it would seem perhaps more preferable to use the notion of ‘inspiration’
instead. This is because all works of fiction draw from ‘real life’. Consequently, following this
line of reasoning, using the notion of legal transplant may seem to stand on shaky ground as being

61. For a recent discussion, see M.F. Lawrence, ‘An Appraisal of the Influence of Legal Transplant on National Legal
Systems: The Case of Cameroon’, 7 European Journal of Comparative Law and Governance (2020), p. 89.
62. Simply, ‘Law is an evolving phenomenon, and its evolution has always been externally influenced’, M. Cohn, ‘Legal
Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the
United Kingdom’, 58 American Journal of Comparative Law (2010), p. 628.
63. In judicial practice, foreign legal law is used alongside the host legal system so that the comparative law point supports
an argument already based on national sources of law, see J. Bell, ‘The Argumentative Status of Foreign Legal
Arguments’, 8 Utrecht Law Review (2012), p. 9. In legislative drafting, the weight of national doctrine on sources of
law does not, however, play a decisive role, see N. Lupo and L. Scaffardi, ‘Introduction. The Uses of Comparative Law
in Legislative Drafting’, in N. Lupo and L. Scaffardi (eds.), Comparative Law in Legislative Drafting: the Increasing
Importance of Dialogue amongst Parliaments (Eleven International Publishing, 2014), p. 1.
64. See P. Legrand, ‘The Impossibility of Legal Transplants’, 4 Maastricht Journal of European and Comparative Law
(1997), p. 111 and P. Legrand, ‘What Legal Transplants’, in D. Nelken and J. Feest (eds.), Adapting Legal Cultures
(Hart Publishing, 2001), p. 55.
65. The debate in a nutshell, see M. Siems, in M. Adams and D. Heirbaut (eds.), The Method and Culture of Comparative
Law, p. 136.
66. G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’, 61
Modern Law Review (1998), p. 11; E. Örüç, ‘Law as Transposition’, 51 International and Comparative Law Quarterly
(2002), p. 205; M. Langer, ‘From Legal Transplants to Legal Translations’, 45 Harvard International Law Journal
(2004), p. 1; W. Twining, ‘Diffusion and Globalization Discourse Symposium: Diffusion of Law in the 21st Century:
Interaction and Influence’, 47 Harvard International Law Journal (2006), p. 507; and V. Perju, ‘Constitutional
Transplants, Borrowing, and Migration’, in M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative
Constitutional Law (Oxford University Press, 2012), p. 1304.
67. M. Siems, Comparative Law, p 231.
68. According to the OED, inspiration has several meanings. Of relevance, here is the following: ‘Something inspired or
infused into the mind; an inspired utterance or product’, Oxford English Dictionary, OED (2020), www.oed.com.
too narrow a conceptualization. Regardless, it is maintained here that using the notion of legal transplant instead of inspiration makes sense for the present discussion.

Now, of course legal transplants are inspirations in some way. They are derived from a certain source of ideas in the sense that they act as models for various adapted inspirations outside the source legal culture. Legal transplants are, in this sense, inspired legal products. The point of using the notion of legal transplant, instead of the more general inspiration, is that legal transplant offers a conceptualization that effectively connects two different fields that seem quite distant at first glance. Legal transplant is much more familiar way in terms of conceptualizing legal borrowing than the notion of inspiration, which is quite general and lacks the rich scholarship that legal transplant has accumulated over the years. There is another problem with this counter argument. In fact, relying on the notion of inspiration when it comes to the use of legal borrowings from reality would boil down to judicial usage of foreign law. Drawing inspiration from foreign law is typically understood, in legal scholarship, as something that judicial organs may choose to do. Notwithstanding, comparative law today as a field is remarkably broader than judicial comparative law. Because this paper seeks to contribute to the scholarly debates underpinning legal culture, comparative law and more specifically legal transplants it would not be particularly beneficial to use the notion of inspiration.

To conclude this section, it would seem that a botanical understanding of legal transplants is more apt than a surgical understanding because the first suggests a teleological development toward an endpoint rather than the second, which suggests actually moving an organ from one body to another. As we will see later, this would make an author of imaginary literature with ideas about the law more like a gardener than a surgeon. Let us now turn to give an outline of the notion of an imaginary legal transplant.

