

## From Lerotholi to Lando: Some Examples of Comparative Law Methodology

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## Abstract

This Essay argues that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow. The tasks of teaching, research, of law reform, or historical investigation are too varied and contingent to be achieved by a single approach. It would be a serious blow if all matters had to be analysed from one angle or perspective, or treated with the same detail and depth, or prepared to the same degree or in the same way. Instead there should be a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs. It cannot be said a priori that one method is always better than another until we know these variables. It is also shown that prescriptions about method must carefully distinguish the principal user groups, for the complex methods of scholars may be unworkable in the practical world where comparisons must be cost-justified. The message from Mount Olympus must not be that comparative law is always forbidding and difficult. The discipline must be accessible and its methods must be flexible.

**KEYWORDS:** Comparative Law, Methodology, Postmodernism

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\*\* Thomas Pickles Professor of Law and Director of European Legal Studies, Tulane Law School. Email : [vpalmer@law.tulane.edu](mailto:vpalmer@law.tulane.edu). This Essay is respectfully dedicated to Xavier Blanc-Jouvan, one of the most illustrious figures in the world of droit comparé. It was written for the *Mélanges Blanc-Jouvan* published by the Société de Législation Comparée. The *Mélange* may be obtained by contacting [slc@legiscompare.com](mailto:slc@legiscompare.com).

“Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.”

--G. Swanson <sup>1</sup>

“I have the unfortunate peculiarity of comparing everything that comes my way, the domestic with the foreign, or the present with the past.”

--Rudolf von Jhering<sup>2</sup>

“[A] comparative approach to law becomes an attempt ... to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another.”

--Clifford Geertz<sup>3</sup>

## INTRODUCTION

Methodological discussions, it has been said, are a good cure for insomnia.<sup>4</sup> Of course any number of legal topics have been known to cure that disorder, so clearly excitement is not the best measure of a subject's true importance. Today the importance of methodology to comparative law is indisputable and crucial, and recent years have witnessed an intense and lively debate over new directions in comparative law. . These discussions, even if some have been dozing, have been keeping many thoughtful lawyers awake

The need to compare and differentiate phenomena seems to pervade all forms of human decision-making and may be indispensable to the development of human intelligence and judgment.<sup>5</sup> This holds true not merely for lawyers, but for architects, physicians, biologists, sociologists and others. All lawyers are comparatists in a natural sense, as when they make distinctions, draw deductions or look for a case in point. There is a native process which has much in common with the procedures of comparative law. Common lawyers compare cases and cross-reference them very carefully. The case method is essentially a comparative method based on similarity, analogy and differentiation. Civilians do not reason

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<sup>1</sup> « Frameworks for Comparative Research : Structural Anthropology and the Theory of Action » in *Comparative Methods in Sociology* 141-202 (Berkeley 1971) Ivan Vallier, ed.

<sup>2</sup> Quoted in Zweigert and Siehr, « Jhering's Influence on the Development of Comparative Legal Method, 19 AJCL 215 (1971).

<sup>3</sup> *Local Knowledge : Further Essays in Interpretive Anthropology*, p216 (Basic Books 1983)

<sup>4</sup> R. Cooter and T. Ulen, *Law and Economics* 8 (Scott, Foresman Co. 1988)

<sup>5</sup> Hiram Chodosh, « Comparing Comparisons, » 84 Iowa L. Rev. 1025, 1033-34 (1999).

so differently. Once they have compared the facts of a case with codal texts and previous jurisprudential applications, they subsume the facts to the code or jurisprudence through an act of categorization. Should the code be silent on a specific point, analogies are developed from related texts. The civilians give constant attention to similarity and contrast in legal rules and facts in issue. Thus the ordinary methods of the civilian or common lawyer are grounded in comparison, and perhaps comparative law is in one sense an extension of the natural.

“Comparative law”, however, is a discipline which incorporates the idea of comparison into its name and this alone suggests that its method is somehow special or distinguishable from what comes naturally. Indeed the impression that comparative law method involves something special is strengthened by traditional statements that comparative law is only a method and not a substantive body of knowledge. If that were true, we would have to admit that we have for a long time sadly neglected the supposed essence of our subject. Some of the most widely read books on comparative law have virtually nothing to say about methodology and, perhaps in consequence, the rank and file may be described as naïve and unaware of methodological questions and issues. They have been led to assume that comparative law can be carried out with the same thinking process that lawyers ordinarily use. Could it be that the ingrained and unconscious methods of lawyers imbued with their own legal culture—whether common law, civil law, mixed system, or other—furnish, by default, the implicit model for comparative law? Unfortunately, this natural paradigm seems rather prevalent.<sup>6</sup>

Before continuing further, however, I need to clarify how I am using the word method. As an abstract matter, comparative law has but one method—to compare and contrast norms, institutions, cultures, attitudes, methodologies, and even entire legal systems. But in practice the word is applied more concretely. Method is now identified by the “techniques” by which comparisons are carried out.<sup>7</sup> These techniques have thereby acquired the status of separate methods: thus we have historical comparisons, functional comparisons, evolutionary comparisons, structural comparisons, thematic comparisons, empirical and statistical comparisons, and all of these can be carried out from a micro or macro point of view. The possibilities are endless.<sup>8</sup> In this paper I will not resist this

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<sup>6</sup> Here the way we compare becomes a mirror of ourselves-- an unwitting caricature of our particular tradition.

<sup>7</sup> See Jean Carbonnier, *Sociologie Juridique* (Quadrige/PUF 1994) who says at p153 « La recherche doit être guidée par une *méthode*, et elle se coule dans des *techniques*. »

<sup>8</sup> Even the physical layout of a study—how it arranges the material—is sometimes described as a method: hence the method of ‘juxtaposition’ or of parallel treatment. I do not regard this as a

proliferation, but I may question the assertion, sometimes advanced, that one of these techniques/methods (functionalism) has precedence over the others. I will also argue that some of the strategies discussed in recent scholarship are unrealistic and unattainable standards—even for scholars—and should be viewed skeptically. In my view they usually overlook the comparative-law needs of the legislatures, reform commissions, judges and seem entirely unworkable at the practical level where comparative law must expand its base. These considerations lead me to suggest a more pragmatic and inclusive view of method than scholarly colleagues have advanced, one which takes into consideration the costs and benefits to different users and recognizes that the methods of scholars may be inappropriate to legal reformers and law appliers.

This plea for a more pragmatic and inclusive approach is stimulated by several background concerns. Mainstream comparative lawyers (and I regard myself as one) seem to be caught in the pincers of three developments, each pulling in a different direction. The first of these I would describe as the underdeveloped and emaciated state of our discipline in the everyday practical world. One of our constant goals must be to strengthen and expand the role of comparative law in the practical world. Basil Markesinis has rightly noted that comparative law continues to be “A subject in search of an audience.”<sup>9</sup> In England and the United States particularly, it needs to acquire a vocation within the profession and the courts, to become the method of legal institutions, and to emerge from its cloistered existence in the academy. Yet to move into the courtroom and into the halls of the legislature will require methods which are not only enlightening, but feasible and nonthreatening.<sup>10</sup> If the profession is to recognize the “value added” of comparative law, then the additional burdens which it imposes will have to be considered cost-justified. There are potentially high costs in acquiring and analyzing information about foreign law, and these increase dramatically under complex methodologies, so realism demands that even simple methods, which it has long been fashionable to disdain, such as purely textual comparisons, or questionnaires devised to gather foreign-law data,

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true difference of method but simply a different arrangement of material. Additional kinds of methods arise when a deeper explanation for comparative law discoveries is sought in economic theory, sociological information or philosophical ideas.

<sup>9</sup> *Foreign Law and Comparative Methodology* 3 (Hart Pub. 1997).

