suggested, that General Principles could be drafted 'with a low level modernity and innovation using the common core methodology', or such Principles could be drafted 'based upon the highest standard or modernity achieved ... using the "better law" method.'[8] Though harmonization suggests that the new rules should be 'derived from existing laws rather than invented by the drafters', in practice what is done is to 'make use of a rule that is common for all or most of the relevant jurisdictions, or a rule selected 'that represents a minority or even one jurisdiction'. Of course, it would be possible to formulate a brand new rule invented, or inspired from some other source. The last two options correspond to the 'better law' approach.[9]

Obviously the 'common core' approach is the easiest to use as it makes justification more straightforward by restating what represents the majority. However, as one tries to move closer to the majority of the jurisdictions, the value of the exercise diminishes. Also, gathering the rules that achieve the same end may prove to be difficult in practice. Even when a 'common core' is found, this may not correspond to a 'satisfactory' solution. Another problem concerns similar legal concepts which conceal fundamentally different understandings. Therefore a move towards the 'better law' approach becomes attractive.

However, in the selection of the 'better law', justification of the choice made can be taxing as it is difficult to decide what is 'modernity' and what is 'progressive'. Also the 'better law' approach entails a comparative evaluation of all the legal systems or legal solutions involved. This could prove to be an impossible task. Even if a quantitative measurement were possible, the 'data' relied on would not answer the question, 'Why?'. It is also difficult to secure total agreement on the necessity and desirability of the 'better law' in all localisms involved.

It is inevitable that by making choices, drafters take up positions and express value judgements. It may have to be admitted that 'no objective criteria can be found in order to justify the choice as to why the drafters consider the rule they have selected to be the "better" one.'[10] Especially in areas politically and ideologically coloured, justification would have to be subjective 'depending on the conviction of the drafters'.[11] When courts adopt this approach in search of commonality, then the same considerations must be faced.

This Variation supports the use of 'better law' solutions even in such politically and ideologically coloured areas as long as the solutions serve as models only. The comparative lawyer's co-operation and contribution is essential in this search if European legal integration is to be one of the main-roads on the map of the twenty-first century.

[8] M. Antokolskaia, 'The "Better Law" Approach and the Harmonisation of Family Law' in K. Boele-Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Answerp-Oxford-New York, Intersentia, 2003), p. 160.
[9] *Ibid.*
[10] *Ibid.*, p. 181.
[11] *Ibid.*

VARIATION II

As comparative law does not exist independently and is but a method of research, its being can only be justified by the purposes for which the method is used. In addition, as comparative law has no substance in itself, the methodology that it professes should be for the use of other disciplines. Comparative law research must be an instrument for the realization of certain aims. The utilitarian view presented in this Variation considers comparative law research as justified only if it is undertaken for specific purposes, either having direct value for the legislature and the courts, or having indirect value by the contribution it makes to legal education and the training of lawyers.

The answer to why one undertakes comparative law work and what is one trying to achieve can be found in the works of many comparative lawyers. If one surveys the bulk of work undertaken to date the following objectives stand out: law reform and policy development by the legislature, an aid to international practice of law, international harmonization and unification – common core research, and a gap filling device in law courts. The findings arrived at by comparative lawyers can be utilized for any one of these. However, three other objectives that can be observed are more controversial for this Variation. One is 'giving students perspective', the other 'being a tool of research to reach a universal theory of law' and another 'aiding world peace'. Such vague purposes as these cannot be valid reasons for undertaking comparative law research.

For instance, one purpose that can justify the use of comparative law research is legislative law reform, when the comparative lawyer works *de lege ferenda*. So, if the purpose of employing the comparative law method is law reform as an aid to the legislature, then comparative law research should provide a pool of models to choose from. Using foreign law to modernize and improve domestic law may occasionally be necessary though essentially this Variation regards internal modernization the more suitable. Nevertheless, when law reform is the purpose, then this will dictate the choice of models. The reformer will be looking for legal systems preferably in socio-cultural and legal cultural affinity, systems which share the same problem and systems which deal with the same problem in different ways, better ways or more efficient ways, from whose solutions the reformer can learn and derive answers.

Harmonization of law, and as a further step, unification of law are other areas in which comparative law research is useful. The activity envisaged might either be harmonization only or unification with prior harmonization. Here the choice of the legal systems and subjects to be comparatively researched is pre-determined by political considerations. Systems to be studied will be those whose laws will be harmonized or unified. The comparative law researcher's work is to provide ideas for the necessary changes to the legal systems or institutions to be harmonized, to smooth the process or suggest the creation of a model law or a unified law. A thorough knowledge of all the systems involved in the process is required before an

approximation is suggested. More problems will be encountered if the two or more systems involved are socio-culturally and/or legal culturally diverse. Here comparative lawyers' advice will be, to confine the process to legal systems that are similar.

Yet another area where comparative law is of use as a method is in the drawing up of international conventions and agreements. The function of the method here is crucial in that the terminology to be used in international documents must be distilled from the laws of the legal systems of the target audience. Additionally, comparative law is indispensable in the interpretation of international instruments. Comparative lawyers' work is essential in discovering the 'general principles of law recognized by civilised nations' or by 'member states' and in determining the customary rules of public international law.

Comparative law research can also provide a tool for judges by making them aware of foreign solutions to similar problems when there are none at home, that is, act as a gap filling device, *de lege lata*. This method obviously should not be frequently used as, where possible, domestic problems deserve domestic answers. Judges may have to refer to foreign law out of necessity when the case they are dealing with involves a foreign element, these would either be cases where private international law rules apply or cases involving the application of, for example, European directives or regulations where a knowledge of cases from Luxembourg or the decisions of the courts of other Member States related to that instrument must be looked at. Apart from this, it is not legitimate for judges to create new law by using foreign solutions. They are not in the business of creating law but applying it.

The same criticism applies to the search for 'better law'. How can the selection of the 'better law' be justified? There are no criteria to tell us what is the 'ideal law', if it exists. We cannot tell what is 'modernity' or what is 'progressive'. There are further considerations. Inherent in the 'better law' approach, is the serious issue of evaluation. Who is entitled to make comparative evaluations of legal systems or legal solutions? Even if such an evaluation were feasible, then quantitatively this should rely on 'data'. In any case, there can seldom be total agreement on the necessity and desirability of the 'better law' in all the localisms involved.

In addition, in the 'better law' approach, drafters make choices, take positions and express value judgements. There are no objective criteria 'to justify the choice as to why the drafters consider the rule they have selected to be the "better" one.'[12] Any possible justification would be subjective 'depending on the conviction of the drafters, especially in areas which are politically and ideologically coloured.'[13] 'Better law' solutions should not be used even as models and comparative lawyers should not involve themselves in such projects.

