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NORA V. DEMLEITNER

Challenge, Opportunity and Risk: An Era of Change in Comparative Law

Law reflects and constructs societal norms and values.[1] This dual function explains the power of law to challenge the status quo and to bring about change. Often law operates as a societal change agent when society has reached a new level of awareness and understanding of itself and others. Comparative law is particularly well positioned to operate as a constructor *and* a reflector of legally clothed societal values. This dual role constitutes its strength — and produces its danger.

At present, comparative law faces a dual challenge to its relevance. At home it has to confront a potential disintegration of the field which results from the vacuum created by the absence of a clear purpose and the attempt on the part of the adherents of newer jurisprudential theories to fill the gap through the use of their methodologies in explaining foreign legal systems. In its study of foreign legal cultures, comparative law runs the risk of misinterpreting legal phenomena because of its use of non-reflective, domestically contingent methodologies that superimpose our value judgments upon other legal cultures, and therefore often conceal rather than illuminate different approaches to law. Both challenges, however, encompass great opportunity and the possibility for a more nuanced understanding of ourselves and others.

I. Challenge: The Disintegration of Comparative Law at Home?

The debate about the purpose and goals of comparative law are embedded in the larger contest about the future of the academy and of legal training. For decades legal education has been heavily criticized for failing to train students to be lawyers. As early as 1930, Karl Llewellyn asked, "[w]hat do you need for your practice which [law school] does not offer? To which the answer is: almost everything you

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1. See, e.g., Clifford Geertz, *Local Knowledge* 218 (1983).

will need for your practice."[2] This attitude prevails to this day. At present, much of it centers around the issue whether law schools should train practitioners or rather develop their students' skills "to think like lawyers." The distinction between those faculty members who see themselves as teaching in a trade school as opposed to those who consider themselves part of a graduate school is alive and well in many law schools.[3] Even those schools that were traditionally regarded as local schools that trained "real" lawyers have turned into more academic institutions which offer a large number of "law and. . ." courses. Practitioners continue to bemoan this development, and increasingly charge that law schools fail in their mandate to train future lawyers. Much commentary has been devoted to the current state of the American law school, and the question whether legal education is directed sufficiently toward the training of new lawyers and is tied closely enough to the legal profession.[4]

The disagreement about the function and role of law schools reflects more than mere petty disagreement between faculty members over the question of what role legal education should play. Rather, it is indicative of the struggle over the character of society, and the function of law and lawyers in it.[5] Is law merely a mechanism to resolve individual disputes in society? Or, rather does it offer a way to re-conceptualize norms of justice?

The persistent dispute over the character of law school as a trade or a graduate school is not the only one raging in today's academy. The other ongoing contest is between those who prefer law schools to look inward to examine this country's condition and those who demand increasing focus on developments outside U.S. borders. While those who are focused on domestic issues are frequently identified with the group that defends the more practically oriented approach to law, the fault lines of the two sets of tensions are not identical. Many of the progressive modern jurisprudential approaches, such as critical legal studies or race and the law, focus primarily on societal dislocations at home while generally being highly theoretical.

Increasingly, American society and academia have become inward looking even though much lip service is being paid to the global

2. Karl Llewellyn, *The Bramble Bush* 92 (4th prtg. 1973) (1930).

3. Stoebuck, "Symposium on the 21st Century Lawyer: Back to the Crib?," 69 *Wash. L. Rev.* 665, 674-75 (1994).

4. See, e.g., Boswell, "Keeping the Practice in Clinical Education and Scholarship," in "Symposium, Theoretics of Practice: The Integration of Progressive Thought and Action," 43 *Hastings L.J.* 1187 (1992); Cumbow, "Educating the 21st Century Lawyer," 32 *Idaho L. Rev.* 407 (1996); Kralovec, "Contemporary Legal Education: A Critique and Proposal for Reform," 32 *Willamette L. Rev.* 577 (1996); Stein, "The Future of Legal Education," 75 *Minn. L. Rev.* 945 (1991).

5. Hazard Jr., "Law School Studies as a Mirror of U.S. Society," 10/20/97 *Nat'l L.J.* A27 (col. 1).

society and the internationalization of markets and societies.[6] Even though national borders have decreased in importance and transnational issues appear with greater frequency and demanding relevance in "domestic" courses, the law school curriculum remains domestically focused. Course offerings in international and comparative law have increased dramatically over the last twenty years. However, the number of students enrolled has not kept up with faculty interest.[7] Surprisingly, that is the case even though bar associations and practicing lawyers have been urging law students to enroll in such courses.