<sup>10</sup> See Vernon Valentine Palmer, « Insularity and Leadership in American Comparative Law : The Past One Hundred Years » 75 Tul. L. Rev. 1093, 1097 (2001) ; Markesinis stresses this approach too. « Bridging Legal Cultures » p. 196, 209 in *Foreign Law and Comparative Methodology* (Hart 1997) (« ...in England (and perhaps elsewhere) interest in foreign law will grow if our judges can be persuaded that its knowledge will help them in their work. ...the beginning of the ‘chain’ is the judge which is why academics should target them for their ideas. »)

or simple juxtapositions of materials without elaboration or comment, --all of these could have legitimacy and value in practical forms of legal research.<sup>11</sup>

A related challenge emanates from within mainstream comparative law. It began in the early twentieth century with the insight that the focus of comparative law must be upon the law in action, not merely the law on the books. This might be viewed as a call for deeper research into legal sources and the social context around legal rules, with the difference however that this was still a lawyer's context not an anthropologist's, and involved none of the epistemological scepticism of the postmodernists. Reaching the "law in action" is still a scientific ideal of mainstream comparative law, but one is never quite sure how high the cognitive bar has been set. If the phrase means the level of research described by Ernst Rabel and Max Rheinstein, it has rarely been realized even by its proponents, and in light of the practical concerns expressed above, cannot be the universal standard for all of comparative law.

The third pincer is the "postmodern critique" which already dominates scholarship in the fields of philosophy, anthropology, and law and society. This critique has now become fairly influential within comparative law as well. It essentially contends that each legal culture is a unique, culturally contingent product which is incommensurable and untranslatable except through a deep understanding of the surrounding social context. Thus a comparativist's claims to understand another country's law can only be validated through an elaboration of its context, or as Clifford Geertz writes, through formulating "the presuppositions, the preoccupations, and the frames of action characteristic of one legal

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<sup>11</sup> The famous Brandeis Brief may be mentioned as an example. Louis Brandeis devised a simplified, low-cost and noninsistent means of bringing foreign laws and sociological data to the attention of the Supreme Court in order to elucidate the meaning of the United States constitution. His brief on behalf of the State of Oregon set forth without comment 112 pages of foreign statutes mandating limited working hours for women, together with socio-economic testimony justifying those statutes. While some academic comparatists might dismiss this technique under various epithets (that it did not make explicit comparisons, only foreign law was presented, a mere juxtaposition of material, and was superficial rather than contextual) yet the effect was a powerful form of advocacy and led to the upholding of the Oregon statute as a reasonable restriction on women's working hours. Excellent academic writing may use the technique of juxtaposition, for example P. Catala and T. Weir's study « Delict and Torts : A Study in Parallel », 37 Tul. L. Rev. 573 (1963) ; 38 Tul. L. Rev. 221(1964) ; 39 Tul. L. Rev. 701 (1965) which Markesinis praises as « the best, closely-knit, truly comparative work on a particular topic. » Foreign Law and Comparative Methodology, Chap. IV, 46-67 (Hart 1997). For the use of questionnaires, see Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide : The Third Legal Family* (Cambridge 2001) and Mauro Bussani and Vernon Valentine Palmer (eds) *Pure Economic Loss in Europe* (Cambridge 2001).

sensibility.”<sup>12</sup> This has been aptly described as “a nearly insurmountable methodological hurdle for the comparative legal scholar.”<sup>13</sup> For Anne Peters and Heiner Schwenke, it casts “fundamental doubts” on the utility and possibility of comparative law.<sup>14</sup> “Context” lies beyond the positive law in which lawyers are trained and the benefit of contextual comparisons will depend upon the purpose of the investigation as well as the cost of acquiring this information and expertise. Indeed the western legal tradition to a large degree prizes concepts and generalizations abstracted from the contexts they regulate and values general concepts which perform the greatest number of tasks. When a comparatist seeks to compare the ‘structural’ and ‘contextual’ background to the rules under comparison, he or she must in effect reconstruct their socio-economic origins, and his notion of context will tend to be considerably narrower than the background which the legal anthropologist or legal sociologist has in mind.<sup>15</sup> Thus the challenge of the post-modern critique could be called that of making context manageable and of developing an *organic method* which embodies both law and social underpinnings into the same comparative act.

What emerges from the interplay of these developments is that the practical goal of expanding the base is somewhat paralyzed by the academic discussion, particularly by its tone. The general message from academic circles—and here I only generalize and do not intend to refer to any particular colleague’s view—is that comparative law is a difficult and forbidding field reserved for a special few. As portrayed, it *always* requires total immersion and deep preparation in specific foreign languages and cultures before being attempted; the foreign system should *always* be seen from the inside and in socio-cultural context; and those who

<sup>12</sup> Geertz, *supra* note 3.

<sup>13</sup> Janet Ainsworth, « Categories and Culture : On the ‘Rectification of Names’ in Comparative Law » 82 Cornell L.Rev. 19,25 (1996). The obstacle is particularly evident, as I shall argue, not for the East-West specialist or those interested in African systems where these ideas are more generally accepted, but for those who deal primarily with Western law.

<sup>14</sup> « To say that the comparatist is trapped in her framework casts fundamental doubts on this tool. The alleged incommensurability of frameworks means nothing else but *total incomparability* across history and culture. » Anne Peters, Heiner Schwenke, « Comparative Law Beyond Post-Modernism » 49 ICLQ 800, 802 (2000).

<sup>15</sup> This narrower focus can be seen in Markesinis’ comparison of the structural and contextual background to the laws of the United States and England. He chooses a few rather abstract traits which are not far removed from a lawyer’s general understanding of the legal systems, to wit: the United States has a written, legally ‘superior’ constitutional document—England does not; the United States has size and geographical diversities when compared to England; the method of financing litigation differs in the two countries; there is an ‘abuse’ of the democratic element in the United States. « Bridging Legal Cultures » pp 204-207 in *Foreign Law and Comparative Methodology* (Hart 1997). No interdisciplinary grounding is necessary in order to adduce and understand such factors.

engage in something less are in essence practicing cognitive control over their readers and deluding themselves in the process. To avoid ethnocentricity and superficiality, the researcher must *always* delve beyond judicial decisions, doctrinal writings and the black-letter law of code and statute and reach into the ill-defined region of “deeper structures” where law perhaps meets philosophy, sociology and social culture.

Of course there is everything praiseworthy about acquiring greater knowledge, even perfect knowledge of the compared object, nevertheless the question is how these standards can be fulfilled by law reformers and law appliers, not to mention academics themselves. I believe these strictures are in part based upon unrealistic assumptions which threaten to make the comparative law enterprise quite impractical. They establish standards of research that are generally unattainable, which means that no project is worth beginning, or if it was begun or accomplished, will not be safe from rigorous critique. And this critique only increases comparative law’s reputation for being exotic and forbidding. One wonders how many have been deterred from undertaking comparative law by the demands which have been evoked in the name of legal method.

In this Essay I wish to reconsider a number of these questions and to suggest the need for a more pragmatic, and inclusive view of comparative law methodology. I cannot pretend that the analysis is systematic or complete, nor am I sure that it is not soporific. As an organizing device and to provide a context for reflection, I will present four case studies of comparative method ranging from efforts to grasp the meaning of customary law in Africa to the techniques employed by the Lando Commission in drafting *Principles of European Contract Law*. I hope to demonstrate a quite unoriginal thesis, that good method is a function of variables, that method should be adapted to the purposes of the project and the individual circumstances of those who pursue it, and that a multiplicity of methods has been a source of enrichment in the best comparative work.

*Maseru 1872*

*Having taken control of the African territory called Basutoland, it was not long before the Colonial Office at Cape Town realized that it had a need to know more about the law of the land. The Chief Magistrate, Mr. Griffith, was instructed to establish a Special Commission “to inquire into and report upon the native laws and customs of the Basutos, and on the operation of the regulations*



*established for their government ....*”<sup>16</sup> *This inquiry may be regarded as the first contact between western legal investigators and the Basotho people. The goals of the Commission were to acquire reliable knowledge of the unwritten custom, and to make suggestions to the House of Assembly at the Cape as to the wisdom and need for amending the colonial Regulations applicable to Basutoland. There were, for example, some Basotho customs that shocked the Victorian values of the commissioners, and these were condemned as “heathenish and barbarous”*<sup>17</sup> *yet their report suggested it would be unwise to take any legal action against them. The practices of polygamy and marriage with bride price (marriage with cattle), it concluded, were too deeply founded in the society to be abolished legislatively. The Commissioners similarly denounced the custom of female circumcision, stating that it ought to be abolished “as soon as possible,” but cautioning against any abrupt move, “for in the districts of Leribe, Berea and Cornetspruit very large number of the chiefs and people are staunch supporters of it, and would probably strongly resent its suppression.”*<sup>18</sup> *The Commission’s inquiry, therefore, sought not only to discover the content of the customary rules but to gauge the depth of the people’s attachment to them and how that attachment might vary from rule to rule or from place to place. The Commission had a responsibility to make legislative suggestions, but its other goal was to conduct a “law as fact” inquiry. The method used to discover the “facts” was purely inquisitorial.*

*The commission was comprised of five European magistrates who had been posted to Basutoland some eighteen months before.*<sup>19</sup> *The inquest was held over a five day period in December 1872. Oral testimony was taken from certain principal chiefs and councillors of the Basotho, as well as from two French missionaries, concerning the contents of Sotho law and custom. The commission*

<sup>16</sup> Letter from the Colonial Secretary, Cape Town, 19<sup>th</sup> August 1872 to C. D. Griffith, Chief Magistrate of Basutoland, reprinted in *Report and Evidence of the Commission on Native Laws and Customs of the Basutos 1873* (Cape Town 1873, reprint Morija 1966).