4. Imaginary legal transplants

The basal assumption behind analysing literature through the notion of legal transplants is simple: literature treats law as one of its subject matters. While this is true both for fiction and nonfiction literature, imaginary legal transplants belong naturally to the realm of fiction literature for rather obvious reasons. At the same time, it is more than likely that the demarcation line between fiction and nonfiction can be drawn only in water. Notwithstanding, we may hold that fiction refers primarily to literature that is created more or less from the imagination. In other words, we have novels in a variety of genres: fantasy, romance, science fiction, mysteries and so on. Nonfiction refers to literature that is in one way or another based upon an actual occurrence. Fact-based writing is, by and large, bound by the rules of reality and in that sense its possibilities to create imaginary legal transplants is somewhat limited. For this reason, what follows concentrates on fiction literature and places the focus on imaginative fiction. A word of caution is necessary. The self-imposed limitation should not

69. See B. Markesinis and J. Fedtke, Judicial Recourse to Foreign Law: A New Source of Inspiration (Routledge, 2006), ch. 3. About the objections to the judicial use of comparative inspiration, see M. Bobek, Comparative Reasoning in European Supreme Courts (Oxford University Press, 2013), ch. 13.
70. J. Smits, ‘Comparative Law and its Influence on National Legal Systems’, in M. Reimann and R. Zimmermann (eds.), Oxford Handbook of Comparative Law (2nd edition, Oxford University Press, 2019), p. 512.
71. Cf. R. Peerenboom, ‘What Have We Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China’, 27 Michigan Journal of International Law (2006), p. 825.
be conceived as a general demarcation line as it is drawn solely for the purpose of the present discussion on imaginary legal transplants.

Now, a reasonable presumption making imaginative fiction relevant concerning the possibility of legal transplants is that imaginative fiction requires ‘a state of mind ignorant of the limits of the real and therefore highly creative’. How does this differ from legal reality if we assume that law as a professional practice also requires a fairly imaginative mindset? Contrary to what some might believe, even though the imagination operates under constraint in law, this does not mean that there would not be room for crafting creative and original ideas, possibilities or solutions. There seems to be a strong possibility that the key difference lies in reality itself. It is a commonplace that reality refers to the state of things as they are, in contrast to imagination – the state of things as they are imagined to be. For legal transplants, the difference between reality and imagination is important even though in a larger perspective literature cannot escape its location also in a normative universe.

National law drafters and legislators who try to develop their legal systems by resorting to legal transplants are necessarily bound by reality because they have no means to mould reality at will whereas creative writers are in a position to do so. To put it otherwise, an imaginative writer can create a reality using the imagination whereas real-life legal transplanters lack this ability altogether. As Henry David Thoreau elegantly expressed it, ‘This world is but canvas to our imaginations’; alas, this is not true for those who work in the real world of law.

By studying imaginative literature, we may analyse and discuss law in a manner that we cannot really do in nonfictional legal studies. If we accept the famous saying according to which ubi societas ibi ius, that is to say, where there is a society there is law, then imaginary worlds and societies created by authors also contain an innate and implicit legal dimension. Now, this is not as complicated as it may sound at first. In essence, law is also present in an imaginary society. How do we transfer law into the realm of literary imagination? A specific writing tool for creating parts of imaginary worlds is to transplant real legal entities (for example, rules, institutions, doctrines, cases) and place them in the imaginary world. The amount of literary tailoring needed depends on the author and the narrative that the transplant is placed in. To be sure, this is nothing like a surgical operation. Transferring legal entities from reality into literature is rather like painting a portrait from a model: much depends on the artist.

