Review Essay - "Contemporary Comparative Law: Between Theory And Practice" - Review of Esin Örücü & David Nelken's *Comparative Law: A Handbook*

By Jennifer Hendry[*]

[Esin Örücü & David Nelken, *Comparative Law: A Handbook*, Hart Publishing, UK, (2007) ISBN: 9781841135960, pp. 449]

A. Introduction

Contemporary comparative law[1] is perhaps one of the most awkward of all legal academic areas, being as it is contested from all sides and even from within. Much of this contestation revolves around questions of scope, purpose and utility, not to mention considerations of methodology, epistemology and applicability. In short, it could be said that, whether they consider themselves to be comparative lawyers or comparatists-at-law, proponents of the discipline agree on little other than the innate importance of undertaking comparative work.

While comparatists appear to "love to wail about the state of their discipline,"[2] reports of an "explosion" in comparative law over the past 25 years have certainly not been exaggerated; it has arguably inched from the periphery of the legal academy to a much more central position. This is undoubtedly the result of a marked increase in globalisation, Europeanisation and governance processes, which in turn have served to engender a shift in perceptions regarding the importance of the nation state, the viability of the "unit" of a legal system, and what

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[1] Throughout this review article I will use the term "comparative law" to denote the full discipline with as little exception as possible; the more particular intra-discipline approaches shall be referred to specifically.

[2] Mitchel De S.-O.-l'E. Lasser, *The Question of Understanding* in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS, 197 (Pierre Legrand & Roderick Munday eds., 2003).

https://doi.org/10.1017/S2071832200000857 Published online by Cambridge University Press

constitutes "law" itself.[3] Also contributing to this escalation, however, is the fact that any remotely comparative endeavour regarding any legal feature tends to fall under the umbrella term "comparative law". In its broadest interpretation, "comparative law" could include within its subject matter the study and research of all the laws of all the legal systems as well as covering their interrelations, shared or diverse genealogies, similarities and differences – in effect, anything "with law as its object and comparison as its process."[4]

It is not difficult, therefore, to see why this is a burgeoning field,[5] nor why there have been numerous recent attempts to delimit and clarify the discipline in order to discover what can realistically be considered its "disciplinary identity."[6] For example, should mere analyses of "foreign law" come under the auspices of comparative law, and what about critical second-order investigations into its methodology and epistemology? Similarly, disagreements are also raging over the extent to which other disciplines – such as the sociology of law, jurisprudence, legal history, international law, comparative politics, anthropology, and even linguistics[7] – overlap with or can be included within the ambit of comparative law. These questions serve to spark a cascade of additional queries: does this interdisciplinarity strengthen or weaken the discipline?; can comparative law actually be considered to be a discipline in its own right, or is it more suited to being on the margins?; is comparative law perennially parasitic, peripheral, and always an extraneous afterthought to the real business of law?[8] Alternatively, should it be thought of as a "central element of legal method"[9] or is it best

[3] The debates on legal pluralism provide a good example of this. See, among others, John Griffiths, *What Is Legal Pluralism?*, 24 JOURNAL OF LEGAL PLURALISM (J. of Leg. Pluralism) 1, 38 (1986); Sally Engle Merry, *Legal Pluralism,* 22 LAW & SOCIETY REVIEW (Law & Soc'y Rev.) 869 (1988); and Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism,* 27 JOURNAL OF LAW & SOCIETY 296 (2000).

[4] AN INTRODUCTION TO COMPARATIVE LAW, 3rd ed. (Konrad Zweigert & Hein Kötz eds., 1998) at 2.

[5] Although some commentators have touted the notion that comparative law as a discipline has already reached its peak and is now beginning to decline; see Mathias M. Siems, *The End of Comparative Law*, 2 JOURNAL OF COMPARATIVE LAW 133 (2007).

[6] See RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001) at 3.

[7] PIERRE LEGRAND, FRAGMENTS OF LAW-AS-CULTURE (1999) at 9.

[8] See H. Patrick Glenn, *Com-paring* in COMPARATIVE LAW: A HANDBOOK, 91 (Esin Örücü & David Nelken eds., 2007).

[9] William Twining, *Globalisation and Comparative Law* in COMPARATIVE LAW: A HANDBOOK, 69, 84 (Esin Örücü & David Nelken eds., 2007).