So far, comparative law appears to have tried to accommodate both sides in the two contests over the future of the law school and over the role of law in society. Comparatists have attempted to navigate the schism between theory and practice by encompassing theoretical and practical goals in their laundry list of purposes. Among the practical applications of comparative law is the way in which it permits U.S. lawyers to communicate more effectively with non-U.S. clients or lawyers. In addition, comparative law is hailed for its usefulness in the harmonization of laws and the delineation of international norms. Among its praised theoretical applications are "promoting an improved understanding of one's own legal system or searching for principles common to a number of legal systems."[8] Comparatists have paid lip service to both sets of goals in an attempt either to navigate around the two preeminent dialectics prevalent in today's law schools or to heal the rift between the different factions by demonstrating the inherent compatibility of these allegedly contradictory aims. The eclectic canon of goals for comparative law allowed the primarily European-trained scholars who dominated the development of comparative law for decades to preempt the schism between "practitioners" and "theorists" and between internationalists and those focused exclusively on domestic issues. It also provided them with the opportunity to establish "comparative law" as a course and a distinct area of scholarship in the U.S. academy. However, the continued adherence to the diffuse set of purposes for comparative law and the attempt of comparatists to pursue the divergent goals at the same time have caused comparative law to lose its focus and a clear sense of purpose. As a consequence, the present conceptualization of comparative law has come under direct attack at home.

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6. See, e.g., Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law," 42 *Am. J. Comp. L.* 195, 218 (1994).

7. Barrett, Jr., "International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students," 31 *Int'l Law.* 845 (1997). See also Barrett, Jr., "International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society," 12 *Am. U.J. Int'l L. & Pol'y* 975 (1997).

8. Mary Ann Glendon, Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions* 9 (2d ed. 1994).

Comparative law has fractured, or at least developed two distinct wings—with others, such as the Michigan/Hastings group,[9] occupying a still undefined middle ground. This schism among comparatists presents a unique opportunity to refocus and rethink the position of comparative law in the academy and its role in the development of law.

I will classify the two major groups as the "American Society of Comparative Law" ("ASCL") and the "Utah" group.[10] The former is named after the established organization of American comparatists which carries on in the spirit of the great American comparatists, Rudolf Schlesinger and Arthur von Mehren. Its focus, even in the last few conferences, has tended to be on traditional comparative law topics such as "Equity" (1995) and "Codification in the 21st Century" (1997). Even though some non-traditional themes and speakers have surfaced at the last few annual meetings, Europe-centered, private law scholarship continues to dominate the ASCL. Terms such as "codes," "legislation," "legal borrowing," and "harmonization" characterize the discourse. Much of the work still focuses on the analysis of legal families or cultures.[11]

Non-traditional comparatists have generally not joined the ASCL but instead met in different fora. The "Utah" group got together in 1996 at a symposium conference put on by the Utah Law Review which was entitled "New Approaches to Comparative Law." While a number of the same scholars who regularly attend the ASCL conferences were present, a very different group of individuals ran and dominated the Utah meeting. Panels and plenary sessions included "Comparative Law as Critical Self-Reflection," "Indian and Indigenous Peoples' Law," "Comparative Law as Exposing the Foreign Systems' Internal Critique" and "Comparative Legal Feminism." Some more traditionally entitled panels were also represented; among them were "Legal Harmonization" and "Customary Law." However, even there the discussion was full of "hermeneutics," "imperialism," "hegemony," and "exoticization." The Utah conference encompassed a greater geographic spectrum and a vaster array of subject matters than more traditional comparative law meetings. In addition, much of the analysis emphasized the use of modern jurisprudential theories and post-modern patterns of thought in comparative law. Instead of focusing on legal cultures or legal families, the

9. This paper is an outgrowth of the two comparative law meetings, one sponsored by Professor Mathias Reimann at the University of Michigan in September 1996, the other hosted by Professor Ugo Mattei at the University of California/Hastings in September 1997.

10. The "Utah" group consists of a loosely connected group of scholars who met at a Symposium Conference at the University of Utah in October 1996.

11. See, e.g., René David & John E.C. Brierley, *Major Legal Systems in the World Today* (2d ed. 1978); Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (2d rev. ed. 1987).

"Utah" group's analytical models centered around the dichotomy between dominant "Western" law and dominated "non-Western" legal systems and societal groups.

The difference between the two groups is rather striking, and reinforces the apparent lack of a common core or a common purpose of comparative law. Comparative law is no longer limited to a narrowly circumscribed group of academics who focus their scholarship and teaching on legal developments in European private law. Rather its subject matter, scope, focus and methodology have expanded, and grown well beyond its original boundaries.