What are we talking about here? Simply, analysing imaginary transplants entails reading imaginary literature from the standpoint of law. One way of actually doing this could be an attempt to understand the behaviour and actions of a character and their actions in a book by applying legal notions. This could mean many things, such as explaining how Lord Stark behaves in the epic fantasy novels of Game of Thrones by articulating a certain type of legal theoretical attitude or mentality by showing how the conception of law plays a significant role not only in the legal world but also in the world of historical fantasy literature. Moreover, laws and legal ideas also travel from reality into the realm of the imagination. To that end, we can

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72. I. Buchanan, A Dictionary of Critical Theory (Oxford University Press, 2010), p. 244.
73. See S. Stern, ‘The Legal Imagination in Historical Perspective’, in A. Amaya and M. Del Mar (eds.), Virtue, Emotion, and Imagination in Law and Legal Reasoning (Hart Publishing, 2020), p. 217.
74. Cover, 97 Harvard Law Review (1983–84), p. 5.
75. H.D. Thoreau, A Week on the Concord and Merrimack Rivers (James R. Osgood & Co., 1873), p. 309.
trace and detect how legal transplants from real medieval legal history find their place in the quasi-real monarchical Westeros.\textsuperscript{76}

Nevertheless, it can go further than that so that scholars may ask how would the trial-by-combat rules in \textit{Game of Thrones} work in state and federal laws in the United States of today. Reality proves, unsurprisingly, to be less exciting than the imaginary world of \textit{Game of Thrones} as it is concluded that arbitration by combat ‘would stand a greater chance of being legally enforced under state and federal law if the combat were conducted pursuant to historical practice instead of the more extreme \textit{Game of Thrones} variety’.\textsuperscript{77} If read through the prism of comparative law, \textit{Game of Thrones} offers insights on how pop culture reflects culturally embedded understandings about historical law and the legalism of modern society. In the sense of cultural legal studies, analysing this kind of imaginative literature may reveal what kind of cultural understandings we hold in our contemporary world. Imagination, in other words, tells indirectly who we are in the real world and how law is an inborne segment of our cultural mindset.

A similar type of legal theoretical reading is also possible when the imagined world is closer to historical reality, through historical fiction, and takes place within the limits of known history. Hilary Mantel’s books on Henry VIII and his right-hand man Thomas Cromwell can be read and interpreted from the viewpoint of philosophical pragmatism as applied to the law, or legal pragmatism.\textsuperscript{78} Mantel’s Cromwell, who is a lawyer, paradoxically manipulates the law while simultaneously harbouring great respect for it. The protagonist of these books is capable of spinning stories in order to achieve certain ends. Yet at the same time he holds that it is enormously important that the law be respected, obeyed and upheld.\textsuperscript{79} Somehow, the spinning takes place within the rules of law although sometimes stretching the law to extremes.

The above-mentioned examples of \textit{Game of Thrones} and the Cromwell books are, of course, not the only examples. Better known is the case of Franz Kafka, who published novels expressing the alienation of the 20th century. Importantly, his works can be read and analysed as law in literature. As an author, Kafka was a thoroughly ‘legal writer’ because he ‘used the law as a template for his fiction’. In fact, law penetrates Kafka’s world in quite a profound manner so that the ‘baroque labyrinth of law’s institutions, like the bureaucratic world depicted in Kafka’s writings, ramifies law’s presence everywhere’.\textsuperscript{80} This is because ‘[t]he law is what he knew . . . The law was the normative basis for his fiction’.\textsuperscript{81} Kafka used legal transplants from the legal reality of his time, as can one see that his literature exploits the law as a plot device. The fact that Kafka’s law looks so strange even for a lawyer with knowledge of civil law legal tradition is because his legal transplants are described from the outside. Even though he was a practising lawyer, his writing took place from an external epistemic position.\textsuperscript{82} In other words, Kafka did not write from a legal insider’s point of

