The Indian Yearbook of Comparative Law
Series Editor: Mahendra Pal Singh

Mathew John · Vishwas H. Devaiah ·
Pritam Baruah · Moiz Tundawala ·
Niraj Kumar *Editors*

The Indian Yearbook of Comparative Law 2019

Springer

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Preface

The Indian Yearbook of Comparative Law (IYCL) was started in 2016 at the Centre for Comparative Law at the National Law University, Delhi, to deepen engagement with comparative law from an Indian vantage point. We have tried to do so by juxtaposing and bringing into conversation the works of both established and younger scholars. The present volume is our third issue, and we hope to become more regular to truly live up to our ambition of being a yearbook of original scholarship in comparative law.

This year marks some important administrative shifts for our yearbook. The yearbook will be housed and managed from Jindal Global University (JGU) from this year onwards. In part, this was driven by our senior colleague Prof. M P Singh, the moving force behind this yearbook, after he assumed a professorial position at Jindal Global Law School (JGLS). In addition, there are many of us among the large faculty cohort at JGU who have deeply invested in carrying forward the founding vision of the yearbook through an interdisciplinary investigation of comparative law themes.

The IYCL 2019 encompasses themes from both public and private comparative law. These include papers on constitutional law, constitutionalism, the German concept of 'Rechsstaat', the comparative study of the principle of 'proportionality', and the significance of constituent assembly debates for legal interpretation. Further, scholarly work on the themes of comparative environmental law, comparative consumer disputes across different jurisdictions, comparative study of arbitral awards under the New York Convention, comparative study of hate speech across Europe, comparative analysis of the religious practice test in India and the US, a critical analysis of legal transplants, and critical Chinese scholarship on the changing landscape of 'Lawyering for Change and Public Interest' in China are also included. We are hopeful that these essays will speak insightfully to the widest readership in contemporary comparative law problems and especially to those interested in thinking about comparative law as a way of solving Indian problems with an eye on global conversations.

We are grateful to all the contributors to this issue for responding and taking forward our call for comparative conversations across the range of themes covered by this volume. A number of others require special mention—Prof. C. Raj Kumar,

Vice Chancellor, Jindal Global University, for his unwavering support and the hard work of the new IYCL editorial team, especially Nupoor Singh (Springer), Abhilasha Ramakrishnan, and Vandana Gyanchandani. Lastly, we hope that the readers of the IYCL 2019 will find this volume enjoyable, useful, and engaging.

New Delhi, India

Niraj Kumar
Moiz Tundawala
Pritam Baruah
Mathew John
Vishwas H. Devaiah

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Part I
Comparative Law: General Themes

Chapter 1
The Limits and Challenges of Comparativism

Esin Örücü

Abstract This paper examines the limits of comparativism under two categories: those limits related to the comparatist herself—the intrinsic, and those related to other factors such as the context, the environment and the purpose, the limits of its use; the limits of its methodology; the limits of topics to be compared and so on—the extrinsic. These limits are not rigid and at times may overlap. Beyond these, the paper also delves into further challenges. As a final note, the paper reminds the reader that although comparative law is not a panacea to all our woes, the comparative lawyer will remain an essential actor in our century. She must endeavour to surpass the limitations enslaving both her, the intrinsic challenges, and her subject, the extrinsic challenges.

1.1 Introduction

Comparative Law appeared limitless to me when I gave my inaugural lecture at Erasmus University Rotterdam in 1982.[1] This rather naïve plunge into the field was fired by what my predecessors professed. I was first bewildered when I read that as a Professor of Comparative Law, I may expect to 'enjoy many privileges which would make (me) an object of envy among (my) colleagues', though 'the subject had

[1] Esin Örücü, *Symbiosis between Comparative Law and Legal Theory – Limitations of Legal Methodology* (Erasmus Universiteit Rotterdam, Mededelingen van het Juridisch Instituut nr.19, 1982).

[2] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 Law Quarterly Review, 40–41.

[3] Max Rheinstein, 'Teaching Tools in Comparative Law' (1952) 1 *American Journal of Comparative Law*, 107.

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a somewhat unusual characteristic that it does not exist'[2] and thereby Comparative Law defied definition. Yet another eminent Comparative Law Professor was warning me that 'comparative law is a word of many meanings and the question of how it can best be put to use in law school instruction is far from settled,'[3] though, above all it was 'a method of knowledge.'[4] Thus, my predecessors made me feel bewildered, interested, intrigued, exhilarated and excited. I also felt my work was to be limitless as it was in pursuit of knowledge.

However, we very well know that nothing is limitless.[5] 'Limits' may mean borders, boundaries, frontiers, margins, edges, perimeters or obstacles, restrictions and restraints. Some of these are rigid, some are not.

Certain factors that may restrict the 'comparative law enterprise' can be referred to as 'the limits of comparativism'. There will be intrinsic limits—the limits of the comparative lawyer herself; extrinsic limits—the limits of the context and the environment in which she works; the limits of the purpose of comparativism; the limits of its use; the limits of its methodology; the limits of topics to be compared and so on. Some of these are severe, some are not.

Here, I regard 'limit' as a 'not so rigid restriction' and question the existence of some of the factors regarded by some as insurmountable. I will consider below 'the limits of comparativism' as I see them in two categories. The first is related to the comparative lawyer herself and the second arises from factors extrinsic to her. In each category, there are a number of issues to look at, some more serious than others. Then, there are also further challenges facing the comparatist.

It is important to note the importance of the comparative lawyer herself before venturing into the first category. By reference to other forms of cognizance by an audience, I will try to demonstrate this.

Through an interpretation of the world by a painter, a painting can be directly seen when hung on a wall, and a book can be read in direct contact with a writer through her words. It can obviously be said that a picture may be enhanced or obscured by the place where it is hung, under what light and so on. So, for a book, whether it is clearly printed on good quality paper and published with care. Nevertheless, the contact is direct in both cases. In music, however, three factors come together: the composer where the composition starts, the player-interpreter through whom the piece is heard and the listener where it ends. The composition reflects the personality of the composer and the re-presentation of the interpreter.