<sup>17</sup> These three customs were the practices of circumcision (*Lebollo*), polygamy (*Sesethepu*) and marriage with cattle (*Bohali*).

<sup>18</sup> Report, supra note 16, p5. A Lesotho court ruled in *Nothobi Maele v. R.* [1963-1966] HCTLR 218 that the forcible circumcision of a girl was repugnant to morality and justice. See Vernon V. Palmer and Sebastian Poulter, *The Legal System of Lesotho* 159-160 (Michie 1972). A recent report in the press indicates that cutting female genitals is still practiced in as many as 28 African countries. See, « Genital Cutting Shows Signs of Losing Favor in Africa » *New York Times*, June 8, 2004, p A3.

<sup>19</sup> At least one, Magistrate Jno. Austen, was an experienced observer of the customs of the region. He had been nineteen years in the Border Department and another ten years as a missionary. Report, supra note 16, p 57. In his supplementary paper published with the Report, he attempted to set the record straight regarding a number of European biases found in the testimony. (e.g. « Cattle marriages were never considered by the primitive Kafir or Mosuto or Zulu as a sale,... The terms barter or buy are European or Colonial terms that have been adopted since the natives have come in contact with the white men.... » *Ibid.* 57-58.

*asked a series of direct questions framed in an abstract manner. No factual hypotheticals or cases were used. The interrogatories covered such matters as the customs relating to marriage, seduction, trespass, inheritance, injury to property, guardianship and criminal offences. The questions often embodied western legal concepts and terms:*

*“What is your law with regard to injury to property? What is the law with regard to unnatural crimes? What is your law with regard to marriage?”*

*Both the style of questioning and other limitations would suggest that this inquiry would tend to produce an “official version” of Basotho custom as opposed to the “living version” actually observed in the community.<sup>20</sup>*

*The questions, it appears, were framed in English and then translated into Sesotho. Responses were received in Sesotho and then retranslated back to English.<sup>21</sup> As noted earlier, the entire process was completed in a short period of time. There is no reason to believe that the special commission made preliminary investigations or invested much time in advance preparation. The rules were discovered quickly and inexpensively and most of the information the report contains proved to be relatively trustworthy. However, experience later showed that it also contained some unreliable and certainly incomplete information about the local law. The entire set of responses were published in 1873 in Cape Town.*

*Some thirty years later, in 1903, an advisory body composed mainly of Basotho chiefs was set up by the colonial administration. This body, which had no legislative power, was called the Basutoland National Council. In that year it*

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<sup>20</sup> The « official version » of African custom have been described as an “invented” tradition, see M.L. Chanock, *Law Custom and Social Order, The Colonial Experience in Malawi and Zambia* (Cambridge 1985). These result when administrators, missionaries and anthropologists are unwittingly blinkered by their own culture. Distortions may result from the use of western terms as well as the natural bias of informants who are typically chiefs and male elders. Their information may be incomplete, dated or one-sided or they have been known to speak to please their interrogators. The « official » version will thus come to describe less what people actually do and more what the government and its chiefly rulers thought they ought to be doing. Living custom is also distorted when colonial judges refuse to enforce features of customary law that are considered to be repugnant to western ideas of morality and justice. There is a risk of further distortion when certainty and precision are imposed upon customary law through devices of stare decisis, codification and restatement. T.W. Bennett, *Application of Customary Law in Southern Africa*, 23 (Juta 1985). See generally, South African Law Commission, Project 90-The Harmonisation of the Common Law and the Indigenous Law. Discussion Paper 74, August 1997, available at [www.server.law.wits.ac.za/salc/discussn/dp74.html](http://www.server.law.wits.ac.za/salc/discussn/dp74.html). Regarding the need to remove distortions in contemporary South African custom, see D.D. Ndima, « The African Law of the 21st Century in South Africa, vol xxxvi CILSA 325 (2003).

<sup>21</sup> The Report does not explicitly state that the questions and answers were translated back and forth, but this appears to have been the only way that the commission would have proceeded since the chiefs did not speak or write English. As Tylden noted, « At this period the only Basuto able to read any language except their own were men like George Moshesh, who had been sent out of the country to be educated. » G. Tylden, *The Rise of the Basuto*, 111 (1950)

*drew up a declaration of Basuto Law and Custom which was immediately published and circulated for the guidance of the chiefs' courts. This expression of the custom was named The Laws of Lerotholi. It was named after Lerotholi who was then paramount chief of the Basotho and a grandson of Moshoeshoe I, the founder of the nation.*

It has been said that ethnocentrism is “the most pervasive problem in anthropology.”<sup>22</sup> According to Wolfgang Fikentscher, “Ethnocentrism means that the researcher uses his or her own bias while problematizing, concluding, reasoning, or systematizing the study of another culture.”<sup>23</sup> Comparative law can claim no special immunity from this virus. So it must be asked, how does an external observer, despite the best will in the world, ever escape from his or her own framework of imbedded conceptions and look outward with a detached eye (“l’oeil agnostique”)<sup>24</sup> that does not superimpose these conceptions onto the object under observation? For the western legal anthropologist studying a fundamentally different non-western society, the dangers of self-delusion may be reduced to some degree by preparation, self-analysis and catharsis, but in the end the impossibility of achieving complete objectivity must be accepted.<sup>25</sup> The comparative investigator must hope to keep a certain distance from his own culture and prejudice, from the society under study and from the biases of his informants.

The 1872 inquiry into Sesotho customary law involved a true opposition of law, culture, language, history, and religious difference. If we wish to imagine a true juridical gulf it would have existed between this pre-Christianized,<sup>26</sup> mountain people and their new colonial rulers. On the other hand I have the impression that postmodern critics tend to find equally “unbridgeable” scenes within the European Union or in the transatlantic corridor.<sup>27</sup> Differences between

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<sup>22</sup> Fikentscher, p117.

<sup>23</sup> Ibid. According to Fikentscher, the Cornell project on comparative law contained an ethnocentric assumption: that laws can be compared by identifying the problem to be solved and then comparing the solutions proposed by various national or local laws.

<sup>24</sup> Carbonnier, supra at 157.

<sup>25</sup> Norbert Rouland, *Legal Anthropology*, esp. pp36-139 (Planel trans. Stanford Press 1994). See also, Clifford Geertz, « From the Native's Point of View » ; On the Nature of Anthropological Understanding, in *Local Knowledge*, (Basic Books, 198 ?) at p. 58.

<sup>26</sup> According to the census of 1875, only 5% of the African population of Basutoland professed Christianity. See supra, Poulter, *Family Law and Litigation*, at 33.

<sup>27</sup> According to Janet Ainsworth, postmodernism and the postmodern sensibility can be « fairly characterized as one of epistemological anti-foundationalism, rejecting the belief that human knowledge can be grounded in eternal or universal truths. Instead, postmodern claims to knowledge are, at best, only partial in nature, and can only be validated within a specific

the laws of Spain, England and France represent an intractable incomprehension between cultures and peoples, and the comparative lawyer is pictured as blithely unaware of the enormity of the cognitive challenge. One mistake of the post-modernist critique, however, is to exoticize all laws equally so that legal and cultural distances are standardized. The observer is not uniformly remote from the foreign. The distances vary, as common experience and the classifications of legal systems into “families” and “traditions” clearly point out.<sup>28</sup>

In its most radical form the discussion suggests that “other law” is essentially unknowable or that the laws under comparison are always incommensurable.<sup>29</sup> Pierre Legrand regards cultures as “spiritual creations” of the community, products of unique historical experiences as distilled and interpreted over centuries by their unique imagination. This harkens back to Savigny’s view that law is a manifestation of the people’s national spirit (*Volksgeist*), an historical unfolding of spiritual activity, an organic production of society which was to be watched for and discovered rather than to be made or tampered with.<sup>30</sup> This claim amounts to more than respecting the equal dignity of laws. The task of comparative law, perhaps even when studying the related systems of Western Europe, begins to sound as epistemologically challenging as an anthropologist’s first contact with a primitive people. Legrand has in mind a method of producing

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context. « Categories and Culture : On the ‘Rectification of Names’ in Comparative Law » 82 *Cornell L. Rev.* 19, 25 (1996).