Another area in which comparative law method can be used is in legal education. The aim here is not to use comparative law for the purpose of broadening the mind - a rather vague claim with no substance - but to use it for practical purposes. Education in comparative law enables students to have a taste of things to come if

[12] *Ibid.*
[13] *Ibid.*

they are taking part in international exchange programmes; however these courses should be courses on foreign law such as French law, German Law or English law. Apart from this, there is not much space for comparative law in already crammed curricula. An autonomous general comparative law course would prove useless. There could be courses such as comparative contract law or comparative tort law to give the students a broader outlook in specific areas, but comparative law should be taught in integrated courses, if taught at all.[14]

[14] This subject will be re-visited in Chapter 7.

Enigma of Comparative Law

Chapter 4

WHAT TO COMPARE?

Here, 'What to compare?' is dealt with at two levels: the macro-comparative and the micro-comparative. These levels are complementary, since the second presupposes the first. The Variations will consider respectively, the units of macro-comparison taking two different stances as to what should be handled by comparative lawyers at this level and then consider the micro level. The first Variations, regarding law in context, look beyond the legal system and are uncomfortable with the notion of legal families and indeed with statutory rules as units of inquiry; whereas the second Variations consider legal systems alone as the macro-comparative units and deal with them within legal families and approach statutory rules as the micro-comparative units.

1. MACRO-COMPARATIVE LEVEL: LEGAL SYSTEMS - LEGAL FAMILIES - LEGAL CULTURES - LEGAL TRADITIONS?

Traditionally, at the macro level, comparative law has been concerned with comparing 'the legal systems of different nations'. This is the starting point for writers such as René David and John Brierley or Konrad Zweigert and Hein Kötz. At the macro-comparative level then, it is legal systems that are to be studied. However, are these two hundred or so legal systems to be studied one by one by comparative lawyers? Or are they to be grouped into the so-called 'legal families' and if so, should only the parent or the dominant systems in each family be studied to give insight into the family as a whole? Is this satisfactory?

William Twining indicates that 'mainstream' comparative law has two approaches. At the macro-level, the approach is what he calls the very broad '*Grands Systèmes*' approach, and at the micro-level, the 'Country and Western' tradition, a 'conspicuously' narrow approach which 'concentrates on some aspects of private law doctrine in the official legal systems of the Western nation-states.'[1]

[1] W. Twining, 'Comparative Law and Legal Theory: The Country and Western Approach' in I.D. Edge (ed), *Comparative Law in Global Perspective* (New York, Transnational Publishers, 2000), p. 32.

Logic necessitates moving the focus from legal system and legal family to legal culture or legal tradition. What a legal culture is may be more difficult to determine than determining what a legal system is however. It has been said that 'the center of gravity of legal development lies not in legislation, nor in jurisdic science, nor in judicial decisions, but in society itself.'[2] This observation takes us into the mysteries of the interaction of social norms and legal rules. For instance, Henry Ehrmann looks at legal culture as a link and says that, 'the attitudes, beliefs, and emotions of the operators as well as of the users (and victims) of the legal system have much to do with the way in which it functions.'[3] Is it this link that should be studied? Are comparative lawyers then to look into what is called by Henry Ehrmann 'legal culture', but by John Merryman, the 'legal tradition', the two definitions given being the same? Then we see Patrick Glenn, who challenges the very notion of culture and insists on the word 'tradition', the term 'tradition' taking on a different meaning (the presence of the past) from that used by John Merryman.[4]

How do comparative lawyers align themselves?

In the usual manner, the first Variation takes the broader approach and the second, the narrower.

VARIATION I

The comparative lawyer must understand the relationship between legal systems, legal cultures and legal traditions as well as find rules which are not necessarily within the formal framework of the legal system but are held by the people to be valid. Both the 'bottom-up' and the 'top-down' models of law must be understood and appreciated. In addition, her approach must be broad and inclusive of both 'ordinary' and 'extraordinary' legal systems. Today a new approach is called for - maybe a 'family trees' approach, which regards all legal systems as overlapping. If a classification is needed, then it must accord with the ingredients; interrelationships must be given their due weight.[5] A new understanding of what has to be studied, understood, interpreted and re-presented must be developed.

In such comparative research, accidental and changeable factors may have to be ignored. That said, differentiation between the accidental and the necessary, the changeable and the constant must rely on sound criteria. For this, one must know the cultures under consideration with their different ethical theories and techniques of social control, and the values and attitudes which bind the systems together. The changeable, irrelevant or accidental can be determined only as a result of empirical survey. So what should we study and what should we compare?

[2] E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W.L. Moll, (Cambridge, Mass., Harvard University Press, 1912, 1936), p. xv.
[3] H.W. Ehrmann, *Comparative Legal Cultures* (New Jersey, Prentice Hall, 1976), p. 9.
[4] See H.P. Glenn, *Legal Traditions of the World* (Oxford, Oxford University Press, 2000).
[5] See Chapter 10.2 for this.

A broad approach to comparative law would certainly move us away from 'legal systems and the law as rules' attitude, as law cannot be understood or re-presented unless regarded within broad historical, political, socio-economic and psychological contexts. John Merryman starts one of his works by stating that there are three 'highly influential legal traditions' in the world today and then draws the attention of the reader to the term he uses - not 'legal system' but 'legal tradition'. He subsequently defines both terms. For him a legal system is 'an operating set of legal institutions, procedures and rules', legal systems being frequently classified into groups or families.[6] He hastens to add however, that being grouped together does not suggest that the legal systems within a group 'have identical legal institutions, processes and rules.' In fact 'there is great diversity among them.'[7] That they are grouped together signified that they have something else in common. This 'something else' is what distinguishes them from legal systems differently classified, and that is legal tradition which relates the legal system to the culture of which it is a partial expression .. and puts the legal system into cultural perspective.'[8] A legal tradition is 'not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition.'[9] Instead, it

> is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[10]

Indeed, many contemporary comparative lawyers abide by his definition. Henry Erhmann for one, takes the very same definition offered by John Merryman for 'legal tradition' and uses it as his preferred term, 'legal culture', at the same time claiming that the two concepts have been used in 'much the same way.'[11]

John Bell gives his definition of legal culture as 'a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts',[12] thus presenting 'legal culture' as a configuration of values, concepts, practices and institutions through which individuals interpret and apply legal norms; legal culture being rooted in general culture. Mark van Hoecke and Mark Warrington go on to say that 'understanding law implies a knowledge and an understanding of the social practice of its legal

[6] J.H. Merryman, *The Civil Law Tradition: An Introduction to the legal Systems of Western Europe and Latin America*, 2nd ed. (California, Stanford University Press, 1985), p. 1.
[7] *Ibid.*
[8] *Ibid.*, p. 2.
[9] *Ibid.*
[10] *Ibid.*
[11] Ehrmann, above note 3, p. 8.
[12] J.S. Bell, 'English Law and French Law – Not So Different?', (1995) 48 *Current Legal Problems* (Oxford, Oxford University Press, 1995) 63-101, at p. 70.