This last instance is very similar to what happens in comparative law. Here, we start with the foreign law—the composition—reflecting the society for which it is envisaged in internal and external contexts, the composer being the actor of the law, in a 'top-down' sense, the legislature, and in a 'bottom-up' sense, the judge. The comparative lawyer is the interpreter. The target audience is the listener or the

[4] Léontin Jean Constantinesco, *Traite de Droit Compare, La Methode Comparative, Tome II* (Libraire Generale deDroit et de Jurisprudence 1974) 289.

[5] I have looked into this subject elsewhere also. See Esin Örücü, *The Enigma of Comparative Law – Variations on a Theme for the Twenty-First Century* (Martinus Nijhoff Publishers 2004) Chapter 10.

reader. As law must be considered by the comparative lawyer in the context in which it lives, she, as the interpreter, is the middleman. The target audience is exposed to the law through the comparative lawyer's conception of that law.

1.2 Two Categories of Limits

As foreign law passes through the sieve of the interpreter raconteur, that is the comparative lawyer, the first limit of comparativism must be the comparative lawyer herself. We can now delve into the first category of the limits of comparativism where we will deal with a number of issues.

1.2.1 The First Category of Limits

The first question is: 'Can the comparative lawyer find the law, understand it, interpret it in keeping with the original meaning and faithfully represent it?' It can be said that in our day most comparative lawyers do possess the technical equipment to meet any demand made upon them, the necessary language skills, cultural appreciation and the tools of social science methodology. But are they all sufficiently familiar with the totality of the legal system and the context of the foreign jurisdiction? Do they all have that keen eye for detail and the willingness to see both similarities and differences and the skills for transmitting this to the audience?[6]

To complicate matters further, there is no single legal culture in a legal system, let alone a single culture in a society: there are communities and sub-communities, as well as legal sub-communities. A comparative lawyer usually does not share the culture of the 'other' into which she wishes to research and juxtapose to 'another'. Nor does she share all the cultural aspects of the 'other' culture's legal sub-communities.

The legal system under scrutiny also has layers. What is the impact of one layer upon others? How should the comparative lawyer decipher 'interlegality' in multi-level legal systems, looking at local customary rules, religious rules, 'national' rules, transnational business rules, EU rules (if a member state), rules of *ius humanitatis* (environmental pollution conventions, etc.) and their interrelationship? What is she to do facing such cases? Where are the functionally equivalent institutions to be found? What should her target audience be told and what would they appreciate?[7]

If we are to give some examples, one could be to do with liability: Who should point out any defects in the goods in a sales contract, the buyer or the seller? What

[6] See Esin Örücü, 'Some Problems and Pitfalls in Researching Law in Foreign Jurisdictions', in Péter Cserne, István H Szilágyi, Miklós Könczöl, Máté Paksy, Péter Takács and Tattay, S (eds), *Theatrvm Legale Nvndi: Symbola CS Varga Oblata*, (Societaas Aancti Stephani 2007) 339–359.

[7] See Nigel Jamieson, 'Source and Target-Oriented Comparative Law', (1996) 44 American Journal of Comparative Law, 121.

differences should one expect where the practice is that a seller sells a box of tomatoes in a cellophane bag or where the buyer habitually handles the goods and picks his own fruit? In both cases, the legal problem may be the same and the rules in force may be the same, but there is a difference in the true meaning of liability here, not because liability has a different meaning in different countries.

Another example could be: Why does a Turkish judge hear both parties separately in a divorce case based on the ground of mutual consent, and does not recognize a foreign divorce decree, even though also based on the ground of mutual consent, where the foreign judge has not heard both parties separately? To a comparative lawyer, it may seem absurd that the Turkish judge cannot see that Dutch or German grounds of mutual consent and irretrievable breakdown are functionally equivalent to the Turkish grounds of mutual consent and irretrievable breakdown. For her, there would be no need even to seek for functional equivalence since all these systems rely on the same ground. Her main concern would be to secure a recognizable pattern and if she could not, she may conclude that only comparables should be compared and that Turkish law in action is 'beyond compare'! This would be because she does not know the special socio-cultural issues involved here.

Yet another example: Why should it be that in some countries only adults can be adopted? Why should the adopters have no children of their own? A comparative lawyer looking at adoption can only develop a deep understanding and genuine interpretation by appreciating the moral, social and cultural contexts that shape the legal institutions. However, a traditional comparatist may come to the conclusion that Turkish law lagged behind until the 2002 Civil Code and that the situation before that date should not be compared with that in Scotland, for example.

Another example could be on the issue of bribery: In the Turkish language and culture, there is a difference between *bahşiş* and *rüşvet.*[8] What is the dividing line here? Gessner says that German tax officers accept deductions for bribery in a tax return if the enterprise claims bribery to be a local custom, in spite of international conventions and codes of conduct against bribery.[9]

Without sufficient confirmation, a comparative lawyer's florid addenda to basic facts may mislead the audience. It may take on a life of its own; it may even start a new narrative. We can only approach this limitation with 'trust' in the integrity and meticulousness of the comparative lawyer.

I, for example, would regard myself as having a 'deep level knowledge' of Turkish law, society and the Turkish language, and am at times amazed at passing remarks made in the works of comparative lawyers which misrepresent Turkish law and its socio-cultural context. Incorrect dates given for pieces of legislation, misspelt words, bizarre explanations for certain legal developments and postures of unfounded authority are frequent.

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[8] '*Bahşiş*' is a payment given as a 'thank you' for a service legally owed to you but which could be delayed in implementation but for it, '*rüşvet*' is a payment to acquire an illegal interest.