<sup>28</sup> See the recent study by Jaakko Husa, « Classification of Legal Families Today : Is It Time for a Memorial Hymn ? » 1-2004 *Rev. Intern. Dr. Comp.* 11.

<sup>29</sup> For an overview of the debate and the literature see, Anne Peters and Heiner Schwenke, “Comparative Law Beyond Post-Modernism” 49 *ICLQ* 800 (2000); Janet Ainsworth, « Categories and Culture : On the ‘Rectification of Names’ in Comparative Law » 82 *Cornell L. Rev.* 19 (1996). See also David Kennedy, “New Approaches to Comparative Law: Comparativism and International Governance” (1997) *Utah LR* 545; Gunther Frankenberg, “Stranger Than Paradise: Identity & Politics in Comparative Law” (1997) *Utah LR* 259; “Critical Comparisons: Re-thinking Comparative Law” (1985) 26 *Harv. Int’l LJ* 411; Vivian Grosswald Curran, “Cultural Immersion; Difference and Categories in US Comparative Law” (1998) 46 *AJCL* 43; Nora Demleitner, “Challenge Opportunity and Risk: An Era of Change in Comparative Law” (1998) 46 *AJCL* 647; Andrew Huxley, « Golden Yoke, Sildenafil Text, » 106 *Yale L. J.* 1885 (1997); Richard Bernstein, « Incommensurability and Otherness Revisited, » in *Culture and Modernity: East-West Philosophic Perspectives* (E. Deutsch ed., 1991). Regarding incommensurability, see Antonio Gambaro, « The Trento Theses » 4 *Global Jurist Frontiers* (2004), available at

<sup>30</sup> Julius Stone, *Social Dimensions of Law and Justice* 102 (Stanford Univ. Press 1966); Pospisil, *Anthropology of Law*, 139 (Harper and Row 1971). Savigny’s former student and close friend, Jakob Grimm, took the view that both language and law were living organisms and were organic productions of popular life. Jean Gaudemet, « Historique et système dans la méthode de Savigny » pp24-25 in *Sociologie Historique du Droit* (PUF 2000). For an interesting account of their friendship, see Tony Weir, « Friendships in the Law » 6/7 *Tulane Civil Law Forum* 61, 81-93 (1991-1992).

an organic understanding of other people's laws and states that all the resources at the disposition of science will be needed to reach it. "Je dévoile aussi mon ambition de faire sa place à une approche reconnaissant la réalité juridique comme ambiguë et comme irréductible à un canevas de lois et de décisions de jurisprudence. Cette perspective veut se faire l'instrument d'un nouveau paradigme global capable de marquer une rupture épistémologique avec l'ancien."<sup>31</sup> Legrand's thesis that each law is a unique spiritual creation and his call for a new paradigm for the comparative act would imply the necessity of developing an organic method of comparison, if that were possible. An 'organic' method (the word is my characterization, not his) would presumably contextualize every object of comparison and thus capture its essence as a unique manifestation of the community. Though his goal has been stated, I am not aware of any work product based on this method, and it remains to be shown that this redoubtable task can be accomplished.<sup>32</sup>

Other writers stress the need for great preparation in order to correct the natural bias of the observer. Vivian Grosswald Curran argues that cultural immersion is a prerequisite for effective comparative analysis. The comparative act is essentially an act of translation, she argues, and the original legal culture must first be viewed in its "untranslated form."<sup>33</sup> Grosswald Curran's prescription resembles the Leyden School of Anthropology's slogan, to achieve "the vision of the participants," or in Kenneth Pike's terms, to adopt an inside (emic) as opposed to the outside (etic) view of the foreign system.<sup>34</sup> She cautions that the comparatist needs to retain the stance of an outsider even as s/he acquires insight into the insider's view. Apparently the comparatist must live with a paradox: "He must render the foreign familiar and preserve its very foreignness at one and the same time."<sup>35</sup> He must find some mid-point between the pull of cultures, a mental space where a bijural or even plurijural mentality might develop. This is not so difficult to envision, but perhaps one will be forgiven for asking: who has actually

<sup>31</sup>See, *Le Droit Comparé* (PUF 1999). In this work Legrand dwells on philosophic, mainly epistemological, problems besetting comparative law (Problématiques constitutives, Apprentissages topiques) and devotes no space to the history, accomplishments, or methods of the subject. The work was reviewed by Bernard Rudden, RIDC 275, 1-2000.

<sup>32</sup> See « What 'Legal Transplants' ? » in Nelken and Feest, eds. *Adapting Legal Cultures* (Hart 2001) pp 54-70.

<sup>33</sup> Vivian Grosswald Curran, "Cultural Immersion: Difference and Categories in U.S. Comparative Law," 46 *AJCL* 43 (1998)

<sup>34</sup> Discussed in Wolfgang Fikentscher, *Modes of Thought: A Study in the Anthropology of Law and Religion* pp118-120 (Tübingen 1995).

<sup>35</sup> Vincent Crapanzo, « Hermes' Dilemma: The Masking of Subversion in Ethnographic Description, » in *Writing Culture: The Poetics and Politics of Ethnography* (J. Clifford and G. Marcus eds. 1986) at p 52.

achieved this and how it is done? Are only high priests capable of meeting these demands?

For Gunter Frankenberg the main flaw in modern research seems to be that the comparatists project their own society's vision of law onto what they have studied. The natural tendencies of the observer are not counteracted or checked by disciplined attention to legal method. Rather than "combating" their ethnocentrism, (to use Nora Demleitner's metaphor)<sup>36</sup> comparatists instead display nonchalance, if not ignorance, of the serious issues of legal method and theory. This is shown by the fact that legal method plays only a marginal role in their research. Frankenberg asserts quite plausibly that a methodologically unaware scholar ends up, wittingly or not, applying "cognitive control" as her dominant mode of comparison.<sup>37</sup> Frankenberg means by cognitive control a "formalist ordering and labelling and the ethnocentric interpretation of information." What emerges from unselfcritical research, he argues, is that "the similarities that surface ... are mirror images of the categories of the conception of law in the comparatist's own culture."<sup>38</sup> The "home law" becomes the natural normal standard.<sup>39</sup>

Reverting again to Maseru 1872, my case example involves a very wide cognitive divide, and ethnocentricity was not held in check by the legal method the Magistrates employed. Yet assuming we do not want to exaggerate epistemological barriers, it cannot serve as a parable to deter us from the study of contemporary systems in Europe. The differences that separated English and Basotho law in the middle of the 19<sup>th</sup> century are obviously far different than those separating France, England, Portugal or Sweden in the 21<sup>st</sup> century. Further, the distortion to custom introduced by the process did not turn out to be great. In retrospect the report of the Special Commission still holds up as a generally fair description of Basotho law and custom.<sup>40</sup> What the English magistrates accomplished through direct interrogation and translation was a rather successful

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<sup>36</sup> "Combating Legal Ethnocentrism: Comparative Law Sets Boundaries," 31 *Ariz. State LJ* 737 (1999).

<sup>37</sup> "Critical Comparisons: Rethinking Comparative Law," 26 *Harv. Intern. LJ* 411, 416 (1985).

<sup>38</sup> *Ibid* 423.

<sup>39</sup> According to Ugo Mattei this problem is particularly widespread in the United States. "A preponderance of the scholarship published in this country by comparative lawyers is methodologically unaware; simply applying the same exercise (as we do internally) of comparing one United States jurisdiction to another to multinational jurisdictions." ["An Opportunity Not to be Missed," 46 *AJCL* 709, 717 (1998).

