The Enigma of Comparative Law

Variations on a Theme for the Twenty-first Century

ESİN ÖRÜCÜ

MARTINUS NIJHOFF PUBLISHERS
LEIDEN / BOSTON

Depending on one's own personal stance on comparative law, one Variation will have a positive, the other a negative tonality. But this tone is there only because the reader's approach to, and appreciation of the topic reflects her expectations of the contents of one chain of Variations. Perchance, the reader may find that in the chain of Variations she is following, there is a Variation in a sub-theme that she is not happy to listen to. Then I suggest that she glance at the other Variation to see whether that is more satisfying.

Depending on the density of the paradox looked at, some Chapters and Variation sections are shorter than others. Half way through the book there is an Intermezzo - a short pause in which to take stock and to note the relationship of, and common ground shared by, the two approaches thus far. Further on, the Cadenza provides an opportunity for improvization without Variations, where a number of complex examples and cases are discussed, the meeting of law and culture is analysed, a de-construction of systems classification and a 'family trees model' is offered, the reality of mixing systems is re-visited and limits of comparativism are considered. The Finale, an integrative Chapter, looks towards our destination and indicates trends and horizons. The tail-piece Coda, in which the shifts ahead are indicated, brings the work to a close

I suggest that the subject be approached not as a monophonic or not even a homophonic texture, but as the polyphonic texture that it is. The question then is, where do we begin? Begin at the beginning, with the theme. So, now is the time to introduce the Theme, 'Comparative Law'.

Chapter 1

THE THEME COMPARATIVE LAW: WHAT IS IT? WHAT IS IN A NAME?

' ..... O! be some other name:
What's in a name? that which we call a rose
By any other name would smell as sweet;'[1]

Comparative law as we know it today can be regarded as a child of the nineteenth century which has reached adolescence in the twentieth.[2] During this period, their subject seems to have given comparative lawyers total freedom and provided them with the seemingly endless pastime of discussing the true meaning, historical development, dangers, virtues, scope, functions, aims and purposes, uses and misuses, and the method of their subject. This has not only been the favourite pastime of comparative lawyers but of others also. Neither did this pastime lose its attraction when comparative law was accepted as part of the undergraduate curriculum in most universities in most legal systems, albeit as an elective course. In our century comparative law will reach maturity.

Although the twenty-first century has been heralded as 'the age of comparative law', amazingly, it is still open to question whether comparative law is indeed an independent discipline at all.[3] Only recently, comparative lawyers have been called upon to re-think their subject[4] and it has also been suggested that the healthiest path for comparative law to secure its future is to penetrate other subjects[5] and to present itself in integrated courses.

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[1] W. Shakespeare, Romeo and Juliet, Act II Sc. 2, Lines 42-44.
[2] The history of comparative law is not to be discussed in this work, but see K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd. edn., trans. T. Weir (Oxford, Clarendon Press, 1998) and the bibliography provided there, pp. 48-62.
[3] G. Samuel, 'Comparative Law and Jurisprudence' (1998) 47 *International and Comparative Law Quarterly*, 817; and J. Gordley, 'Is Comparative Law a Distinct Discipline?' (1998) 46 *American Journal of Comparative Law*, 607.
[4] B. Markesinis, 'Comparative law – A Subject in Search of an Audience' (1990) 53 *Modern Law Review*, 1.
[5] *Ibid.*, p. 21.

Objectives as varied as aiding law reform and policy development, providing a tool of research to reach a universal theory of law, a critical perspective to students and an aid to international law practice, facilitating international unification and harmonization of laws, helping courts in filling gaps in the law and even working towards the furthering of world peace and tolerance have been attributed to comparative law. These objectives have been grouped as practical, sociological, political and pedagogical. The findings of comparative lawyers could be utilized for any of these objectives. However, unanswered questions remain: Are these the true objectives of comparative lawyers and if so, are they fully taken advantage of?

Other categorizations have also been made and attached to the name 'comparative law' such as descriptive, dogmatic, applied, contrasting, integrative, legislative, scholarly, scientific, formal, historical, macro, mezzo and micro. The terms 'traditional comparative law', 'conventional comparative law' and 'critical comparative law' have also become popular.

One thing is certain. There is a growing interest in comparative law. For example even a cursory survey of legal journals shows that there is an increase in the number of journals either dedicated to Comparative Law or with Comparative Law in their titles. Additionally, the number of articles with a comparative element published in these journals has quadrupled within the past ten years.[6] It has recently been observed that, 'Comparative law is an odd discipline. Long considered to be exotic and irrelevant to real issues, today it is a required component of university curricula and legal practice'.[7] Not only that, but it has become indispensable for all doctoral research, and judges and legislators consult foreign material as a matter of routine.[8]

Of course diversity and popularity are to be welcomed. 'However, comparative law is not just experiencing the pleasure of the ageing movie star suddenly becoming a cult figure: it is also fraught with internal contradictions, uncertainty, and a sense of mid-life crisis.'[9]

It has been said that in the UK, 'Comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome, rather than fear, its influence.'[10] On the European continent it is said that:

> For a long time it looked as though comparative law was a matter for academic research, difficult and, surely, very interesting, beautiful to know something about, but not immediately relevant to the daily life of the law. Over the last ten or fifteen years the legal climate seems to be changing. This evolution may be influenced by the process of European integration; it may also result from the fact that we are living closer together (the 'global village' situation); it may finally be an autonomous process, occasioned by the lawyer's search for fresh perspectives, in particular when completely new legal problems are to be solved.[11]

[6] See P.G. Monateri, 'Everybody's Talking'; The Future of Comparative Law' (1998) 21*Hastings International and Comparative Law Review*, 825.

[7] O. Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', (2001) *Oxford University Comparative Law Forum* 4 , p. 1 at ouclf.iuscomp.org; also in (2001) 53 *Revue international de droit comparé*, 275-288.

[8] *Ibid.*

[9] A. Harding and E. Örücü, 'Preface' in id. (eds) *Comparative Law in the 21st Century* (London, Kluwer Law International, 2002), p. xii.

[10] Lord Goff, 'The Future of the Common Law', (1997) 46 *International andComparative Law Quarterly*, 745, at p. 748.

It is certainly true that 'if comparative law did not exist it would have to have been invented'.[12] Yet the two fundamental questions related to comparative law remain, 'What is it?' and, 'Is the name "comparative law" appropriate?' This is remarkable. What is even more remarkable is that the attempts to answer both these questions are so varied.

Although Harold Gutteridge once observed that, 'the essential problem is not – What is comparative law? The question of real importance is – What is its purpose?',[13] most works on comparative law start with the question, 'What is Comparative Law?' and then try to define it. As pointed out by Alan Watson, who himself starts by asking the same question, 'the range of replies is startling',[14] even including a rather circular, vague and open-ended definition telling us that 'the words suggest an intellectual activity with law as its object and comparison as its process.'[15]

We as comparative lawyers may rejoice in the knowledge that the more complete a theme appears to be, the less possibility there is of seeing it in its various aspects, so we can say that the less complete the theme, the more likely it is to be open to new connotations. Hence the pleasure in dealing with an 'incomplete theme' such as Comparative Law.

The first Variation below regards comparative law as an autonomous branch of social science, a science of legal knowledge, an end in itself, as a high level analytical subject. The second Variation considers the subject comparative law, if it exists at all, as merely a way of looking at the normative world and trying to discover similarities and differences between legal systems and legal rules, and for a practical purpose.

[11] T. Koopmans, 'Comparative Law and the Courts' (1996) *45 International and Comparative Law Quarterly*, 545, at p. 545.

[12] H.J. Ault and M.A. Glendon. 'The Importance of Comparative Law in Legal Education: United States – Goals and Methods of Legal Comparison', in N.J. Hazard and W.J. Wagner (eds) *Law in the USA in Social and Technological Revolution* (Brussels, Bruylant, 1974) p. 69.

[13] H.C. Gutteridge, *Comparative Law* 2nd. ed., (London, Cambridge University Press, 1949; reprint, Wildy & Sons, London, 1974) p. 5.

[14] A.Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974) pp. 171-172.

[15] Zweigert and Kötz, above note 2, p. 2.

