Pierre Legrand, « Comparative Law », dans *Encyclopedia of Law and Society*, sous la dir. de David S. Clark, vol. I, Los Angeles, Sage, 2007, pp. 220-23.

Comparative Law

As distinguished from comparisons based on nineteenth-century novels or contemporary religions or medieval political regimes, a comparative legal study makes problematic what is apprehended as the law (although no canonical definition of this term obtains). Unlike investigations limited to aspects of municipal or international law, comparison of laws engages different (often national) laws.

Comparing Laws and Comparing *Laws*

Comparison is present whenever an author socialized into one law devotes research to another. It is made more visible if the research explicitly refers to more than one law. It is even more recognizable if the laws studied are made to enter into negotiation with one another. While no consensus has been reached about principles, methods, modes of problem specification, types of argumentation, forms of narration, standards of evidence, or techniques of verification, the historical and political fact of differentiation of laws provides comparative legal studies with its vital justification. The apprehension of pluralism as an enabling condition of thought and value supplies comparatists with a protocol of deterritorialized action emancipating them from the local law and foregrounding an interpellative ethics on which all structures organizing the relation between self-in-the-law and other-in-the-law are made to rest.

Comparative analysis is a powerful political act: it not only ascertains "alterity" or otherness but also inscribes it to the extent that what the comparatist writes constitutes the other's legal identity (which, therefore, can be betrayed). This fact calls for the voice of the other-in-the-law to be allowed to be heard. Because the crossing of boundaries also means the violation of boundaries, it is important to accredit the discourse of the other by allowing the other to be as it is. The comparatist must come to terms with validity claims made and accepted elsewhere based on ontological-symbolic premises guiding statements and actions and taken as being either true or correct.

Throughout, in recognition of the semiotically complex cultural material underwriting denotational textualization, the comparatist must address the matter of linguistic practices of individuation and foster a means of acknowledging linguistic alterity. Since the disclosure of the other's conception of "governmentality" and of its underlying symbolic-ontological bases may allow the comparatist to uncover structures that run counter to the other's self-understanding, critical distance remains key. In any event, the comparatist can never gain access to the legal perspective "from within," even through a strategy of "immersion."

Beyond Positivism

Any comparative endeavor, because it must assume at the minimum two terms of comparison and a comparatist, requires to be envisaged as an interruption of totalizing thought. Like impressionism or cubism, like dodecaphonism or ragtime music, comparison is a practice of desublimation- or defocalization. Through its stress on the discontinuity and localization of knowledge as opposed to the idea of a unitary body of "true" knowledge, comparison acts as a kind of schizophrenic not-all. Comparative legal study is possessed of a "contestatory" energy: vis-à-vis the national law, comparison intervenes as a break or transgression rather than an annotative elaboration. It is, in fact, the prevalence and vehemence of totalizing thought itself that confers on the act of comparison its disruptive rhetorical valence. Comparison of laws thus serves to highlight the contingent and specific character of rules, practices, and assumptions.

The interest of comparative legal study in posited law is limited. Taking the view that sense cannot securely be taken to reside exclusively within the posited law, comparison of laws wishes to critique posited-law-as-closed-normative-system. It aims to unwork "the law" by constantly unraveling it. Its task is revelatory. By challenging the law's "thereness," which positivism assumes, comparative legal study emphasizes an experience of disjunction. It seeks to aid the nonidentical, which finds itself repressed by positivism's compulsion to privilege identity (what is "the" law?).

As it presses against the epistemological barrier erected by positivism, comparative legal study purports to supplant the impetuosity of unity with the authenticity of multiplicity. It can, therefore, liberate one from the idea that familiar rules, practices, and assumptions are necessary, just, and unchallengeable. Through comparative analysis of law, legal agents realize that no configurations can afford to be regarded as self-evident. In the same way as the development of the law and the achievement of justice require that problems be approached and resolved in the light of data supplied by other disciplines (whether, for example, anthropology, sociology, economics, philosophy, or literary criticism), they

command that a problem be examined with reference to the epistemological strategies prevailing in other jurisdictions.

Accordingly, comparative legal study is not concerned with the dry juxtaposition of legal propositions originating from different jurisdictions. In fact, it is preoccupied with the "intextualization" of law, that is, with elucidating its constitutive discourses. It wishes to know the law in the fullest sense, to achieve its identity by interrogating its character, by substituting for its failure to grasp its own depth. It wants to diagnose the law. Accordingly, comparative legal study is best effectuated by reading legal texts as expressions of culture and tradition and by securing pertinent anthropological, sociological, philosophical, historical, linguistic, psychological, and literary insights. Arguably, the comparatist can account in a meaningful way only for how the law is constructed in a foreign jurisdiction through an interdisciplinary investigation, which often means that massive dedication is required to produce even small accretions in knowledge. Nevertheless, the comparatist's erudition is usually not enough to allow an escape from life at the intellectual margins of the legal academy.

