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How to Do Comparative Law

> Still, the beautiful can be distinguished from the common, the good from the mediocre. . . .
>
> Each writer finds a new entrance into the Mystery, and it is difficult to explain.
>
> Nonetheless, I have set down my thinking as clearly as I am able.
>
> Lu Chi, from "Preface" to *Wen Fu: The Art of Writing* 9 (Sam Hamill tr., 1987).

What do we teachers and scholars of comparative law tell our students when they ask for guidance on how to write a comparative law seminar paper, note, or comment? How do we respond to colleagues who say they are interested in using the "comparative law method" but want to know what it is? When we are asked to evaluate comparative law scholarship, what standards do we apply? Like most fields of legal scholarship, we do not have an official canon of great works for writing in the field to emulate. Is there even really a "comparative law method"?[1] If there is, does it need an overhaul in light of the persistent criticism that comparative law as a field of intellectual endeavor has failed to live up to its promise?[2]

I believe that there is a "comparative method" and that it continues to offer strong benefits for the study of law. Most of us who teach and write in the field of comparative law, however, were not taught formally how to do comparative law. Rather, we have for the most

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1. Some leading comparatists have maintained that there is. E.g., Rudolf B. Schlesinger et al., *Comparative Law* 2-52 (6th ed., 1998); 1 Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* 28-46 (Tony Weir tr., 2d ed. 1987).

2. See, e.g., Martin Shapiro, *Courts: A Comparative and Political Analysis* vii (1980); Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?," 143 *U. Penn. L. Rev.* 1889, 1891-93, 1961-65 (1995) (citing a number of other critical articles as well) Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," 26 *Harv. Int'l L.J.* 411 passim (1985).

part worked out our own methods based on an amalgam of the scholarship we thought effective for our particular purposes at the time. Moreover, we keep adjusting our approach for every new task. Some would see this self-taught experimental approach as a strength of the field. It may be a bit inefficient for every scholar to make up his or her own method, but no promising avenue will be barred by orthodoxy. However, as I have tried to answer the types of questions raised at the outset, I have come to wonder whether, despite the prevalent methodological agnosticism, there isn't really a large degree of consensus about the essentials of the comparative method. Perhaps we even have a canon.

In the hope of stimulating a discussion that might lead us to a clearer statement of that consensus, I offer the following nine principles about comparative law scholarship and the closely allied field of foreign law. The first principle considers the relationship between the study of comparative law and the study of foreign law. The next four principles (Nos. 2-5) concern the basic technique of comparing law in different legal systems and the special value of that type of study. There follow three principles (Nos. 6-8) concerning specific guidelines for carrying out a comparison involving legal subjects. The final principle concerns the attitude which I believe to be indispensable for good comparative work. While I am interested in providing guidance in order to strengthen the quality of comparative law studies and increase interest in the field, I think it important to concede that there is no simple recipe for good scholarship. I am simply trying to list the most important characteristics of good comparative scholarship, with the caveat that deviations may always be made for good cause.

Basic Principles of the Comparative Method

1. Comparative law involves drawing explicit comparisons, and most non-comparative foreign law writing could be strengthened by being made explicitly comparative.

The first clause of this principle may seem to verge on tautology, but it is amazing how much writing about foreign law is not explicitly comparative and yet is thought of as part of comparative law. I wish to insist that the comparative method involves explicit comparison of aspects of two or more legal systems. Some may object that any description of foreign law is implicitly comparative because all descriptions of foreign law are at a minimum trying to make the law of one system comprehensible for those trained in a different system. But I reject that argument on the grounds that the step of actually drawing the comparison is crucial to realizing the intellectual benefits of comparison. Actually framing the comparison makes one think hard

about each legal system being compared and about the precise ways in which they are similar or different. If one wishes to claim the benefits of the comparative method, one cannot leave the act of comparison to the reader.

The foregoing statement is not meant to denigrate the value of scholarship focused solely on foreign law. Indeed, all comparative law scholarship has to start by introducing some aspect of foreign law in order to have something to compare. The field of comparative law certainly depends on the study of foreign law and legal systems, so I do not want to suggest that the study of foreign law on its own terms cannot be a valid form of legal scholarship. See Section 7 infra. But I do mean to distinguish it from comparative scholarship.

I will also go so far on behalf of comparative law to argue that much "pure" (that is, non-comparative) foreign law scholarship could be made stronger by incorporating explicit comparison. The first argument has to do with strengthening the effectiveness of foreign law writing. Whatever other purposes a study of foreign law may be intended to serve, at a minimum it is no doubt intended to communicate to a domestic audience some aspects of the foreign law. The domestic audience will inevitably compare what the author tells them about foreign law with what they know about their own legal system. The communication will therefore be much more effective if the author draws the comparisons for them by summarizing the most important similarities and differences. In so doing, the foreign law scholar can also prevent the reader from making miscomparisons based on ignorance of her own legal system. This danger is all the more likely if the audience includes people who are not educated as lawyers, as it often does in the case of foreign law studies.