\textsuperscript{76} J. Husa, ‘Exploring Imaginative Legal History: The Legalism of the House Stark in the Game of Thrones’, \textit{20 Media and Arts Law Review} (2015), p. 181.
\textsuperscript{77} M. Smith and R. Shah, ‘Arbitration by Combat’, \textit{20 Media and Arts Law Review} (2015), p. 184.
\textsuperscript{78} The Wolf Hall Trilogy consists of three books: \textit{Wolf Hall} (Fourth Estate, 2009), \textit{Bring up the Bodies} (Fourth Estate, 2012) and \textit{Mirror and the Light} (Fourth Estate, 2020).
\textsuperscript{79} See D. Kenny, ‘The Human Pared Away: Hilary Mantel’s Thomas Cromwell as an Archetype of Legal Pragmatism’, \textit{Law & Literature} (2020), p. 1 (published online http://dx.doi.org/10.1080/1535685X.2020.18042).
\textsuperscript{80} R.K. Sherwin, ‘Law, Metaphysics, and the New Iconoclasm’, \textit{11 Law Text Culture} (2007), p. 85.
\textsuperscript{81} G. Dargo, ‘Reclaiming Franz Kafka, Doctor of Jurisprudence’, \textit{45 Brandeis Law Journal} (2007), p. 522.
\textsuperscript{82} As a comparatist puts it, \textit{The Trial} describes a court process ‘from the point view of someone who does not share the institutional and internal point of view’, J. Bell, ‘Legal Research and the Distinctiveness of Comparative Law’, in M. van Hoecke (ed.), \textit{Methodologies of Legal Research} (Hart Publishing, 2011), p. 161.
view ‘but depicted the position of outsiders subjected to an unknowable and alienating legal system composed of layers of petty officials’.  

Kafka’s way of writing about law, and placing legal transplants in his writing, can be seen as part of a narrative that is typical of continental European legal tradition in particular. At the turn of the 20th century law was modernized and Kafka’s literature expresses this change as he uses legal transplants (procedures, officials, legal concepts) while writing in alienated fashion about the decaying old world around the characters of his novels. From the standpoint of comparative law, for example, one can read The Trial as a description of judicial procedure in a civil law system of a decaying (fictional) European monarchy. In a broader view, it has been noted that literature may reflect the crises in the history of Western law. Arguably, Kafka’s work reflects one such crisis and, moreover, it also reflects the development of European legal thinking because literature reflects the stages of jurisprudence in general. For someone reading The Trial through a non-legal prism, the main plot seems to tell a story of such a cumbersome judicial system that the character of the book does not even know what he is accused of; all he knows is that there will be a trial, and there will be a conviction.

Crucially, a comparative law-sensitive reading of The Trial may bring a new enriching view. From there it follows that, for instance, reading Kafka’s The Trial through the U.S. common law experience can shed comparative light on the U.S. judicial system and its real problems. Reading The Trial as an imagined reflection of a real judicial system and procedure frees the reader from approaching the book as an allegory or parable as it focuses on how the writer’s imagination has transformed real-life rules and institutions of law into imaginary legal transplants and placed them as a part of a literary and somewhat bizarre imaginative narrative.

To take yet another example, from more or less children’s or young adult literature, we can see clear parallels between the legal institutions of the Anglo-Saxon world and the legal institutions in

R.M. Kaplan, ‘Joseph K. Claims Compensation: Franz Kafka’s Legal Writings’, 3 Advances in Historical Studies (2014), p. 119.

M. Dubber, ‘Colonial Criminal Law and Other Modernities: European Criminal Law in the Nineteenth and Twentieth Centuries’, in H. Pihlajamäki, M.D. Dubber, and M. Godfrey (eds.), The Oxford Handbook of European Legal History (Oxford University Press, 2018), p. 1064.

See T. Ziolkowski, The Mirror of Justice: Literary Reflections of Legal Crises (Princeton University Press, 1997). This book divides more than 2000 years of Western literary and legal history into twelve sections that are centred on key legal problems or moral debates.

It is at those moments when the tension between law and morality is increased to the breaking point that the law is changed and its evolution lurches forward again. And it is precisely those epoch-making moments that great literature reflects’, ibid., p. 16.

The whole process feels like a nightmarish version of civil law criminal procedure, as explained by one of the characters – Titorelli, the Painter: ‘from time to time various injunctions have to be obeyed, the accused has to be questioned, investigations have to take place and so on. The trial’s been artificially constrained inside a tiny circle, and it has to be continuously spun round within it’, F. Kafka, The Trial, translation by D. Wyllie (Courier Corporation, 2008), p. 116 [first published as Der Prozess 1925].

See D.K. Brown, ‘Can Kafka Tell Us About American Criminal Justice?’ (Review Essay of Robert Burn’s book Kafka’s Law: The Trial and American Criminal Justice), 93 Texas Law Review (2014), p. 487 (describing The Trial as ‘a dystopian version of a classic hierarchical bureaucracy common in advanced European states such as Germany’, ibid., p. 495).