<sup>40</sup> According to Poulter, its accuracy can generally be relied upon and the replies to questions were « remarkably direct and straightforward. » *Family Law and Litigation in Basotho Society*, 13 (OUP 1976),

transfer of legal ideas. Here if I am not mistaken was a more successful meeting of the minds than postmodern critics generally think is possible.<sup>41</sup>

*Roma, Lesotho 1976*

*Prior to the publication of his seminal research on Sotho family law in 1976,<sup>42</sup> Sebastian Poulter was a senior lecturer who had lived and taught law for about five years as a senior lecturer at the University of Botswana Lesotho and Swaziland in Roma, Lesotho. During that period he observed and wrote extensively about the legal system. He devoted much thought to questions of legal methodology and wrote several articles on the subject.<sup>43</sup> He was a sensitive scholar/lawyer/anthropologist who was cognizant of his own legal culture and wary of projecting Western conceptions of law onto Sotho law and custom.<sup>44</sup> Nevertheless it is difficult to say that he was “deeply immersed” in Sesotho culture, since he did not live among the Basotho other than the Basotho students living at the university nor he did speak or read the Sesotho language. Nevertheless he was acutely conscious of this limitation and of the danger that certain subtleties might be lost in the translation and interpretation of the evidence. The painstaking preparation underlying his research is described at length in the book’s introduction.<sup>45</sup> According to this account, he first read all existing ethnographic and legal accounts of Sesotho law and society. Then he started to unearth and analyze a wealth of case materials, most notably cases decided by Lesotho customary courts of first instance which were taken on appeal to the Judicial Commissioner’s Court., Apparently no previous researcher had looked at these decisions. All in all he examined 346 judgments on family law matters decided by courts of all levels of the system and in all historical periods.*

*Next Poulter went beyond the existing literature and (previously unexamined) cases and added two new sources of his own invention. He assembled an expert panel of nine persons with judicial experience (four panelists were Basotho chiefs) and over a five day period he led the panel through discussions on disputed and unclear points of Sesotho law. Most of the questions to the panel were prepared in advance, but new questions emerged as the discussions continued. The sessions were taped and a written transcript was later*

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<sup>41</sup> See P. Legrand “European Legal Systems Are Not Converging” 45 ICLQ 52 (1996).

<sup>42</sup> *Family Law and Litigation in Basotho Society* (OUP 1976)

<sup>43</sup> See Poulter, « An Essay on African Customary Law Research Techniques : Some Experiences from Lesotho, » (1975) *Journal of Southern African Studies* 181.

<sup>44</sup> In his later career at the University of Southampton, he went on to become the leading expert on ethnic diversity in contemporary Britain. His works included *English Law and Ethnic Minority Customs* (1986), *Asian Traditions and English Law* (1990) and shortly before his death, *Ethnicity, Law and Human Rights: The English Experience* (1998).

<sup>45</sup> *Supra*, pp 6-17.

*produced. Poulter saw the panel as serving many purposes-- to test and verify the legal rules that came to him from other sources, to discover additional rules not previously noticed or described, to understand how far actual practice (the law in action) differed from stated legal norms<sup>46</sup>, and finally "to reduce the ethnocentricity likely to appear in my expatriate's account." The last source of his study, which again attempted to reach the law in action in the contemporary society, was to conduct a social survey in which 162 women in two village communities were interviewed regarding contemporary practice and attitudes toward to elopement, polygamy, widow's rights to land, remarriage and child-bearing.*

*Poulter went further than any other investigator of Sotho law and custom had gone before and the results were impressive. His methods yielded a far richer account because he asked more detailed, circumstantial questions and he marshalled both unofficial and personal sources as a crosscheck against existing accounts. He did not discard divergent accounts and discordant opinions. His findings indicated that oftentimes several "versions" of the legal rules exist within society at one time. Every version is entitled to at least some weight, for even the most dominant views were changing over time. Thus he attempted to reconstruct all versions of the rules for every period from 1850 down to 1976 and to compare and contrast them with the case records and the panel discussions so as to present what he called "the historical development of Sesotho law." Only in this way, he maintained, "can the reader ... evaluate the respective weight of one propounded legal rule against another. This, in my opinion, has been one of the fundamental weaknesses of some previous studies of African law."<sup>47</sup>*

How does any lawyer ever gain unbiased, objective knowledge of what he/she calls "the law"? When comparative law research is reproached for bias, for failure to distance and differentiate the home law from the foreign law, or for its nonchalant approach to method, could it not be said that these reproaches apply equally —indeed *a fortiori*—to the work of domestic lawyers and jurists who work within the only system they know? After all, the typical municipal jurist makes no methodical attempt to avoid the dangers of ethnocentricity, legal formalism or his/her own cultural bias. By a curious lapse, even the most exigent comparatist may be methodologically "off duty" when teaching a domestic

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<sup>46</sup> With the help of the panels he discerned differences between the propositions originally stated in the old Laws of Lerotholi (as interpreted by courts) and the written and oral information that he was now collecting. A very interesting discrepancy which illustrated the incompleteness of the Laws of Lerotholi involved the custom called *kenelo*, the Sesotho version of the levirate. See supra pp 259-265

<sup>47</sup> Supra, p14.



subject. Put another way, if the post-modernist critique of *droit comparé* is well taken, then the same critique should generally extend to all teaching and scholarship that takes place within a national or state system. That critique, however, never seems to be directed internally, perhaps because the wider argument for comparative law is not really appreciated: namely, that all lawyers need some means of freeing themselves from the limitations and distortions of their own legal culture.<sup>48</sup> It is still commonplace for municipal lawyers to teach, study and write about their own law without applying any method of distancing themselves from their natural ethnocentric, political and cultural biases. So far, the post modernist critique is reserved for those who compare laws. Others are spared presumably because their condition is considered endemic and unchangeable.

The encounter between the British magistrates and the Basotho chiefs in 1872 marked the beginning of the mixed (and plural) legal system of modern Lesotho. In the first days of the Crown colony the three legal streams—English law, Sotho law and Roman-Dutch law-- flowed in separate channels in lawyers' minds and hardly interacted. A century and a half of coexistence, however, have mixed and mingled the streams. There has developed a single mixed legal culture<sup>49</sup> in which jurists pass more freely from one law to the other, negotiating the passages between common law, civil law and custom without sensing a disturbing change of "mentalité" or needing to consult unfamiliar legal terms in a dictionary. Sesotho judges and lawyers are familiar with the three branches of their system. They would be amused, if not a trifle exasperated by the suggestion that these branches are incommensurable and cannot be fully grasped. The Sesotho lawyer, like any other mixed-jurisdiction jurist, has lived through, reconciled and internalized differences that some critics think are irreconcilable. This is not to say that the Dutch and English segments of his law would be understood or applied as they were originally understood in England or Holland.

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<sup>48</sup> The point is stressed by James Gordley who argues that the law of a single country cannot be studied independently of the law of others. See « Comparative Legal Research : Its Function in the Development of Harmonized Law, » 43 AJCL 555 (1995) ; « Is Comparative Law a Distinct Discipline ? » 46 AJCL 607, 611 (1998). This view is sound and I am tempted to add that domestic lawyers whose teaching and writing embraces such movements as law and economics, sociological jurisprudence, law and philosophy, and critical legal studies are also seeking some distancing from the prevailing bias and inaccuracy of a purely dogmatic domestic account. This is not to say, however, that every movement provides an effective corrective. Critical Legal Studies scholars tell us that traditional jurisprudence ignores reality and perpetuates myths about its own objectivity and neutrality, yet these claims, as Laura Nader notes, are made mainly by lawyers based in the U.S. who mainly write about their own law and show no interest in comparative law, legal anthropology or comparative cultures. See Laura Nader, *The Life of the Law : Anthropological Projects*, 104 (Univ. Calif. Press 2002).