[9] Volkmar Gessner, 'Global Legal Interaction and Legal Cultures', (1994) 7 Ratio Juris. However, this is not any more the case since the law has been amended.

The comparative lawyer may be forever confronted with the problem of how closely she can keep to the actual. A high level of legal intelligence and sensitivity is expected from comparative lawyers. Yet, some exaggeration and generalization of findings may be inevitable. We must also keep in mind that there will always be a number of different interpretations. Law is a living thing capable of being seen in different lights and from different angles at different times even by the same comparative lawyer.

Interpretation is a matter of emphasis to a large extent, so the audience must know the interpreter as well as the law. Although the comparative lawyer must be faithful to the original material, her personality, views and approach will inevitably colour her interpretation. As each comparative lawyer thinks differently, has different emotional attitudes and a different philosophy of life, it is only to be expected that comparatists handle material differently. The target audience must be aware of the comparative lawyer's input to what they are being presented with. The audience needs some idea of the legal systems under consideration as a point of reference and should be able to sense the contribution of the comparative lawyer to it. An intelligent body of audience is needed who also must have a sense of responsibility. This requires a broadened base. It is insufficient to be involved only in the conventional aspects of the normative legal order.[10] The target audience must develop an unprejudiced broad taste for the different. Above all, the comparative lawyer and the audience must both 'hear' and 'listen'.

Interpretation, re-creation and re-presentation are delicate tasks. In these processes, we see other limits of comparativism related to the comparative lawyer. A lack of a deep knowledge of language is a major one. Language is a comparative lawyer's most important tool: the language of the foreign law, the 'original language' and the language of the target-audience. Grammar, structure and vocabulary can hide a host of relationships between law and the language in which it is expressed. The same relationship exists between law and the language into which it is interpreted. Although law is expressed in language, until the law has been constructed and applied, it remains merely words on paper. Meaning must be given to language and there is never one single meaning but permutations of meaning. Especially in relation to concepts that do not exist in the target language, any translation made by the comparative lawyer, however well she may know both languages, may remain at the level of the idiosyncratic.

Furthermore, when dealing with customary law, the comparative lawyer must remember that it is not always explicit or written and is often known only by word of mouth. She must re-present this in explicit language, at times abstracted from the facts. A further danger may arise here from a misunderstanding of what is 'said', or a misinterpretation of what is 'not said', leading to assumed analytical conclusions or even universal truisms. Though not in the realm of law, the example I often use for

[10] See Hannu Tapani Klami, 'Comparative Law and Legal Concepts', in *Oikeustiede Jurisprudentia*, ost- (1981) XIV Suomalaisen Lakimiesyhdistyksen Uosikirya (Vammala 1981) 67–166, for an intriguing and thorough discussion of the role and limits of comparative law, as well as the theoretical problems, legal dogmatics and contexts.

this is simple.[11] Most people who have travelled to Turkey tell me: 'Turkish coffee is awful, it is so sweet, so strong and so gritty! I could never drink that'. Coffee cannot be sweet by nature. Personally, for example, I always have my coffee without any sugar in any country I happen to be in. Turkish coffee would be sweet, strong and gritty only for the half-enlightened and is the result of misunderstanding and confusion between what is 'said' and what is 'not said'. For information to the novice, a cup of Turkish coffee is individually made to personal taste. It is not filtered but cooked. The grounds fall to the bottom and stay there and are not meant to be consumed. Sugar, if asked for, is added while the coffee is being cooked. A Turk when ordering coffee would never ask for '*kahve*', but would say '*sade*' (without sugar) or '*şekerli*' (with sugar) with gradations such as '*az*', '*orta*' or '*çok şekerli*' (meaning a little, some or medium, or a lot of sugar). Thus, when the foreigner ('other') asks for 'coffee', the waiter makes his own judgement on what is being asked for. He assumes that 'foreigners like sweet things' and brings a very sweet cup of coffee. Neither would a Turk drink the coffee grains in the bottom of the cup, thus the coffee itself is neither strong nor gritty, whereas when the 'other' drinks her coffee, she notices that a lot of coffee is still sitting in the bottom of her small cup and tries to swallow the grounds which should have remained at the bottom, and from which she might even have her fortune read! Misunderstanding, misinterpretation and misrepresentation! If this can happen in so simple an act as drinking coffee, imagine the perils at the door of a comparative lawyer facing oral law!

For instance, now that its position is entrenched by the Constitution, how is the indigenous law in South Africa to be researched, since it is not part of the literate tradition, being basically oral?[12] Narratives or stories about rules are as important as the rules themselves and give meaning to them. How does one listen to stories, especially if one is a judge? The true values underlying the indigenous law must be discovered by listening. Can the comparative lawyer do this effectively?

Translation is yet another acute problem.[13] We can observe this even when comparing the name of our theme, Comparative Law—its English version—with French, Italian, German, Dutch or Turkish versions. Then there are well-known and frequently observed problems with terms such as public policy and *ordre public*; rule of law, *Rechtsstaat* and due process; law, *droit*, *recht*, rights and so on. Bernhard Grossfeld analyses the relationship of law and language and asks the questions:

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[11] This example was inspired by the one provided by Mitchel De S.-O.-L'E. Lasser, 'The question of understanding' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 237.

[12] Gardiol Van Neikerk, 'Indigenous law and narrative: rethinking methodology', (1999) XXXII CILSA 208. Also see Jacques Du Plessis, 'Fairness and diversity in the South African law of contracts', in Sean Patrick Donlan and Jane Mair (eds), *Comparative Law: Mixes, Movements, and Metaphors* (Juris Diversitas Series, Routledge 2020) Chapter 4, 47–66.