The same atmosphere of the bizarre with added satire can be seen in the description of a day in the life of the Court of Chancery by C. Dickens in Bleak House (Harvard University Press, 1956) [first published in 1853], p. 2, ending in the famous exclamation: ‘Suffer any wrong that can be done you rather than come here’.
the *Harry Potter* books by J.K. Rowling. For an adult reader with legal-historical knowledge there are clear real-life connections that add a comparative and legal historical dimension beyond the story’s visible plotline. One of the most obvious of these is the cosmopolitan constitutional document of the wizarding world that is the International Statute of Secrecy, which was passed by the International Confederation of Wizards in 1692.\(^{90}\) The Statute is clearly a legal transplant, which can be compared with real-life international legal documents such as the Rome Statute of the International Criminal Court.\(^{91}\) However, from a comparative-law point of view, the most interesting legal institution in the Harry Potter books is probably the British Supreme Magical Court, the Wizengamot. This is a panel of wizards and witches, a kind of High Council of Magical Law that uses the highest judicial power in the British magical world (that is, the Wizard High Court). This judicial institution is clearly an imaginary legal transplant because it refers back to the witenagemot, which was an important legal and political institution of historical Anglo-Saxon society.\(^{92}\)

Tracing and discussing these kinds of imaginary transplants is a task that falls to the field of cross-cultural law and literature, namely comparative law and literature. This kind of research exercise is thus a jurisprudential attempt to expand our understanding of law’s cultural force beyond any particular legal tradition. In essence, it means looking beyond the national or regional boundaries of law and culture. Looking at how legal transplantation from the realm of law into the realm of imaginative literature takes place means specifically investigating how rules, institutions and doctrines from law are transferred, or are encoded, into literature. In other words, this kind of approach may be described as *law in literature*. This approach typically ‘involves the appearance of legal themes or the depiction of legal actors or processes in fiction or drama’.\(^{93}\) Harry Potter’s disciplinary hearing before the Wizengamot and Josef K’s ordeal with the Examining Magistrate are examples of procedural imaginary transplants also involving a transplanted imaginary judicial organ that plays a role in the story. Furthermore, they also reveal the authors’ legal cultural background.

As discussed above, imaginary legal transplants concern a particular way of transporting legal entities to the world of literary fiction. Alternatively, to put it another way, imaginary legal transplantation is a writing technique that can be traced and examined by cross-cultural comparative reading. Analysis of imaginary legal transplants highlights how imaginative literary texts are put together using law as a source or an inspiration. In sum, legal transplantation is the nexus where comparative study of law and law and literature meet. Paradoxically, perhaps this is why imaginary legal transplants are capable of revealing something germane about real-life legal transplants.

### 5. Imaginary transplant – the perfect transplant

The above raises questions, of which one of the most important concerns the connection between comparative law and literature. To be more precise, what is the relation between legal transplants and the proposed notion of the imaginary legal transplant? Whereas the legal transplant is a notion

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90. The history of this legal document is explained in J.K. Rowling, *Harry Potter and the Deadly Hallows* (Bloomsbury, 2007), p. 261.
91. The Rome Statute of the International Criminal Court, UN Doc A/CONF183/9.
92. S.P. Liemer, ‘Bots and Gemots: Anglo-Saxon Legal references in Harry Potter’, in J.E. Thomas and F.G. Snyder (eds.), *The Law & Harry Potter* (Carolina Academic Press, 2010), p. 19.
93. R. Weisberg, ‘The Law-Literature Enterprise’, *1 Yale Journal of Law & the Humanities* (1989), p. 1.
filled with innate unsettled issues and paradoxes, in literature it is far less problematic. Essentially, the 'presumption that the success of legal transplants is independent of the conditions of the recipient countries runs against longstanding conviction in comparative law'. This largely accepted view does not apply to imaginary legal transplants. What then, does apply, exactly?