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described as being "a big tent, encompassing lots of different types of scholarship"?[10]

It is perhaps not unusual that the discipline of comparative law should spend much of its time both in questioning its own position as regards other academic fields and attempting to define its own contours and boundaries – after all, this drawing of distinctions and differentiating on the basis of them is a fundamental tenet of the discipline. Problematic with this, however, is that comparative law often seems to be a discipline with more questions than answers.[11] Indeed, it is often unclear exactly what the point of the whole comparative endeavour, in fact, *is*. If, like Legrand says, comparative legal research ought to involve "a proclivity on the part of the comparatist toward an acknowledgement of 'difference,'"[12] should it not also have a concrete end *in itself*? As mentioned above, the main proponents of the discipline appear to be in concordance on very little other than the comparative analysis of law is a Good Thing, but its actual usefulness could and should be called into question. Even Sir Basil Markesinis has voiced the criticism that comparative law tends to concern itself with "ideas and notions that cannot be put to practical use," which are more often than not only of interest to those "who spend their time devising them and then quoting each other with self-satisfaction."[13] An allegation of preaching to the converted is certainly too strong here, but the question of utility does tend to hover in the background.

In light of these questions, therefore, the very endeavour of masterminding and compiling such an ambitious volume on Comparative Law should be commended; there is no doubt that the discipline has been crying out for a catch-all text that could be used as both an introduction and a course textbook. However, while such a text is definitely required, it is debatable as to whether *this* volume actually does fill the recognised gap in the market. My purpose in this review article, therefore, is essentially threefold. First, I hope to give a brief critical overview of this edited collection, although the scale and complexity of the volume dictates that this must

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[10] David Kennedy, *The Methods and the Politics* in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS, 345 (Pierre Legrand & Roderick Munday eds., 2003).

[11] Nelken says much the same about the concept of legal culture, posing the question: "is legal culture the name of the question or the answer?" See David Nelken, *Defining and Using the Concept of Legal Culture* in COMPARATIVE LAW: A HANDBOOK, 109, 114 (Esin Örücü & David Nelken eds., 2007).

[12] See *supra* note 7, 10.

[13] See SIR BASIL MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM (2003) at 53; see also Sir Basil Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 MODERN LAW REVIEW (MLR) 1 (1990).

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be, at best, somewhat cursory. Second, I will attempt to sketch the development of the discipline in order to show how it has arrived at its current fractured (some say fractious) state. Finally, the last section of this review article will then look at the professed aims of this volume both as an introductory text and a teaching tool in order to ascertain whether or not it can be said to have achieved them.

B. Understanding Legal Alterity?

The purpose of this Handbook, as stated by the editors in the Preface, is to "fill the gap in comparative law teaching and study resulting from changes in the scope and composition of the subject," and one of the methods relied upon to achieve this ambitious aim is the selection of specific subject matter outside what could be considered the "comfort zone" of the discipline. The traditional, usually private law, areas have been downplayed and even omitted in favour of some new fields and fresh debates, both theoretical and substantive, while significant attention is also paid to questions of methodology and categorisation. As David Nelken says in the introduction to this Handbook, the reason behind the selection of certain topics and approaches over others (aside from straightforward pragmatism – as it would be impossible to cover everything) is "to unsettle the normal contents of what would be thought appropriate for a handbook on comparative law."[14]

On the balance of things, this can be considered to be a successful approach – for one thing, it is refreshing that this introductory text on comparative law does not feel the urge to provide an overview of, for example, German, French and English contract law and the interrelations between these legal "cultures" in terms of this substantive area. Many books on the topic of comparative law or that claim to follow a comparative method are packed predominantly with detailed descriptions of laws in particular countries, penned by national experts, after which comes an attempt at comparison, sometimes almost by way of supplement.[15] While there is obviously a time and a place for this type of detail-rich analysis, a huge plus point for this book is that it avoids the temptation of covering old ground or sticking with tried-and-tested, which serves to give it a much more contemporary flavour.

Something that is not new, although not immediately apparent on perusal of the titles on the contents page, is the Euro-centrism of the book. There is the token

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[14] David Nelken, *Comparative Law & Comparative Legal Studies* in COMPARATIVE LAW: A HANDBOOK, 3, 4 (Esin Örücü & David Nelken eds., 2007).

[15] For example see *supra,* note 4, and ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan Smits ed., 2006).

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"beyond Europe" article,[16] plus one on globalisation[17] and another that engages with primarily international law concerns but, specific subject matter aside, the perspectives and methodological approaches are essentially European in character. This is perhaps a somewhat unfair criticism considering both the historical genesis of the discipline[18] and the fact that many of its main contemporary debates concern the legal integration process in Europe;[19] nevertheless, and especially in light of the professed aim at the start of the Handbook – to "unsettle" established notions of what should be included in such a volume – the failure to take the opportunity to present a distinctively non-European (and non-Western, for that matter) perspective alongside the European one can go down as a missed chance.

