6. THE COMPARATIVE METHOD AS AN APPROACH TO LEGAL SCHOLARSHIP

Comparative law used to be labeled as a method or sometimes as a science. The debate, started early in the twentieth century, shortly after the already mentioned Paris conference of 1900, conventionally known as the "founding moment" of our discipline.[1] It unfolded at a time in which the Western legal scholarship in general and the European one in particular, were successfully claiming a scientific status. It is just natural that comparative law, eager to be recognized as a prestigious academic discipline, would make similar claims. At this very early moment in its childhood, comparative law had developed what some critical observers call a *Cinderella Complex*.[2] On the one hand, its adepts felt that their approach was more worldly and sophisticated than that of their "municipal" or "parochial" law school colleagues. Therefore, they developed a sense of pride and belonging to a community that was early-endowed with its academic institutions like the prestigious International Academy of Comparative Law founded in The Hague, in Holland in 1924, which has ever since presided over the organization of a major event every four years. On the other hand, comparative law experts have always been quite marginal in law schools, regarded as a strange type of jurists compelling them to justify their very existence. In most U.S. law schools, even today the comparative law professor is often known by his peers as the colleague with the funny accent....

Early methodological debates on the nature and functions of comparative law, therefore, abound on law review articles and introductory chapters of books, producing a large amount of highly technical literature that certainly has not helped in enhancing the reputation of our discipline.[3] Recently, a leading comparative lawyer, participating in a new wave of critical methodological discussion, has gone as far as arguing for the end of comparative law as an autonomous discipline.[4]

Today, we know that the early debates on comparative law as a science or a method are pedantic and rather pointless. There is no one method of comparative law but a large variety of methods to compare laws, fitting the different objects of a given comparative project. For example, if we wish to compare the land law of Mali with the land law of Afghanistan, two legal cultures in which a thick component of the legal system is neither written

1. *See* Anna di Robilant & Ugo Mattei, "The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe," 75 Tulane Law Review 1053–1092 (2001).

2. *See* Günther Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harvard International Law Journal 411, 412 (1985).

3. *See* L.J. Costantinesco, Traité de droit comparé Tome II, Lgdj, Paris, 1972, pp. 81ff.

4. *See* Mathias Reimann, The End of Comparative Law as an Autonomous Subject, 11 Tulane European & Civil Law Forum 49 (1996).

nor dominated by a formalized legal profession as in Germany or the U.S., we might find useful or even unavoidable to use an *ethnographic or an anthropological method* in the study of comparative law.[5] However, if we wish to compare corporate governance in Switzerland with corporate governance in the United States, an approach known as *Comparative Law & Economics* might be in order.[6] Moreover, to compare the *styles* of judicial legal decisions in different legal systems, we might find useful a comparative study using literary criticism as its central method.[7]

As to comparative law as a "science," today, we are generally skeptical (at least in the United States) about such claims when it comes to the nature of law. We can, however, accept that law, as a social phenomenon, can be approached with a *scientific method* of inquiry by advancing hypotheses concerning its nature and by testing them empirically. Comparative data about the behavior of law in different contexts and conditions are certainly a crucial component of any scientific testing of a proposition about the nature of law.[8] To be sure, one should also consider and take into account the critical position that denies any possibility of objective "scientific knowledge" in the social sciences. For such critics then, comparison, rather than being a scientific exercise should be considered an experience of participatory observation, discounting the inevitable political and cultural biases of the observer.[9]

In more critical vein, comparative law has been described as a narrative hiding behind a façade of scientific neutrality—a conservative political agenda.[10] Without belaboring too much on a scholarly dispute, interesting as it might be, we might want to sum up the most recent developments by mentioning that "ethnocentrism" and "orientalism" are broadly pointed out as the two main enemies of serious comparative inquiry in the domain of the law.[11] Any student approaching for the first time our discipline must be prepared to get rid of all assumptions about the very nature of the law, including those that he or she might consider more natural. Comparativists should always display an attitude of learning rather than of teaching, of

5. *See* Keita, Amadou (2003) "Au Detour des Pratiques Foncieres a Bancoumana: Quelques Observations sur le Droit Malien," Global Jurist Frontiers: Vol. 3, Iss. 1, Article 4. Available at: http://www.bepress.com/gj/frontiers/vol3/iss1/art4.

6. *See generally* on this method, Ugo Mattei, Comparative Law and Economics, (1997). Of course, the ethnographic and historical method can be usefully applied even in the case of "economic" subject matter. *See e.g.*, Ellen Hertz, The Trading Crowd: An Ethnography of the Shanghai Stock Market (1998), and Teemu Ruskola, Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective, 23 Stan. L. Rev. 1599 (2000).

7. *See* Mitchell de S.O.I'E. Lasser, Judicial (Self-) Portraits: Judicial Disclosure in the French Legal System, 104 Yale Law Journal 1325, 1332 (1995).

8. *See* R. Sacco, Legal Formants: a Dynamic Approach to Comparative Law, 39 American Journal of Comparative Law, 1–34 (Part I); 343–401 (Part II) (1991).

9. *See* Günther Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harvard International Law Journal 411, 412 (1985).

10. David W. Kennedy, The Politics and Methods of Comparative Law in Pierre Legrand (ed.) Comparative Legal Studies: Traditions and Transitions (2003).

11. *See* Teemu Ruskola, Legal Orientalism, 101 Michigan Law Review 179 (2002).

listening rather than of talking. They should never be judgmental but only try to understand. They should be humble and ready to be surprised about others, but also about themselves. In Gunther Frankenberg's image, the comparative lawyer should be like a traveler, experiencing the marvel of discoveries.