The second reason concerns the question of the audience for foreign law, an even more acute problem for foreign law than most other legal writing. Without explicit comparison to the home country explaining the relevance of the foreign law for the domestic legal system, most domestic lawyers will have little interest in reading a piece about foreign law. There are, no doubt, exceptions. Perhaps some areas of foreign law are of such general interest and obvious importance that a non-comparative, foreign law article on those subjects will interest a general legal audience.[3] Moreover, there will always be groups of country specialists and general comparatists for whom specialized treatment of foreign law will be interesting. Indeed, foreign law articles, even if not comparative, are crucial for comparative

3. Some years ago, for example, there was a great deal of discussion in the U.S. about Japanese "administrative guidance" and more recently there has been considerable interest in the sudden development of constitutional litigation in the formerly socialist countries and the explosion of case law on many controversial subjects such as the treatment of the claims for restoration of property nationalized by the Communists.

law scholars because they permit them to expand the number of jurisdictions with which they work beyond those that use languages with which they are comfortable and to whose legal materials they have access. But beyond these small circles, there are not likely to be very many people who will be interested in a foreign law topic unless the writer explains its relevance for contemporary, domestic issues, and such an explanation necessarily requires some explicit comparison.

Finally, I would argue that, in view of the ways in which explicit comparison is especially likely to contribute to our understanding of law, it is a shame for someone to have made the effort to master the details of certain aspects of one or more foreign legal systems and yet not take advantage of that knowledge, which is a prerequisite for comparison, to try to get the benefits of the comparative method. I argue in Sections 4 and 5 that the benefits of explicit comparison are exciting analytical moves that carry the promise of interesting insights. I believe that the disappointment critics have expressed in comparative law is in large part based on the fact that so much writing in the field is either entirely non-comparative or at best only weakly comparative. It therefore naturally fails to deliver on the promise of comparison. Foreign law scholars could thus help comparative law "bring home the bacon" by employing explicit comparison.

Of course, there are many degrees of comparativeness. While some writing may be thoroughly comparative, other scholarship may focus on the law or legal system of a particular foreign country and use explicit comparison to domestic law solely as a frame to make clear the significant ways in which foreign law differs from domestic law or the reasons why a domestic lawyer ought to be interested in the example of a foreign legal system. As long as it uses some explicit comparison, legal scholarship has an opportunity to realize some of the intellectual advantages of the comparative method, and it is more likely to realize those advantages the more thoroughly comparative it is.

2. The comparative method consists in focusing careful attention on the similarities and differences among the legal systems being compared, but in assessing the significance of differences the comparatist needs to take account of the possibility of functional equivalence.

Comparison starts by identifying the similarities and differences between legal systems or parts of legal systems under comparison. However, in performing the basic comparative job of identifying similarities and differences, one has to consider the scope of comparison: What is going to be compared with what? Here the comparatist comes face to face with the enigma of translation. In one sense every

term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. At a minimum, generally equivalent terms in each language often have different fields of associated meaning, like, for example, "fairness" and *"loyauté."*[4]

One is thus always in some sense comparing apples and oranges. For example, jurors in the common law tradition bear some functional similarity to lay judges in the civil law tradition, but there are important differences in the way they come to and fulfill their office, including the way in which they interact with the professional judges and the kinds of non-criminal cases in which they participate. Consideration is a very different requirement from *causae*. Nor is it uncontroversial to say that the civil law simply omits the requirement of consideration because, if one asks what functions the doctrine of consideration might be said to fulfill (channelling, cautionary, evidentiary, and deterrent)—even though it admittedly does not do a very good job of fulfilling those functions—one can see that both German and French law have doctrines that might be considered in some sense to do the same thing.[5]

Comparatists dispute vigorously among themselves how big a problem the lack of congruity is in general and with respect to specific areas of comparison. But I think there is a high degree of consensus that good comparative analysis should pay careful attention to the problem of equivalency by probing how similar and how different the aspects of each legal system under study are. A comparative study of the consideration doctrine in British, French, and German law that simply reported that neither French nor German law recognizes the doctrine without considering whether French and German law achieve some of the same purposes with other rules would simply be a very weak effort.

Thus a good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. This inquiry forces the comparatist to consider how each legal system works together as a whole. By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of

4. George Fletcher gave this example during our seminar discussions.

5. von Mehren, "Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis," 72 *Harv. L. Rev.* 1009 (1959).

law, including especially the relationships between substantive law and procedure.