[13] See Esin Örücü, 'A Legal System Based on Translation: The Turkish Experience', (2013) 6 J.Civ.L.Srud., 445–473, available at https://digitalcommons.law.lsu.edu/jcls/vol6/iss2/2/. Also see Esin Örücü, 'One into Three: Spreading the Word, Three into One: Creating a Civil Law System', (2015) 8 J.Civ.L.Stud., 381–407, available at http://digitalcommons.law.lsu.edu/jcls/vol8/iss2/3 accessed 1 December 2020.

> All this is very alarming for the comparative lawyer. If law lives in and through language, what happens to it when it is transferred to another language? If the structure of a language influences, or even determines, the mode and content of thought, might it not be that any language can only express certain thoughts, and that these thoughts differ from culture to culture?[14]

This concern is even deeper than that voiced by Harold Gutteridge in 1938: 'I would, in fact, be disposed to assert that pitfalls of terminology are the greatest difficulty and danger which the student of comparative law encounters in his novitiate.'[15] Not only the novice but also the seasoned comparative lawyer is at risk here.

To complement Bernhard Grossfeld's observations of the Japanese language, let us consider the Turkish language. In the Turkish language, the verb is always at the end of the sentence; the subject need not always be mentioned but be understood; there are no separate personal pronouns for 'he', 'she' and 'it', and the word 'o' may mean he, she or it. A sentence may be extremely long, cut across by a number of clauses carrying the thought from one subject to another. In a translation from English, for example, say a judgement by the late Lord Denning, which usually consists of one-line long sentences, the directness and the crispness of the English language could be totally lost, and the idea becomes fuzzy. If we agree that limits of the language mark limits of understanding, then either certain legal ideas are untranslatable, or altered in the process. Therefore, the comparative lawyer would be advised to keep the original terminology and offer a description and an explanation of it in the target language in a footnote.[16]

As comparative lawyers will in future be going more often to cultures beyond the Western, the limits for comparative lawyers will be reached more quickly, the fundamental difficulty being the overcoming of conceptual differences. It might be worth remembering that 'A word denoting an object, an institution or, if such exists, a psychological characteristic peculiar to the source-language culture is always more or less untranslatable—everything else is more or less translatable.'[17]

Connotations, as well as words themselves, can pose problems. On the whole, the British, for instance, think in terms of 'reasonableness' and assess an administrative action in relation to administrative action taken by a 'reasonable administrator'. 'Reasonableness' would apply to all professions. Once, while giving a paper on English administrative law and judicial review in a Seminar in Turkey, I talked of 'Wednesbury reasonableness' and the 'reasonable administrator'. This caused a lot of mirth and I was asked whether there could ever be a 'reasonable administrator' and what would he be like, a question seldom asked in Britain since the connotation

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[14] Bernhard Grossfeld, *The Strength and Weakness of Comparative Law*, (trans) Tony Weir (Clarendon Press 1990) 101.

[15] Harold Cooke Gutteridge, 'The comparative aspects of legal terminology', (1938) 12 Tulane Law Review 401–411, at 403.

[16] See Martin Weston, *An English Reader's Guide to the French Legal System* (Berg Publishers 1991) for a most valuable contribution, specifically the first three chapters, pp 9–42.

[17] ibid 9, where Weston quotes Peter Newmark, 'Twenty-three restricted rules of translation', (1973) 12 Incorporated Linguists, 12. Also, for the 'translation theory' and some problems that may arise see Jamieson (n 7), 121.

of 'reasonable' is well internalized. I was then told by one Turkish judge that 'a Turkish "reasonable judge (!)" could never base a decision on such vague criteria as the "Wednesbury test"'!

Not many foreign legal terms have a directly corresponding translation. Therefore, even bilingual legal dictionaries cannot be relied on exclusively. They can even be dangerous.[18] Examples abound, and one finds lists of these in most books and articles on comparative law. As to definitions, finding internationally acceptable definitions is very difficult indeed. Vagueness and generality can make such definitions almost useless. When involved in the preparation of International Conventions or in creating multi-language legal texts, these are some of the problems faced by comparative lawyers. For example, comparative lawyers working for the enlarged European Union face considerable problems. Those of us who are also interested in other regions of the world encounter even more significant difficulties. There is a growing need for explanatory bilingual glossaries and dictionaries.

A simple warning to students of comparative law is 'beware of words which are similar in two languages or two cultures'. One example I used to give at the very beginning of my comparative law classes is the word 'sheriff'. It goes thus: A serious Scottish student of comparative law is on holiday in the deep south in the USA. He wants to carry out a small piece of empirical research by interviewing a judge of a court of first instance, so he is looking for a 'sheriff'. Using the vocabulary of his domestic legal culture and with the assertion that he is in an English-speaking country, he asks his friend whether he could be introduced to a 'sheriff'. Imagine his amazement when he meets the American 'sheriff' with all his paraphernalia! Had he asked to meet a judge from a court of first instance, he would have had no such surprise and been able to carry out a meaningful survey. Moral of the story: dangers arising from similar or related languages may be the most acute! The worst possibility is a complete misunderstanding, but just as bad is the meaningless or unnatural use of language for the target audience. Then, more subtly of course, there is the apparent correspondence of terms that have different meanings that one finds in the various so-called civil law countries.

Up to this point, the limits of comparativism have been related to the comparative lawyer herself: the possible lack of a deep level of knowledge of language, problems related to listening and hearing, and the pitfalls related to translation, especially translation of culture-specific concepts. This last leads us into one more limit related to the comparative lawyer, that of cultural deficit. Before she can re-present what she finds, the comparative lawyer must be able to understand the context well in order to approach a legal system in context confidently. The context—mainly the culture and therefore localism—may sometimes escape even an academic looking at her own laws. It is also true that sometimes an outsider at times sees more clearly than

[18] See for a severe criticism put forth, Gerard-René De Groot, 'The quality of bilingual dictionaries', (2000) 7 Maastricht Journal of European and Comparative Law, 331–335, who says that out of approximately one hundred bilingual dictionaries, only six can meet the requirements of the comparative lawyer.

an insider, but the question is whether seeing is understanding. It is in some ways comparable to hearing and listening noted above.