Imaginary legal transplants are different from real-world transplants because in the real world legal diffusion always takes place in mutated form, transforming transplants into irritants. In reality, the success of a legal transplant depends very much on its utility, whereas in the imaginary world utility plays no role at all. A real legislator or court never controls the world completely, but in literature, the creator of a written work controls the created world. In this particular sense, imaginary legal transplants are perfect transplants. Importantly, 'imaginary' means that a thing exists only in the imagination; consequently, imaginary legal transplantation is a phenomenon that takes place only in the imagination of writers who transport and transplant law into a world of their own literary imagination. Legal fiction is transformed into the text of literary works.

What is more, even a whole book can be based on an imaginary legal transplant, as is the case with Dickens’ *Bleak House*. This book’s narrative core is a fictional long-running case in the Court of Chancery, Jarndyce v. Jarndyce, which is assumed to be based on the real case of *Thellusson v. Woodford*.

One further qualification can be added. An important similarity between imaginary literature and the language of law is that they both describe a metaphysical phenomenon because ‘[l]aw does not exist in the physical world’. This state of affairs has a consequence, in that the reality of both law and imaginary literature is typically metaphorical. Be that as it may, legal texts are certainly not merely metaphorical whereas this dimension seems to be more akin to imaginary texts. For the imaginary writer this is less of a problem than for the legal professionals of the real world. As noted above, legal transplantation in the real world is a phenomenon that takes place but is innately burdened with difficulties. Practical obstacles predestine transplants, more often than not, to failure. The main obstacles concern time, context and predictability.

A storyteller, unlike the legislator or judge, is free from the constraints of time because they can choose legal transplants and place them in the past or take past legal transplants and place them into the present or even in the future. Whereas the legislative drafter, legislator or court is bound by the context of real law and society, the storyteller can mould the context and society according to the rules they have created for their imaginary world. This is true whether it be the medieval-type *Game of Thrones* world, the Tudor period as augmented by the writer’s imagination, the non-existent early 20th-century fading monarchy of Kafka or the magical world of Harry Potter. Above all, there is no way of telling how real-life legal transplants will behave in their new legal, societal and political contexts. The storyteller, in contrast, can predict and steer perfectly how imaginary

94. R. Michaels, ‘“One Size Can Fit All”: Some Heretical Thoughts on the Mass Production of Legal Transplants’, in G. Frankenberg (ed.), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, 2013), p. 56.
95. R. de Mulder and H. Gubby, ‘What is the Role of Norms and Values in the Reception of Law?’, in S.P. Donlan and J. Mair (eds.), *Comparative Law: Mixes, Movements, and Metaphors* (Routledge, 2020), p. 98.
96. *Thellusson v. Woodford* (1799) 4 Vesey, 237. For a broader discussion, see P. Polden, *Peter Thellusson’s Will of 1797 and Its Consequences on Chancery Law* (Mellen Press, 2002).
97. H.E.S. Mattila, *Comparative Legal Linguistics: Language of Law, Latin and Modern Lingua Franca* (Ashgate, 2013), p. 137.
98. G. Watt, ‘The Matter of Metaphor in Language and Law’, *Pòlemos* (2012), p. 49.
legal transplants will behave as a part of their creative narrative. If the transplant does not behave the way the writer wishes, it is always possible to go back and revise.

We can now draw an important conclusion. As an outcome stemming from these three variables, imaginary legal transplants are the only perfect legal transplants. Only in the imagined worlds of literature can legal transplants be indefectible because only in an imagined world can the storyteller know everything and control everything. Paradoxically, this contains a sobering jurisprudential lesson for legal transplanters – only in imaginary literature can one control all the aspects of legal transplants. However, to avoid confusion, it is not argued here that legal transplants would be impossible. Nevertheless, what is argued here has an important implication for comparative law scholarship. There are no perfect legal transplants in real life, where legal transplanters are doomed to muddling through as they lack the perfect control that a creative writer wields. It is the committed real-life action that distinguishes law from literary world of fiction.