As in all fields of intellectual endeavor, a healthy skepticism about the received wisdom concerning differences and similarities and a strongly self-critical approach toward one's own conclusions are useful tools. Do civil law countries really refuse in all cases to treat court decisions as a source of law or are there civil law analogues to *stare decisis*? Does the U.S. constitutional limitation of federal court power to "cases" and "controversies" really prevent all abstract review of the kind permitted in continental European systems? How similar are the offices of judge in different legal systems? Or the role of private attorneys in litigation or in counseling? In the end, few rules or legal institutions—maybe none—have precise equivalents in other legal systems, and yet there are many rules and institutions which are broadly similar or similar in some very important ways. Comparative analysis proceeds in the tension between these two extremes. Good scholarship should normally try to figure out the extent to which the differences identified in law or legal systems are significant because they affect the outcome or the nature of the process and the extent to which they do not.

Before leaving the discussion of the basic procedure of comparing, we need to discuss one technical term, the *tertium comparationis*, which a number of well-known writers insist upon as an essential element of the comparative method.[6] This imposing bit of jargon refers to nothing more than the common point of departure for the comparison, typically either a real-life problem or an ideal. For example, as suggested above, a comparative study of the consideration doctrine might take a functional approach by asking how each legal system under study determines which promises to enforce. A comparative study of constitutional law might ask how and to what extent each country under study implements the ideal of the rule of law. In large measure, the notion of a common point of departure seems inherent in the process of comparison. Either one legal system has the same legal rule or legal institution as another, or it has different rules or institutions which perform the same function, or it provides different results for a particular problem, or it does not seem to address that problem at all. A diligent search for similarities and differences ought to encompass all of those possibilities, so one may simultaneously agree that the term is essential to the comparative method and question whether one needs the special term at all. Nevertheless, the term may be useful as a way of reminding ourselves to be clear about

6. See, e.g., 1 K. Zweigert & H. Kötz, supra n. 1, at 30; Vagts & Cappelletti, "Book Review [Review of Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (1986)]," 82 *Am. J. Int'l L.* 421, 423 (1988).

the point of or framework for comparison and to hold that point or framework constant until the comparison is completed. The term has further utility in underlining the importance of looking into the question of functional equivalence.

Finally, as the example of comparison to an abstraction or ideal shows, the term permits a richer, more complex understanding of comparison. Neither system is likely to conform to the abstraction or ideal entirely, and each system may conform to the abstraction or ideal in different ways. For example, one might compare the judicial office in various countries by reference to the ideal of the rule of law. No one country perfectly implements the rule of law, and the ways in which they differ are not necessarily functionally equivalent. But one can still study how the ways in which they conform to or depart from the ideal differ and how they are similar. The use of a *tertium comparationis* may thus permit a more complex comparison, but the essential comparative techniques are the same. One compares each country's legal system with the ideal, and then one compares the ways in which each legal system fulfills or departs from the ideal to investigate similarities and differences between or among them, always investigating the possibility of functional equivalence.

In using ideals as a common point of departure for comparison, one must be on guard against the natural human tendency to use without reflection the ideals of one's own system as the normative measure for systems that may not accept the ideal. For example, the rule of law is an ideal that developed first in Western Europe and the United States. Some would argue today that it enjoys nearly universal acceptance; others would dispute that it does, pointing out how its development is tied to the development of society, law, and forms of government in the West. Thus, if one wishes to argue that one legal system is better or more highly developed than another because it better or more fully institutes the rule of law, one should not only consider carefully the question of functional equivalence, but also confront directly the question why it is appropriate to apply the rule of law as a normative measure. Of course, ideals by their nature are meant to carry normative force, so the use of an ideal as a *tertium comparationis* will naturally be understood as a normative argument. Therefore, if the comparatist means the comparison with the ideal solely as an analytic exercise, he had better make his non-normative stance especially clear. If he means it as a normative argument, he had better consider whether it is justifiable to apply the ideal to the societies in question.

3. The process of comparison is particularly suited to lead to conclusions about (a) distinctive characteristics of each individual legal system and/or (b) commonalities concerning how law deals with the particular subject under study.

What should the point of the comparison be? Comparative study of law can be undertaken simply to inform the reader about foreign law, perhaps for the practical purpose of facilitating an international transaction or resolving a conflict of laws problem. It may be part of a campaign of law reform. It may be part of a comparative study of human culture or part of a critical project aimed at exposing the way law masks the exercise of power. It can even be used to spoof legal scholarship.[7] There is no reason why comparative studies should be limited to any particular set of purposes. The comparative method is just a tool.