VARIATION I

Is Comparative law to be defined merely as the juxtaposing, contrasting and comparing of legal systems or parts thereof with the aim of finding similarities and differences? For the purposes of this Variation, the reply must surely be much wider than that. The appropriate reply here is: 'Comparative Law' is a science of knowledge with its own separate sphere. Comparative law is an independent science, producing theoretical distillate. The enabling of the comparative lawyer to extract new knowledge with diverse applications, makes even comparative law methodology a method of acquiring knowledge. Comparative law can be regarded as the 'critical method of legal science'.[16]

Obviously, this does not mean to say that there are no other aspects to it. Indeed comparative law is a very broad field and the fruits gained by comparative study can be put to many uses. Comparative study can have many objectives: sociological, political, practical and pedagogical. It has developed in a number of well-established disparate directions. However, it can never be justified by its uses or objectives. As Rodolfo Sacco points out 'the use to which scientific ideas are put effects neither the definition of a science nor the validity of its conclusions.'[17] According to him, the reason why 'those who compare legal systems are always asked about the purpose of such comparison'[18] is not because comparative law has to justify its existence by its uses, but because the inquirers are of the 'common sense' or 'utilitarian' ilk. 'Comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use',[19] though obviously this does not mean that the knowledge gained should not be put to practical use. For example, my inaugural lecture at Erasmus University Rotterdam, 'Symbiosis between Comparative Law and Theory of Law',[20] at no point denied the uses to which knowledge gained by comparative legal research can be put, yet saw comparative law as intertwined with legal theory in the quest for knowledge. In this way comparative law gives deep understanding and insight. The initial thesis of the Trento group is to be endorsed: 'Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks such as the improvement of the law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research.'[21]

[16] *Ibid.*, p. 33.
[17] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative law (Installment I of II)' (1991) 49 *American Journal of Comparative Law*, 1.
[18] *Ibid.*
[19] *Ibid.*, p. 4.
[20] See E. Örücü, *Symbiosis Between Comparative Law and Theory of Law – Limitations of Legal Methodology* (Mededelingen van het Juridisch Instituut No 16, 1982, Erasmus Universiteit Rotterdam), pp. 1-25.
[21] Sacco above note 17, pp. 4-5.

Comparison is the essence of understanding. Comparison is for logical abstraction. Comparison is the juxtaposing of the unknown to the known in order to glean legal knowledge. Comparative law is essentially for scholars.

The everyday process of thinking involves the making of a series of comparisons, that is, it is a process of contrasting and comparing. We comprehend the phenomena around us by observing differences and similarities, by juxtaposing the unknown and the known. 'Just as the qualities of a yellow, its hue, brilliance and tone are perceived and sharpened most truly by placing it first on or beside another yellow and secondly by placing it in contrast to purple, so we explore the world around us.'[22] One cannot appreciate darkness till one has seen light or light till one has seen darkness. All research which aims at explanatory generalizing involves comparison.

> Many terms have been used to designate the methods of scholarly investigation: *a priori, a posteriori*, deductive, inductive, analogical, historical, artistic, genetic, statistical, scientific, intuitive, observation, experiment, classifying, hypothesizing, empirical, logical, ethical, quantitative, qualitative, descriptive, narrative, dialectical, codifying and so on. Comparison is involved in all these methods. It is characteristic of all intellectual functions whose purpose is the discovery of sameness and difference.[23]

It is in this way that we also understand the legal world around us.

Comparative law is the name of the most sophisticated analysis of law. It looks at the world of law and the environment in which it lives, provides knowledge about law as rules, law in context and law as culture, thus enabling us to have comprehensive and deep knowledge of the legal phenomena and their interactions in society. The subject works towards total understanding of law. Although traditional legal doctrine does engage in comparative law through the 'law as rules approach', here law is approached in context and not merely as 'sets of rules'. Any other way of looking at law and at comparative law bears the prejudices of positivism and of national legal cultures. It is important to regard comparative law 'as an indispensable international component of a "*culture juridique*"'.[24]

Comparative law gives us a tool of communication. Indeed it is the vital tool for this. Therefore, one must study comparative law with its vast subject matter, as a separate topic in undergraduate studies and as a sophisticated tool in postgraduate studies. This can only be done in an autonomous general comparative law course.[25]

[22] A.E. Örücü, ' Method and object of comparative law' in: H.W. Blom and R.J. de Folter (eds.), *Methode en Object in de rechtswetenschappen* (Zwolle, W.E.J. Tjeenk Willink, 1986) pp. 57-72, at p. 57.
[23] J. Hall, *Comparative Law and Social Theory* (Louisiana, Louisiana State University Press,1963), p. 20.
[24] Zweigert and Kötz, above n. 2 p. 54.
[25] This subject will be considered again in Variation I in Chapter 7.

Comparative law is the ultimate in sophistication in legal research; it has the generality of legal theory but also the specificality of drawing its examples from the pool of models which it can use to illustrate the general points it is making. Comparative law, like legal theory, legal history and legal sociology, brings to the lawyer additional perspectives, and not only that, it is indispensable for these other fields as well. It can even be claimed that, 'comparative law, properly pursued, is an essentially philosophical activity.'[26] However, it has also been pointed out that unfortunately traditional comparative law has failed by paying insufficient attention to context and ignoring the context of ideas.[27] This is the failure of comparative lawyers not the inadequacy of comparative law. To regard comparative law purely as the comparison of laws has been rejected as, 'incompetence masquerading as jurisprudential expertise.'[28] These observations must be noted and the situation reviewed, and where necessary, remedied in our new century.

Of course, all can avail themselves of the fruits of comparative law research. But for the academic comparative lawyer the prime function of comparative law, sometimes called 'scholarly comparative law', is to provide access to legal knowledge which can be used not only for the purposes of law reform, or as a research tool, or to promote international understanding, but above all to fulfil the essential task of a comparative law scholar proper, that is, to further the universal knowledge and understanding of the phenomenon of law. Such extraction of knowledge also breeds scepticism, this being the starting point of intellectual freedom. Comparative law is concerned with the overall problems which influence the legal, social and cultural systems in society rather than with rules of a particular field of law. It belongs as a theoretical subject, with legal history, sociology of law and jurisprudence or legal theory. As pointed out earlier, the findings often do, but need not have practical value

Hence, 'Global systematic legal comparison is essential for an accurate definition of law as a social phenomenon and for the understanding of the nature of law and its function in society generally. Comparative law is indispensable to the legal theorist or legal philosopher ... for the formulation of general theories of law ... for the testing of these general theories.'[29]

As Harry Lawson observed:

[26] W. Ewald, 'Comparative Jurisprudence (1): What Was It Like to Try a Rat?' (1995) 143 *Pennsylvania Law Review*, 1889 at p. 2145.
[27] *Ibid.*, p. 1889; and also M. van Hoeke and M. Warrington, 'Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law', (1998) 47 *International and Comparative Law Quarterly*, 495.
[28] R.H.S. Tur, 'The Dialectic of General Jurisprudence and Comparative Law' (1977) *Juridical Review*, p. 238.
[29] W.J. Kamba, 'Comparative Law: A Theoretical Framework', (1976) 23 *International and Comparative Law Quarterly*, p. 494.

> The jurist who approaches legal theory by way of comparative law, not only becomes sceptical of facile generalisations about law, but refuses to be exclusively interested in definitions or theories which squeeze out of the law of any country the peculiarities that give it life. To adopt a mathematical metaphor, he is more interested in discovering the least common multiple of law than its highest common factor.[30]

A succinct view formulated by Richard Tur summarises the ultimate position:

> The unity of general jurisprudence and comparative law consists in the unity of form and content; they are essential moments of legal knowledge, different sides of the same coin. General jurisprudence without comparative law is empty and formal: comparative law without general jurisprudence is blind and non-discriminating. General jurisprudence with comparative law is real and actual: comparative law with general jurisprudence is selective and clear-sighted.[31]

This Variation fully endorses the view expressed by the highly respected American comparative lawyer Hessel Yntema who equated legal research with comparative law, saying that, comparative law was another name for legal science being 'an integral part of the more comprehensive universe of social and human science.'[32] It has lately been claimed that macro-comparativism is being pursued as an alternative to jurisprudence.[33] If this is the case, then why not regard this as a worthy aim? Comparative lawyers would be well advised to strive towards this goal. Comparative law is also in competition with legal history. It has been said that, 'ten lively lectures on the Persian or Chinese conception of law would do more to stimulate true jurisdic intelligence than a hundred addresses on the pitiful bunglings of the law of intestate succession between Augustus and Justinian.'[34]

Reading this Variation the reader might be led to the conclusion that comparative lawyers are undertaking an ambitious, delicate and infinitely difficult task, but then: 'Who ever claimed that comparative legal studies should be easy? Who ever asserted that comparative legal studies should be for everyone?'[35] .