A knowledge of the wood is essential for the identification of the trees, yet the wood may not be visible because of the trees. This becomes an occupational hazard for comparative lawyers who may pay close attention to formal and substantial detail but lose sight of the text as a whole, let alone the context. To close the cultural deficit, one must be aware of its importance and impact, and be humble enough to correct possible misunderstandings by using the experience of domestic academics, practicing lawyers and judges in the confirmation stage of one's research in order to check the correctness of one's understanding, insight, imagination and creativity. Even the best-intentioned comparative lawyer will have great difficulty in tackling law as a bottom-up phenomenon. The top-down approach is easier to cope with since the material is to hand, it is easier to understand and re-present. But the apparent bottom can prove to be bottomless and the re-presentation can become idiosyncratic, and unreliable. This ties in with yet another limit of comparativism related to the comparative lawyer herself, and that is, her conception of law itself.

When the comparative lawyer believes that reporting formal rules of the foreign law and signalling differences and similarities between the laws studied are the sole aims of her research, and her conception of law is the normative legal order found in legislation, regulations, judicial decisions and doctrinal writings, then this black-letter-law approach would have already restricted the comparative lawyer and prevented her from entering into any discourse of context, or show any interest in the bottom-up approach to law. This comparative lawyer would be happy to limit herself to descriptive translations and information on foreign law. She may not even need a specific methodological approach and definitely no theory. In such a case, the cultural deficit remains but is regarded as of no importance. Issues of cultural pluralism let alone legal pluralism would not even arise in the normative context of 'law'. However, even with this approach, how can she solve some mysteries?

Here, in assessing such cases either as an interpreter or even as a raconteur, the comparative lawyer must re-think her conception of law in appraising the relationship between law, custom and culture. What should she consider? How can she truly understand the position of the courts handling the law and then re-present it? Without a deep understanding of contexts cumulatively, it would be difficult to deal with such cases or any of the questions posed in the earlier parts of this paper, properly.

> 'What is law?' is as hotly contested as the question 'What is comparative law?'. The term 'comparative law' has been bisected and the discourse taken to an inquiry into the meaning of both 'comparative' and of 'law'.[19] Obviously, before one can 'compare' one must determine what one is comparing, that is 'what is law'.

Referring to our earlier metaphor, the law then is the 'composition' of which the comparative lawyer is the 'interpreter'. The composition must be grasped with all its intricacies, textually, contextually, with its form and content, and the environment

[19] See Olivier Moréteau, 'The Words of Comparative Law' in Esin Örücü & Sue Farran (eds), (2019) 6(2) Journal of International and Comparative Law, Special Issue: The Relevance of Comparative Legal Studies in the Twenty First Century, 183–208.

within which it lives. Legal scholars approach 'law' in many different ways. Some analyse law as rules, as norms, as a system, as virtual facts, constructed facts or actual facts, as cases, as culture or as tradition. Some analyse law in relation to history, economics, legal theory, sociology or even anthropology. In addition, one can consider law as coming from the 'top', from the 'bottom', from the 'side', from the 'back' or moving 'forward'. In fact, there is no agreement on what 'law' is or on its properties! There are arguments about the nature of law and further, arguments on the nature of the arguments about the nature of law.[20] Thus, as Joseph Raz says: 'The list of the essential properties of law is indefinite.'[21] Having already dramatically oversimplified the issues, I will not try to rehearse the whole debate here.

The comparative lawyer's methodological tools and how she uses them is the last limit of comparativism in this first category of limits. The problems with social science methodology and the failure of mainstream comparative lawyers to avail themselves of this methodology can be discussed endlessly. Listening to a piece of music many times does not necessarily bring an understanding of it and might actually have a dulling effect on nuances, neither does reading material over and over again necessarily bring enlightenment. Therefore, I will not go into the discussion of methodology here yet again.[22] This limit is also related to the comparative lawyer's conception of the law, how far she is going into context and what is the level of her comparative venture.

It is apparent that the comparative lawyer must consider many complex issues related to visions and traditions, traditions and transitions, interpretation, human rights and margins of appreciation, interaction of law and culture, modernity and traditionality and the relationship between transposed law and 'source-law'. For instance, without these considerations, a comparison of Turkish law to, say, German law—or even the Swiss 'source-law'—would be difficult.

All the limits of comparativism discussed up to now relate to the interpreter, her conception of law, the depth of her knowledge of languages, translation skills and the possibilities of listening and hearing, and to the audience of comparative law because hearing but not listening is also a limitation of the audience, though obviously not as significant as for the comparative lawyer. As stated above, a cultural deficit is a further problem.

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[20] Robert Alexy, The Nature of Arguments about the Nature of Law, in Lukas H Meyer, Stanley L Paulson, and Thomas W Pogge (eds), *Rights, Culture, and the Law* (Oxford University Press 2003) 3–16.

[21] Joseph Raz, 'On the Nature of Law', (1996) Archives for Philosophy of Law and Social Philosophy, 1–25, at 6.

[22] See, Esin Örücü, 'Methodological Aspects of Comparative Law', (2006) VIII (1) European Journal of Law Reform, 29–42.

1.2.2 The Second Category of Limits

The second category of limits of comparativism I will look into is related to nationalism, specific national visions and the 'contrarian challenge'. Although under this category extrinsic factors such as the limits of the context and the environment in which the comparative lawyer works, the limits of the purpose of comparativism, the limits of its use, the limits of its methodology, the limits of topics to be compared and so on have been mentioned at the outset, I will confine myself here only to these. The 'contrarian challenge' straddles the two categories since it is also related to the interpreter, her personality and philosophy. Let us start with this then. The so-called 'contrarian challenge' advocates that the comparative lawyer be only interested in difference. In its extreme form, assuming an epistemological pessimism, there could even be a denial of comparativism. Cultural differences in this extreme position would bar comparative law research. The 'other' would remain a mystery, since any attempt at understanding the 'other' would only lead to misconceptions and misleading results. The contrarian lawyers seem to be living in 'closed worlds'. In its more flexible form, however, comparative law works, but must be involved only with differences between systems. There is a natural link between the 'contrarian challenge' and the 'difference theory'.