From the nature of comparative studies, as outlined in the foregoing section, however, it can be seen that comparative law naturally and primarily leads in two directions at once. Because comparison focuses on both differences and similarities, comparative law studies cast light on (1) the special or unique natures of the legal systems being compared and (2) their commonalities with respect to the issue in question. The first direction leads toward defining the distinctive features of each legal system. The second direction leads toward appreciation of commonalities, maybe even universal aspects, of legal systems and insight into fundamental aspects of the particular legal issue in question. Thus a comparative study of contract enforcement in France and the United States should lead to both (a) an appreciation of distinctive aspects of French and U.S. law, respectively, and (b) an appreciation of some of the fundamental problems of enforcement of private agreements in an economy with significant market activity.

It is important to bear in mind that comparison by itself is at best a "weakly normative"[8] exercise. As every adolescent in U.S. society learns, there is some normative force in the statement, "Everyone else is doing it," or "Nobody else's family does that," but, as we parents immediately counter, "So what?" Comparison is a relatively weak basis for normative argument. Rather, it is a sign that hard thinking about the normative basis for the apparently deviant behavior or rule is in order. Thus comparative studies may uncover interesting ideas for domestic law reform, but in the end the case for adoption of a foreign model cannot rest on the fact that many other

7. See, e.g., Yablon, "Judicial Drag: An Essay on Wigs, Robes and Legal Change," 1995 *Wisc. L. Rev.* 1129 (with perhaps more serious purpose behind the spoof).

8. Gianmaria Ajani used this phrase in the course of our seminar discussions.

countries have the rule or legal institution. The argument for domestic law reform has to be made in terms of normative claims acceptable within the domestic legal system, and probably the foreign transplant will have to be modified in significant ways precisely because each legal system reflects an at least partially unique legal system.

Because of its indispensibility for testing claims of universality with respect to law and legal systems, social scientists have been strongly attracted to comparative law. Martin Shapiro has claimed that it should be a chief purpose of comparative law to provide data for testing general theories about law.[9] It is, indeed, a very exciting use for comparative law. But comparative law is not a mere appendage of social science. It is part of the general study of law, and therefore at heart, part of the humanities, like philosophy and history. Just as the social sciences may make use of philosophy and history, so too, they may make use of comparative law, but there are also many other important uses for comparative studies. The simple educative function of helping lawyers from one system understand and communicate effectively with lawyers from another system seems to grow more important every day as human transactions become ever more "globalized." For the same reason, there is renewed interest in efforts to harmonize law, in part by finding the "common core" of different legal systems' rules governing particular areas, like contracts, property, and torts. The spread of human rights discourse drives a similar interest in the "common core" of public law in order to help define, in the weakly normative way discussed above, what the ideal of the "rule of law" should mean. In all of these activities, the basic comparative method leads us to commonalities, simultaneously relativizing differences and correcting overhasty generalizations by revealing distinctive differences, as well.

4. One of the benefits of comparative analysis is its tendency to push the analysis to broader levels of abstraction through its investigation into functional equivalence.

The fact that after careful analysis the aspects to be compared in each legal system remain in some important senses apples and oranges is not bad. The real power of comparative analysis arises precisely from the fact that the process of comparing "apples" and "oranges" forces the comparatist to develop constructs like "fruit." It forces the comparatist to articulate broader categories to accommodate terms that are at least in some significant way functional equivalents and to search on broader levels for functional similarities

9. Shapiro, supra n. 2, at vii.

and differences. For example, consider pretrial discovery in the United States, which permits non-criminal litigants to search widely even in the hands of the opponents for evidence to support their cases. German civil procedure does not recognize a similar general right of one party to look for evidence in the other party's files and among its witnesses outside of the courtroom, but there are some more limited rights to require divulgence of specific information or documents in court.[10]

One might have thought that in looking for analogues to pretrial discovery, there was no need to consider in-court interrogation since U.S. law also provides for that method of eliciting information from the other party and non-party witnesses, but further reflection leads one to see that discovery is but one method of permitting one side to extract information from the other side or from third party witnesses. In-court examination is, of course, another method, and in looking for functional equivalence, one might even want to consider the question of the degree to which both systems shift the burden of proof (or impose strict liability in tort cases) to account for grossly unequal access by the parties to relevant information. Thus the search for functional equivalence with U.S. civil discovery procedures leads to the broader question of how different legal systems handle the inequality between the parties with respect to access to information.

5. The comparative method has the potential to lead to even more interesting analysis by inviting the comparatist to give reasons for the similarities and differences among legal systems or to analyze their significance for the cultures under study.