[30] F.H. Lawson, 'Comparative Law as an Instrument of Legal Culture' in F.H. Lawson, *The Comparison, Selected Essays*. V. II (Amsterdam, New York, Oxford,North-Holland Publishing Co., 1977) p. 75.
[31] Tur, above note 28, p. 249.
[32] H. Yntema, 'Comparative Law Research – Some Remarks on Looking out of the Cave', (1956) 54 *Michigan Law Review*, p. 902.
[33] I. Ward, 'The limits of Comparativism: Lessons from UK-EC Integration', (1995) 2 *Maastricht Journal of European and Comparative Law*, 23 at p. 31.
[34] Zweigert and Kötz, above n. 2 p. 53 from Thibaut supported by Feurbach. (Thibaut,'Über die Nothwendigkeit eines allgeeminen bürgerlichen Rechts fur Deutschland', in Thibaut, *Civilistische.Abhandlungen* (1814) 433)
[35] P. Legrand, 'How to compare now' (1996) 16 *Legal Studies*, 232 at p. 239.

In addition to the question of 'What is comparative law?', a second concern is with the name of the subject itself. This concern is voiced mostly in the English speaking world and for the term in the English language. However, and most interesting, though in Turkish, '*Mukayeseli Hukuk*' or '*Karşılaştırmalı Hukuk*' - an exact translation of 'comparative law'- is the term used, discussion related to the name has never arisen among Turkish comparative lawyers and the name is well established. But then, in Turkey, as on the European continent, law is regarded to be a branch of social science. This is not so in the English speaking world. In the English speaking world we are constantly asked: Is comparative law an appropriate name? Is it not a misleading term? It has been said that the term 'comparative law' is misleading since it is not a specific area of law as is family law, property law or administrative law. Many, especially those who regard comparative law as a non-subject void of a content of its own, as will be seen in 'Variation II', point to the term as it appears in some other languages where, as translated, the subject is either called 'Comparison of Laws' (*Rechtsverglichung*, *Rechtsverkelijking*) or 'Law Compared' or 'Compared Law' (*droit comparé*) and suggest that 'comparative law' as a term be abandoned.

However, this Variation regards the name 'Comparative Law' to be appropriate as comparative law has its own specific sphere, is the central element in all comparative work, is the critical subject for the study of law in context which increases our knowledge of law in society. It has recently been stated that, 'Because law is not only a reference but is the very field of our study, the traditional term of comparative law is fully justified and suitably reflects the field of our scholarly endeavours.'[36] Not only law, but comparison are the central elements here. If there were a serious call for a change of name, then 'Comparative Study of Law' or better still, 'Comparative Legal Studies', another name that is now often used, would be apt, as this has a generality beyond the normative approach dominant among black-letter-law comparatists and implies a wider approach to law. In a recent work for example, carrying the title 'Comparative Legal Studies: Traditions and Transitions', it is stated that the term 'Comparative Legal Studies' in the title was chosen deliberately to avoid 'this academic quagmire'.[37]

Comparative law is an independent theme. As a branch of social science it is based on positive observation rather than philosophical speculation. Nevertheless, as earlier stated, even the philosophy of law which aims at true knowledge of law must exist in symbiosis with comparative law as it cannot afford to be merely speculative if it intends to serve the purpose of the furtherance of legal knowledge by answering questions about law. Hence:

[36] K.D. Karameus, 'Comparative Law and Comparative Lawyers: Opening Remarks', (2001) 75 *Tulane Law Review*, 859-870, at p. 867.
[37] R. Munday, 'Accounting for an Encounter', in P.Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2002), p. 10.

> To regard theory of law as a theory of legal knowledge establishing a specific science of law and to regard comparative law as the critical extraction of this legal knowledge from individual instances by translating the inquiry into conceptual equivalents and thus to verifiable hypothesis through an active analytical exercise, indicates that legal knowledge can be accrued only by a symbiosis between comparative law and theory of law.[38]

Michael Bogdan states that, 'It appears to be clear that highly qualified work in comparative law has a scientific character, even if there is no generally accepted definition of "scientific"'.[39] However, answering the question as to whether comparative law is an independent science, Michael Bogdan is more doubtful and says, 'There are no generally accepted criteria for what constitutes an independent field of scientific research'.[40] Nevertheless the conclusion he reaches is that, 'comparative legal research is normally of such degree of difficulty and has to deal with so many unique tasks that its independent treatment ... is well justified.'[41]

VARIATION II

Comparative law 'has by common consent the somewhat unusual characteristic that it does not exist'.[42] 'Legal definitions are notoriously unsatisfactory and apt to lead to controversies which are often barren of result. This, in particular, is the case when any attempt is made to define "comparative law", since the subject-matter, being non-existent, is one which defies definition.'[43] Comparative law is not just another branch of law, it is certainly not independent of the subject area it is investigating. As Harold Gutteridge observed:

> The process of comparing rules of law taken from different systems does not result in the formulation of any independent rules for the regulation of human relationships or transactions. Not only are there no "comparative" rules of law but there are no transactions or relationships which can be described as comparative.[44]

[38] Örücü, above note 20, p. 6.
[39] M. Bogdan, *Comparative Law* (Kluwer Tano, Göteborg, 1994), pp. 24-25.
[40] *Ibid.*, p. 25.
[41] *Ibid.*
[42] O. Kahn-Freund, 'Comparative Law as an Academic Subject', (1966) 82 *Law Quarterly Review*, pp. 40-41.
[43] H.C. Gutteridge, *Comparative Law, An Introduction to the Comparative Method of Legal Study and Research*, 2nd. edn. (London, Cambridge University Press, 1949; reprint, Wildy & Sons, London, 1974), p. 2.
[44] *Ibid.*, p.1.

Thus, as comparative law has no subject matter, it does not exist and is not a category of law at all: it has no subject as contract law, tax law or administrative law have. One could at best talk of a comparative family law, a comparative constitutional law or a comparative contract law. Here the comparison is not the central element of the comparative work but the focus is on fields of law which are inquired into comparatively for specific purposes such as law reform, harmonization or offering solutions to problems of domestic law. There must always be specificity and a purpose in comparative law research. One cannot fruitfully talk of 'theoretical' comparative law but only of 'applied' comparative law.

William Twining very aptly remarks that 'there is a lingering yearning to maintain that comparative law is an autonomous discipline or sub-discipline which has a distinctive method if not a distinct subject matter.'[45] He then puts forward three reasons for questioning this idea. According to William Twining the first is that such an idea is philosophically dubious, the second that since all legal scholarship involves comparison, 'it is misleading, indeed dangerous', to set comparative law apart, and the third that comparative law has no defined subject matter. He is of the opinion that, if one abandons the idea that comparative law is an autonomous discipline, then 'it is easier to accept the plurality of approaches as legitimate without giving up on basic standards of scholarly vigour.'[46]

In essence, comparative law is a term with many meanings. 'The term "comparative law" can mean so much or so little that it is only by examining particular methods, aims, approaches and the consequent utilisation that we can glean from "comparative law" substance and purpose'.[47] As comparative law has no specific content, the content of any particular comparative endeavour will depend entirely on what is being compared and the purpose of comparison. If it is anything, comparative law is merely a method or technique of looking at law.

Comparative law is the technique used by those who call themselves comparative lawyers to collect information on foreign law, present foreign law, contrast the findings and make comparisons, that is, identify similarities and differences. This means that by comparative law research, one finds and establishes foreign laws, juxtaposes them and then adapts these findings to the domestic legal system or to each other. Thus, comparative law as a method or technique of legal research is used to contrast, juxtapose and compare entire legal systems, legal institutions or legal rules from different legal systems with the view of discerning similarities and differences, and it is the purposes or objectives of this method that give comparative law meaning. However, a serious question remains: Does one need to be a comparative lawyer in order to do that?