Pierre Legrand invites the comparative lawyer,

> to place herself firmly in opposition and to pursue the *contrarian challenge*. Indeed, there is no more pressing research and teaching programme for a comparatist to undertake in 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.[23]

He states that

> From the moment he [comparative lawyer] ascribes meaningful meaning to law through tradition or culture and accepts that nothing can be explicated without the support of historical narratives arising over the *longue durée*, the comparatist naturally engages in interdisciplinary studies. He also spontaneously privileges the idea of difference as *principium comparationis*.[24]

Nationalism is the next limit in this second category. A lawyer from the legal system of a country where nationalism is a pronounced philosophy will have little room for developing an interest in comparative law or an understanding of foreign laws. The official position may even be to direct any interest in comparative law research towards proof of the superiority of the domestic legal system. This could only be frustrating for the comparative lawyer and be an impasse for comparative law. It might be difficult to find many examples to illustrate this limit today, but in the past it was commonplace. 'We have nothing to learn from elsewhere' was the common attitude of many practicing lawyers, judges and even academics. In such a culture, there is little scope for comparative law.

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[23] Pierre Legrand, *Fragments on Law-as-Culture* (Deventer, W.E.J. Tjeenk Willink 1999) 13.

[24] ibid 18.

A more subtle version of nationalism is the possession of a specific 'national vision' or a political or religious ideology. A State may have a goal, an inbuilt mission. In the realization of this goal, only certain ideas can be furthered. This also means that comparative law research must be carried out between the domestic legal system and legal systems that have served as models, or legal systems with the same vision or ideology. Usually, these visions are specific to a nation State or a cluster of States. One such obvious case is that of the socialist camp prior to 1989, which regarded the carrying out of comparisons as only valid if taking place 'within the family'. So, we see the denial by socialist comparative lawyers of the possibility of comparative law across legal families, possibly regarding the term 'comparable' to mean 'similar'. There are other instances, such as that of Turkey, where the official vision was to create a State, a law and a people with a forged socio-culture that was introduced by the reception of laws of Western origin and social reform legislation. In such a case also, comparisons could be given value if carried out with the 'source-laws' only. However, later developments in the source-laws in unwanted directions would be ignored. This could create an isolationist approach with 'separateness' and 'distinctiveness' valued as goods in themselves. How is the comparative lawyer to explain why these received values were so inherent to the receiving system and so cut off from their roots over the past number of years that, though changes may have taken place in the 'source-law', in the domestic law they were regarded as an integral part of indigenous societal values and local culture? What kind of a 'fit' was there between the foreign institution and the local culture that the law could not be changed in Turkey, though the 'source-law' changed? In Turkey, the comparative lawyer's role is greatly diminished in the eyes of the target audience who cannot see the relevance of being exposed to the 'other'. To consider the 'other' might even be regarded as detrimental to the vision.

As far as I am concerned, there can be no limits to comparativism as to the topics that can be compared. Although it has been sometimes claimed that system-oriented topics are incomparable or culture-specific topics should not be covered, I believe personally that it is part of the comparative lawyer's duty to expose all. I do not accept that certain topics 'do not lend themselves to comparison'. Family law, for example, previously regarded by many as not appropriate for comparison, is one area in which a commonality in certain of its aspects has now emerged in Europe to an extent that harmonization is necessary and feasible.[25] Areas of public law likewise used to be regarded as 'no go areas' for comparative lawyers, but today there is vigorous comparative activity in such areas. The Constitution for Europe, if finally constructed, requires a thorough comparison of the constitutional traditions of all the Member States and of the US Constitution if it is to build a Europe 'united in its diversity'.

The interest of the comparative lawyer determines her choice of topic. She can inquire into any subject matter. She might want to show, for example, that 'never

[25] See the works of The Commission of European Family Law summarized by Katharina Boele-Woelki, 'The Commission of European Family law: Taking Stock after almost Twenty Years', (2019) Journal of International and Comparative Law, Special Issue: E, 233–244.

the twain shall meet' in a certain area, but she could only determine this by first carrying out comparative research. The only limit here might be when an institution is unique, but how would a comparative lawyer even discover this if she did not undertake comparative research first?

1.3 Further Challenges

Today, comparative law is taking stock of important issues arising from the above picture and is then moving on. The horizons of comparative law are shifting and changing. How can comparative lawyers enter this new and different world with their existing strategies, and accommodate differences by building on or modifying them and so extend the scope of comparative analysis beyond the jurisdictions and topics traditionally dealt with? Can contemporary comparative law say anything new to a world that will be radically different from the one hitherto covered? Analysing fully transfrontier mobility of ideas and institutions and reciprocal influence, as the underlying phenomena of most interest to comparatists in our day, must be one of the tasks of comparative lawyers. Several challenges must now be addressed.