It is troubling, however, that the two groups, or at least their individual members, do not engage each other in constructive discourse. While the ASCL group fails to view the "Utah" bloc as "real" comparatists, the latter rejects the former as "outdated."[12] The gulf that separates the two groups mirrors the ones that divide the academy as a whole.

II. Opportunity: Establishing Comparative Law's Relevance to the Domestic Legal Discourse

Instead of bemoaning the fractures within the field of comparative law, the schism between the two comparative law groups should be viewed as a vast and unique opportunity for innovative and enriching comparative work. It creates space for the development of different conceptions of other legal systems and of our own. However, it will be impossible to succeed in the endeavor of challenging and reconceptualizing existing notions of foreign and domestic legal cultures unless we learn to respect and validate each other's perceptions about law and methodological approaches at home first. Only when we have achieved this goal is it possible for comparatists to begin to look at, affirm and accept the distinct philosophies, concepts and visions underpinning foreign legal cultures. "We simply must get used to the fact that every [comparative work] is an interpretation of only part of a culture."[13] That dual learning experience — at home and abroad — might be the most powerful message comparative law in its current state has to convey to the American legal system and to American society. An explanation of any aspect of our legal system and legal culture could then be acknowledged as one piece in a puzzle

12. Obviously, not every person who belongs to the organizations or attended the conferences shares those feelings. However, different attendees commented in such manner frequently enough as to allow me to draw the conclusion that the two phrases capture the two groups' prevailing perceptions of each other effectively and appropriately.

13. Bohannan, "Ethnography and Comparison in Legal Anthropology," in *Law in Culture and Society* 401, 407 (Laura Nader ed., 1969) (statement made about "ethnography" rather than comparative law).

rather than as the sole account of reality, let alone an assertion of ultimate "truth."

Like the study of other religions, comparative law will help us understand how another person conceives of the world and how law contributes to and reflects the culture of a country.[14] Since religions as well as laws are dynamic and continuously in process, changing and adapting in the light of new circumstances and new knowledge, comparative law is also constantly evolving. Consequently, "no single procedure [is] forever suitable to the study of [ ] religions"; rather it must "be adequate to the total epoch and [to the] prevailing conditions of the time to which the study is directed."[15] The current schism in the U.S. world of comparative law indicates that we might have reached a point that mandates our re-thinking of comparative methods in light of law and economics, critical legal studies, critical race studies, feminism, international human rights, law and society, and other modern and post-modern jurisprudential developments. Only the compilation of different methods will assist us in illuminating the prevailing understanding of law at home and abroad. "We need a way of turning . . . varieties [of comparative methods] into commentaries one upon another, the one lighting what the other darkens."[16] Different methodological approaches will allow us to analyze the same phenomenon or question in innovative ways that will produce distinct but mutually enriching explanations. Only together can such insights provide a full picture of the actual working of a legal and societal system. In addition, the concurrent use of different methodologies will test their theoretical and explanatory power as well as reveal their historical contingency and geographical and cultural situatedness.

Tolerating and sympathizing with other comparativists will force us to learn as much about ourselves as about them. It should "weld[ ] the processes of self-knowledge, self-perception, self-understanding to those of other-knowledge, other-perception, other-understanding; . . . identif[y], or very nearly, sorting out who we are and sorting out whom we are among."[17] Ultimately, it is this ability that also dominates comparative law. The goal will be to establish one's own identity by seeing the others as not so much like us, but rather us as very similar to them, while acknowledging and accepting our differences. Instead of taking ourselves as the yardstick, as the norm, we have to

14. In many respects comparative law and comparative religion share a common fate. As their ultimate goal, both seek to understand the meaning of law and religion, respectively, in society. They do this either by studying one foreign legal/religious system in depth, or alternatively by studying a universal phenomenon in different legal/religious systems. Jean Holm, *The Study of Religions* 2-3 (1977).

15. Cf. Brauer, "Preface," in *The History of Religions* vii, ix (Mircea Eliade & Joseph M. Kitagawa eds., 1959).

16. Geertz, supra n. 1, at 233.

17. Id. at 181-82.

situate ourselves in the world in equivalent distance from the "others" whoever they might be. This will require us to "defin[e] ourselves neither by distancing others as counterpoles nor by drawing them close as facsimiles but by locating ourselves among them."[18] Despite commonalities and similarities, it is necessary to manage the difference, not to abolish it.[19] After all, we do not strive for the abolition of distinctions since even an internationalized world and a global society do not and should not connote uniformity.