[45] W. Twining, 'Comparative Law and Legal Theory: The Country and Western Tradition', in I.D. Edge (ed), *Comparative Law in Global Perspective* (New York, Transnational Publishers, 2000) p. 45.
[46] *Ibid.*
[47] C.M. Campbell, 'Comparative Law: Its Current Definition', (1966) *Juridical Review*, p. 151.

In addition, comparative law is only one of the ways of looking at the legal world, one of the methods of research; just one way of approaching legal phenomena. It is a facilitator. However it is in good company as it belongs to a group of facilitators which includes history, sociology, economics and others.

As to the name, indeed the name given to the subject, or the non-subject, is entirely misleading. This misconception is created by the English version of the name. Precise translations from French, German or Dutch would render something like 'Comparison of Laws', 'Compared Law', 'Law Compared', or 'Legal Comparison'. 'Legal Comparison' as used in Germany may be the most appropriate term to be used here. At least 'Legal Comparison' indicates clearly that there is no interest in the extrinsic factors in the comparisons to be undertaken which should remain normative. Many writers today find the terms 'comparative analysis of law' or 'comparative study of law' more suitable. The preferred approach in this Variation is not to use the term 'Comparative Law' at all but talk of Comparative Family Law, Comparative Property Law or Comparative Civil Procedure, as the field of inquiry demands.

The recently coined and widely used title, 'Comparative Legal Studies', also has a confusing aspect in that it indicates studies beyond the law as conventionally understood. Surely, a degree obtained in Legal Studies would not have the same weight as a degree in Law. Lawyers compare law and should continue to do only that.

Having no subject matter and the wrong name, comparative law should not even appear on the curriculum for a law degree as an independent autonomous subject but be subsumed in others. After all, in our day all courses should contain some contrasting and comparing of domestic law with laws in other legal systems, and we do not need 'comparative lawyers' to do that. At best comparative law should be specific, maybe a method, and at its worst it is nothing. 'Comparative lawyers', who claim to be a special kind of academic with a deeper insight into law in context, are in essence superficial and mediocre; they claim to be generalists but in reality they are not real lawyers nor do they effectively add to information about foreign law. They should juxtapose the functionally equivalent rules they find in various jurisdictions and identify differences and similarities with a specific purpose in mind.

'Because "comparative law" is in a sense a subject without a constituency, a clear appreciation of its objectives is especially vital. ...unless the subject does discover a meaningful sense of purpose, it will find itself without an audience.'[48] In Chapter 3 a more comprehensive coverage will be found as to the 'why' of comparative law.

As a method, comparative law could be applied to domestic problems or transactions across international boundaries. In this sense it has close connections

[48] Munday, above n. 37, p. 10; also B. Markesinis, 'Comparative Law – A Subject in Search of an Audience', (1990) 53 *Modern Law Review*, 1.

with international private law, or the so-called, conflict of laws. In any case, comparative law has been superseded today by Transnational Law.

Chapter 2

COMPARABILITY: THEORIES AND PRESUMPTIONS

'Shall I compare thee to a summer's day?'[1]

Is it not true that any one thing can be compared with any other thing if they either both belong to the same category, or if one belongs to it and the other does not? When translated into law terms, what is meant by comparability? Is an element of similarity necessary for comparability? Since the existence of comparative law indicates that there is a plurality of legal systems, legal institutions and legal rules, can the comparative lawyer compare the seemingly 'incomparable'? What is the so-called 'meaningful' comparison? Now, we know that the term 'comparative law' itself is by no means free from ambiguity; the factor of 'comparability' is even less so.[2]

Below, the first Variation of this Chapter, in line with the first Variation of the foregoing Chapter, deals with the question of comparability in its widest sense inclusive of comparability of differents both at macro and micro level; whereas the second Variation approaches this sub-theme through functionality and the comparability of similars. However, it must be remembered that 'similar' indicates a lack of difference and 'difference' a lack of similarity, both ever present unless two things are identical, which state also can only be discovered by comparison.

VARIATION I

All things are comparable even if unique. Understanding the phenomena around us necessitates such comparison. Even identicals must be compared in order to determine that they are in fact identical. How would we know and decide on the issue except by placing them side by side?
The sea and a blue slipper can be compared if the aim is to determine the blueness of one as against the other, or an apple to a table if the aim is to test whether our teeth

[1] Shakespeare Sonnet XVIII.

[2] I discuss some of the issues of comparability in Chapter 3 of M. Aitkenhead, N. Burrows, R. Jagtenberg and E. Örücü, *Law and lawyers in European integration: A compareative analysis of the education, attitudes and specialisation of Scottish and Dutch Lawyers* (Medelingen van het Juridisch Instituut van de Erasmus Universiteit Rotterdam No: 43, 1988), pp. 40-64.

would break or not upon biting these two objects. Thus 'thee' can very easily be compared to 'a summer's day' and it may be discovered that 'thou art more lovely and more temperate' and that though there is no eternal summer in the seasons, 'thy eternal summer shall not fade'. 'Thee' is comparable to 'a summer's day', the slipper to the sea, an apple to a table, and darkness to light. How else can we develop understanding?

Now, how is this to be transposed to law? Can we not, for example, compare a divorce case with an eviction case if our intention is to find out how courts deal with cases in general and develop an understanding of, for example, how long cases take in court or how decisions are written? Could we not compare, for example, an English statute on taxation, town and country planning or matrimonial causes with three pieces of German legislation on entirely different topics if we were trying to establish how such documents are prepared and how long or detailed they are in order to develop an understanding of such a source of law? The examples could be infinite.[3]

Nevertheless, the fact that any thing can be compared with any other thing has not prevented wide and varied discussion of the concept of 'comparability' by comparative lawyers. The discussion actually arises from another basis, namely, that 'things to be compared must be comparable', and usually revolves around the words 'like' and 'similar'. It is stressed that 'like must be compared with like' and '*similia similibus*', these being two well-established maxims of comparative law. What is 'like' in law? Even if what 'like' means is determined, how 'like' do things have to be to be 'comparable'? May we not compare diverse legal systems, legal institutions or legal rules and come to the conclusion that they are not 'like'? Would this not be 'meaningful' or 'fruitful'?

It is claimed that 'comparison is possible only if the instances are comparable and the results interpretable'. By 'comparability' is meant a requirement that 'there be a variable common to each instance and that the variable have the same meaning for each instance'.[4] It is further claimed that, 'comparisons can be useful only if the legal institutions under investigation are naturally or functionally comparable'.[5] In 1900 the assumption underlying the Paris Congress, presented as the starting point of methodological and scientific comparative law proper, might have been that only 'similar' things could be compared. But is this the approach we want to take today? Might it be that the reason why, for example, socialist comparative lawyers rejected the possibility of comparison between their legal systems and bourgeois legal systems was partly based on a misunderstanding of the word 'comparable': in many

[3] See also M. Bogdan, *Comparative Law* (Göteborg, Kluwer Tano, 1994), p. 58.

[4] J.H. Merryman, 'Comparative Law and Scientific Explanation' in J.N. Hazard and W.J. Wagner (eds), *Law in the U.S.A. in Social and Technical Revolution* (Brussels, Bruyand, 1974), p. 92, and also in id., *The Loneliness of the Comparative Lawyer* (The Hague/London/Boston, Kluwer Law International, 1999), 478-502 at p. 489 where he discusses Zelditch's views on comparability, referring to Zelditch, 'Intelligible Comparisons', in Vallier (ed) *Comparative Methods in Sociology* (1971) pp. 267-307.

[5] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd. edn., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 34.

languages the word 'comparable' 'can also mean "approximately similar" or "not too different".'[6] Thus to talk of 'comparability' evokes an intellectual activity of juxtaposing somewhat similar systems, institutions or rules. Is this correct? As rightly put though, 'to accept comparability is, however, not the same as accepting similarity: the comparison can of course demonstrate great fundamental differences.'[7] However, even then, it is not clear whether this means that to accept comparability means to accept that different things can be compared or that only similars can be compared but we may of course discover differences.

Comparative law is said to be a comparison of 'comparable' legal institutions or of the solutions to 'comparable' legal problems in different systems.[8] This statement does not contribute significantly to the meaning of the concept of 'comparability'; neither does recognition that the topics under examination must be 'comparable' or 'meaningfully comparable'. So, what is meant by the seemingly tautological sentence 'only comparables can be meaningfully compared' or by concepts such as 'sufficiently comparable', 'reasonably comparable' or 'fruitfully comparable'?