Comparative study could end with a delineation of relevant similarities and differences. This would satisfy the minimum goal of comparative study, and as the previous sections have indicated, that goal alone requires significant legal analysis if the problems of functional equivalence are investigated thoroughly. However, once one has carefully determined similarities and differences between the legal systems under study, a broader field of inquiry presents itself, one that poses fascinating questions of great general interest. One may ask what the reasons are for the similarities and differences among the legal systems under study. Alternatively, to avoid simplistic notions of causality in human society, one may ask what the significance of the identified similarities and differences is for an understanding of the respective legal systems and the broader cultures of which they are a part. In either case, the point of the inquiry

10. See generally Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States," 34 *Am. J. Comp. L.* 745, 757-67 (1986).

is to pay attention to the connections (or lack of connections) between the specific differences and similarities under study and broader, more systemic contrasts among legal systems, and most particularly, broader contrasts among societies and cultures.

Seeking answers to these questions will cause the comparatist to consider not only global comparison of legal systems, but also similarities and differences in the respective political, economic, and social systems and historical traditions of which they are a part. This is the aspect of comparative law that leads the student beyond law to the rest of the humanities and social sciences, maybe even to the natural sciences. This is where the various "law ands" become relevant: law and history, law and economics, law and society, even law and literature. Political science is an allied field of obvious relevance. Comparative linguistics may offer interesting insights. Even geography influences law in some respects. Since law is but a part of the seamless whole of human culture, there is in principle scarcely any field of study that might not shed some light on the reasons for or significance of similarities and differences among legal systems. Really good comparative writing should be informed by at least some of these allied fields and will be to the extent it seeks to explain why there are given similarities or differences among legal systems or seeks to assess the significance of such similarities or differences.[11]

Of course, I am not claiming that one can obtain this benefit or the one described in the foregoing section solely by undertaking comparative study. A very bright person might take the analysis to a broader level of abstraction or seek the connection between law and society without the prompting of the comparative approach. But I am claiming that the comparative method is a particularly good strategy for trying to secure these intellectual benefits. Under the comparative method, all scholars, not just the especially brilliant, are likely to recognize the necessity of finding broader levels of abstraction and connections between law and society to the extent that the comparison turns up law that remains on some significant formal or functional level different in the various legal jurisdictions being studied.

11. In making this statement, I am mindful that chance may also play a significant role in the process by which law is formed or transplanted. See, e.g., Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe," 43 *Am. J. Comp. L.* 93 (1995). Nevertheless, even that "explanation" cannot be adopted without consideration of other factors relating to the broader cultural contexts of each legal system under comparison.

6. In establishing what the law is in each jurisdiction under study, comparative Law (and, for that matter, studies of foreign law, as well) should (a) be concerned to describe the normal conceptual world of the lawyers, (b) take into consideration all the sources upon which a lawyer in that legal system might base her opinion as to what the law is, and (c) take into consideration the gap between the law on the books and law in action, as well as (d) important gaps in available knowledge about either the law on the books or the law in action.

I have now described the basic method and value of comparing law, but I need to say more about the specific rules for carrying out the comparison. This section lays down guidelines for determining what the law is in each country under comparison. These comments apply equally well, of course, to non-comparative treatments of foreign law.

(a) Focus on the Normal Conceptual World of the Lawyers

I agree with Ewald that the primary task for which comparative *lawyers* are prepared by their training and experience is to compare law from the interior point of view—that is, to help lawyers from one legal system see how lawyers in another legal system think about certain legal problems.[12] I do not want to lay down narrow definitions of what is and what is not comparative law for fear of choking off interesting work that might not fit my definition. Moreover, comparative law by definition takes one outside of one's own legal tradition and therefore facilitates the taking of an exterior viewpoint of the law. I also have no problem with the kind of political science that treats law as the output of a black box and seeks to explain that output by correlation with other factors exterior to the law, and I have no objection to lawyers contributing to that kind of study as long as they do a good job. Indeed, I think that lawyers should be interested in such studies especially insofar as they shed light on the workings of the legal system and suggest factors at work other than those called out explicitly by legal doctrine. But I do wish to insist that comparative law studies should normally compare the interior views of legal systems, whatever else they may also do. Comparative work therefore usually ought to address the question, "How does the foreign lawyer appear to think about this question and how does that compare to the way we think about it in our legal system?"

This focus on the conceptual world of the lawyer suggests first and foremost a focus on formal legal reasoning. What counts as a source of law in each system under study? Using the law stated in

12. Ewald, supra n. 2, at 1973-74.

the formal sources of law, what arguments can be made in each system with respect to the legal question under study and how would they be evaluated by well-trained lawyers in each system respectively? In some systems, like that of the United States with its common law heritage and explicitly political ways of selecting judges, lawyers tend to include a consideration of broader questions of policy in their formal legal reasoning and may also take into consideration the political dimensions of a legal problem in analyzing how a court will likely decide a given issue. These kinds of policy considerations and political calculations should also be included as part of the mental world of the well-trained lawyer in such a system. Furthermore, as Ewald has pointed out,[13] appreciating what does and does not count as a good argument in a foreign legal system requires an understanding of the general philosophical traditions of that culture, at least to the extent that they may have influenced the jurists.