<sup>49</sup> For bibliography and a short description of the system, See *Vernon Valentine Palmer, Mixed Jurisdictions Worldwide: The Third Legal Family* 479-480 (Cambridge Univ. Press 2001)

These transplants almost always undergo some modification and reform not only at an unconscious epistemological level (wherein borrowed rules receive a distinct local interpretation or “translation” by the local culture); there is often a conscious revision of the transplant to conform to an analogous or cognate legal idea already present in the system . The process is neither new nor abnormal in many mixed systems. It is actually a kind of creative convergence--the construction of autonomous law out of borrowed elements.<sup>50</sup>

Trento, Italy 2003

*One of the first studies to emerge under the banner of the Common Core Project in Trento, Italy is entitled “Pure Economic Loss in Europe”.<sup>51</sup> The research was undertaken in 1996 by an international team of 20 scholars. The study was coordinated and edited by Palmer and Bussani and examined the subject from the standpoint of 13 systems within the European Union. Generally the individual rapporteurs were nationals of the country they reported upon and were specialists in the field of torts. They were in most cases comparative lawyers or at least familiar with other systems and well aware of the pitfalls of ethnocentricity. In two instances the rapporteur was not a native of the country in question but was a comparatist who specialized in that country’s laws. English served as the common language of the study and each contributor was expected to submit a report at a publishable level, though in some cases this required review and rewriting by a native speaker.*

*In initial meetings at Trento, the entire team acted as a committee of the whole to draft and devise a series of twenty factual hypotheticals which became the basis of a Questionnaire. These specific cases explored diverse angles of pure economic loss, but neither the words “pure economic loss” nor any equivalent term was ever employed in the hypotheticals. This is in accordance with the Schlesinger/Cornell factual method which attempts to gather comparable answers to identical questions by developing, as far as possible, neutral, culture-free cases that allow an opportunity for each rapporteur to frame the solution in*

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<sup>50</sup> On the question whether mixed jurisdictions are capable of producing sui generis norms through the remodeling of disparate legal elements, see Palmer, *Mixed Jurisdictions Worldwide*, supra at pp59-62. For the view that nothing new is ever produced, see Kenneth Reid, « The Idea of Mixed Legal Systems » 78 Tul. L. Rev. 5, 24-27 (2003) .

<sup>51</sup> Mauro Bussani and Vernon Valentine Palmer (eds) *Pure Economic Loss in Europe* (Cambridge 2003). Mauro Bussani and Ugo Mattei are the general editors of the Common Core Project. For reviews of the above book, on pure economic loss, see Yves Chartier, I-2004 Rev. Intern. Dr. Comp. 224 and Jane Stapleton, \_\_ L. Q. Rev \_\_. (July 2004).

*terms of his/her national legal system.<sup>52</sup> The first hypothetical in the series can serve as a typical illustration:*

**Case 1**

“While maneuvering his mechanical excavator, an employee of the Acme Road Works cuts the cable belonging to the public utility which delivers electricity to Beta Factory. The unexpected black-out causes damage to machinery and the loss of two days production. Beta Factory’s owner claims compensation from the excavator (Acme) not only for the damage to his machinery but also for the damage caused by the loss of production.”

*This fact complex sometimes goes by the name of a “cable case” for jurists from the United Kingdom and other common law jurisdictions, but in many European countries it may come across simply as a neutral question without special importance or resonance. As the Trento team knew from the beginning, some countries do not acknowledge or “know” the problem of pure economic loss in tort and if the question had been posed by that name the answer would have been, in some cases, “nothing to report.” France and Belgium for example fit into this category. There is no recognized autonomous subject, no specialized literature and no taxonomy of pure economic loss cases. Yet France and Belgium do have a solution for the above hypothetical (indeed the solution is for Beta Factory to recover its loss of production) and that solution can then be compared to solutions reached by jurisdictions which have either specialized rules or categorical treatment (such as German, Scandinavian and English systems) and therefore have “something” to report. The significant merit of the factual approach is that it eliminates, or at least reduces, the distortion which occurs when the normative terminology of one system is allowed to take over the framework of the enquiry.<sup>53</sup> Instead of theory determining data, the Trento permits data to be extracted with minimal interference from preconceived theory. Of course, it still may be said that in the selection of the facts, that is, in the selection of the problem itself, normative assumptions are inevitably made. Indeed it can be claimed that the legal representation of fact is normative from the*

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<sup>52</sup> The Trento method relies heavily upon the research techniques developed by Rudolf Schlesinger, (ed) *The Formation of Contracts* (1968) and Rodolfo Sacco, « Legal Formants: A Dynamic Approach to Comparative Law » (Installments I and II) 39 *Am. J. Comp. Law* 1, 349 (1991). For an appraisal of this method, see Xavier Blanc-Jouvan, « Reflections on ‘The Common Core of European Private Law’ Project, » 1 *Global Jurists Frontiers* (2001) available at

<sup>53</sup> Janet Ainsworth writes that the use of Western legal terminology obscures the normative framework that is presupposed within that legal vocabulary. « The very concepts and categories with which the scholar organizes this purportedly universal legal framework are freighted with culturally contingent normative baggage. » *Categories and Culture*, *supra* at pp 30-31.

start.<sup>54</sup> Yet the Trento team did not assume that if “cable cases” are problematical for some jurisdictions, then they **must** pose a problem for others. The research simply wished to uncover what occurs and did not prescribe what should occur in these situations.

Beyond the factual nature of the method, which allows each system to express its own dogmatic individuality, another important advantage appeared. The method sought to uncover the complex tensions and interplay between various legal formants that may exist within the national rules.<sup>55</sup> To harvest as many of these as possible the rapporteurs were instructed to give three-level responses so that formants of various kinds perhaps hidden within the system could be elucidated. These three levels were called Operative Rules, Descriptive Formants, and Metalegal Formants. We can summarize the meaning of these terms as follows.

“Operative Rules” would describe how judges have decided the cable case, the position of doctrine on the recoverability of the type of damage sustained in the hypothetical, and whether doctrine is divided; concordant or discordant with judicial positions; and whether the various solutions are recent achievements or were identical in the past (the diachronic point of view). “Descriptive Formants” asks for the reasons which autochthonous lawyers give in support of the “Operative Rules” and the extent to which various solutions are consistent with legislative provisions and general principles. It also asks how the solution is dogmatically reasoned; and whether the solution depends on legal rules and/or institutions outside the private law; such as procedural rules; administrative or constitutional provisions. “Metalegal Formants” refer to broader elements affecting the solution such as policy considerations, philosophical premises, economic and social factors, social values and the structure of legal institutions.

From a methodological point of view, this type of research led to three different products. The first product was a “functional juxtaposition” of comparable solutions. The common problem elicits all the rules and principles that produce the solution, and therefore one country’s positive solution is the functional equivalent of another’s solution, even if the doctrines and tools in two answers of this kind are not mutually coherent. The juxtaposition of thirteen national solutions is of course the prelude to comparison and synthesis, but keeping these responses distinct from the comparative segment has an independent value of its own. Since each answer is self-contained and (hopefully)

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<sup>54</sup> Clifford Geertz, « Local Knowledge : Fact and Law in Comparative Perspective », in Local Knowledge (Basic Books 198 ?) at p. 174.

<sup>55</sup> See Rodolfo Sacco, « Legal Formants : A Dynamic Approach to Comparative Law » 39 Am. J. Comp. Law 1, and 343 ( 1991).

*fully demonstrated, it permits the reader to see the comparative evidence for him/herself and places the reader in a position to manipulate the various pieces of research to fit whatever individual purposes he or she may have. This combines simultaneously the benefits which a method of juxtaposition and functional analysis could offer. Rather than having evidence summarily treated or subsumed in the comparative part, and rather than being able to follow only those comparisons which the editors might think important to make (which is the second product of the research) the individual reader may create any number of new combinations and reach additional or different conclusions as to the meaning of the comparative evidence. It is also interesting that the Comparative Remarks of the editors indicate that a variety of techniques emerge out of such evidence. Some comparisons seem functional (for instance that some contract doctrines in Portugal are asked to function like tort doctrines function in France), others historical ( diachronic trends for individual countries are noted and a chapter by Gordley was devoted to history) and others indicate the existence of transnational concepts (the search for the common core). Further, since the responses are at one level in full dogmatic dress and then at another level delving into 'metalegal' explanations, it is clear that the method was designed to go well beyond a functional approach, although some observers attach that label alone.<sup>56</sup>*

*The third product of this research was the three-level arrangement of the responses. By far the most ambitious and potentially the most enlightening part of this arrangement is the third level. As mentioned earlier, reporters were asked to explain, in some deeper way, how or why the particular reasoning, rules, cases, and doctrines operated as they did to solve the problem. This "metalegal" explanation could range into philosophical, economic, historical, anthropological, sociological or cultural perspectives on the problem. The reporter was not asked to derive that explanation by making a comparative assessment with other systems, which orthodoxy teaches is the normal basis of the explanatory phase in comparative law research. Instead the reporter was asked for an internal perspective into the home system. Of course this response could then become comparative data to inform and enrich the assessment that an outsider-comparatist might offer for the same legal phenomena, but in calling upon the reporter for "the native point of view" this method held out the hope of coming closer to what Geertz claims our discipline should be attempting to do: "to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another."<sup>57</sup>*

<sup>56</sup> As Grazadei does. See infra note 75,

<sup>57</sup> Supra note 3.

