Critical Comparisons: Re-thinking Comparative Law

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This essay will consider the aims of comparative law and focus on how the de-emphasized theoretical discussions and foundations of comparative work influence the various comparative approaches. It will argue that because of comparative legal scholarship’s faith in an objectivity that allows culturally biased perspectives to be represented as “neutral,” the practice of comparative law is inconsistent with the discipline’s high principles and goals. In response, this essay will suggest a critical approach that recognizes the problems of perspective as a central and determinative element in the discourse of comparative law.

I. DISTANCE AND DIFFERENCE

Comparative Law is somewhat like traveling. The traveler and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown. Traveling

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1. Comparativists, so it seems, have identity problems. More often than not, their work begins with a complaint. They reject the term “Comparative Law,” calling it a “misnomer.” R. Schlesinger, Comparative Law 1 (3d ed. 1970) (n. “empty phrase”), H. Gutteridge, Comparative Law 1–2 (2d ed. 1949) (“an expression peu satisfaisante”), I. P. Arminjon, B. Nolde & W. W. Wolff, Traité de droit comparé 10 (1956). The complaint that the term has little or no meaning usually spurts on search for new terms, such as “Comparative Legal Traditions,” “Comparative Legal History,” “Comparative Legislation,” “Comparative Jurisprudence,” the “Comparative Study of Law” or simply the “Comparative Method.” See H. Gutteridge, supra, at 1–10; M.A. Glendon, M. Gordon & C. Olafson, Comparative Legal Traditions in a Nutshell 2 (1982) (hereinafter cited as M.A. Glendon); A. von Heeren & J. Godeke, The Civil Law System (2d ed. 1977); K. Zweigert & H. Kötz, An Introduction to Comparative Law 1–10 (1977). New definitions have always—more or less clearly—indicated that the comparatists set out to pursue. See L. Constantinescu, Rechtsvergleichung 205–12 (1971). Yet these definitions and redefinitions have not silenced the doubts that there is something basically wrong with comparative law. Instead of providing the ultimate definition, I propose that we do not bother with changes in terminology but deal with the doubts instead.

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Infering that, for example, only the Continental systems, with their tendency to abstraction and generalization, develop the grand comprehensive concepts, while the common law, with its inductive and case-by-case habits, produces low-level legal institutions especially adapted to solve isolated, concrete problems (Zweigert/Kötz).

In order to be objective the comparatist is basically asked to exercise sober self-restraint and is assured that the functionalist method guarantees both—objectivity and restraint.

Function is the start-point and basis of all comparative law. It is the tertium comparationis . . . . For the comparative process, this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.87

How solutions can be “cut loose” from their context and at the same time be related to their environment, how law can be “seen purely” as function satisfying a “particular” need, escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes the specific specific. The functionalist negates the interaction between legal institutions and provisions by stripping them from the systemic context and integrating them in an artificial universal typology of “solutions.” In this way, “function” is reified as a principle of reality and not taken as an analytical principle that orders the real world. It becomes the magic carpet that shuttles us between the abstract and the concrete, that transcends the boundaries of national legal concepts, that builds the system of comparative law, the “universal” comparative legal science or “the general law.”88

Despite these allusions to a universal legal science, the comparative functionalist should not be mistaken for a philosopher, her ideal is rather practical: to devise the most efficient legal system and to order the reasonable expectations. In the end the neutral observer reveals herself as a lawyer in defense of the status quo.

IV. RE-IMAGINING COMPARATIVE LEGAL STUDIES

What is to be done? The critiques of the discourse on comparative law and of the dominant paradigms might suggest that we should

87. K. Zweigert & H. Kötz, supra note 1, at 36–37.
88. Id. at 39. See Lecoultre, supra note 20, at 852; R. von Jhering, supra note 78, at 15.
give up legal comparison because there is no neutral referent and because it seems quite impossible to devise "good" abstractions. Moreover it is still doubtful whether "comparative law" exists at all—and even if it does it might not have anything significant to contribute to legal education and practice. Besides, comparatists, whatever their intentions may be, seem to be invariably and hopelessly trapped by the ethnocentric mechanisms of cognitive control.