The first challenge is that the current concerns of comparative lawyers on convergence versus divergence, problems for the importer and the exporter of legal ideas and institutions and mismatch in borrowings should be constructively approached as 'Critical Comparative Law'. The term 'Critical Comparative Law' can be used as the direct opposite of the terms 'Traditional Comparative Law', 'Mainstream Comparative Law' or 'Conventional Comparative Law'. The future entails changes both in the perception and practice of comparative law, and its interaction with other disciplines investigating the phenomena of legal and social cultures. While still continuing to serve other disciplines, comparative law will remain independent and develop new visions and new agenda thereby also broadening its vista.[26]

The second challenge is that comparative law needs a fresh approach to the classification of legal systems. In the last two decades, there has been increasing interest in mixed systems and legal pluralism. I regard all legal systems as mixed, whether covertly or overtly, and suggest grouping them according to the proportionate mixture of the ingredients. All systems are better understood as overlaps. My scheme also makes it easier to classify systems such as Malaysia, Singapore, Burma, Thailand and others, long neglected by Eurocentric comparatists. The whole of South East Asia can be better served by this approach. All, being the outcome of transpositions, off-shoots and sub-groups, can be catered for, and the overlaps clearly seen with this approach.[27]

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[26] See, for example, the ten contributions full of vigor and innovation in Esin Örücü & Sue Farran (eds), (2019) 6(2) Journal of International and Comparative Law, Special Issue: The Relevance of Comparative Legal Studies in the Twenty First Century.

[27] See Esin Örücü, 'Family Trees for Legal Systems: Towards a Contemporary Approach', in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (Hart Publishing, European Academy of Legal Theory Series 2004, Chapter 18, 359–375.

The third challenge, though related to the second one, is that a large number of legal systems are in 'extraordinary' places.[28] The problems facing comparative lawyers today will not be solved by hiding behind phrases such as 'law is culture and lawyers cannot understand any culture other than their own', 'legal history is the only path for comparative lawyers', 'the only true explanation of legal change is through economic analysis of law', or 'comparative law must be legal theory, therefore we must be "comparative jurisprudents" in order to understand other laws', 'comparative law as we know it cannot cope with renewal', or 'transplants are impossible'. These approaches can be encountered in the writings of many colleagues. We cannot ignore the reality of transmigration and 'difference'. Whatever our stance, we must be prepared to go out to these 'extraordinary' places. 'Comparison in extraordinary places' is vital in our 'extraordinary times'. These places should not be the sole domain of regionalists and anthropologists or the subject of cultural studies alone.

Obviously, the more fundamental underlying differences are those related to socio-cultures and values. We have to live with the fact that there can never be a tailor-made model; a perfect match between model and recipient is not possible and a degree of mismatch is inevitable. So, the major question is: 'How is this mismatch to be addressed?' Can it be dealt with by the power of the reception on the imagination and creativity of the recipient, the 'tuning'? Comparative law as the science of the new century must be deeply involved here.

The function of comparative law is the building of bridges, with the understanding that legal systems and cultural systems can indeed 'live apart together'. Therefore, comparative law in 'extraordinary' places can perform this 'bridging' role by analysing and adjusting any mismatch, and so easing transposition. There are, however, serious bridging problems when legal systems from diverse traditions such as the socialist, religious or traditional look towards civilian or common law systems. This must be of particular concern for legal systems that have never been part of a single legal tradition. Imagine, for example, the US Uniform Commercial Code in Uzbekistan, or the German Code of Bankruptcy in the Kyrgyz Republic. Such issues are of great importance for legal and social systems in 'extraordinary' places that have for centuries been at the receiving end of movements from the civilian and the common law, that is, the so-called 'ordinary' models.

How is the obstacle of *mentalité* to be bridged? Within Europe, this obstacle is related to the nature of what is accepted and the technique of how it is accepted, rather than to the principle of the acceptance of a rule or solution, on which there is little room for negotiation, such as, the putting into effect of a European Union directive. So, refusing the medicine is not the real issue, but how one takes the medicine is.

The fourth challenge is that many models from 'ordinary' places are competing to sell their particular product to 'extraordinary' places. We know, for example, that the new Dutch Civil Code has won the competition as a favoured model in Russia for the preparation of the Russian Civil Code, and that the systems of the

[28] For 'extraordinary' places, see Esin Örücü, 'Comparatists and extraordinary places', in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 467–489.

USA, the European Union and the individual Member States of the European Union now compete according to their 'power profile' and their previous contacts with the systems in Central and East Europe now in transition.[29] At times, Dutch law appears to be the favourite being well equipped to fulfil its exporting task since in the past the Netherlands was itself an importing country, and the new Dutch Civil Code of 1992 is itself influenced by German, French and English laws. It is the outcome of thorough comparative studies.[30] These factors are part of its attraction as an ideal model and as a source of inspiration. As a consequence, Dutch legal advice is playing a more important role than that of American, German and Italian experts. For example, in Armenia, a most 'extraordinary' place, Dutch, American and Armenian experts were all involved in the drafting of the new Penal Code and Code of Criminal Procedure in co-operation with the Council of Europe under a predominant Dutch influence.[31]

Even as they themselves are trying to modernize, we see how the legal systems of the so-called 'ordinary' places are today competing to become the ones selected for import to 'extraordinary' places. For Central and East European, Asian and African systems, the process of import can create acute problems. For example, how will the Dutch model fare in Russia? It could be that a jurisdiction with an existing 'mixture' is the better model and would be more acceptable to recipients.

Fifthly, we must note that similarity is not a requirement for successful transposition and fruitful cross-fertilization. We know that socio-cultural and legal-cultural differences are the most serious causes of mismatch. Yet differences between national rules do not seem to restrict their import and even the misunderstood can be transplanted though there is a danger that legal-cultural and socio-cultural differences may affect their internalization and efficacy, and the internalization of norms and standards by the people of a recipient system is crucial for success. Harmony as a possibility of conversation can be achieved through the appreciation of diversity as well as by the elimination of diversity. Cross-fertilization between seeming incompatibles is facilitated and even the misunderstood can be successfully transposed when communication and conversation are on the move. If unexpected developments ensue, they should be regarded also as part of the progress.

Shared human problems require similar responses from legal systems for their solution, hence legislatures and courts look to other jurisdictions for inspiration in an effort to improve these responses. Global problems of our day need global solutions or interrelated local solutions, and legal ideas and institutions are crossing borders. The established conceptual and analytical frameworks of law, the role and value of receptions, theories of convergence and divergence, the dynamism of comparative law, the classification of legal families and the concept of the legal system itself are all challenged.