Many scholars use the term *tertium comparationis*, a common comparative denominator which could be the third unit besides the two legal *comparanda*, that is the elements to be compared, the *comparatum* and the *comparandum*. Here, comparability is seen to be closely related to *tertium comparationis* and to depend on the presence of common elements which render juridical phenomena 'meaningfully comparable': thus comparability is equated with *tertium comparationis*. It is said that the objects of comparison must share common characteristics which serve as the common denominator, the *tertium comparationis*. What must the comparative lawyer look at as *tertium comparationis*? Should this be the common function between institutions and rules, or the common goal they are set out to achieve, or the problem, or the factual situations they are created to solve or the solutions offered?

To give further substance to this discussion it is necessary to look at 'comparability' on two distinct levels: macro-comparability and micro-comparability.

Comparability at the level of macro-comparison, or macro-comparability materializes at the level of legal systems. Therefore, the definition of a legal system may be the first task to tackle.[9] What is a legal system? From a theoretical starting point 'a legal system exits if, and only if, it reaches a certain minimum degree of efficacy',[10] the efficacy of the system being a function of the efficacy of its laws which is determined by the obedience to them, reinforced by the application of sanctions. Also a 'normative system is a legal system only if it has a certain

[6] See Bogdan, above note 3.

[7] *Ibid.*, p. 67.

[8] Zweigert and Kötz, above note 5, p. 34.

[9] This is re-visited in the sub-theme in Chapter 4.

[10] J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal Systems*, (Oxford, Oxford University Press, 1973), p. 93.

minimum degree of complexity',[11] that is, every legal system should at least possess a court structure of some kind and lay down sanctions. These are normative analyses. For one comparative lawyer, a legal system means, 'the complex of legal institutions, actors and processes in the context of a legal culture and the secondary legal rules'.[12] Furthermore, a legal system 'has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society'.[13]

To analyze comparability at the level of the legal system then, it is necessary to choose an accepted definition of the term 'legal system' and test this definition in macro-units regarded in actuality as legal systems. Above are four such definitions. In addition to these four, other definitions could be so tested. Two of the above are the result of normative analysis, and two are supplied by comparative lawyers and therefore indicate a wider context. Hans Kelsen's normative analysis, elaborated by Joseph Raz, depends on the criterion of efficiency which means obedience to the laws and application of sanctions as a reinforcement for them. The second normative approach, again elaborated by Joseph Raz, requires a minimum degree of complexity for the existence of a legal system which demands some kind of court structure and sanctions. John Merryman's definition stresses the legal institutions, actors and processes in the context of a particular legal culture. René David and John Brierley provide a more extensive definition of a legal system requiring the existence of a specific vocabulary, rules arranged into categories and techniques for interpreting these rules. In this definition, the legal system is also linked to a view of the social order itself which determines the way in which law is applied.

Although it is difficult to assess how far any legal system is linked to a specific social order, it can be said that in most societies laws are deeply imbedded in political and social cultures. It is essential for the purpose of later attempts at explaining differences and similarities encountered in the legal systems under comparison, that the notion of a system as a macro-unit combines the legal system with the societal, cultural, political and economic systems. Most of the differences that cannot be explained in terms of the legal system can more easily be explained in terms of the societal, political or economic systems. Social systems may determine the content of the corresponding legal systems and vice versa. Therefore, for a true understanding and evaluation it is necessary to establish the link between the legal systems under comparison and the social systems in which they live. This interrelationship is striking whether legal systems at the same level of legal development are surveyed, or legal systems at the same level of socio-cultural background. The same could be said of the economic systems.

[11] *Ibid.*, p. 141.
[12] Merryman, above note 4, p. 101.
[13] R. David and J.E.C. Brierley, *Major Legal Systems in the World Today* 3rd. edn., (London, Stevens, 1985), p. 193.

At the level of macro-comparison, the issue of 'comparability' has been resolved by many comparative lawyers with the argument that the comparison must extend to the same evolutionary stage of different legal systems under comparison. For example, Harold Gutteridge understands from 'compare like with like', that 'concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development.' That is to say, that at the macro-level also the legal systems under comparison should be at the same stage of development, whether, economic, social or legal. Harold Gutteridge also introduces the provision of 'the subject matter lending itself to comparison'. Only when this is realised the 'nature and the extent of the comparison may be left to the discretion of the investigator.'[14] However, are these really requirements of 'comparability'?

There is nothing in the logic of comparative inquiry dictating that comparison be limited to any specific level or unit. Hence it must be argued that at the macro-level, 'comparability' may be relative to the interests of the comparative lawyer. It is the aims of the specific comparative study that should determine the choice of legal systems to be compared. Whether such systems have reached the same degree of development, legal or otherwise, may be a secondary consideration when the purpose of the comparative lawyer points to a preferred selection.[15] Nor need one carry out comparative research only in groups of legal systems with broadly shared attributes. Even if one were to think the reverse, history shows otherwise, and the overlapping systems and the 'family trees' approach suggested below regarding legal systems as sitting on family trees with intertwining branches,[16] expand the scope of the comparative field to legal systems grouped in different ways and at different level of development.

Yet, can a comparative lawyer use her discretion as to the extent and nature of the comparison and then generalize from, for example, two legal systems? Here a distinction must be made between specific results and methodology. While it is true that the degree of generality of the findings in a piece of research considering but two legal systems can only be limited, the methodological grid carefully worked out in the process is of far more general application. For example, in a survey covering Scotland and the Netherlands, the findings may be limited to Scotland and the Netherlands, but the methodological grid can be applied elsewhere, to obtain a general understanding of the similar factual problems in, for example, other Member States of the European Union.[17] However, it should also be remembered that the findings themselves would probably be valid for a number of other Member States. Naturally, the degree of probability would have to be verified by further research. In addition to this, the findings would be useful as a working hypothesis for possibly a large number of additional countries.

[14] H.C. Gutteridge, *Comparative Law*, 2nd ed. (London, Cambridge University Press, 1949; reprint., Wildy & Sons, London, 1974), p. 73.
[15] W.J. Kamba, 'Comparative Law: A Theoretical Framework', (1976) 23 *International and Comparative Law Quarterly*, 494 at pp. 507-508.
[16] See Chapter 10 below.
[17] See our research, above note 2.

Ideally, macro-comparison and micro-comparison should merge since the micro-comparative topic must be placed within the entire legal system. Hence the totality of the legal system in context, the macro-comparative unit, is the frame within which all else is contained and evaluated. From such analysis, it should be possible to offer ideal types, determine the level of permeability of specific legal systems and make conjectures about cross-fertilization between systems. Within the context of a supra-legal system, such as the European Union for example, the comparative lawyer has an even wider frame within which to evaluate her findings. From such analysis it is possible to venture into suggesting common denominators, be they at the level of the lowest, the average or the highest. Common core studies also can be pursued after such exploration. In this context, the 'better law' approach must also be analyzed and evaluated.[18]

At the level of micro-comparison, it has been widely argued that the true basis of comparative law is functional equivalence. According to Michele Graziadei, functionalism represents two distinct currents: the 'functionalist method' which is 'one of the best-known working tools in comparative legal studies', and 'functionalism' in the sense 'that law responds to society's needs'.[19] Though the 'functionalist method' does not represent 'the sole or even the dominant approach' in comparative law research, and though today it is being challenged, it has gained new life 'under the flag' of common core studies in Europe.

Now, if by 'law' we meant a body of rules only and comparison at the micro-level was directed at these rules, then the functional approach would be useful, since a body of rules is created for the purpose of solving human problems most of which are shared. Thus, in the context of the European Union for example, where comparative law is a driving force and has a decisive role in the harmonization process, the 'functional comparative analysis method' shifts the focus from the 'vertical' to the 'horizontal' and provides the potential for convergence of both the legal systems and the legal methods of the Member States of the Union, this leading to gradual and eventual legal integration. In this, to build on similarities may be desirable and decisive. However, the scope is narrow. A considerable number of areas are left out of the range of the 'functional equivalence' approach because of history, mores, ethics, religion, politics, ideology and cultural difference. Not only that, but the question of whether each rule or each institution has only one function has not been satisfactorily addressed. In addition, though law can be seen as 'a body of rules', it is much wider than that. Therefore, this Variation, though not totally opposed to employing 'functional equivalence' as a tool of comparability at the micro-level for specific projects, supports the use of a multiplicity of approaches.