community',[13] which presupposes an understanding of the general culture of that society since the legal community is embedded in that society. Therefore, to distinguish legal systems one must locate them and their cultures 'within the broader context of the societal culture to which they belong'.[14]

It has been suggested that it may be more appropriate therefore, to talk of 'cultural families' rather than legal families. 'Legal families' suggests regarding legal systems as isolated from the culture within which they are embedded and also corresponds to the 'law as rules' approach.[15] Rather, the approach should be 'law as culture'. When this approach is assumed, differences as to world-views held, the concept of law, the role of law in society and the way conflicts are handled become central. These cannot be understood by merely comparing rules, legal institutions or even processes. This issue is of greater relevance when the comparative lawyer is looking cross-culturally rather than intra-culturally.[16] It is also true that cross-cultural comparisons are more valuable in enhancing knowledge about law in context than intra-cultural comparisons.

As basic elements of legal culture the following have also been suggested: a concept of law, a theory of valid legal sources, a methodology of law, a theory of argumentation, a theory of legitimation of law and a common basic ideology.[17] David Nelken admits that, 'Like any fruitful theoretical term, the meaning of legal culture is far from settled',[18] and that 'Clearly, legal culture is something which is both hard to pin down and, at the same time, difficult to escape.'[19] On the one hand it is used in relation to sociology of law, on the other as a catch-all. David Nelken calls Lawrence Friedman's distinction between 'internal legal culture', that is, ideas and practices of legal and political actors, and 'external legal culture', that is, the type and level of expectations of people from law, a classical understanding. This distinction seems to be reduced sometimes to 'supply' and 'demand'.[20] Talking of 'boundary problems', David Nelken tells us that, 'Disagreements in approaches to legal culture may simply reflect the different purposes which these definitions are intended to serve.'[21] However, it is also noted that the definition of legal culture itself depends on 'the culture from which it emerges.'[22]

[13] 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, at p. 498.
[14] *Ibid.*
[15] *Ibid.*, p. 502.
[16] Van Hoecke & Warrington, above note 13, pp. 508-509.
[17] *Ibid.*, pp. 514-515.
[18] D. Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 *Social and Legal Studies* 435-452 at p. 437.
[19] *Ibid.*, p. 443.
[20] *Ibid.*, p. 437.
[21] *Ibid.*, p. 438.
[22] *Ibid.*

It has been aptly questioned: Where should we go to look for legal culture and, how should we investigate it?[23] What is the impact of the economy, politics, social control, institutional structures, practices and ideas on legal systems? Can we measure their impact? We need to show how concepts both reflect and constitute culture. We as comparative lawyers see the need for such understanding and yet require the help of others such as economists, political scientists, sociologists and psychologists in order to grasp true meanings, even when we are looking at our own legal system. Nevertheless, we must undertake this task in order to get at the true picture, though 'we must also beware of the danger of artificially presupposing too high a degree of internal coherence within a culture, or exaggerating its separateness from other cultures or from global trends.'[24] Culture is never a homogenous whole, neither is law.

However, Patrick Glenn rejects the concept of a legal system conclusively and of a legal culture tangentially, and talks of 'legal traditions' instead, stating that 'the notion of tradition, after two or three centuries of neglect and opprobrium in the western world, has recently received renewed attention', the result of a 'postmodern shift' from 'rational-legal authority' to 'self-expression'.[25] He recognises that tradition is not an uncontroversial process and therefore, does not offer a definition, but rather, talks of the elements of tradition, 'pastness' and 'presence', tradition involving 'the extension of the past to the present' representing legal civilizations.[26] The whole journey is related to the question of 'How do we validate our knowledge of the law?'.

William Twining tells us that, 'Legal orders are made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions.' Quoting from Italo Calvino, he defines the concern as 'to portray the diversity and at the same time universality of human experience.'[27] These legal orders have been placed in geographical levels by William Twining thus: global, international, inter-communal, territorial state, sub-state, non-state, sometimes all impacting the same relationships.[28] This understanding also has a bearing on the micro-comparative level below.

All the above shows us two things. The first is that we cannot talk of legal systems as the sole units of macro comparative inquiry and the second, that there is no clear cut definition of legal culture and legal tradition or any obvious reasons for preferring one concept to the other. What is certain however is that it is context that counts. Macro-comparison must be carried out in context, legal systems – at present the hallmark of the nation State - must be approached within their social, cultural, economic and political environment if we are to reach a deep understanding of law

[23] *Ibid.*, p. 440.
[24] *Ibid.*, p. 444.
[25] Glenn, above note 4, p. xxi.
[26] *Ibid.*, p. 11.
[27] W. Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000) p. 172.
[28] *Ibid.*, p. 139.

as it actually unfolds. Interrelationships between legal systems must also be considered.

VARIATION II

Comparative law must be involved only in the 'top-down' model, that is the legal system as laid down by the formal law-maker, and elaborated upon by the appropriate high courts. A broader approach is dangerous and beyond the comparative lawyer's competence. Comparative lawyers can only rely on normative inquiry; this is all that is needed. To resort to 'legal culture' only confuses the issues as the following questions cannot be answered: Can differences between legal systems be explained by 'national character'? Can legal cultures faithfully mirror national character and overall culture? Can two legal cultures be more alike but the overall cultures more divergent? Is national character the effect or the cause of differences? Comparative lawyers should keep clear of such discussion.

Comparison should be limited to civil law/common law since the ordinary world is clearly divided between 'the heirs of Rome and Westminster'. Interest in other regions of the world or 'extraordinary' places, unless seen as extensions of the two families by comparative lawyers, must be satisfied by regionalists or anthropologists but not comparative lawyers.

Thus, legal systems together with the legal families in which they sit must be the starting points of macro comparison. A legal system is made up of a set of interrelated parts, each with a specific function to make the system work. The comparative lawyer analyzes the working of these parts; comparative law is the comparison of rules

The farthest limits we can go to in studying legal systems may be to say with Konrad Zweigert and Hein Kötz that we should 'grasp their legal styles'.[29] However, the concept of the 'legal style' does not go beyond history, mode of thought, institutions and legal sources; the last factor ideology is often discarded today as all five factors need not be used cumulatively. The comparative lawyer finds, describes, juxtaposes and identifies the differences and similarities between statutes, judicial decisions and related material but must ignore context when not of a legal nature. This is a technical perspective which is shared with traditional legal doctrine applicable to domestic law.

Most comparative law research is intra-cultural, that is, the subject of comparison remains legal systems or legal rules and institutions in legal systems 'rooted in similar cultural traditions and operating in similar socio-economic conditions'.[30] Attempts to harmonize laws, which is one of the practical purposes for

[29] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 67.