(b) Taking Account of All Sources of Information About the Law

The focus on lawyers' argumentation will counteract the tendency to focus on statutory materials only and will force the comparatist to consult cases and the commentary of scholars, as well. In Sacco's terms, the comparatist will have to deal with the variety of "legal formants"—that is, all the authorities a lawyer working in a given system might consult to find the law, from formal sources of law like constitutions and statutes to authorities that are not recognized as formal sources of law but which are nevertheless influential, such as the writings of jurists.[14] The point of Sacco's formulation is that these legal formants may or may not be in harmony. Indeed, on many important questions, there are likely to be in any legal system that has any substantial degree of autonomy from other political institutions a number of conflicting opinions about what the legal rule is. By paying attention to all the relevant legal formants, the comparatist will be saved from taking a more simplistic view of the law than does the foreign legal culture the comparatist is studying.

(c) The Gap Between Law on the Books and Law in Action

The discussion of legal formants shows that one cannot confine one's search for foreign law to the statute books. Other legal formants, such as court opinions or the writings of scholars, may show that what is regarded as the law in that society is quite different from what one might have thought it to be if one looked only at the statutes. There thus may be, and probably are in most legal systems,

13. Id.

14. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1 (1991) and 39 *Am. J. Comp. L.* 343 (1991); see especially 39 *Am. J. Comp. L.* at 22.

important gaps between the law in the statute books and the law actually applied by the courts. Comparative law should be interested in both, and especially in the explanations and rationales given by participants in the legal system to explain the gap because these explanations may reveal a great deal about legal reasoning in that system.

There are also in all countries gaps between the law applied by courts and the law under which people live who for some reason—poverty, ignorance, attachment to traditional lifestyles, prejudice, corruption, or fear of political persecution—are unable or unwilling to invoke the protection of the formal legal rule. Because lawyers are interested not just in formal legal argumentation, but also in the actual impact of law in the world, the comparatist should be interested in this gap, as well. Perceptions of the gap may influence legal reasoning. In Brazil, for example, the gap between the law on the books and law in action has been so evident to Brazilians that it has a special name, the *jeito*, and it has, at least in some forms, become a highly prized legal or social institution for obtaining fairness amid the chaos of the formal legal system.[15] It may be especially easy to see this kind of gap in foreign legal systems, but the comparatist should also be on the lookout for it in his own legal system because no legal system is entirely immune to this phenomenon.

Finally, there are also in all countries situations in which the impact of a particular legal rule is affected by practices which are not part of the formal law. For example, the effect that the consideration doctrine could have to hinder the commercial use of options in U.S. law is greatly mitigated by the practice of granting them in return for nominal payment. Medieval Islamic law even developed a rich literature on the subject of legal devices which were forthrightly intended to permit parties to circumvent certain legal proscriptions, like that against payment of interest.[16] In trying to assess the functional equivalence of two systems of rules, it is important to have information about contracting and other practices which may either attenuate or magnify the impact of the rules.

(d) Gaps in Information About Foreign Law

Those who study U.S. law in the large research libraries in the United States become accustomed to having a great deal of information available about their subject, from complete collections of statutes and regulations to extensive case reports, a burgeoning "how-to" literature for the actual practice, and an extensive academic literature. There is even a growing literature about empirical studies of the real-world effects of many aspects of law in the United States. But comparative law studies are dogged by enormous gaps in the in-

15. Rosenn, "Brazil's Legal Culture: The *Jeito* Revisited," 1 *Fla. Int'l L.J.* 1 (1984).
16. Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* 11-12 (1970).

formation available. First, libraries' collections of foreign law are hardly ever as complete as the best libraries in the foreign country itself. Second, countries of the civil law tradition do not publish the decisions of appellate courts with the thoroughness and persistence of common law countries. Third, despite the growth of fields like legal sociology, it is often difficult to find empirical studies of the aspects of U.S. law in which a scholar is interested; it is even more difficult to find relevant empirical studies for many other countries, especially third-world countries.

Good comparative writing should show concern for this issue and should deal honestly and forthrightly with it. The reader should bear this concern in mind in evaluating comparative and foreign law studies. Has the author cited the most recent sources for what is represented to be current law? Are there reasons to believe that the sources available to the author are not current? Has the author cited such a reasonable assortment of commentators or such distinguished commentators that the views represented to be the dominant views in a given legal system are not likely to be the idiosyncratic views of one person or group? Has the author presented any information about law in action so that the reader can see whether or not there is a gap between it and the law on the books? If so, does the author cite reliable sources for that information? (Anecdotal evidence is not necessarily objectionable. Much comparative law is based on anecdotal evidence of law in action. It is not, however, systematic and hence may not accurately represent the norm, and careful comparative analysis should recognize this limitation.)