*By July 2001 the country reports were completed in draft form. It had taken five years and consumed considerable sums of money, energy and patience. Because of the need for editing, synthesis and eventually updating, another two years elapsed before publication was possible. The breadth and depth of the investigation, the annual meetings of the participants (the editors met and conferred more frequently), and the final synthesis of the results into comparative perspective all contributed to the glacial pace of the work. It is hardly doubtful that this method produced deeper insights and valuable new knowledge about this subject and its relation to the liability regimes of Europe. It is fair to say that no single researcher could have investigated so many systems in their various languages and legal cultures, nor maintained the same levels of expertise and objectivity as did the twenty two individuals who worked on the project. The research treated the small jurisdictions of Europe as on a par with the large countries and thus brought to light legal data usually never researched by western comparatists. Of course the real "value added" of this approach-- its capacity to describe the "law in action" ---would depend upon the rapporteurs' exacting execution of the three-level response, which, it must be acknowledged, was not always accomplished in a consistent manner. One disappointing aspect, and the present writer speaks only for himself, was the failure of the team to fully exploit the promise of the method at the third level. This is understandable since such research is unfamiliar, and difficult, and often presupposes interdisciplinary information which is not easily or cheaply obtained. Unfortunately experience showed that even the most highly qualified reporters found it difficult to comply. Thus, whether the Trento/Cornell method is recommendable for all research purposes could be doubted.<sup>58</sup> It is an important addition to our fund of scientific knowledge and may be extremely valuable as the preliminary step toward large codification or harmonization projects, but it will be rare that other jurists would have such aims or find it appropriate to duplicate the method on such a scale.*

The attention to method by the Trento scholars stands in contrast to the longstanding neglect of the subject by mainstream comparative lawyers. Ironically enough, this neglect was already evident in the views of HC Gutteridge when he opined more than fifty years ago that comparative law is just a method and nothing more.<sup>59</sup> The intriguing thing about Gutteridge's statement, however,

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<sup>58</sup> Similar criticisms were made of Schlesinger's *Formation of Contracts* project which required ten years and considerable sums to complete. See A.A. Ehrenzweig's review in 56 Calif. L. Rev. 1515 (1968) and J.A. Weir's review in 27 Cambridge L.J. 124 (1969). Still Weir concluded that « the grandeur of the result justifies an effort of such magnitude. »

<sup>59</sup> Gutteridge maintained that comparative law could not be regarded as a distinct subject matter since the fruits of the enterprise-- the comparisons themselves-- are not positive law and do not have the force of law in any country. "If by 'law' we mean a body of rules; it is obvious that there can be no such thing as 'comparative' law." HC Gutteridge *Comparative Law 1* (Cambridge,

is that he then proceeded to tell us nothing about the method-- what it is, how it operates, whether there is one or many, what it yields and so forth. His omission suggests that there is but one method of comparing and the technique is just a matter of common sense.<sup>60</sup> But there is no need to single out Gutteridge. The same omission is found in most treatises and casebooks on comparative law.<sup>61</sup>

One still hears echos of Gutteridge's view,<sup>62</sup> but one also hears that comparative law is something else besides. It is a distinct subject matter—the subject of compared legal phenomena.<sup>63</sup> The material of this body of knowledge consists in the comparisons themselves and the insights they yield.<sup>64</sup> The old debate whether the field had any particular vocation or was just a Cinderella subject is no longer seriously discussed. Given the impressive uses of comparative law in the last century in national recodifications, international conventions and European integration, utility is no longer open to doubt. Today comparative law is feared as being too useful. In some quarters it is regarded as a discipline which masks political decisions, a biased science at the service of governments and scholars. Ward for instance complains that comparative law is used within Europe “as a means of effecting sameness and suppressing difference.” Comparative lawyers are not “neutral observers” but “powerful players.”<sup>65</sup> Thus relevance and utility, far from being doubted, are increasingly

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reprint 1971) Cf. Frederick Pollock's statement at the International Congress of Comparative Law : “Le droit compare n'est pas une science propre, mais qu'il n'est que l'introduction de la méthode comparée dans le droit.” *Procès- Verbaux des Séances et Documents* (Paris 1905) I, 60.

<sup>60</sup> Hiram Chodosh also regards Gutteridge's lapse as paradoxical. *Supra* p. 1044.

<sup>61</sup> Chodosh says of the leading casebook by Rudolf Schlesinger, et al, *Comparative Law* (6th ed. 1998) « ...The method of comparison is nowhere described and methodological questions are left largely unexplored. » Similar remarks are made in relation to Merryman's *Civil Law Tradition*, David and Brierley's *Les Grands Syustemes de Droit Contemporains*, Cappelletti's *The Judicial Process in Comparative Perspective*, and Damaska's *The Faces of Justice and State Authority*. Chodosh, *supra* pp 1044-46. The subject is also largely omitted in Von Mehren and Gordley's *The Civil Law System : An Introduction to the Comparative Study of Law* (2<sup>nd</sup> ed. 1977) and Jacques Legrand's, *Le Droit Comparé* (PUF 1999).

<sup>62</sup> J. Kozyris, “*Comparative Law for the Twenty-First Century: New Horizons and New Technologies*,” 69 *TLR* 165, 166 (1994).

<sup>63</sup> Jerome Hall writes, « The gist of this theory is that comparative law is a type of knowledge, a social science. » In France the theory was formulated by Saleilles, Lambert, and Lévy-Ullmann ; in Germany the work of Kohler, Rabel, and others is closely related. *Comparative Law and Social Theory*, 10 (LSU Press 1963).

<sup>64</sup> Rodolfo Sacco, “*Legal Formants: A Dynamic Approach to Comparative Law (I)*,” (1991) 39 *AJCL* 1. One of the articles of the manifesto of il circolo di Trento declares “Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks such as the development of law or interpretation are worthy of the greatest consideration but are necessarily only secondary aims of comparative law. *Ibid* p4.

<sup>65</sup> I. Ward, “*The Limits of Comparativism: Lessons From UK-EC Integration*” (1995) 2 *MJ* 23.

deplored. And to spare *ad hominen* attacks, much of the malaise is refocused on research methods rather than the political objectives of the comparatist.

The methods of comparative law have developed over time. We had for a time only comparison of legislative texts (*législation comparée*) but little or none of jurisprudence or of doctrine. It is conventional to say this type of comparative law is outgrown<sup>66</sup> but in fact it still has important uses, at least in legislative reform, code revision and legal advocacy.<sup>67</sup> Ernst Rabel's famous injunction "Comparative Law, not Comparative Legislation" was in essence a call for research beyond black letter sources. "It is insufficient," he said, "to compare code sections. We must consider the practice of legal transactions especially type-forms and the practice of courts. A code without its accompanying cases is but a skeleton without muscles. Prevailing doctrines are the nerves .... By the entire law we must regard the whole "law in discourse," the "law in action" including law teaching, the position of the profession, ethical standard, public attitudes to law – in short—"the spirit of each legal system must be made living."<sup>68</sup> The distinction drawn between the law on the books and the law in action was owed principally to the Austro-Hungarian scholar, Eugen Erlich, who has been called the founder of the sociology of law.<sup>69</sup> Roscoe Pound's essay on "Law in Books and Law in Action" immediately followed Erlich's work<sup>70</sup> and Max Weber stressed that formal law is often modified or subverted at the level of application.<sup>71</sup> It has become part of the common ground between mainstream comparative law and the field of sociology of law, yet because of its vagueness, it is an inexhaustible

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<sup>66</sup> Roscoe Pound, "Comparative Law in Time and Space," 4 *AJCL* 70, 77 (1955)

<sup>67</sup> The technique of taking a "tour de horizon" of foreign legislation in search of stimulating options and better formulated ideas is still a useful tool in legislative reform and revision. As to its effectiveness in legal advocacy, see *supra* note 11. On the usefulness of foreign decisions for domestic purposes as data points or to prove constitutional facts or to indicate systems with a comparative legal advantage, see David Fontana, « Refined Comparativism in Constitutional Law, » 49 *UCLA Law Rev.* 539 (2001).