[30] W.J. Kamba, 'Comparative Law: A Theoretical Framework', (1976) 23 *International and Comparative Law Quarterly*, 494 at p. 511.

which comparative research is undertaken, will be successful only if kept 'within the family'.

2. MICRO-COMPARATIVE LEVEL: RULES OR BEYOND?

At the micro-comparative level the most frequently asked question is, 'What is law?'. As Rodolfo Sacco puts it: 'If one asks what students of comparative law compare, the most obvious answer would be, "the rules of different legal systems".'[31] What then is meant by a 'rule'? This question must be addressed at the micro comparative level. The traditional approach is of a positivist and looks at statutory rules, law as created by the State. To these rules may be added case law and pertinent legal documents. However, it is also obvious that there are other strands such as consideration of legal history, the political, economic, cultural and sociological environment in which law lives, legal techniques and the ideological or conceptual backgrounds of the actors of the law. Furthermore, in the context of 'legal pluralism', law goes far beyond the so-called 'official law', and extends to multi-layers of systems.

Today, 'law' spans the range of positive law and then moves to non-state law, rules, custom and tradition. What is a comparative lawyer to look at? Below, Variation I advocates looking beyond 'official law', that is, 'law as rules'; while Variation II only at law created by nation States.

VARIATION I

A broad approach to comparative law moves us away from legal systems as macro-units of inquiry and the 'law as rules' approach. Law cannot be understood or re-presented unless regarded within broad historical, political, socio-economic and psychological contexts. Hence, context is what counts. We have already seen that macro-comparison must be carried out in context and legal systems – at present the hallmark of the nation State - must be approached within their social, cultural, economic and political environment in order to lead to a deep understanding of law as it actually unfolds. The question of 'What is law?' must be approached in the same manner.

At the micro-comparative level comparative law presupposes the existence of rules and legal institutions, and their plurality, but statutory rules alone cannot be the object of comparative inquiry.

The first step is to regard judicial decisions as law. Even a monolithic legal system built on a Kelsenian hierarchy may regard both statutory law and judicial law as part of the legal system and yet not become pluralistic merely by the acceptance of judicial precedents as formal law. Judicial precedents must be considered by the

[31] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *American Journal of Comparative Law*, 1-34, at p. 21.

comparative lawyer whatever the inclinations of the legal system. In addition, great value must be attached to the decisions of lower courts and not only of the highest courts in systems under investigation. It is also commonplace today to talk of 'state legal pluralism' a weak version of normative legal pluralism.[32]

That said, it must be added that this is not the whole picture. Rodolfo Sacco for one, first stresses that the two keys to comparative study are 'evolution' and 'diffusion' and then goes on to point out that, 'it is wrong to believe that the first step toward comparison is to identify "the legal rule" of the countries to be compared.'[33] We should be talking of 'rules of constitutions, legislatures, courts, and, indeed, of the scholars who formulate legal doctrine'; although 'within a given legal system, the jurists assume' a unity between all these rules, since the 'main goal is to discover "the legal rule" of their systems'.[34] Rodolfo Sacco is here on a quest to discover the 'formants' of the law and therefore refutes the existence of a 'single rule' and, looking at the 'living law', sees many elements in the search for 'one rule'. Having stated that one needs to recognize the diversity of the 'legal formants', he says that 'within a given legal system with multiple "legal formants" there is no guarantee that they will be in harmony rather than in conflict.'[35] The legal formants cited by him are constitutional and legislative rules, case law, operational rules and scholarly writings, although no list is compiled to include all possible 'legal formants'.

It must be kept in mind here that the number of legal formants and their comparative importance will vary from one system to another. In addition we may ask ourselves, 'What about 'formants' other than the legal'? Rodolfo Sacco goes so far as to say that some 'legal formants' are 'explicitly formulated' and others are not. He calls these 'cryptotypes' representing 'non-verbalized' rules and 'implied patterns'. Once verbalized, 'ctyptotypes are perceived and passed on from one generation of jurists to another'.[36]

However, other 'formants' of the law are also to be taken into account. The comparative lawyer must look at all the elements at work in a given legal system in context.. She must remember that rules, institutions and processes must be studied in context and that 'legal formants' themselves develop under the influence of 'contextual formants'. For instance, Tibor Varady presents ideology as yet another important 'formant'. Any attempt to analyze the formants of private law in Central and East European countries for instance, indicates that strong value judgments or ideological precepts have acted as formants of private law during recent decades there. It is further suggested that the importance such a formants have is not

[32] See for a discussion of 'weak' and 'strong' version of legal pluralism, J. Griffith, 'What is Legal Pluralism?', (1986) 24 *Journal of Legal Pluralism*, 1.
[33] Sacco, above note 31, p.21.
[34] *Ibid.*
[35] *Ibid.* p. 23.
[36] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (Installment II of II) 39 *American Journal of Comparative Law*, (1991), 343-401, at pp. 384-385.

confined to Central and East European countries, nor is it confined to the past decades.[37]

It must also be noted that a link to statehood has never been a prerequisite for the existence of a legal system.[38] Since this is the case, why should we compare only the 'official rules' created by the State? The State does not have a monopoly on creating law. Whenever possible the 'bottom-up' approach must be resorted to and the comparative lawyer must be prepared to go behind the rules, looking backwards, sideways and forwards at all times. For true comprehension, a feeling for 'law in action' is vital at all times and not only when looking at judicial decisions.

So, in a world of legal pluralism, there is much to consider. 'Official rules' are only one type of rules. Law however, is made at a number of 'layers'. For instance, according to Boaventura de Sousa Santos's broad conception of law, 'modern societies are regulated by a plurality of legal orders, interrelated and socially distributed in the social field in different ways', rather than 'being ordered by a single legal system'.[39] This is the idea of legal pluralism, indicating that 'more than one legal system operates in a single political unit', that is, 'non-state law' has equal place with 'official law'. However, he also observes that 'there is nothing inherently good, progressive, or emancipatory about "legal pluralism"', and therefore, the better choice is to regard this phenomena as given and speak of 'a plurality of legal orders' rather than 'legal pluralism'.[40] He also introduces the concept of 'interlegality' to capture the complex relationships of superimposition, interpenetration and mixing between legal orders and semi-autonomous legal fields. Comparative law studies should attempt to extend to norms of non-state law, folk law and customary law, remembering that the law is global, national and local.[41]

VARIATION II

Only the 'top-down' model of law-making interests comparative law. Law is a creation of the nation State. As we have seen at the macro-level the units of inquiry are the legal systems, and law is what is laid down by formal law-makers and elaborated upon by the appropriate high courts. Comparative lawyers are not interested in a broader approach and such an approach would be dangerous. Normative inquiry is all that is needed. The normative approach is not involved in any way in empirical field studies to find out how things actually are, but confines itself to the study of law in the books. Law is a system of rules. Comparative law is for the comparison of rules. If the primary sources of law include court decisions,

[37] See T. Varady, 'Notes on Ideological Precepts as Formants of Private Law in Central-East European Countries', (2002), Vol: 2, No 2, *Global Jurist Frontier*, pp. 1-18.
[38] See for example, the four definitions given in Chapter 2 above.
[39] B. de Sousa Santos, *Toward a New Legal Common Sense*, 2nd. edn. (London, Butterworths, 2002), p. 89.
[40] *Ibid.*
[41] *Ibid.* See map on p. 371.

these would also be included in the inquiry, thus a degree of 'law in action' is present here too.