Nevertheless, a word of caution is in order. Even though authors of a work of fiction can in principle do whatever they like, mismatches can occur. For instance, one can pen a novel set in medieval Japan talking about a trial that seems to follow the modern U.S. jury system. Yet this is not an argument against applying the notion of legal transplant simply because legal reality is filled with such mismatches. The field of law and development shows us only how many mismatches there have been when Western legal institutions and codes are unsuccessfully transported into developing countries. Transplants have turned out to be mismatches because those developing them had no idea how legal transplants operated, or did not operate, in very different social and cultural contexts. That such mismatches can also happen in works of fiction is hardly a surprise but a supporting factor for using the notion of transplant rather than inspiration. To put it otherwise, speaking of a failed transplant seems to make more sense than speaking of a failed inspiration.

Before moving to conclusions, it is worth mentioning one important further point on the relation between real and imaginary. Writers can imagine completely new societies and legal systems, such as Thomas More’s Utopia, but they can also imaginatively extend and transform an existing system into something recognisable but different, as in Kafka’s The Trial or Dickens’s Bleak House. These books comment critically on their societies, through exaggeration and through converting details into symbols. Now, the contrast between imperfect actual legal transplants and perfect fictional legal transplants may undermine the fact that even fictional writers are not in total control of their creations; their imagination is narrowed by their historical positions. Consequently, readers may not find the imagined legal vision as compelling or fascinating as the writers.

6. Conclusion

This paper makes a perhaps unlikely link between comparative law and imaginative writing in a manner that may look odd at first. Nevertheless, as shown above, the link is not that far-fetched at all. On the very purpose of studying law and literature, it has been pointed out by Richard Weisberg

99. We may speak of certain ‘world-creating potential’ and how stories may help in maintaining the normative world, C.O. Frank, ‘Narrative and Law’, in K. Dolin (ed.), Law and Literature (Cambridge University Press, 2018), p. 42.
100. Cf. Cover, 97 Harvard Law Review (1983–84), p. 49.
101. D.M. Trubek and M. Galanter ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’, Wisconsin Law Review (1974), 1062.
102. B.Z. Tamanaha ‘The Primacy of Society and the Failures of Law and Development’, 44 Cornell International Law Journal (2011), p. 237.
that ‘only fictional narratives, which move through time together with characters whose actions and words are revealed, permit us to understand dynamically the jurisprudence of our era’. Combining comparative law and law-based literature into comparative law and literature offers a methodological option for conceiving law in literature in a distinctly cross-cultural manner. This approach invites the reader to consider legal cultural differences while reading, apprehending that certain stories make sense against certain legal-cultural backgrounds. In the end, cross-cultural study of literature and comparative law both have global ambitions; they seek to embrace the whole world instead of culturally or regionally defined pockets of humanity.

There are obvious limitations, too. One limitation concerns methodology. An imaginary legal transplant does not replace any existing tool of comparative study of law or law and literature. However, it focuses attention on cross-cultural law and literature and adds a tool that combines the two fields as it is capable of highlighting a particular border-crossing dimension in law’s relation to literature. That is to say, we carry our legal-cultural Anschauung into the realm of literature by using our imagination. Fictional writers, in brief, make imaginary legal transplants.

Tracing and discussing imaginary legal transplants is one possible way to enhance understanding of the legal thought of our own era as it reveals how real-life transplants are moulded and shaped as part of a storyteller’s imaginative narrative. The notion of the imaginary legal transplant demonstrates how comparative study of law may contribute to the study of law and literature. To expand the discussion, it may be the case that law ought to be treated as a language that constructs its own world of meaning. However, one particular tool of doing so is to borrow and shape real-life legal rules, institutions, doctrines or cases and implant them as part of a constructed imaginary world.

In the end, of course, it is left for the reader to judge whether imaginary legal transplants work believably. Alternatively, in the words that Hilary Mantel puts into the narrator’s mouth in her book Wolf Hall, laws are ‘Like spells, they have to make things happen in the real world, and like spells, they only work if people believe in them.’ In a similar fashion, imaginary legal transplants only work if readers believe them to be a part of the world imagined by the storyteller. In sum, even though imaginary transplants are perfect transplants they, too, can fail if the story fails. The possibility of mismatch concerns both law and works of fiction, legal or otherwise. What I am arguing here is that there is intellectual potential in bringing literature into dialogue with comparative law as means to expand our legal imagination and understanding of legal transplants.

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103. Weisberg, 66 Journal of Legal Education (2016), p. 38.
104. Mantel, Wolf Hall, p. 574.