III. Opportunities and Dangers: Comparative Discourse and the Study of Foreign Systems

In contrast to comparative religion or anthropology, traditional comparative law as well as the new approaches to the field run the risk of underestimating the relevance of the way in which we characterize and analyze foreign legal cultures. "Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery — the smugness of your own tribe and your own time: *We* are the Greeks; *all* others are barbarians."[20] Such a warning is particularly compelling in light of the growing research focus on non-(Western) European societies since preconceived notions of the inferiority of such legal systems are more prevalent. Lawyers, not unlike legal anthropologists, are prone to stereotypes and built-in assumptions about other systems since they are frequently "caught by the thought systems of their own cultures and the way that different disciplinary lenses in legal studies screen out data."[21] In addition, legal comparativists share with religious comparatists an emotional attachment to their own religion/law and our own, our communities' and cultures' preconceived notions about other systems.[22]

Colonialism and Social Darwinism were the primary contributors to the ethnocentric illusion of the superiority of Western cultures, and with it Western law.[23] That attitude seemed confirmed after the fact by the economic (and political) success of Western regimes. Today, the presumption seems to be that legal systems as well as religions "jostle with one another in a market-place of possibilities."[24] Lawyers have become missionaries, especially in the former Communist countries in Europe. However, such a position restricts

18. Id. at 186.
19. Id. at 216.
20. Llewellyn, supra n. 2, at 44.
21. Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* 317 (1990).
22. Eric J. Sharpe, *Comparative Religion: A History* 318 (2d ed. 1986); William A. Lessa & Evon Z. Vogt, *Reader in Comparative Religion: An Anthropological Approach* 4 (4th ed. 1979).
23. Eugene Hillman, *Many Paths* 1 (1989).
24. Alan Race, *Christians and Religious Pluralism: Pattern in the Christian Theology of Religions* 1 (1982).

the scope of comparative inquiry and understanding of "foreign" legal cultures.

What holds true for comparative religion, should also be the guiding principle for comparative law: "What the student of religion *does* need [ ] is a high level of personal commitment to those whom he is studying: '. . . in the study of religion, I would distrust any scholar of the Hindus who did not love India, or any interpreter of Islamics who had no Muslim friends.'"[25] The understanding of, respect for and engagement of foreign legal systems rather than their mere tolerance will not only facilitate discussions with foreign counsel or clients but will also allow us to respect cultural, gender-based, religious, and legal differences at home to a greater extent. In that respect comparative law could live up to its promise of providing a domestic as much as a foreign perspective.

Describing, defining, categorizing, and eventually comparing the "other" occurs in the narrowly circumscribed framework of current analytical methods and theoretical structures. Such constructs, however, tend to derive from domestic situations since they were created as explicatory mechanisms for particular legal or societal phenomena at home. Once those lenses are superimposed on foreign legal systems, they may cause severe misperceptions and dislocations because they originated in such a different context.[26] In what I call "traditional" comparative law, such dislocations might have been limited merely by the geographic restrictions that had been imposed on the research agenda. The existing domestic schism between comparatists and their dispute about methodologies and focus might cause unreflected application of domestically developed explicatory theories to prove the superiority of their respective approaches instead of testing the validity of their methodologies in a foreign context. The farther one moves away even from the dominant system in Western societies, the less likely will the prevailing paradigms be applied successfully. Moreover, even classifications, such as those into legal cultures or Western and non-Western societies, can blur one's analytical vision of reality and impede the development of a more comprehensive picture of a foreign legal system.

The construction and explanation of foreign legal systems will also be affected by the comparatist's informants. Who provides the necessary information about the foreign legal system? What explanatory models will they provide to the observer? What biases will these individuals bring to their own system and to the foreign comparativist? How will the foreigner identify with the domestic infor-

25. Sharpe, supra n. 22, at 304.

26. Ainsworth, "Categories and Culture: On The 'Rectification of Names' in Comparative Law," 82 *Cornell L. Rev.* 19, 30-31 (1996).

mants?[27] Clearly, the stories of the informants and their appraisal of the material provided will become part of the description of the foreign legal system. In light of these considerations, it appears as if it were impossible to represent another's legal tradition accurately since "'[no] cultural tradition can analytically encompass the discourse of another cultural tradition.'"[28] However, if the foreign legal culture cannot be described appropriately, it cannot be compared to our system either. Therefore, it is important not to resign but rather to learn about our own existing cultural preconceptions and legal acculturation, so that we may be aware of them.[29] In addition, any hypothesis about a foreign system should remain tentative, dynamic and subject to change. Only after a description and comparison of another system, can we engage in real engagement with the "other". The engagement that is needed will be more than tolerance; it will include a commitment to find common ground and to put our most deeply held beliefs at risk. The beginning for such a constructive dialogue is at home, with a recognition of the "other" comparatists.

27. Cf. Nader, supra n. 21, at 10-11.
28. Ainsworth, supra n. 26, at 26.
29. Bohannan, supra n. 13, at 407.