In the same vein, another minor reservation I have is the scant attention paid by the Handbook to a couple of important contemporary topics such as, for example, the post-modern perspective on comparative legal studies as furthered by, among others, Günter Frankenberg and Pierre Legrand.[20] While in the introduction Nelken does acknowledge this lack of dedicated focus on post-modern theorising,[21] explaining instead that it is touched upon by some of the contributions to the volume, these references are few and far between and serve to make this a somewhat striking omission - especially considering the high incidence of the post-modern approach in current harmonisation debates.[22] A more detailed or explicit investigation of the context-in-law approach could have acted as a natural counterpoint to the law-in-context perspective that much of this Handbook is written from.

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[16] Werner Menski, *Beyond Europe* in COMPARATIVE LAW: A HANDBOOK, 189 (Esin Örücü & David Nelken eds., 2007).

[17] *Supra,* note 9.

[18] The birth of the discipline is universally recognised as occurring in 1900 in Paris, at the first congress held by the *Société de Législation Comparée.*

[19] Obvious examples here include the civil/common law split, the notion of legal *mentalité* and constitutional borrowing, to name but a few.

[20] See for example the seminal piece by Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law,* 26 HARVARD INTERNATIONAL LAW JOURNAL (HARV.INT'L.L.J.) 411 (1985) and *infra*, note 22.

[21] *Supra,* note 11, at 4, 24 and 33.

[22] See, most obviously, Pierre Legrand's anti-harmonisation standpoint as argued in, for example, Pierre Legrand, *European Legal Systems are not Converging*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (ICLQ) 45, 52-81 (1996); and Pierre Legrand, *Antivonbar*, 1 JOURNAL OF COMPARATIVE LAW (JCL) 13 (2006), among others.

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The law-in-context approach can be considered as being the natural consequence of the increasingly widespread rejection of the once mainstream[23] positivist process of comparison;[24] in essence, it is this progression that provides the basis for the schism between what have come to be known as the comparative law and comparative legal studies approaches (or, more loosely phrased, theoretical and substantive discussions), which I will discuss in more detail later. Legal positivism tends to view law in instrumental terms, which in positivist comparative law came to be articulated in terms of the purpose or *function* of a given legal rule. The discipline's focus, therefore, has in the past rested upon the analysis of posited rules (namely those enacted or declared by human law makers in official processes), while other things not officially posited, such as ultimate and emotional values, traditions and customs[25] were disregarded. This "dreary positivism," as Legrand terms it, had the effect of "relegat[ing] comparative legal studies to [being] a technical exercise whose output is deeply flawed and which … remain[s] largely irrelevant to the matter of understanding alterity in the law".[26]

In fact, it is upon this notion of *understanding* legal alterity that the debate can be said to turn, as the two approaches have very different aims in this regard. The law-as-rules positivist approach is interested in the purpose or function of a given law, and so the process of comparison here is intended to identify the most fitting or efficacious rule in achieving particular goals or effects; as Roger Cotterrell says, "the search for the most efficient rule to serve a given social or economic function has been the primary technique for unifying law in comparative legal studies."[27] Nevertheless, the popularity of this approach can now arguably be said to be on the wane - not least because of a sea change in attitudes concerning both the desirability and even possibility of identifying similarities across legal systems (or

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[23] It should be noted here that the positivist (instrumentalist/functionalist) approach really only occupied the mainstream in Europe. While legal realism and functionalism were also popular in the U.S., they were rarely utilised in terms of comparative law. See Ralf Michaels, *Functional Method* in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 339, 351 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[24] See Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AMERICAN JOURNAL OF COMPARATIVE LAW (AM. J. COMP. LAW) 637 (1998), where he critiques the classical edifice of mid-century comparative legal scholarship.

[25] Roger Cotterrell, *Is It So Bad To Be Different? Comparative Law and the Appreciation of Diversity* in COMPARATIVE LAW: A HANDBOOK, 133,135 (Esin Örücü & David Nelken eds., 2007).

[26] Pierre Legrand, *The Same and the Different* in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS, 240, 277 (Pierre Legrand & Roderick Munday eds., 2003).

[27] *Supra*, note 25, 136.

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cultures) - and is being increasingly replaced by an approach that argues for a more contextual consideration of the law.