To abandon comparative legal studies would be wrong-headed, I think, for it would freeze the tradition and current conditions into an eternal pattern. It would be equally wrong to go on with a comparative muddling-through. And from reading through the various approaches and from such highlights as Pound's Comparative Law in Time and Space, I infer that it is not just a more complex and longer process of comparison that is needed. Comparative Law never had too little baggage in the overhead compartment. To this very day it is crammed with thoughts and oughts, with aims and claims.

For Comparative Legal Studies to become a learning experience, much more critical work has to be done. Stated in very broad terms, critical comparisons require a greater sensitivity to the relationship between the self and the other rather than merely intellectual sophistication. Instead of continuing the endless search for a neutral stance and objective status, comparatists have to recognize that they are participant observers, therefore their studies have to be self-reflexive and self-critical. Instead of presupposing the necessity, functionality, and universality of law, critical comparisons have to question "legocentrism," the religion guiding and pervading legal education and practice. Instead of "getting straight" the histories and diversities of laws, critical comparisons must call for a rigorous analysis of and tolerance for ambiguity.

I suggest that we try to free comparative legal studies from its present condition as "an esoteric and relatively undynamic specialty" by critically reviewing the scholarly discourse. I want to argue that comparing the law can be empowering and liberating, provided that we do not take our terms of and perspective on law for granted but are open to a radical re-evaluation of the domestic legal consciousness. In particular, we can begin the journey only by both emphasizing self-criticism—and not affirming a quest for neutrality—and re-examining specifically the assumed centrality of "law" in comparison. The remainder of this section will discuss these requirements and employ them in describing how one would critically discuss and compare abortion decisions.

89. McDougall, supra note 17, at 926.
90. Merryman, supra note 80, at 482.

A. From Ethnocentrism to Self-Criticism

Comparatists have to face a basic contention against their work—that it is necessarily laden with concepts, values and visions derived from their local legal culture and experience. Instead of coping with ethnocentrism, most comparative legal scholars avoid or hope to circumvent the problem of perspective by positioning themselves as neutral observers. The Encyclopedist implies that she gives every legal culture its due, by the very fact that none is excluded from the panorama and each is merely regarded and not weighted. The doctrinist may claim that she merely juxtaposes texts, implying that perspective is limited to the "comparative remarks" and even there under jurisprudential control, if not neutralized by the basically universal style of legal argument. The philosopher relies on strictly reasoned speculation that leads to universal legal principles, the law of nature or the portrait of an original position. The legal historian claims to retell a story that anyone can retell. Protagonists of a universal legal history have no qualms about biases: they rely on human nature, constants and archetypes of legal development that are said to be universal. How could a particular perspective taint the law's universality? The legal ethnologist derives objectivity from her vantage point as a quasi-natural scientist who observes and analyzes in detail and cross-culturally the laws and their stages of development. The functionalist trusts that functional, based on the essential likeness of all problems and legal solutions in modern societies, and the discourse with other comparatists will automatically rid her of hegemonic thinking and cultural biases.

Yet, despite all these claims that the comparatist be open-minded and think supra-nationally, the civil and common law still rule over the comparatists' world. And the individual as an abstract legal entity bestowed with rights and duties has been transplanted from the Western to almost every other legal culture. The law that "We" have dominates the law that "Others" have. Our schema dictate to a degree what we find in others and classify them as relevant or marginal, familiar or exotic, and so on.

Perspective is not only a cognitive or emotional defect or disposition that can be manipulated or cured by a "right" ethic, attitude or reasoning. It is an integral aspect of every person's history of learning. Being socialized into a particular culture—or simply: growing up—means to become familiar with, to gain a particular perspective on and be biased toward that environment. Are we therefore victims to our culture? Can a Western head only think in Western terms? I do not think so. We can transcend perspective, we can learn about, understand and empathize with what we find "strange" or "foreign"
or “exotic,” provided that we always recognize that we are participants of one culture and observers of any other. To transcend perspective means to realize that we use our language, which is culture-based, to grasp what is new and seemingly other than us. While the self, our cognitive history and its baggage of assumptions and perspective, cannot be disposed of at will, we can still try to honestly and consciously account for it, exposing it to self-critical re-examination. Though using our language is necessary, there is no a priori truth or universal logic to how we use it. That is why comparative work could be enlightened by a skeptical attitude toward allegedly authentic interpretations and universal categories.