Moreover, there is no special way of dealing with foreign law. Whether one is investigating the rules of foreign law or of domestic law makes no difference. Since the comparative process starts with the juxtaposition of the unknown to the known, the rules of the domestic system must be studied first and then functional equivalents sought.

The core of research in micro comparisons is the 'law as rules' approach. Any other approach would side track the comparative lawyer into sociological and anthropological research. She must resist this. It is also wise to remember that comparative law is a practical pursuit and not a theoretical one. Theories often coincide with the theorist's political preferences and comparative lawyers are not political players. They juxtapose, contrast and compare 'official law' for practical purposes exclusively.

If a discussion of 'legal pluralism' is to be entered into, 'legal pluralism' could only be understood to mean 'state legal pluralism'- the so-called 'weak version - and thereby could only imply 'officially recognized rules' such as case law, gentlemen's agreements in contract law or regulations of professional bodies, complementing the rules made by the 'law-maker' and allowed by the State to co-exist.

Chapter 5

HOW TO COMPARE?

> When lawyers, as a sideline, indulge in what they consider scientific work, their method is usually to take up a subject, read and think about it, try to find out as much as possible about it, and hope vaguely that all this will result in conclusions which are in some way interesting, useful, surprising, etc. The choice of a subject is dictated by personal taste (of the author himself, of his editor, his boss, etc.) and there are almost no rules concerning research methods, except the one which says that the more legal provisions, cases and other pertinent material you read, the better the research.[1]

So, which methods can and should be used by comparative lawyers? When and with what expectations? If it is accepted that social science research methods are essential in comparative law, can and do comparative lawyers make full use of social science research methodology?[2] Can there be a standard comparative law methodology? Considering that there has been little systematic inquiry into methods of comparative law, as indeed admitted by many comparative lawyers, it is essential to study answers to the question: 'How should we compare?'.[3]

Apart from regarding comparison itself as a method, the problems of comparative legal methodology are very varied and have been discussed in different ways by many comparative lawyers,[4] and the methodology of comparative law has been referred to in a number of ways. 'Functional equivalence' and the 'problem-

[1] F.J.M. Feldbrugge, 'Sociological Research Methods and Comparative Law' in M. Rotondi (ed) *Inchieste di Diritto Comparato*, Vol 2: *Aims and Methods of Comparative Law* (New York, Oceana Publications, 1975), p. 215.

[2] These issues were also discussed by me elsewhere: E. Örücü, *Symbiosis between Comparative Law and Theory of Law – Limitations of Legal Methodology*, (Erasmus Universiteit Rotterdam, Mededelingen van het Juridisch Instituut No: 16, 1982).

[3] The reader may wish to read this sub-theme together with the sub-theme 'Comparability' in Chapter 2.

[4] See G.K. Roberts, *What is Comparative Politics?* (Macmillan, Essex, 1972); and also a number of Chapters in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003).

oriented' approach,[5] 'model-building' and 'common core' studies – the 'factual' approach,[6] the 'multi-axial method' made up of the historical, functional and dogmatic axes and the law as a system of rules in a national context[7] and 'method in action'[8] are just some approaches to 'How to compare?' put forward in the last century.

'How to compare now' is actually the title of an article by one of the more controversial comparatists of our times.[9] There we find the accusation that comparatists do not carry out comparison proper but just contrast rules of law, which means that they take a very narrow view of 'how to compare', and an analysis of what comparatists must concentrate on.[10]

VARIATION I

The simple answer to the question, 'What is the method to be employed in comparative law research?' is, that 'comparison' is the method. It is clearly a fact that 'comparison' is used in all fields of study, be they social sciences or natural sciences. One can 'encounter the use of comparisons in various fields – governance, economics, linguistics, architecture and so on. Thus it is quite obvious that comparison itself is a method. It is a way of looking, it is a mode of approaching material, a method in the process of cognition.'[11] Thus, used alone, the 'comparative method' can be employed in various fields of discourse. In this sense it is an empirical, descriptive research design using 'comparison' as a technique to cognize. However, when the term 'comparative' is included in the name of a subdivision of a field such as comparative architecture, comparative linguistics or comparative law, it denotes an area of study and in that context, the word 'comparative' in the title no longer depicts a method, but indicates an independent branch of that science, in our case, legal science. This subject then, develops its own methods.

Though law is not cited among the subjects covered in works designed as guides to the social sciences which include subjects such as sociology,

[5] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn., trans. T. Weir (Oxford: Clarendon Press, 1998), pp. 34-36; and K. Zweigert, 'Methodological Problems in Comparative Law', (1972) 7 *Israel Law Review*, p. 466.

[6] R.B. Schlesinger, (ed), *Formation of Contracts: a Study on the Common Core of Legal Systems* (Dobbs Ferry, Oceana, 1968).

[7] F. Schmidt, 'The need for a multi-axial method in comparative law' in J.C.B. Mohr (ed), *Festschrift für Konrad Zweigert* (Tübingen, Paul Siebeck, 1981), 525-536.

[8] M. Ancel, *Utilité et methodes du droit comparé* (Neuchatel, Editions Ides et Calendes, 1971).

[9] P. Legrand, 'How to compare now' (1996) 16 *Legal Studies* 232, also in P. Legrand, *Fragments of Law-as-Culture* (Deventer, W.E.J. Tjeenk Willink, 1999) as 'A Redemptive Programme', pp. 1-13.

[10] *Ibid.*, p. 234.

[11] A.E. Örücü, 'Method and object of comparative law' in: H.W. Blom & R.J. Folter (eds.), *Methode en Object in de rechtswetenschappen* (Zwolle, W.E.J. Tjeenk Willink, 1986), p. 57.

anthropology, psychology, political science, economics and geography, 'comparative law' is surely one such subject. Comparative law is more closely related to social sciences than to 'pure' normative inquiry which seems to characterize other types of legal research. To indicate its place with social sciences, the first fact to note is that comparative law has borrowed some of its methods from behavioural sciences and from the field of statistics; its methods are adaptations of various methods of cognition. Comparative lawyers have not 'invented' their methods or the 'process' of the methods used. The borrowed methods have been creatively applied to the problems of comparative law research. Nevertheless, there remains much confusion about methodology and methods.