By the use of comparison, it then should become possible to make observations and to gain insights that would be denied to one whose study is limited to the law of a single country.[12] Of course, the mental attitude of the enterprise, whether we look for analogies or for differences, in a word whether we consider the glass "half empty" or "half full" might make all the difference. Most times however, because we belong to history, this does not mean that the endeavor of comparing is completely subjective. On this issue, it might be worth reading an excerpt from the last published piece, a true intellectual testament, of a great master of our discipline and the first author of this casebook.

R.B. Schlesinger, The Past and Future of Comparative Law

43 American Journal of Comparative Law 477 (1995).

Let me begin with the obvious: To compare means to observe and to explain similarities as well as differences. In comparing legal systems and institutions, depending on the purpose of the undertaking at hand, the emphasis is sometimes on differences, and at other times on similarities. In Europe, where endeavors directed at legal comparisons have a long and venerable history, periods of contrastive comparison (with emphasis on differences) have alternated with periods of what we might call integrative comparison, i.e., comparison placing the main accents on similarities.

Any discussion, however summary, of the past history of comparative law has to include a careful look at the period that elapsed from the days when Irnerius began to teach at Bologna until the more recent era marked by codification of private law in most civil-law countries. During those

12. For an extensive discussion of "the concept of comparative law," *see* K. Zweigert & H. Kötz, An Introduction to Comparative Law 1–12 (Tony Weir trans., 2d ed. 1987; one-volume paperbound ed. 1992). A new German edition (K. Zweigert & H. Kötz, Einführung in die Rechtsverglieichung (3d ed. 1996)) has since been published. Other general texts on the subject include Michael Bogdan, Comparative Law (1994); L.-J. Constantinesco, Rechtsvergleichung (3 vols., 1971–1983); *id.*, Traité de Droit Comparé (3 vols., 1972–1983); René David & John E. C. Brierley, Major Legal Systems in the World Today (3d ed. 1985); H. G. Gutteridge, Comparative Law (2d ed. 1949); M. Rheinstein, Einführung in die Rechtsvergleichung (R. von Borries ed., 2d ed. 1987); Rodolfo Sacco, Introduzione al Diritto Comparato (1990), most of which has been translated as R. Sacco, Legal Formants: A Dynamic Approach to Comparative Law (pts. 1 & 2), 39 Am.J.Comp.L. 1, 343 (1991). More recently, Patrick Glenn, Legal Traditions of the World. Sustainable Diversity in Law (2000); Esin Orucu & David Nelken, Comparative Law. A Handbook (2007); Werner Menski, Comparative Law in the Global Context (2006).

seven centuries, there emerged what we call the *ius commune* of continental Europe....[1]

Comparison of laws and legal materials across political frontiers became a standard technique of lawyers and judges during the era of the *ius commune*. To make the point more concrete, let me assume for a moment that as a practicing lawyer or a judge in, say, 17th century Brussels I have to struggle with a difficult question of law not answered by any local statute or ordinance. What sources will I consult in my search for convincing arguments leading to a solution? Unless the text of the Corpus Juris provides unambiguous guidance, I shall of course look at the writings of the recognized sages. Some of those scholars, like Azo and Bartolus, lived and taught in Italy; the nationality or university affiliation of other legal authors may have been French, German, Spanish, Portuguese or Dutch. A court sitting in Brussels would measure the authority to be accorded to each of those scholars by his reputation and by the strength of his exposition of the relevant points, but certainly not by the number of kilometers or of political frontiers separating Brussels from that particular scholar's birthplace or from the situs of his university ... reported judicial opinions also formed part of the legal materials and authorities that were consulted at that time by anyone seeking to ascertain the principles and rules of the *ius commune*. But here again, as in the case of scholarly writings, the judicial decisions to be consulted by a Brussels jurist might have been rendered by a court sitting in Italy or Germany, or indeed anywhere in continental Europe.... It is important to note, however, that when they studied, and often relied upon, materials and authorities emanating from other parts of the continent, they did not treat such materials and authorities as belonging to a foreign legal system. On the contrary, they studied those out-of-state materials as part of their routine endeavor to ascertain and to concretize the ius commune, i.e., their own law. Quite naturally, therefore, the process of comparison tended to be *integrative* rather than *contrastive*.

All of this changed during the age of codification that commenced in the second half of the 18th century. The new codes that were adopted in virtually all countries on the European continent were national codes, thus, largely unifying the law within each of the nation states. Each code was written in its own national language. The common language of previous legal learning—Latin—was abandoned; and because each of the codes in its text and its application reflected a good deal of national individuality, formidable new intellectual barriers were erected between the legal systems of the several nations. Lawyers and legal scholars working within any of the newly codified systems now had to treat other similarly codified systems—even those on the European continent—as truly foreign law, with which the great majority of judges and practicing lawyers, and even most law professors teaching at national law schools, were totally unfamiliar.

Under these changed circumstances, comparative law became a specialized branch of legal studies, with a different emphasis. Legislators, who

1. *See infra.*

desired to learn from the good or bad example of foreign laws, began to seek help from comparative law specialists who were familiar with those laws. And in legal practice, whenever the foreign elements of a case required resort to foreign law, again it was the same specialists who were called upon to ascertain and explain, and if necessary to prove, the applicable foreign law. With all this dominant focus on "foreign law," those engaged in the study and practice of comparative law were compelled to emphasize differences rather than similarities, i.e., to take a contrastive approach that was radically different from the integrative approach of the previous period.

The contrastive approach continued to prevail well into the second half of the 20th century. In the last two or three decades, however, the pendulum has again begun to swing the other way. Under the impact of a dramatic world-wide intensification of the trans-national exchange and movement of persons, goods, services and capital, the work of all branches of the legal profession tends to become globalized....

QUESTION

Do you agree that globalization carries with it "integrative" approaches to comparative law? Within which political, cultural and geographic limits?