[18] This is considered more fully in Chapter 3.

[19] M. Graziadei, 'The Functionalist Heritage', Chapter 5 in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003), p. 100; also see for a useful discussion of functionalism with a capital (F) and a small (f). W. Twining , 'A Post-Westphalian Conception of Law' (2003) 37 *Law and Society Review*, pp. 213-217 and 238-243.

This Variation also supports the comparison of differents and contexts and therefore the extension of comparison beyond functionally equivalent rules.

The problem-solving, sociological approach is the other side of the coin. It is an alternative to the functional-institutional approach or a variation of it. This problem-solving basis answers the question, 'How is a specific social or legal problem encountered both in society A and society B resolved by their respective (legal or other) systems?' that is, 'What legal or other institutions have developed to cope with it?' This approach, similar to the 'functionalist' approach, springs from the belief that similar problems have similar solutions across legal systems, though reached by different routes. For example, how is the problem of supporting a wife who would otherwise be destitute after the termination of marriage, resolved in society A and B? This problem may be tackled in various ways: by alimony, by state social security or by care within the traditional family of the needy spouse. Again, how is an individual represented in court in Scotland and the Netherlands respectively? This matter may be tackled differently and handled by different bodies in the two societies. In this connection it is said that, 'the fact that the problem is one and the same warrants the comparability'.[20]

The functional-institutional approach, though a useful and elegant understanding of comparability, does not solve the issue of comparability as between a western legal system and a religious system or a developing legal system. In addition, if a problem arises in one legal system but has no counterpart in another, this approach faces another dilemma, and yet this is when comparative law research becomes most fruitful. Legal systems pertaining to societies that are socio-culturally and legal-culturally different from each other can also be compared even if for the purpose of establishing diversity and in this case the functional-institutional approach cannot be the basis. Legal systems of 'ordinary' places and of 'extraordinary'[21] places must be compared by comparative lawyers of our day if our knowledge of the law is to be enhanced, not in one place or in another place, but law as a social phenomenon. This functional-institutional approach has also been challenged as not working between capitalist and socialist legal systems, in spite of the fact that basic human needs are largely universal. There are other fundamental criticisms of this approach on grounds such as the limitation of subject areas that can be compared by using this method and the fact that many areas of law are left out of the scope of comparison since they are regarded as 'not lending themselves to comparison', being determined by specific histories, ethical values, political ideologies, cultural differences or religious beliefs. As pointed out above, there is also the problem of 'one institution or rule with many functions'.

Should all this lead the comparative lawyer to abandon the task because no functionally comparable solution can be found and come to the conclusion that

[20] M. Schmitthoff, ' The Science of Comparative Law' (1939) 7 *The Cambridge Law Journal*, 94-110 at p. 96 where he refers to M. Salomon's work, *Grundlegung zur Rechtsphilosophie* (1925).

[21] I discuss the meanings of 'extraordinary' place in E. Örücü, 'Comparatists and extraordinary places' Chapter 13 in Legrand and Munday above note 19, pp. 467-489.

comparisons are impossible, or, does it only raise a serious problem of comparability which should lead the comparative lawyer away from functional terms? Is a certain degree of similarity of content a basic requirement for a 'meaningful comparison' of forms, or is similarity of forms a presupposition for comparison? Do structural differences between the basic systems preclude comparability? The answer to these questions in this Variation is 'no'. Surely, it would be odd to allow comparative law research but one methodology, functional inquiry, which has only a technical perspective.

In fact, recently, many other bases have been presented as being more appropriate. As Michele Graziadei notes, 'no one could have foreseen the plurality of methods which are currently being practised when comparative law was thought to be a method in itself'.[22] It would be reductivist to view 'comparative law' as a method since there are indeed a number of methodological options. Most of these are contextual approaches such as analysis of existing rules and institutions in 'historical context', 'economic context', 'political context' or in 'cultural context'. Some of these approaches are now dubbed as post-modernist, intermingled with legal realism. The functional method was built to do away with 'the local dimensions' of rules and to reduce the rules to their operative description 'freed from the context' of their own systems; whereas, the contextual approaches specifically stress the 'local dimension'.

Surely a seasoned comparative lawyer could not be guided by the following advice given by Konrad Zweigert and Hein Kötz:

> ...if we leave aside the topics which are heavily impressed by moral views or values ... we find that as a general rule developed nations answer the needs of legal business in the same or in very similar ways. Indeed it almost amounts to a "presumptio similitudinis"... At the end of the study the same presumption acts as a means of checking our results: the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed the original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.[23]

Other words of caution seem called for:

> Functionalism has led us unwittingly to a precipice where we can almost think that all institutions which perform equivalent functions are essentially the same, that any pattern of change which achieves developmental goals is equal to any other on grounds of cultural relativism, and that the significance of institutions can be discovered exclusively in their social or economic consequences, not in their intrinsic characteristics.[24]

[22] Graziadei above note 19, p. 101.
[23] Zweigert and Kötz, above note 5, p. 40.

'The proliferation or diffusion of structurally similar institutions over much of the globe is true' and legal systems possess strikingly similar institutions. But, 'there is no reason for assuming that functionalism provides a better guide to the subtleties of the (legal) process'[25].

It has been suggested that 'the post-modern critique of functionalism, coined as "better-solution-comparativism" is primarily directed against its implied or outspoken universalism, its "agenda of sameness".'[26] In that critique functional-equivalence is seen to be useful for yielding results of similarity and to be avoiding 'challenging questions about the role of law in society'. Anne Peters and Heiner Schwenke assert that claims that the functional approach underestimates differences flows from cultural 'framework-relativist' thinking, 'according to which legal thought, language and judgements are determined by greatly differing and ultimately irreconcilable frameworks'.[27] They reject this theory which they call 'framework-theory'.

Vivian Curran who is cited by them as one of the post-modernist 'framework-relativist' however, has also said that 'hypersentivity to differences, and hesitation in the face of cross-cultural judgments, may make good sense as a component of comparative law methodology, but may be detrimental in developing a legal order for the European Union'.[28] Furthermore, 'this hypersensitivity to difference, so useful to the conduct of comparative legal analysis, can become a liability when the comparatist also is a law-maker or is preparing to advise law-makers.'[29] Moreover, 'Our globalized world of encounter is unlikely to preserve the cultural differences that have been'. Vivian Curran goes on to say that 'Deference to national tradition, culture and distinctiveness should remain a point of departure for the comparatist, but as an absolute mandate beyond discussion or modification, one of the costs it can carry, and has carried, is death'. This warning must be taken to mean that the post-modernist approach to comparability is softening and becoming more realistic.

In any case, even the so-called functionally equivalent institutions are what they are because they reflect the structure of the legal and social system within which they exist. Thus, legal, social, cultural, economic, religious and political backgrounds cannot be neglected. Indeed, in the explanation of results this background is vital. Legal systems and legal institutions in countries socio-culturally and legal-culturally different from one another must be comparable, especially for a

[24] F.W. Riggs, 'The Comparison of Whole Political Systems' in R.T. Holt and J.E.Turner (eds), *The Methodology of Comparative Research* (New York, The Free Press, 1970), p. 77.
[25] J. LaPalombara, 'Parsimony and Empiricism in Comparative Politics' in ibid., p. 131.
[26] A. Peters and H. Schwenke, 'Comparative Law Beyond Post-modernism' (2000) 49 *International and Comparative Law Quarterly*, 800 at p. 827.
[27] *Ibid.*, pp. 827-828.
[28] V.G. Curran, 'On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project' (2002) 2 *Global Jurist Frontiers*, p. 8.
[29] *Ibid*

comparative lawyer who wants to study 'extraordinary' places, to leave the shores of Eurocentrisism and to investigate 'localisms' in our 'globalizing' world. This Variation suggests that nets be cast as wide as possible to include the comparison of the 'ordinary', the 'extraordinary', the 'similar' and the 'different', and bases this on the assumption that 'everything is comparable'.

Although the comparison of 'thee' to a 'summer's day' presents no problems of comparability, it does create a problem of functional equivalence. No umbrella would be large enough to shelter the comparatist here and yet comparison can always take place depending on the comparatist's strategy. So also in law.