Comparison has to be self-reflective. The comparatist has to reflect upon herself as a subject of and to law. Instead of pretending to the posture of a neutral, objective, and disinterested observer, the comparatist has to regard herself as being involved: involved in an ongoing, particular social practice constituted and pervaded by law; involved in a given legal tradition (a peculiar story of law); and involved in a specific mode of thinking and talking about law. Once the comparatist asks herself how she came to be what she is in terms of the law (an “individual” with “rights” and “duties,” a “tenant,” “taxpayer,” “parent,” “consumer,” etc.) and how she came to think as a “legal scholar” about her own law and the other laws the way she does, notions of normality and universality begin to blur. It becomes clearer then that any vision of the foreign laws is derived from and shaped by domestic assumptions and bias.

To cope with ethnocentrism, we have to analyze and unravel the cultural ties that bind us to the domestic legal regime. A practical and rather fascinating beginning could be a deviant reading of comparative legal literature focusing on the marginal stuff that is normally skipped for lack of relevance. Forewords and prefaces have interesting stories to tell about how comparison, despite higher aims and claims, is inspired and organized, in part at least, by contingent factors that reveal perspective: the comparatist’s legal education and exposure to specific legal cultures, honeymoons and travels, invitations to conferences, and so on.\(^91\) The marginal remarks indicate why and how the purportedly objective discovery and comparison of the “compared” legal culture is undercut by the comparatist’s assumptions.

After deciphering scholarly motives, interests and perspectives, one should then move on to systematically exploring the mechanisms for denying perspective. The deviant reading of marginal information would thus precede and prepare a critical reading of the “real” com-

92. To give some examples for such a critical reading: Wigmore’s “realistic impressions” of other peoples’ (legal) lives are intermittently supplemented by the imagery of his own (legal) culture: Hojo Yasuaki comes across as “a genuine Edward I.” The basic maxim of Confucian political philosophy is “the reverse of our own.” B. Irish colonialism in India is said to have been benign. J. Wigmore, supra note 36, at xi, 145, 215, 272, 475 (emphasis added).

Textbook authors come close to admitting that the selection and presentation of the comparative materials are not all that objective but influenced by their experience and educational (if not other) purposes. Still, most of them claim to present texts representing the “relevance” of “major” legal systems and traditions, which almost invariably include their domestic legal system. Usually—in analytical jurisprudence always—the categorial framework is provided by the domestic legal culture. In spite of authors’ claims that juxtaposed texts speak for themselves, the comparative remarks, the “pluses,” are prone to become dangerous supplements, for they appear to be necessary to make the texts speak—in the comparatists’ voice.

Modern comparatists, particularly in the fields of comparative constitutional and public law, rely on the dichotomy of substance and procedure. They attempt to “solve” the problem of perspective merely by comparing culturally “neutral” legal processes and institutions. McWhinney distinguishes the “value-neutral recording of institutions and processes and ethnically cultural relativism as to substantive aspects.” This distinction is meant to strip comparative legal studies that focus on formal and procedural aspects of cultural biases. E. McWhinney, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE 6 (1981). See also Z. NEDJATI & J. TRICE, ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW (1978); M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1969); F. GODWIN, COMPARATIVE ADMINISTRATIVE LAW (1983). The “procedurealists” and “institutionalists” typically claim neutrality for their comparative work because legal processes and institutions (courts, judicial review, civil procedures, etc.) cross-culturally fulfill the same or a comparable function. A different strand of comparative discussion operates within theories of natural law that allow the comparativist to identify substantive legal principles (freedom, human rights, fundamental values, etc.), which transcend national boundaries and thus neutralize particular cultural traditions and perspectives. See E. McWhinney, supra, at 7–8, 89–90 (“open-society values”); M. Capellatti, supra, at vi–vii (fundamental values); Claude, Introductory to COMPARATIVE HUMAN RIGHTS in R. Clade ed. 1976 (“flow of freedom”).