In short, good comparatists should be sensitive to the ever present limitations on information available about foreign legal systems and should qualify their conclusions if they are unable to have access to sufficient information or if they have reason to suspect that they are missing important information. If the gaps are too large, the study should not be undertaken at all because its conclusions about foreign law will be too uncertain to be useful.

7. Comparative and foreign law scholarship both require strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand, but it is also reasonable for the comparative scholar without the necessary linguistic skill or in-country experience to rely on secondary literature in languages the comparatist can read, subject to the usual caution about using secondary literature.

How does a comparatist gain enough information about a foreign legal system to engage in comparison? Reading a foreign statute

written in a language other than the comparatist's native language takes considerable linguistic skill, and going beyond statutes to consult the wide variety of potentially relevant legal formants takes an even greater degree of fluency because of the volume of literature to be read. Thus scholars of foreign law, whether or not they are also doing explicit comparison, obviously need to be fluent in at least one main language of each of the foreign countries whose law they intend to study. In-depth knowledge of the history of the country and its peoples and its philosophical and religious traditions is necessary to understand the indigenous forms of legal reasoning and value judgments. In addition, in-country experience is obviously useful to ensure that the foreign scholar adequately appreciates the cultural and geographical context for the foreign legal system. Moreover, actual legal study and research in the foreign country or at least considerable contact with lawyers or law professors from that country is very helpful to ensure that the foreign legal scholar is correctly understanding the general pattern of legal reasoning in the foreign country.

Finally, in-country experience is crucial for learning about the actual practices and social conditions that may create gaps between the law on the books and law in action. To the extent these are documented in the foreign country's literature, it would not of course be necessary for the foreign law scholar to gather information about them, but they often are not. It would thus be desirable for foreign law scholars to supplement their linguistic skills with the field observation skills of an anthropologist. Most comparatists and foreign law scholars, like me, are not so trained, but many of us have enjoyed substantial in-country exposure to one or more of the systems on which we write and have not hesitated to document our anecdotal observations about the workings of the foreign systems. As indicated above, this unsystematic information is probably better than no information at all, but has to be evaluated with caution.

Pure foreign law scholarship and the foreign law portion of comparative law scholarship thus ideally involve formidable linguistic knowledge (at least where the foreign law is in a foreign language) and substantial historical and cultural knowledge, as well as actual experience in the country and in contact with its lawyers. Such scholarship would even be enhanced by training in anthropological field methods. These demands call for a huge scholarly investment. To the beginner, especially the student, it may seem virtually impossible to gain the required base of knowledge and experience.

There are two points I wish to make about the knowledge and experience needed to gain a proper understanding of foreign law. First, the burden involved in obtaining it is a good reason why some scholars choose to specialize in foreign law and minimize explicit

comparison. While I wish to encourage broader use of explicit comparison, I recognize that comparison requires considerable knowledge of at least a second legal system. Acquiring that knowledge may conflict with acquiring the in-depth knowledge of the first legal system. No one can amass that kind of knowledge about every part of the globe, and in order to keep scholars without the full grounding necessary to be an expert in a particular country's law from serious error, there is a need for some country specialists to devote most of their energies to specialized study of a given country or group of countries, especially in the case of cultural traditions radically different from those of the scholar's own country and especially if the main language is very different from the scholar's native tongue. Specialization and team efforts comprise a better solution than asking every scholar to spread himself too thin. The foreign law specialist and the comparatist stand in symbiotic relationship. I would, however, suggest that since most foreign law scholars have considerable knowledge of their own domestic system, most foreign law scholars could include explicit comparison with the scholar's own system without detracting much from the pursuit of knowledge about the foreign legal system.

Second, it is quite legitimate for comparatists to base their comparisons on literature produced by foreign law specialists, at least to a substantial degree. The comparatist need not have first-hand knowledge of all the foreign law upon which he bases his comparisons, but she needs to be a discriminating consumer of the available scholarly writing, whether it is explicitly comparative or not. The comparatist should evaluate secondary literature on foreign law in accordance with the foregoing observations about what is required. Does the author possess the necessary linguistic knowledge? Do his citations show that he has canvassed adequately the various legal formants? Has she made good use of translations of important, relevant legal literature from the foreign country if there are any? Has he reported on actual practices in the country based on his own experiences or on reliable reports by others? Do the author's comments appear to be informed by a deep understanding of the nation's cultural and religious traditions and history? It may be difficult for the non-foreign-law-specialist to make these judgments with any confidence. As in all types of research beyond personal knowledge, healthy skepticism, a search for corroboration from multiple sources, and attention to academic reputation should help.