This development is, however, not without its own complication; the positivist hangover is still clearly evident in the work of some proponents, a number of whom have contributed to this Handbook,[28] where the reliance is still upon a predominantly functionalist approach. This attachment to what Nelken refers to as the "*putting* law-in-context" model serves to engender a subsequent split within the law-in-context movement, as well as giving rise to some of the confusion throughout the discipline by "confusing purposes with effects," overlooking the cultural and social construction of said problems, and assuming too great a degree of equivalence across various legal contexts.[29]

On the other side of this split – as one may have expected – one finds a model that is more aware of these potential tripwires and pitfalls, and seeks to avoid them by means of a *second-order* approach. This "*finding* law-in-context" model has substantial representation in (particularly the first part of) this volume, not least due to the editors' own clear preference for it; the contributions of Cotterrell, Glenn[30] and Nelken himself are excellent exemplars of this model. However, being aware of the hazards does not necessarily translate into an avoidance of them; the recognition that law is "an indissoluble amalgam of historical, social, economic, political, and psychological data, a compound, a hybrid, a 'monster', an 'outrageous and heterogeneous collag[e]'"[31] is an insightful but perhaps not particularly useful one.

An additional difficulty relevant to utilising either of these law-in-context models is the weighty burden of justification that must be faced regarding any contextual selection – indeed, this is the main bugbear for any comparative analysis relying on

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[28] See, for example, the contributions of Masha Antokolskaia, *Comparative Family Law: Moving With the Times?* in COMPARATIVE LAW: A HANDBOOK, 241 (Esin Örücü & David Nelken eds., 2007); John Bell, *Administrative Law In Comparative Perspective* in COMPARATIVE LAW: A HANDBOOK, 287 (Esin Örücü & David Nelken eds., 2007); Nicholas H.D. Foster, *Comparative Commercial law: Rules or Context?* in COMPARATIVE LAW: A HANDBOOK, 263 (Esin Örücü & David Nelken eds., 2007); Werner Menski, *Beyond Europe* in COMPARATIVE LAW: A HANDBOOK, 189 (Esin Örücü & David Nelken eds., 2007); see also, *supra,* note 4.

[29] *Supra,* note 14, 19

[30] *Supra,* note 8, 91-108

[31] *Supra,* note 7, 5

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contextual considerations.[32] While taking account of context is recognised by proponents as being the optimum way of looking at a legal unit (its history, development, peculiarities, etc), providing as it does much more texture than a mere superficial snapshot, there are always question marks over what is omitted from any given analysis. For example, the selection of the relevant unit(s), namely *which* legal system, legal tradition, legal culture, legal family, region, etc. is to be studied, requires explanation - as does the chosen legal feature; why has one been chosen over another? Is that not an arbitrary choice? Has the context been taken properly into account? Can the comparatist be sure that they are not projecting onto the observed? And so on and so forth. I shall not attempt to supply answers here but, then again, neither does this Handbook, and this is my essential point – while Nelken discusses these first and second (order) law-in-context models in his introductory article, there is little further elaboration on the *specifics* of these models throughout the volume, no clear declaration that a particular one is being applied, and no signposted route to follow from these models to arrive at the more complex "comparative law" and "comparative legal studies" approaches that I mentioned earlier.

The stand-off between the two separate camps that wear the respective colours of comparative *law* and comparative *legal studies* is less clear-cut than one might think, considering that this schism goes right to the heart of the discipline and concerns the very contours of the field – namely, what is meant when we refer to comparative law, and what is its purpose? In its simplest articulation the split can be described as being between theoretical and substantive concerns: the former camp sees itself as having more lofty concerns than its more empirically-oriented, practical counterpart. In effect, those of a more theoretical bent consider comparative law to be an activity in its own right, whereas those in the latter camp are more interested in undertaking comparison from the perspective of affecting things on the ground, such as law reform.[33] While this appears to be a rather clean distinction, on closer inspection it appears that the lines are frequently blurred in terms of the degree to which certain tenets are upheld, most notably in terms of the contextual approaches outlined above.

Considering, then, that this is a fundamental debate regarding the scope and boundaries of the field itself, it is very difficult to condone the somewhat slapdash use of these categories throughout this volume. While each author maintains a

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[32] For an account of the logistical differences of a contextual study, see Foster, *supra,* note 28, 280.

[33] See Sjef van Erp, *Comparative Law in Practice: The Process of Law Reform* in COMPARATIVE LAW: A HANDBOOK, 399 (Esin Örücü & David Nelken eds., 2007).

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certain rigidity as regards the concepts that they themselves employ, the apparent interchangeability of the terms "comparative law," "comparative legal studies," and "law-in-context" throughout the volume is downright confusing. This lack of clarity is obviously a consequence of a general lack of consensus in the discipline, but an introductory text such as this should really have consistent application of conceptual terminology.