VARIATION II

To compare 'thee' to a 'summer's day' is totally and solely poetic and even then, absurd; and such comparison can never be transposed to the realm of comparative law. The motto in any comparison must be 'compare that which is comparable', 'compare like with like'. In comparative legal method this must be an absolute. Topics selected, and the rules, concepts or institutions under comparison must be comparable. It is at this level, that is comparability at the level of micro-comparison, or micro-comparability, that problems emerge. It can be asked: In what sense should the topics selected be comparable? It becomes more difficult to determine this when the systems, that is, the units of macro-comparison, belong to different levels of legal development or have entirely different socio-cultural backgrounds. Can one speak of comparability in such cases? The answer is 'no'. Thus, at the macro-level fruitful comparisons can only be carried out between systems that share the same degree of economic, political and social development and also are within groups of legal systems broadly sharing similar attributes. In any event, the comparative lawyer's proper role is to establish the basic similarity of legal systems. This is one of the assumptions of the functionalist method - the main method of comparative legal research.

What is the meaning then of 'compare like with like'? Harold Gutteridge for example, understands from 'compare like with like' that 'concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development.' He also introduces the provision 'the subject matter lending itself to comparison'.[30] Based on this starting point we can move on.

One method that works in comparative law research is functionalism, to be taken as both the 'functional method' and the understanding that law responds to human needs and therefore all rules and institutions have the purpose of answering these needs. Then there is the universalist approach to human needs. Social problems are universal. Laws respond to these needs in various ways but the end results are comparable. Hence we start with a 'concrete problem'. As noted, 'It is possible to compare the incomparable provided that the focus is on the same facts'.[31]

[30] Gutteridge, above note 14, p. 73.
[31] Graziedei, above note 19, p. 105.

The 'factual approach' is the starting point. If facts are not the same there is no comparability. In the universalist approach the similarity of solutions is paramount. If this were not so there would be no place for comparisons. That is why certain areas such as family law, where moral and religious values are prominent, should be left out of comparisons. Comparability benefits from the findings of similarity as it can then develop further on '*praesumptio similitudinis*'. Functional inquiry also suits the utilitarian approach to comparative law.

It is essential that topics selected be comparable in the sense that they relate to functionally equivalent rules, provisions or institutions, since the true basis of comparative law is this functional-institutional approach The functional-institutional approach, answers the question, 'Which institution in system B performs an equivalent function to the one under survey in system A?' From the answer to this question, the concept of 'functional equivalence' emerges. For example, if an institution called 'divorce' is under survey in system A, the comparative family lawyer looks for an institution in system B performing an equivalent function, that of freeing an individual from an unsatisfactory marital relationship within which he or she does not want to remain. Again, if the institution of 'solicitor' is under survey in Scotland, the comparative private lawyer looks for an institution performing an equivalent function, that of preparing documents for litigation and also dealing with non-contentious matters, representing the client, and so on, in another system, for example, the Netherlands. [32]

The problem-solving approach - the other side of the same coin - asks the question, 'How is a specific social or legal problem encountered both in society A and society B, resolved?' that is, 'Which legal or other institutions cope with this problem?' For example, how are children in need of a home and caring parents catered for in society? By fostering, adoption, or institutionalization? Or, 'how is an individual protected from human rights abuses perpetrated by the State in Scotland and the Netherlands respectively?' This legal problem may be handled differently and by different bodies in the two societies. Here it can be said that, 'the fact that the problem is one and the same warrants the comparability'.[33] According to the functionalist-institutionalist approach the above questions once answered, are immediately translated into functional questions.

Thus one either starts with a social problem or need in one society, discovers the institution that deals with it and then looks to other societies for institutions, legal, or otherwise, which deal with the same problem or need, that is functional equivalents, or, one starts with an institution in one society, asks the question, 'what is the purpose or function of this institution in that society?', and having ascertained it, looks for a functionally equivalent institution in the second and then, if so wished, in a third society. The underlying assumptions are that there are shared problems or needs in all the societies under comparison, that they are met somewhere in the society and that the means of solving these problems are different but comparable, their functions being equivalent.

[32] See our research, above note 2.
[33] Schmitthoff, above note 20, p. 96.

At the level of micro-comparison, 'functional equivalence' is the answer to the question of 'comparability' or 'similarity'. Comparative lawyers should seek out institutions that have the same role, that is, have functional comparability, or solve the same problem, that is, similarity of solutions. Konrad Zweigert and Hein Kötz regard this issue as finite and say:

> the basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law. Incomparables cannot be usefully compared and in law the only things which are comparable are those which fulfil the same function.[34]

Hence the comparative lawyer searches for functionally equivalent rules, concepts and institutions in societies that have reached comparable levels of development.

It must be admitted that it is difficult to answer ongoing questions of comparability without resorting to terms such as 'sufficiently comparable', 'reasonably comparable', 'fruitfully comparable' or 'meaningfully comparable'. The problem can sometimes be dealt with by separating those legal institutions in a legal system that are system-conditioned from those that are not.[35]

It has already been pointed out above that the starting point can be the 'factual' one. That is, for example, the consideration of recourse to the Court of Justice of the European Community in matters of Community law in Scotland and the Netherlands or the Community Law cases encountered in the work-loads of lawyers in the respective systems would point to the existence of common factual problems. The comparative lawyer choosing the 'factual approach' may also discover functional comparability or similarity of solutions through observing accidental divergences of facts. Again, similarity of factual needs answered by different legal systems makes them comparable, and 'different legal systems can be comparable only if they solve the same factual problem, that is answer the same legal need ... institutions can be meaningfully compared if they serve the same function'.[36] However, would this approach be satisfactory when institutional facts encountered in one legal system have no comparable counterpart in the other legal system? The answer must lie in comparisons being carried out between legal systems of some similarity. If the countries under comparison have social orders that are different to one another then legal rules that regulate situations specific to only one of the societies must be separated from the legal rules that regulate shared situations. Those in the first

[34] Zweigert and Kötz, above note 5, p. 34.

[35] See solution offered by E.K. Banakas, 'Some Thoughts on the Method of Comparative Law:
The Concept of Law revisited', (1981) LXVII *Archiv fur Rechts- und Sozialphilosophie*, 289; and a suggestion by R.P. Schlesinger (ed) *Formation of Contracts: a Study on the Common Core of Legal Systems* (Dobbs Ferry, Oceana, 1981), p. 70.

[36] Zweigert and Kötz, above note 5, pp. 44-45.

category are not comparable, whereas those in the second are. Thus comparative lawyers must work in systems that are in some way related.

Some other problems must be tackled. One such is that even when subject-areas are broadly comparable, categories can be imprecise and open to different interpretations. For example, certain areas of law, such as law relating to transport or competition have a narrower scope in Scottish law than in Dutch law, thus direct translations or synonyms do not suffice. Here the crucial questions are: Should the classificatory scheme of one or the other national system be adopted? Or should one try to create a new system of classification by merging or making compromises between some of the divergent categories found in the various systems? Or, is it preferable to create a brand new set of categories for comparative purposes?[37] If the chosen path is the second, then an effort must be made from the outset to redefine or delineate existing concepts, in order to achieve communication across the barriers. Here, functional equivalents would have to be looked for. Areas of law which perform the same task, that is, institutions that serve the same function in relation to problems and needs, would to be looked at. Thus 'meaningful' comparisons could be carried out. Care must be taken to identify functions in terms of system-relevance.

At the level of the concepts, when problems arise that create doubt as to the suitability of synonyms or taxonomies, one approach could be, as suggested earlier, to abandon existing concepts and create totally new ones to encompass the variations and nuances.[38] This might be called 'the ultimate path'. On this path umbrella concepts must be created for use as a problem solving technique. Having studied what the existing institutions comprise, a definition can be elaborated which does not involve concepts exclusive to one or the other of the legal systems. For example, if an umbrella concept were sought to cover the notions of advocates and solicitors in Scotland and *advocaten* and *notarissen* in the Netherlands, as none of the existing terms can be used, a definition might be arrived at with the label 'lawyer'. This is still a functional definition but is wider than the existing individual concepts. If the four professions in the two societies were individually examined, then a determination could be made on the overall comparability. Since all the institutions are sufficiently comparable, a meaningful umbrella concept to cover all could be formed.