Beyond Sameness

No comparison can be initiated without a comparatist taking the view that there is an apparent sameness between the objects of comparison, that they seem alike in at least one respect. Inevitably, dwelling in his culturally preoriented understanding and enabling background, the comparatist must build a perceptual bridge allowing for the apprehension of something that can be compared with something else. However, the presence of an "as-structure" of perception must not be understood to mean that comparatists can then legitimately effectuate an approximation of alterity to sameness, that they can then silence alterity. Avoiding the pitfalls of essentialism, comparative legal study is concerned with the genius loci, that is, with frameworks of intangibles within which ascertainable legal communities operate, which have normative force for these communities (even though not completely and coherently instantiated), and which, over the long term, fashion the identity of a community as community.

When one researches the law, when one reads a statute or a judicial decision with full response, one is implicated in a matrix of inexhaustible specificity. The more one proceeds with the task, the more enmeshed one is in an experience of irreducibly complex, singular life forms. Indeed, the network of associative context that energizes usage in any given law can be replicated into another law only partly, and then by virtue of periphrastic and metaphrastic maneuvers that—not unlike the translation of a poem—inevitably transform the intensity, the evocative means, the formal autonomy of the original. A deep appreciation for the other's law world, therefore, requires the comparatist to surmount the reductionist urge to confine comparative analysis to the identification of similarities in the formulation of statutes or the outcome of judicial decisions across jurisdictions. To accord difference priority is the only way for comparative legal studies to take cognizance of what is the case. Only in deferring to the nonidentical can the claim to justice be redeemed.

In an age of globalization, which cannot be taken to have generated a de-traditionalization of law, there is an urgent need to understand how foreign legal communities—including subaltern legal communities—think about the law. Why would they think about the law as they do; why would they find it difficult to think about the law in any other way; and how does their thought differ from ours? Comparatists are uniquely suited to reveal this information and disseminate it, leaving the technical knowledge about what a foreign law says on any given point at any given time to practitioners specializing in a given foreign law. The vocation of comparative work about law is intrinsically scholastic and its agenda is, therefore, incongruent with that of practitioners or lawmakers seeking to elicit epigrammatic answers from foreign laws.

Any urge to stereotype knowledge and construct prescriptive axiomatic patterns established through strict reference to the formalized elements of law and through the simulation of a condition of unity across laws is necessarily based on a repression of differences located in the constitutive matrix within which

any manifestation of posited law is inevitably ensconced. Ultimately, comparatists cannot detract from the continued relevance of Charles-Louis de Montesquieu's (1689–1755) guiding principle from the preface to *The Spirit of Laws*. "When I have been obliged to look back into antiquity, I have endeavoured to assume the spirit of the ancients, lest I should consider those things as alike which are really different; and lest I should miss the difference of those which appear to be alike" (1991: 1). Nor can they eschew Max Weber's (1864–1920) advice from *Agrarian Sociology of Ancient Civilizations:* "A comparative study should not aim at finding 'analogies' and 'parallels,' as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other" (1998: 385).

Beyond Representation

Comparison is premised on another law being capable of representation. However, whatever its intention, writing reflects a certain ideology and incorporates a certain poetics. Writing, since it necessarily intervenes at a time that is subsequent to experience, remains as a memory of that which cannot be restored. The act of "reproduction" cannot overcome singularity, since any re-presentation is tied in a "nonsuppressible" fashion to ex post facto perception even as the re-presenting statement purports faithfully to account for what was presented. In this sense, every comparison always already involves a necessary transformation of its object of study. The comparatist does not so much report on actual interconnections as on conceptual interconnections she has devised to make the situation under study amenable to clarification. Comparatists' theoretical equipment allows them to eschew anything like objectivity as they appreciate that their understanding is always conditioned by the concrete historical situations in which they are embedded and as they internalize the fact that "the law" is a site of many different semantic possibilities. For this reason also, and to restrain ethnocentric violence, they display a vigorous skepticism toward frameworks of commensuration across laws and practice a healthy brand of cultural relativism, accepting that while contradictions or antagonisms may be noted, they cannot necessarily be resolved.

Through the hermeneutical and deconstructive exigencies of a thought that allows the other-in-the-law to signify according to himself and to his own obviousness—which is, ultimately and empathically, *for* the other—the comparatist distances himself from his own assumptions (which, then, no longer partake in truth). He is interested in a variety of responses to "reality" and is keen to grasp the unique significance of these responses for given communities, such that his understanding of the world is stronger. He lives more knowledgeably, since through the mediation of an other, the self can become more explicit to itself. It remains, though, that the self can never fully overcome the epistemic partiality arising from the fact that human relations are inherently asymmetrical and irreversible.

In the end, comparative legal study features a constitutive *aporia*. It demands the public intervention of critical individuals who accept that within the structural constraints set by the human interpretive apparatus, understanding of a law or of an experience of law other than one's own can arise only from thorough intextualization. But such understanding can, in effect, never arise since epistemologies are irrevocably irreconcilable, even though we live them simultaneously and act as if we can reconcile them.

—Pierre Legrand