C. Conclusion

This leads to the consideration of whether or not this Handbook can be said to have achieved its broad aims, which from the start are clearly laid out as: a) the presentation of a contemporary perspective on the topic subsequent to major changes in its scope and composition; b) the facilitation of an engagement with "the challenges and controversies found in comparative law" by students of the subject; and c) the plugging of the recognised gap in the market for an introductory textbook.[34]

The verdict? Well, it *sort of* manages. Put simply, the Handbook copes valiantly with the former two self-posed challenges, but struggles somewhat to be convincing in accomplishing the latter. I should say that this is not a criticism as such; in particular, the second and third aims appear to be mutually exclusive, as a successful engagement with some of the complex issues inherent to contemporary comparative law cannot be done in the same breath as a general introduction to the key principles of the discipline. Some of the papers in the volume are clearly intended to be introductory, outlining the background to, the main tenets of, and the current state of play in the given field,[35] whereas others appear to pitch it at a higher level and assume a substantial knowledge of the literature and debates. Again, this is by no means a criticism of specific papers, merely an observation of a disjunction between the target audiences that causes the volume to lack both cohesion and any clear progression from section to section.

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[34] For the stated aims, see both Esin Örücü & David Nelken, *Preface* in COMPARATIVE LAW: A HANDBOOK, (Esin Örücü & David Nelken eds., 2007) and the description on the back-cover.

[35] Good illustrations of this type are the papers by, for example, Esin Örücü, *A General View of 'Legal Families' and of 'Mixing Systems'* in COMPARATIVE LAW: A HANDBOOK, 169 (Esin Örücü & David Nelken eds., 2007); Jan Smits, *Convergence of Private Law in Europe: Towards A New* Ius Commune*?* in COMPARATIVE LAW: A HANDBOOK, 219 (Esin Örücü & David Nelken eds., 2007); and Andrew Harding & Peter Leyland, *Comparative Law in Constitutional Contexts* in COMPARATIVE LAW: A HANDBOOK, 313 (Esin Örücü & David Nelken eds., 2007). Roger Cotterrell also has helpful clarifications of difficult or advanced terminology throughout his text: see *supra,* note 25.

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In a similar vein, the fact that the Handbook is an edited collection means that there is no common thread running through it., Although, to be fair, Nelken does acknowledge this in the introduction,[36] conceding that the authors are by no means singing from the same hymn sheet regarding either the contemporary debates or the historical development of the discipline. Nevertheless, and while these often contradictory arguments serve to exemplify some of the real battles in the field, they tend to leave the reader at somewhat of an impasse. Although there are evident benefits to presenting a comprehensive overview of the field, disagreements included, it does have the unintended "irritant" effect of failing to provide a clear path for the reader. If the book is read as an edited collection then this is unproblematic and even stimulating; however, if the book is intended to be utilised as a textbook and/or an introduction, then this variety could be pointed to as a flaw.

Correspondingly, the repeated, albeit accurate, assertion that the inherent complexity of today's (global) legal environment makes the very process of comparison a difficult one is increasingly tiresome as the Handbook progresses. While obviously also a result of the compilation nature of this text, the repetition has the effect of being rather disheartening for the reader, who may end up coming to the pessimistic conclusion that effective comparison is either impossible or so fraught with difficulty that it is not worth the effort it requires. A nod or two to the necessity of *selecting* certain legal units or features, as mentioned above, might be a helpful inclusion; for example, Boaventura de Sousa Santos' work on maps, and their necessary simplicity compared to the sheer *unrepresentability* of reality springs to mind.[37]

If these points seem like nitpicking, however, then that is because they are. When it comes down to it, this Handbook is a worthy attempt to provide an accessible and useful overview of the fluid, contested and generally infuriating discipline of comparative law. Its shortcomings are less that it fails to provide this overview and more that it does it so well – it actually reflects a lot of the fundamental problems with the discipline and as such is very informative, although one does occasionally

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[36] It should be said here that a minor gripe on my own part is that the vast majority of criticisms I (would) have raised in reviewing this volume have been pre-empted and on the whole both explained and justified by Nelken's excellent introductory chapter, especially as I followed his suggestion to read it both at the beginning and end of the Handbook; see David Nelken, *supra*, note 14

[37] See for example, Boaventura de Sousa Santos, *Law: A Map of Misreading*, 14 JOURNAL OF LAW & SOCIETY 279 (1987) and BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE (2002).

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wonder whether this is less by design than by accident. It may end up being the case that its employment as a course textbook could have more to do with its format (the inclusion of key concepts, questions for discussion, and further reading at the end of each chapter) than with its content but, in terms of that content, this volume is undoubtedly a beneficial contribution to the literature in the field.

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