Although comparative law research is open ended, the methodology being dictated by the strategy of the comparative lawyer, and there is no standard methodology, the possibility of comparison is dependent upon the existence and availability of data. Data can best be obtained by employing social science methodology. Direct investigation, understanding and analysis of data recorded for a specific purpose provide an essential and healthy starting point to comparative inquiry. The inquiry stage is also related to concept building where concepts that are neither so broad as to be meaningless nor too narrow to cover more than one instance, have to be devised; umbrella concepts may have to be created.

Later in the process a set of general statements can be used as the premise for explanation. The classical technique of legal methodology of reading texts of all kinds and hoping for insight, has serious limitations for collecting data to serve comparative inquiry adequately. This black-letter-law approach confining law to rules is totally inadequate for comparative law research. Indeed, unless there is collaboration between legal and social science researchers, comparative law falls short of its function, not only as a way of enhancing understanding and knowledge of law in context, but also as a source of models and of empirical information and knowledge. Though scholarly comparative law has philosophical underpinnings, it follows from the above that it is a social science based on positive observation rather than on philosophical speculation. The goal of any science is to develop valid, precise and verifiable general theory, theory supported by empirical generalization, that is, it should be based on comparative data and theoretical distillates as well as informed imagination.

Ferdinand Feldbrugge has shown the limitations of both lawyers and legal methodology, as we have seen above. His observation is pertinent to comparative research. Studying the law in books or reading more and more textbooks and cases would not have enlightened our research team on the specific problems of education and specialization of lawyers in European Law for example. Moreover, it would not have told us anything of value about those lawyers' attitude to European Law.[12]

[12] See the research in M. Aitkenhead, N. Burrows, R. Jagtenberg and E. Örücü, *Law and lawyers in European integration: A comparative analysis of the education, attitudes and specialisation of Scottish and Dutch lawyers* (Mededelingen van het Juridisch Instituut van de Erasmus Universiteit Rotterdam, No: 43, 1988).

Inquiry is only the starting point. Thereafter, a comparative lawyer is expected to describe, juxtapose, identify similarities and differences and then venture into the field of explanation. It is here that hypotheses are needed and it is here that real comparison starts. Now this explanation, this discovery of the *raison d'etre* for the differences and similarities, also necessitates moving from the domain of pure legal reasoning to that of social factors. In explanation, hypotheses must be consistent with the facts and verification of the findings needs transformation of an empirical nature. That is, the comparative lawyer must collect and describe data on the basis of carefully constructed classificatory schemes, discover and describe uniformities and differences on the basis of such data, formulate interrelationships between component elements of the process and other social phenomena as tentative hypotheses, subsequently verify the tentative hypotheses by rigorous empirical observation and construct the cumulative 'acceptance' of various basic propositions.[13]

The empirical school may suggest that the appropriate method should begin with the facts rather than hypotheses, and end in description. This is said to be a more realistic approach, since the present day lawyer is well equipped to use this method. Yet this Variation tells us that comparative inquiry should not stop at description, but move on into explanation where the real comparison starts, and then, on into confirmation of findings. Hence the need for hypotheses.

Whether a comparative lawyer starts with hypotheses or with facts, when she goes on to explanation, as she must do if the intention is to use the universal method of science and extract ultimate legal knowledge, she must make sure that the hypotheses are consistent with the facts. According to John Merryman, when instances are comparable and results interpretable, descriptions - sets of empirical observations - should be made, compiled and juxtaposed. Only then should the comparative lawyer launch into an explanation when further empirical observation may also become necessary. This is compatible with explanatory generalizations as the objective, and with legal systems as the matter or object of comparison.[14] Explanation of the differences and similarities identified is an accounting for these findings. However at this stage context becomes indispensable for understanding. Here the help from economists, historians, anthropologists or cognitive psychologists may be needed. Yet the imagination and creativity of the comparative lawyer cannot be replaced by any of those specialists. At this stage more information and therefore the expansion of the research may become necessary. At the end of this activity the comparative lawyer will be in a position to offer tentative hypotheses.

We have noted that it is also possible to start with hypotheses and then conceptualize, describe and so continue. The choice depends on whether the comparative lawyer is a follower of the empirical school or whether she already has

[13] See R.G. Macridis, *The Study of Comparative Government* (New York, Doubleday, 1955).
[14] J.H. Merryman, 'Comparative Law and Scientific Explanation', in J.N. Hazard, W.J. Wagner (eds.), *Law in the United States in Social and Technological Revolution* (Brussels, Bruyland, 1974), p. 95

certain phenomena in mind on which she has a speculative theory, the aim of the comparative research being to prove or disprove it. However, the possession of a purely curious mind is not the only reason why a scholar finds it worthwhile to carry out research. A specific project may rest on a number of middle level hypotheses on which there is prior agreement by the research team, as well as curiosity. It is possible to regard this as scientific research in its simplest form, in the sense that hypotheses are deduced from a set of theoretical propositions and then investigation is carried out to determine whether the outcome predicted by the chosen hypotheses manifests itself empirically.

Comparative analysis can be used to test or suggest propositions that can be applied, and by extension, to explain all cases, if only on a probability basis, at the level of generality of the cases compared. John Merryman says that, 'the explanatory approach represents one attempt to choose error over confusion'.[15] An explanation of findings, of exceptional and typical cases, an accounting for differences and similarities, is thus not just a necessary step in comparative research but is its essence. Some of the hypotheses may also serve as explanations, but for some findings new explanations have to be found.

It has been observed that contemporary comparative law has become very modest, very realist, very pragmatic and that comparative lawyers hesitate to venture into explanations.[16] Perhaps the main reason for this is not modesty but that the methodology to be employed for a fruitful extraction and explanation of legal knowledge is often beyond the realm of law and thus beyond the lawyer's competence, or even her interest. In fact, a comparative lawyer who follows the logic of Variation II below, may not believe that explanations are within the remit of a comparative law researcher. Most of the time explanation necessitates moving away from the domain of 'pure' law to that of social, cultural, religious or economic factors. How is the conventionally trained lawyer to do that?

Let us assume that a comparative lawyer who speaks the language of this Variation is investigating 'adoption' as seen in Turkey and Scotland, two legal systems that do not belong together according to the traditionally accepted classification. In neither system is adoption a part of the indigenous law; it is a historical addendum through historical accident. Her findings would show the comparative lawyer that in Turkey between 1926, when this institution was introduced through the Civil Code adapted from the Swiss Code, and 2002 when the Civil Code was amended, only persons over the age of 35 who had no natural children of their own could adopt, that the age difference between the adopter and the adoptee had to be at least 18 years, that if the adoptee was married the consent of his/her spouse was also required, that the adoptee did not lose his/her relationship with the natural parents and therefore could inherit from them as well as from the adopter who in turn could not inherit from the adoptee.