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[29] See Ádám Fuglinszky, (2019) 'Applied Comparative Law in Central Europe', in Esin Örücü & Sue Farran (eds), (2019) 6(2) Journal of International and Comparative Law, Special Issue: The Relevance of Comparative Legal Studies in the Twenty First Century, 245–272.

[30] Jan Smits, 'Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience', in EH Hondius (ed), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentia Rechtswetenschappen 1998) 63.

[31] ibid 57.

Our time is one of the imposed receptions—'voluntary' activities of import under circumstances in which the exporters hold the trump cards. As this activity accelerates, systems in 'extraordinary' places will become the 'ordinary' systems of tomorrow and laboratories for comparative lawyers. There will be more harmony though not necessarily more integration. The future lies in 'diversity' and 'unity in diversity' rather than 'unity through uniformity'. A new 'genre of *mixité*' in 'extraordinary' places will be the focus of 'system-watching' as 'ordinary' places cease to be the main focus of attention. It is in 'extraordinary' places that comparative lawyers can best observe, analyse and understand the interaction of legal- and socio-cultures and appreciate the value of 'tuning' in transpositions. Paradoxically, it is in these 'extraordinary' places that the present comparative lawyers are least equipped to work. Comparative lawyers of tomorrow must have an education appropriate to the new age.

The sixth challenge to consider is that comparative law will be tied theoretically and practically to enhanced legal science, convergence and integration as well as the appreciation of diversity, the use of foreign models in law reform, and law and culture studies. New approaches to harmonization, receptions, mixing systems and the re-designing of systems, a new European *ius commune*, and a new emphasis on regional comparative law such as European, Central and East European, Common law, African and Far Eastern will be the main concerns of comparative lawyers. In addition, new areas of interest will form the new subject matters of comparative research.[32]

In our new century, comparative law by providing models of legal reasoning will supply systems in transition, wherever they are, with the possibility of structured change. Its role in this field will strengthen since comparative law is about communication. By providing the language of that communication, it allows legal scholars to enter into holistic communication. Comparative law research also reveals how legal institutions are connected, diversified and transposed. Comparative lawyers are extending their subject beyond the traditional areas, both geographic and substantive, and re-assess legal systems and legal families. With an even broader intellectual agenda, comparative law will remain an essential instrument for legal understanding.

The combination of comparative law and culture took the form of 'law and society studies' in the 1970s, and 'law and popular culture' in the 1980s. In the 1990s, its main aim was to provide a better understanding of multi-culturalism, integration and legal pluralism. Today there is growing and impressive literature here with anthropologists and sociologists querying the complexities and problems arising. It is among scholars interested in culture that we find the majority of the so-called 'contrarian challenge' supporters mentioned above. It is they who are most concerned with the clash of cultures surviving under monolithic value systems imposed by legislatures. A 'mild' form of 'law and culture' studies will only enhance comparative law by providing the tools for 'deep level' understanding of legal phenomena, but an 'extreme' form of this post-modernist cultural relativism can prove to be counterproductive and lead comparative lawyers to the impasse of 'incommensurability'.

[32] See contributions in *JICL* 2019, (n 26).

Tangible results and intellectual vigour will carry the discourse further, and the market value of comparative lawyers' work will increase. However, comparative law must retain its independent character and not be replaced by 'comparative jurisprudence', 'historical comparative law', 'comparative cultural studies', 'comparative law and economics', or any other kind of 'comparative law and …. Comparative law must preserve its separate and distinctive position in the titles of such perspectives, although such combinations can produce additional benefits. To broaden the scope of our subject, a more relevant title for our century could be Comparative Legal Studies, which would also defy any 'comparative law and…' suggestions.

Within the European Union where comparative law is extensively used, its prime task is in 'new *ius commune*' studies. It is asked to facilitate integration and make the case for reciprocal influence as the basis for convergence. Its related task is to find ways of reconciling civil law and common law and to aid the creation of European Codes. An additional specific task is to act as a tool for construction in national and European courts.

However, Europe also sees comparative law as a tool for the export of legal ideas and institutions and aiding law reform elsewhere. Competing models of Western European legal systems are put on convincing display with the help of comparative lawyers—this is yet another task.

Another challenge concerns the assertion that 'globalization', the catchword of the last two decades, will diminish the value of comparative law. This is a mistaken view. In fact, the reverse is proving to be the case. There is an increasing interest in localization. Both the local and those who study the local feel the need to assert localization. The trend to integrate moves the focus to the different and its value. Thus, comparative law will become indispensable in the globalization movement since in the effort to create universalist standards, interest in localized exceptions will also flourish. In addition, as William Twining says: 'processes of globalisation stir up old nationalisms, exacerbate cultural conflict, and encourage post-modern scepticism about the universality of values and ideas.'[33] In order to facilitate co-existence and harmony, comparative law will be essential for the understanding of this diversity. A more limited focus and realistic vision must be built upon the 'similarities' between 'differents', and by the accommodation of the 'differents' in harmony.

Yet another challenge is related to the controversial quest to find the 'better law' or the 'better solution'. What is the 'better law' approach, what is its value and is it workable? Is this an area where comparative lawyers should be at work? Those involved in harmonization projects in Europe have a number of choices. One is to keep the *status quo*: not to harmonize but hope that in time convergence may come as changing social, religious, and economic conditions world-wide push localisms towards globalism and sporadic transplants take place. The second option is to strive towards a 'common core'. In such an effort, though the ideal would be pitched at the highest common denominator, either the lowest common denominator or the average solution might be acceptable. The most innovative and progressive option would be

[33] William Twining, 'Comparative Law and Legal Theory: The Country and Western Tradition', in Ian Edge (ed), *Comparative Law in Global Perspective* (Transnational Publishers 2000), 21.