93. For a rigorous and fascinating application of the “dangerous supplement” analysis to legal doctrine, see Fing, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1277 (1984).

move beyond the dichotomy between relativism and universalism to a critique of positivist models of knowledge and rationality. From the vantage of that critique one’s own language and culture can be rethought as a chance as well as a trap; a chance to shed new light on a foreign culture from a distance. There is no guarantee against misunderstanding what is strange and new, but there is always the possibility that such misunderstanding can be productive and inspiring.

B. From Legocentrism to a Critique of Law

In order to be liberating, comparative legal studies would also have to overcome the legocentrism that characterizes the comparatists’ as well as the non-comparatists’ discourse. By legocentrism I mean that law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony. Most of legal scholarship and practice centers around law—how it works or ought to work, and how it can be made to work better. Jurists—legally educated and socialized, intrigued by legal techniques, overwhelmed by the legal vision of life—think and talk and act in terms of the law. Diachronic as well as synchronic comparison teaches us, however, that the law is not immutable, but that it is in constant flux, that there are quite different paths to social conflicts, and, more importantly, that other societies seem to get by with little or no law of the type to which we are accustomed. So even the traditional discourse, when carefully read, reveals that there is no absolutely right, superior, and exclusive legal technique and necessity at work. This may lead the student to intuit that no such technique exists and, hence, to question the objective rationality and hegemony of any one legal system.

Insights based solely on the historical and cultural relativity of law as a framework for social order are shaky, though; they are vulnerable to the suggestion that, given a more consistent construction of the body of laws and a more efficient legal technique, the law we are accustomed to would be necessary and rational. Legocentric thinking and legalism, its political strategy, draw their strength from an idealized and formalized vision of law as a set of institutions, rules and techniques that function to guarantee and, in every possible conflict, to vindicate individuals’ rights. If legal provisions do not live up to the promises inherent in the rule of law, this may be interpreted as an unfortunate and atypical accident, a singular event of justice miscarried. Thus the overall legitimacy and efficiency of the legal order remain intact.

Legal formalism affirms the inevitability or unquestionable or superior rationality of law by focussing on its reified elements—forms, procedures, texts—and by emphasizing the relations between the agencies and agents of law. The legocentrists dichotomizes law and reality, legal and social practice, granting law a realm—a reality, logic, and language—of its own. This dichotomy permits the non-comparatist to conclude that the legal language is malleable, that legal doctrines and provisions and their application are indeterminate. We are to believe that the unpredictability of legal trends and decisions is merely an expression of the law’s development lagging behind the developing social demands emanating from the environment. All the law needs, then, is to improve, shape up, and be more in touch with reality.

Legal realism and, to a lesser degree, sociological jurisprudence have undermined this legocentrist-formalist syndrome by connecting law with social purposes, political interests and problems of language/writing. They have challenged the idea of a politically neutral normative structure determined by legal reasoning and forming a coherent system. The realist message and, of course, its radicalization by critical legal scholars go to a large extent unnoticed in the discourse on comparative law. Mainstream comparatists, so it seems, try to escape from the critique of the legal order by comparing and affirming the relative determinacy, rationality, and consistency of modern (civil and common) law. While the critics assert that there is clearly a body of legal doctrine and legal provisions, albeit one short of the status of “system,” comparatists talk of systems of law and presuppose that legal norms and doctrines provide a determinate answer to all questions that may arise and cover all conceivable situations. While the critics reject the vision of jurists as applying doctrine and statutes to reach results that are untainted by the jurist’s interests and biases, comparatists generally do not question that there is a neutral and autonomous mode of legal rationality; some even go on to claim, often implicitly, that there is in essence a universal or world style of legal reasoning. While the critics contend that the law reflects competing ideas of social life and normative ideals, and contradictory ideological visions of individuality and collectivity, comparatists generally hold


98. Compatatists, as if sensing the sticky problem of indeterminacy, emphasize process and procedures, legal forms and relations over substantive ideas and norms. See, e.g., textbooks on comparative law: J. Merriman & D. Clark, supra note 9; M. Carpelletti & W. Cohen, supra note 9.

99. See Zweigert & Kötz, supra note 1, at 16, 19–21, 25, 30–31, 39. The “juxtaposters” at least imply such a universal style beneath the apparent differences.
fim to the view that legal provisions and doctrines contain a coherent and justifiable concept of human relations.