Konrad Zweigert and Hein Kötz[39] advocate developing a special syntax and vocabulary, with concepts large enough to embrace the quite heterogeneous institutions, which are functionally comparable; the higher concept or heading being related to the function common to all. Using the umbrella term 'lawyer' in the example above, a net wider than those of the national systems is cast to catch solicitors in private practice, including trainees and advocates in Scotland; *advocaten*, trainees and *notarissen* in private practice in the Netherlands.[40] If,

[37] *Ibid.*, p. 76.

[38] *Ibid.*

[39] Zweigert and Kötz, above note 5, pp. 37-38.

[40] See our research, above note 2.

however, the functions of two institutions with the same label, such as 'advocates' and '*advocaten*' were totally different in the two systems, then a serious problem of comparability in functional terms would arise. How is this to be resolved? One may have to come to the conclusion that the two institutions are not comparable.

A final word of advice is offered by Konrad Zweigert and Hein Kötz:

> ...if we leave aside the topics which are heavily impressed by moral views or values ... we find that as a general rule developed nations answer the needs of legal business in the same or in very similar ways. Indeed it almost amounts to a "*presumptio similitudinis*"... At the end of the study the same presumption acts as a means of checking our results: the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed the original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.[41]

Let us reiterate. This Variation takes legal systems as the units of macro-level inquiry and legal rules as the units of micro-level inquiry. However, if legal cultures are taken as determinants of legal systems and if the comparison is not to be carried out at the normative level and the intention is to go beyond the rules, the picture changes altogether. In total opposition to Variation I, where there seem to be no incomparables, this Variation may go so far as to say that 'everything is incomparable', since cultural frameworks are incommensurable. Therefore, comparison is futile. This futility is the consequence of what has been called 'framework-relativism'.[42]

[41] Zweigert and Kötz, above note 5, p. 40.
[42] See Peters and Schwenke, above note 26.

Chapter 3

WHY COMPARE?

Can there be one simple answer to the question: What is the purpose of carrying out comparative legal research? Is this purpose the same for all involved in comparative law or should a distinction be made between scholarly activities and the activities of the legislatures, the practitioners of the law and the judiciary? In other words, is there one identifiable purpose or is there a multiplicity of purposes? Comparative law research has moved in a number of disparate clear directions. What are they? Do these studies serve only the interests of national laws particularly when there are weaknesses or gaps in the home legal system? To what extent are legal solutions derived from comparative analysis useable in the domestic scene? Should the interest rather be directed towards satisfying curious minds of scholars? Why do we engage ourselves in this enigmatic subject?

In the past it was claimed that comparative law could only be defined and justified by its purposes such as to facilitate legislation and the practical improvement of the law or unification of private law. Has anything changed?

Below, Variation I considers the wider aims of comparative law and answers the question 'why' in this broad perspective. Variation II approaches the question from several practical standpoints. Both Variations pave the way to the discussion related to the sub-themes to be covered in Chapters 7 and 8.

VARIATION I

Comparative law research is undertaken to improve and consolidate knowledge of the law and knowledge and understanding of the law in context. As mentioned in the previous discussion on the nature of comparative law, this branch of legal science gives us insight into law and legal texture as no other branch can do. We understand the legal world around us by juxtaposing the unknown to the known and thereby analyzing and assessing legal phenomena, domestic or foreign, and do this in a wider ambit than the rules and institutions of law provide. An attempt to create a science of universal law would be too ambitious. This would also ignore the fact that there is no universality even in a globalizing world and that localisms coloured by different social, cultural, political and economic conditions help our understanding

of human phenomena. The aim is to sharpen awareness and cognition of the legal, social and cultural environments in which we live.

This is best done not just by discovering resemblances between similars or even similarities between differents, but more fundamentally by finding and explaining similarities among differents, and differences and divergences among similars. It is not only similarities but often differences that help us to develop theories.[1] Comparative law thrives on differences. It is a fact that comparisons complicate rather than facilitate research; yet this enhances the quality of research. Therefore, scholarly comparative law research, by increasing detailed understanding of legal phenomena will point in the direction of diverse systems: the more diverse the systems, the more rewarding the findings. Choice is open-ended and it is advisable to look for extreme positions, remembering that there are no 'incomparables'.[2] 'Extraordinary' systems must be considered beside those regarded as the 'ordinary'.[3]

The aim is not romantic: it is not to create one law for the whole world. Neither is it utopian: a dictionary of legal terms in all languages. Far from it. The aim is to discover and understand differences between legal systems and legal institutions and explain the reasons for these in order to enhance knowledge and at the same time to discover similarities between different and diverse legal systems and find explanations for these. This reflects a wide approach to comparative law rather than the positivistic and nationalistic approach. Hypotheses must be tested, concepts refined, differences uncovered, sameness pinpointed, underlying assumptions critically investigated and syntheses drawn. Comparative law is conversation on and about law.

As early as 1938 it was said by Harold Gutteridge that:

> The isolation of legal thought in national watertight compartments has always seemed to me to be one of the factors which is most prolific in producing that frame of mind which leads to a spirit of national egotism. We have much to learn from one another in legal as well as other departments of human activities, and it is, in a sense, a reproach to the lawyers of all nations that they have been unable, up to the present, to arrive at the free interchange of knowledge and ideas which has been attained in other branches of learning.[4]

[1] See for example P. Legrand, 'The same and the different', Chapter 9 in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003), pp. 240-311.

[2] For a fruitful discussion of 'incommensurability' seen as equivalent to 'incomparability' see H.P. Glenn 'Are Legal Traditions Incommensurable?' (2001) 49 *American Journal of Comparative Law*, 133; and also see R. Chang, 'Comparison and the Justification of Choice' (1998) 146 *University of Pennsylvania Law Review*, 1569 who regards 'competing systems' as 'comparative alternatives' and asks the question of whether, if two alternatives were incomparable, would it follow that there could be no justified choice between them. (pp. 1569, 1573). Additionally, this issue of the Review is reserved to the papers given at a Symposium 'Law and Incommensurability'.

[3] See for an understanding of 'ordinary' and 'extraordinary E. Örücü, 'Comparatists and extraordinary places', Chapter 13 in above note 1, pp. 467-489.

It goes without saying that one of the main pursuits of comparative law is the creation of groupings of legal systems. This objective can be regarded even as the starting line of all comparative law activity. Legal systems, legal cultures and legal traditions are classified for the purpose of comparison.

Where scholarly comparative law research is also concerned in tracing relationships, legal systems historically related by colonization, imposition and borrowing, and systems related in other ways must be studied. In order to understand the changes that take place during the moving of institutions, the emphasis must be placed on the institutions that have moved. Explanations for the changes have to be sought, and therefore, social and cultural as well as political contexts must be understood. Choice of systems here is pre-determined by historical connections. The systems will be related systems for one of the above reasons. This is the kind of comparative law research that attracts many legal historian comparatists.

An often-claimed virtue of scholarly comparative law is that it serves the purpose of broadening the mind of the law student and helps in the development of tolerance. In this context, the most valuable course to be offered to undergraduates is not comparative family law, comparative contract law, comparative civil procedure or even comparative private law or comparative public law, but an autonomous general comparative law course providing the breadth necessary for the development of critical minds. A Comparative Jurisprudence component in a Jurisprudence course would also be highly desirable.[5]

Recently there has been increasing interest in comparative law among the judiciary, an interest not confined to the filling of gaps in domestic law by reference to foreign solutions but an active search for a universal language in areas such as human rights.[6] It may soon become possible to talk of a 'common law or a *ius commune* of human rights'. This 'common law' is now being developed by domestic judges in conversation with judges from other jurisdictions and from the European Court of Human Rights. This may even be regarded as the new natural law. The comparative lawyer is active in this creation.[7] This search for 'commonality' can be seen as connected to 'common core' research, comparative law being geared towards discovering 'common cores', and further, creating 'better law'.

Today, in the context of the European Union, a number of Commissions are working on projects to produce at least 'General European Principles' in a number of fields. Most of these are 'common core' based Principles. However, it has been

[4] H.C. Gutteridge, 'The comparative aspects of legal terminology' (1938) 12 *Tulane Law Review*, 401-411, at p. 410.

[5] These issues will be re-visited in the course of Chapter 7.

[6] See contributions in E. Örücü (ed), *Judicial Comparativism in Human Rights Cases*, United Kingdom Comparative Law Series Vol: 22, (London, UKNCCL/BIICL, 2003).

[7] These issues will be considered in depth in Chapter 8.