[15] *Ibid.*, p. 100.
[16] C.L.J. Constantinesco, *Traité de Droit Comparé, La Méthode Comparative*, Tome II (Paris, Libraire Générale de Droit et de Jurisprudence, 1974), p. 123-256 where he shows what he thinks comparatists should be doing.

In Scotland things are very different. Through the adoption process, a single person or a couple can adopt if they are over 21, unless one of the two applicants is already the natural parent of the child. An adoption order can only be made for a child who is under 18; the child must be at least 19 weeks old and must have lived with the applicant adoptive parents for the preceding 13 weeks. A married young person cannot be adopted. On adoption the legal relationship between the child and her birth parents is severed and a new relationship between the child and the adoptive parents, now the substitute parents is created. Adoption is still operative after the child reaches 16, whereas parental rights would by then have ceased.

The explanation for the difference lies in a number of tentative hypotheses: In Turkey the aim of adoption, as in Roman law, is to provide care for the elderly and continuation of family name and family business for persons who have no children. As a result, it is not for the interest of the child that adoption is available and therefore the adoption of adults would be the more appropriate for the stated aim. There must be an age difference of 18 to avoid sexual relationships between the two adults. Arising from the underlying aim of adoption as stated, only childless persons can adopt; the ban on adoption for those with children of their own also protects the inheritance rights of the blood relations.[17]

The comparative law researcher must examine these explanations in order to understand why the legal systems have produced the institutions they have, although these explanations are not legal ones As expected, the texts themselves only show the differences but do not offer explanations.

Yet explanation is not the final step in a piece of comparative research. Findings must be verified and confirmed, and only then can the work be called complete. This is the theory testing stage for the tentative hypotheses offered through explanation and for this the research must be extended. When the frame, the methodological grid and the hypotheses which have a probable validity for comparables are available, then the choice of two other appropriate legal systems is easier. In this way both comparability of subject matter and generalizability of the results can be secured. Further research would verify this degree of probability.

Traditional black-letter-law oriented comparative law research, with which Variation II deals, is normative, structural, institutional and positivistic, and would not use any approach other than the reading of statutes, cases, parliamentary debates and sometimes doctrinal works, and would regard description to be the final stage of the inquiry. Even the conceptualization stage might be suspect. The present Variation is concerned with law in action and law in interaction with social and cultural systems. Therefore, rule based research is regarded as useless since it leads to only partial truth and a misleading picture. Creative comparative law research can also be interested in suggesting 'core concepts' and point the way to 'ideal systems', or at least to the 'better law' approach. William Twining has remarked that comparative lawyers are concerned 'with description, analysis and explanation,

[17] See for further discussion of adoption Chapter 10.1 below.

rather than evaluation and prescription.'[18] In relation to the search for 'better law' however, there is scope for evaluation and prescription, but the legitimacy of this activity will always remain questionable.

The Variation I comparative lawyer has to grapple with a number of serious problems as well as the above. These include choice of systems, appreciation of cross-cultural systems, language, terminology, translations, both participant and non-participant observer effect, access to material beyond the legal, absurdity of explanations offered, reliability of secondary sources, the existence of historical accidents and anachronism of predictions. For the black-letter comparative lawyer in Variation II, these are not seen as great concerns.

In his article 'How to compare now?' Pierre Legrand expects the following from comparatists: They must concentrate on translation and the 'foreignness of languages'; bring a 'deep' understanding of rules by tying them to *mentalité* and culture; be committed to theory which must include a commitment to 'interdisciplinarity' special attention being paid to anthropology, linguistics and cognitive psychology; acknowledge differences and cherish them and develop an empathy for 'alterity', and at all times remain critical extending the notion of 'law' beyond that of 'binding law'. Pierre Legrand ends his thoughts on how to compare thus:

> To privilege a commitment to theory, to follow a practice which respects and values difference, to foster a way of acting in the world that is critical, even polemical, will naturally take the comparatist away from the traditional approaches to comparative legal studies which, because such obsolete routines only focus on crude formalistic solutions to raw legocentric problems, do not accept the need for theory and obstinately pursue similarity and consensus as if confined to a groove. In other words, the comparatist is invited to register a dissenting opinion, to mark her disapproval of what continues to be done in the name of comparative legal studies. She is asked to place herself firmly in opposition. She is asked to pursue the 'contrarian challenge'. Indeed, there is no more pressing research and teaching programme for a comparatist to undertake at this historical juncture than actively to promote the merits of the 'contrarian challenge' for comparatists themselves, for comparative legal studies, and for the European legal order.[19]

This Variation would argue that in order to fulfil the requirements of scholarly comparative research both similarities and differences must be considered, keeping in mind however, that the purpose is not to search particularly for similarity or difference but, to observe what is actually there. When there is similarity, this cannot

[18] W. Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000), p. 185; and also 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. 34.

[19] Legrand, above note 9, p. 242.

be ignored just because the researcher is keen to follow the 'contrarian challenge', neither can a difference be glossed over because some other policy consideration such as European integration or globalization dictates that only similarities should be highlighted. The science of law can only be built on truth, though it must be admitted that absolute objectivity is not always attainable. Therefore this Variation would agree with the first half of the above quotation from Pierre Legrand.

In carrying out comparative law research, a decision has to be taken as to what to ignore as accidental rather than essential and what as temporary rather than permanent. Certain factors may be deemed irrelevant for the purposes of a project. However, seemingly irrelevant dimensions may in fact be of great significance. The problems associated with looking at the temporary rather than the permanent can cause instability in the research.

It is understandable that when a comparative lawyer starts with a hypothesis there is a tendency to read meanings into facts when they do not match or support the hypothesis. Rather than accepting that the hypothesis should be restated or corrected, the researcher may tend to misread the facts or ignore them. Although it may be reasonable to ignore accidental and temporary factors, differentiation between the accidental and the essential, the temporary and the permanent must rely on sound and dependable criteria. This in turn necessitates knowledge of the cultures under consideration with their different ethical theories, techniques of social control, and the values and attitudes which bind the system together. Only as a result of an empirical survey can the temporary, irrelevant or accidental be determined and drawn to the attention of those in a position to affect the ultimate outcome, such as the legislature. This is all part of the comparative law venture.