If this adequately summarizes the comparatists' overall reaction to standard critiques of law, then it would be naïve to postulate a re-imaginative discourse. To begin with, comparatists have to rise above modestly sociological insights, such as the interdependence of law and its environment, and have to try a little realism—and then more: critical legal theory. Theoretically and practically this would mean to stop conceptualizing law as a supplement to reality, based on the oppositions of nature and culture and society and law. Legal institutions, techniques and rules are not just cultural phenomena regulating and ordering a temporarily prior and originally unregulated state of nature. Such a pure state or original position never existed, however strong the desire for it or however powerful a myth creating it may be. It is equally misleading to place law outside and vis-à-vis reality and society. Social life, so I have argued above, is constituted by law also. Some form of order has always already structured nature, reality and society, although it is true that at various but rather uncertain points are these structures referred to as "law."

Once these oppositional distinctions are given up, law can be seen as an equivocal phenomenon. Institutions, techniques, and procedures symbolize only one side of the law. The formalized relationships between agents and agencies in terms of the law are only the frozen aspects of a social practice constituted by specific ways of thinking and acting alienated from immediate experience, by a specific normative imagery ("rule of law," "rights," "due process," etc.). Law teachers and students, legal practitioners as well as law-abiding, law-avoiding, and law-breaking citizens are deeply involved in, sustain and develop this practice. Isn't it true that "legal gains" have been made? That "rights" when enforced have protected individuals and minorities? That freedom of speech is essential? A pervasive legal consciousness keeps us in a Kafkaesque and fascinating world of rights and duties, rules and standards, procedures and substances, crimes and punishments. It is not so much the law's institutional framework or symbolic representation, not so much courts, texts and arguments or conscious use of the instruments of law. It is rather its hiddenness and pervasiveness as a social agenda and as our "second nature"—framing our minds, kindling fantasies, structuring and limiting our social visions, and influencing our actions—that account for its mystique and magic spell.

What good can comparison do in this situation? How can comparative legal studies prevent us from being totally mystified by the law? How can comparative law make us see where and when rights protect or help or disempower or depoliticize? A comparative perspective could be one of the methods for questioning and distancing oneself from the dominant legal consciousness. And, as I have argued, distance does not come naturally. A comparative analysis may well be and often is as mystifying and involving as its non-comparative sibling. Distance requires taking nothing for granted, least of all the forms and rationality of law. A liberating distance begins with investigating what the law does to us, to our world views, and to human relations. Intuitively we know or have a hunch that legal provisions and procedures—whatever their positive effects may be—also disempower by channeling conflicts to legal agencies, reify by turning personal relations into matters of law, and alienate by imposing an exclusive and excluding language and logic and by imposing a time-frame that abstracts from real persons and their life. A non-comparative approach might be more prone to discount these features and effects of law as necessary evils if not as rational mechanisms. I believe that the comparatist is in a privileged position by the very fact that she is confronted with different legal forms and categories, with alternative legal and non-legal strategies all of which may be more or less realistic, adequate, mystifying, reifying, alienating, and so forth. All I suggest, therefore, is that comparative legal studies offer a better chance for distance and for exposing in law deficiencies, contradictions, ideological components and competing visions.

If the tradition of comparative legal scholarship does not promise that comparatists will make much of this chance, another consideration might. Comparatists are under pressure. The Cinderella Complex is real. Their discipline, interesting as it may be, is chiefly regarded as a cognitive burden without adequate compensation. That is why comparative legal research is more and more done outside the law schools. In order to reverse this trend and to root comparative law firmly in legal education, comparatists have to demonstrate that comparison is worth the extra effort and that it makes a difference.

C. A Non-legocentric Look at Abortion Decisions

To illustrate how comparison could make a difference, I shall briefly discuss how court rulings on abortion have been compared and how they might be compared from a critical and non-legocentric perspective.

Conventional comparison basically follows the path of doctrinalism relying on the method of Juxtaposition-plus. From all available court decisions generally those are selected that allow for some cultural

100. See M. CAPPELLETTI & W. COHEN, supra note 9, 563–622; W. MURPHY & J. TANINHAIN, supra note 61, 409–12.