8. Comparative law scholarship should be organized in a way that emphasizes explicit comparison.

Finally I come to the nitty-gritty detail of organization. I do not wish to dictate matters of form narrowly. Good writers find the organization that best fits their subject. However, I want to encourage

the use of organization for comparative writing that emphasizes the comparative task being accomplished. There are all too many examples of comparative books and articles in which the comparative exploration of a subject (antitrust, for example) is organized in the following way: a detailed description of the antitrust law of country A, followed by a detailed description of the antitrust law of country B, followed by a brief section that attempts to draw the chief comparisons. But this last section is inevitably too short and too lacking in detail to be effective comparison, not only because the writer has run out of steam at the end of the work, but also because, if he were to support his comparative analysis with all the rich detail, he would have to repeat much of the first two sections. It is as if the writer said to the reader, "Here is all the raw data about this subject in the two legal systems I am studying. Now you do the comparison according to these general guidelines I am giving you!"

Instead of the simplistic, ineffective, and inefficient three-part approach, I advocate trying as much as possible to make every section comparative. For example, if the subject is antitrust law, one section might compare and contrast the development of antitrust law in each country, another the two countries' treatment of horizontal restraints of trade, another the vertical restraints, another the enforcement mechanisms and remedies, etc. Try to break the subject down into the natural units that are important to the analysis and then describe each country's law with respect to that unit and compare and contrast them immediately. Let the contrasts documented in each section build toward your overall conclusion.[17] Of course, for certain subjects it may be necessary to describe the law of one country in a block before comparing it. This seems especially likely, for example, when what is being compared is the historical development of a field or legal system.[18] But the shorter these blocks, the more effective will be the comparison.

9. Comparative studies should be undertaken in a spirit of respect for the other

The last point concerns the attitude a comparatist should have. So much in foreign legal systems seems so bizarre that it shocks us. Why do the Germans and French disdain the U.S. practice of intrusive party-led discovery in civil cases? To the U.S. lawyer, it almost seems as if the Germans and French must not be that interested in finding the truth. To the German and French lawyers, it seems as if the U.S. system fails to protect individual privacy. Neither system is

17. For one successful example of this type of organization on a large scale, see *International Encyclopedia of Comparative Law*, Vol. XI, Torts (André Tunc ed., 1983).

18. See, e.g., John P. Dawson, *The Oracles of the Law* (1968).

contemptible simply because it is different from the other. In analyzing a foreign legal system, the comparative scholar has to make extraordinary efforts to discern the sense of foreign rules and arrangements.

I want to emphasize that I mean by this to suggest a working method only, not a limit on what comparative scholars may say. I have already said in Section 3 above that comparative law may be undertaken for any purpose, including a critical one. Indeed, constructive criticism is a sincere form of respect. Moreover, at the end of the day, criticism should be judged, not by the critic's attitude, but by the reasonableness of her premises and the force of her logic. However, before the comparatist criticizes, she must make all possible efforts to avoid a narrowly chauvinistic view. She must try to see the sense of the foreign arrangements even if they are strangely different from her own and seem to represent values directly contrary to her own.

The comparatist must also bear in mind that criticism coming from an outsider is always suspect on the grounds of chauvinism. This is all the more reason to be cautious in criticizing foreign law, but it is much less of a problem when the same piece of scholarship levels the same or a similar criticism against the author's own legal system. Criticism of a foreign legal system is also less likely to be dismissed as chauvanistic if it is supported by citation to domestic critics of the system. Nevertheless, sometimes a foreign legal system's disregard for certain values compels one to criticize even in the absence of support from the target legal system, especially in situations involving authoritarian governments, in which only the foreigners may have the possibility of publishing their criticism. God grant us the wisdom to know when to speak out forcefully!

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SUMMARY

The foregoing nine principles comprise, I believe, the basic elements of the comparative method for studying law. The method is not complicated. In fact, it is so simple that I for long have hesitated to dignify it with the term "method." I have come to realize, however, that while the comparative method is simple to describe, it is difficult to apply because satisfactory results can be obtained only if the one making the comparisons has command of a large amount of information about the legal systems under comparison, as well as the broader societies in which the legal systems exist. This factor may explain at least some of the general disappointment with comparative law: It is difficult to do well. Nevertheless, it is ever more indispensable in our interconnected and shrinking world. It offers at least two significant intellectual benefits that are not easily obtained outside of the com-

parative method: (1) the tendency to push analytic categories to higher levels of abstraction in order to bridge differences between legal systems, and (2) the tendency to force the researcher to expand the analysis to include the whole legal system and its relationship with the rest of human culture and its material and spiritual context in order to understand the differences and similarities observed. For these reasons, comparative law truly holds exciting potential to help us better understand law and legal systems.