Among the many obstacles on the course of comparative research, the most difficult to overcome is often the 'observer effect'. Others mentioned earlier, such as concept construction and abstraction, languages of comparison, problems of translation, cross-cultural terminology, imprecision of terminology and recognition of similarities and differences are easier to surmount through cross-check control. The 'observer effect', being subjective, is difficult to detect and overcome. It exists in various forms, such as the 'participant observer effect' and the 'non-participant observer effect', which pose separate problems. However, there is always the danger of being over-sensitive to the observer effect.[20] The observer effect may arise while the technique of observation is employed, or when the sample is surveyed, content analyzed, results evaluated and differences and similarities explained. Awareness of the problem is the best precaution.[21]

VARIATION II

Comparison is of legal rules, provisions and institutions. Following on from the premise of 'functionally equivalent' rules, provisions and institutions, the

[20] Roberts, above note 4, p. 53.

[21] I return to the subject of obstacles in Chapter 10 under 'Limits of Comparability'.

comparative lawyer starts with rules whose functions are equivalent and collects relevant data that lead to a succinct description. Thus comparable concepts, rules etc; are first described and then juxtaposed. Contrasting is the first step of comparing. As suggested by the empirical school, the appropriate method begins with the facts, 'the problem', rather than with hypotheses, and ends in description. Similarities and differences brought to light by this contrasting and comparing are then identified. This is a down-to-earth approach, which the present day lawyer is well equipped to handle. The question, 'Should comparative inquiry stop at description without venturing into explanation?', is an unconditional 'Yes'.

If a comparative lawyer were asked, say by the English Law Commission, to look into 'do-it-yourself divorces' in the laws of the Members States of the European Union with a view to facilitating divorce in England, all that she would have to do is to report on the different schemes, describe them and identify the differences and similarities between the different schemes and also between them and the domestic law. She would not be asked to evaluate the findings since this is the task of the Law Commission and would be determined in keeping with the policy decisions made there for the type of desirable law reform. If the comparative law researcher had also been asked to comment on the most efficient rule, she would have indicated that also, though based on conjecture, so not necessarily reliable. But her remit would not take her beyond that. The comparative lawyer is purely a facilitator and not a political player.

It is not for the comparative lawyer to give explanations, build theories, test these in the confirmation phase of her methodology and then offer generalizations. These activities entail going beyond the realm of law. Lawyers can only compare laws. What makes the comparative lawyer a different and special species of the genus lawyer? Offering *a posteriori*, futuristic suggestions is a dangerous and unnecessary activity, so is starting from *a priori* hypotheses. Comparative lawyers should not become policy advisors nor try to create blue-prints for the future. They are not social scientists and have not been trained to be anything other than lawyers. They are simply lawyers looking at laws comparatively. They facilitate the jobs of others, be these historians, economists, politicians or practitioners who may then use the findings exposed by comparative research to build theories or suggest reforms etc;. Comparative research itself must end at the description or the identification phase. The comparative lawyer presents the actual in law. It is for others to build with these bricks. Neither should she enter the arena of prescription of a 'better law' consequent to an evaluation.

Language, terminology, translation, access to material and the reliability of secondary sources will be among the problems faced by comparative lawyers but when working in teams they have others to act as correctives to the research. Most of their research assistants will be from the jurisdictions under review who are fluent in the foreign languages in use.

Let us assume that a comparative lawyer takes on a research project inquiring into the workings of review of constitutionality in the United States of America and Germany. She could end her research by the following observation: The established

traditions in judicial review of constitutionality can be studied in two broad types: The first type is the decentralized, diffuse, *incidenter*, *inter partes*, concrete, legitimating and retroactive *ex tunc* as noted in the United States, and the second centralized, concentrated, *principaliter*, *erga omnes*, abstract, invalidating and prospective *ex nunc* as observed in Germany. All others, developed under the influence of these two original models, are intermediary systems.[22] Her job is done. She does not thereafter venture into explaining these striking divergences. It is for political scientists to look into explanations if they so wish. She should not pass judgement.

Some comparative lawyers have suggested blueprints which could be successfully employed for the comparative law method. For example, Peter de Cruz suggests an eight step method, an outline laying down a plan of action which starts with identifying the problem, identifying the foreign jurisdiction and the parent legal family, deciding on primary sources of law that will be relevant, gathering and assembling the relevant material – and here he offers a normative checklist -, organising the material in accordance with headings, tentatively mapping out the possible answers to the problem – here bearing in mind cultural differences –, critically analysing the legal principles according to their intrinsic meaning, and finally, setting out the conclusions within a comparative framework with caveats if necessary.[23] Peter de Cruz does not claim to be a black letter lawyer and therefore his suggestion entails the explanatory stage and a critical conclusion where extra-legal phenomena become important. So for the purposes of this Variation the researcher following Peter de Cruz's blueprint should stop earlier in the research as indicated above. Carrying out comparative law research is not in any way different to carrying out research related to domestic law.

[22] See M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, Bobbs-Merrill, 1971).

[23] P. de Cruz, *Comparative Law in a changing world*, 2nd edn. (London, Cavendish Publishing Limited, 1999), pp. 235-239.

Chapter 6

INTERMEZZO

In this brief interlude we ask ourselves the question: Are we facing a schism here, an unbridgeable split, incompatibility between the two Variations of the above five Chapters? Are the positions mutually exclusive? I do not believe this to be the case.

It is true that there are comparative lawyers who claim that comparative law is a science with its own separate sphere, others who call comparative law merely a method of study and research or even a technique, and some who see it both as a comparative method and a comparative science of law or see in comparative law more than one of these aspect. It is immediately obvious that those who see comparative law as a method only, do not fully discuss what that method is, leaving this issue unanswered or very vaguely covered, and those who think or feel that comparative law must be more than a mere method, do not seem to agree on what this subject matter is. We have seen that the answers to 'What to compare?' and 'How to compare?', for example, can be extremely varied. Are we then to conclude that comparative law will depend entirely on what is to be compared and that the purpose of the comparison, and the purpose for which comparative law is studied or taught will determine the form which the study or instruction should take? Is this a satisfactory position to assume today? Obviously we would not want to put comparative lawyers, who pride themselves in the freedoms they have, into straight jackets, but at the same time, we do not want them to have no jackets at all!

It is not too fanciful to predict that the twenty first century will be 'the age of comparative law', though it seems still open to discussion whether comparative law is indeed an independent discipline and there is some disquiet concerning the methodology to be used. There is decidedly a renewed and growing interest in the subject and the meaning of the term 'comparative law', and varying views on what it is or how we compare, yet the subject seems well rooted. Academic study, law reform, policy development, research and teaching, international practice of law and law courts all avail themselves of it, in various ways. There are practical, sociological, political and pedagogical objectives in the above activities. However, comparative lawyers have been called upon to rethink their subject and it has also been suggested that comparative law would have a better future if it were to penetrate other subjects rather than profess to have an autonomous value. So some confusion can be said to continue. Nevertheless, out of confusion clarity will emerge as essential theoretical insight is developed by comparative lawyers. Cacophony will