<sup>68</sup> Quoted from Max Rheinstein, "Comparative Law and Conflict of Laws in Germany," 2 *U. Chi. L. Rev.* 232 (1934).

<sup>69</sup> The distinction appeared in his 1903 essay *Frei rechtsfindung und freie rechtswissenschaft*, which has been translated, with certain omissions, as « Judicial Freedom of Decision : Its Principles and Objects », in *Science of Legal Method : Select Essays by Various Authors* (IX Modern Legal Philosophy Series) 47, 51-53, 63-71 (1917). *Fundamental Principles of the Sociology of Law* (Moll trans. Harvard Univ. Press 1936)

<sup>70</sup> 44 *Am.L. Rev.* 12 (1910). As an explanation for the growth of this concept in both Europe and the United States at approximately the same time, see Assaf Likhovski, « Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence, » *Theoretical Inquiries in Law*, Vol 4: 621.

<sup>71</sup> *Economy and Law (The Sociology of Law. » in M. Weber, Economy and Society : An Outline of Interpretive Sociology , vol II* (Roth and Wittich eds) (Bedminster Press (1968)



source of misgivings, leaving excellent scholarship open to the charge that it is superficial.<sup>72</sup>

Some writers argue that there is one method (or one *best* method) that our discipline ought to follow. Zweigert and Kötz maintain that the basic methodological principle is “functionality,” which uses problem solving to bridge the differences between common law and civil law.<sup>73</sup> This is actually a quite surprising assertion since one may often wish to explore things other than the function of legal rules and principles. One could want detailed knowledge of another’s laws simply to understand them, to preserve them, or to trace their evolution, as Sebastian Poulter attempted in Lesotho. It is sometimes important to compare and contrast sociological attitudes that underlie the law.<sup>74</sup> Historical comparisons illuminate the migration of legal ideas and the filial relationships between legal systems, as Watson has impressively demonstrated.<sup>75</sup> None of the cause/effect relationship between a transplant and its foreign antecedent, however, can be shown through functional analysis because functional relationships are not based on causality. Likewise the discovery of transnational rules or “common concepts,” which has been almost a slogan of professional comparative study since the 1900 Paris Congress,<sup>76</sup> will be difficult to discover through functional analysis. The searcher will look among competing models, balancing the advantages and disadvantages of each in the pursuit of optimal doctrines. While functionality is a factor, it is not even the main factor in the assessment.<sup>77</sup> Thus to

<sup>72</sup> See for example the criticisms of Luke Nottage, “Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law,” EUI Working Paper, No. 2001/01 in which the author takes to task Zimmermann and Whittaker’s recent work *Good Faith in European Contract Law* (Cambridge 2000) for rarely addressing the deeper sources of law, the metalegal formants; Bussani and Mattei are criticized for referring only to statutes, case law and academic writings and not exploring more broadly the “law in action”; and Van Gerven’s casebook project is reproached for focusing on blackletter law and ignoring a rich literature on the law in action.

<sup>73</sup> *Introduction to Comparative Law*, 34, 68 (OUP 3rd ed. 1998). “In law the only things which are comparable are those which fulfil the same function.”

<sup>74</sup> One instance is James Q. Whitman, « The Two Western Cultures of Privacy : Dignity versus Liberty » 113 Yale L. J. (April 2004).

<sup>75</sup> *Legal Transplants* (1<sup>st</sup> ed. Edinburgh 1974) (2<sup>nd</sup> ed. Ga. 1993); see also “Legal Transplants and European Private Law” in Jan Smits (ed) *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia 2001) at p 15.

<sup>76</sup> “To investigate into that common groundwork at once became the watchword of the Congress. The *droit commun*, defined in various ways as *droit commun* legislative, *droit commun* contemporain, *droit commun* civilisé etc, was generally talked about.” Henry Lévy-Ullmann, “The Teaching of Comparative Law: Its Various Objectives and Present Tendencies at the University of Paris,” *Jour. Soc. Publ Teachers L.* (1925), 19. See also, Jerome Hall, *Comparative Law and Social Theory*, Ch. 4 (“Conceptualism”) (LSU Press 1963).

<sup>77</sup> Gerrit De Geest, *supra* at 122,

assert that functionality is *the* basic method is an artificial restriction on the scope of discovery and privileges one type of comparison over all others.

Admittedly functional comparison is an important and useful means of seeing differences and similarities and indeed it has been called comparative law's principal gift to 20<sup>th</sup> century legal science.<sup>78</sup> Nevertheless it is rare to observe an author comparing exclusively on that basis.<sup>79</sup> The comparative work of Zweigert and Kötz is not only about function but also about the structure of concepts, their history, and philosophical underpinnings.<sup>80</sup> Indeed if we carved away all the non-functional comparisons from their analysis we might be faced with an impoverished account, which might cease to be the highly acclaimed work that it is. The same I believe holds true of the best comparative work over the past twenty years. Comparative work has seldom had a single focus and it is illusory to speak of *the* comparative method.

#### *Copenhagen 1974*

*It is said that the founding of the Lando Commission which produced the Principles of European Contract Law goes back to a dinner in the Tivoli Gardens when Dr. Winfried Hauschild, a highly placed European official, said to Ole Lando "We need a European Code of Obligations."<sup>81</sup> With the help of Dr. Hauschild and funding from the Directorate General of the European Communities, the Lando Commission began its work in 1982 and continued to*

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<sup>78</sup> Glendon, Osakwe and Gordon, *Comparative Legal Traditions* 11 (1994). According to Jean Gaudemet, the functional method has roots in a biological conception of law. Laws were seen as living organisms which could be considered from an anatomical and physiological point of view. Thus for Von Jhering, the purpose of an organism would be revealed in its function. See Jean Gaudemet, « Organicisme et evolution dans la conception de l'histoire du droit chez Jhering » in *Sociologie Historique du Droit*, 40-42 (PUF 2000). Another view holds that the method originated in the field of conflict of laws in response to characterization problems. See Michele Graziadei, *The functionalist heritage*, *infra* note 76, 103-106.

<sup>79</sup> According to Michele Graziadei, « ...it never represented the sole or even the dominant approach to comparative legal studies during the twentieth century. Nor is it the prevailing method today despite the fact that some initiatives, such as the research being conducted by a large number of scholars under the flag of the 'Common Core of European Private Law', have breathed new life into it. » See, « The functionalist heritage » p 100 in Legrand and Munday (eds), *Comparative Legal Studies : Traditions and Transitions* (Cambridge 2003).

<sup>80</sup> An important area where function seems to play almost no role is in the analysis of the « styles » of legal families. *Supra*, pp63-73.

<sup>81</sup> Quoted in Lando and Beale (eds) *Principles of European Contract Law*, p xi (Kluwer 2000).

1996. *The Commission consisted of around 20-25 members, drawn from across Europe. Most were leading academics familiar with the techniques of comparative law. In the belief that “the best uniform rules are made by lawyers who do not take instructions from any government and do not professionally belong to any specific interest group.”*<sup>82</sup> *the Commission was self-appointed and had no ties to the national governments.*

*The aim was to create the general part of the law of obligations. The visionary purpose is to lay a foundation for any European Code of contracts that might be adopted in the future, but there are some immediate, less controversial goals that may be accomplished as well. Parties living or carrying on business in different member States may expressly adopt the Principles as a set of neutral rules to govern their international contracts. Arbitrators and courts may look to the Principles when the parties have adopted the *lex mercatoria* or “general principles of law” to govern their contract. They could also serve as a model for judicial and legislative development and as a basis for harmonization. Thus even if never enacted into a European Code of contracts, the Principles may serve as a set of “recommendations” to contracting parties, courts and arbitrators and thus play a role analogous to that of the American Restatement (Second) on the Law of Contracts in the United States.*

*The framework of the work was vast, and the Lando Commission essentially had a legislative mission: to derive a single set of principles from as many as sixteen legal systems. There are detailed national bibliographies showing the doctrinal works that were consulted, long tables of cases indicating that the jurisprudence of each country was not neglected, and of course the statutes and codes of each country are fully set forth. In addition various European and international conventions and legislation such as the CISG (1980) and the EC Directive on Unfair Terms in Consumer Contracts (1993) were in some instances sources of its provisions. This list, however, would not be the entire data base of the study. There are invisible and undocumented sources in works of this nature. The Commission consisted of eminent academics, practitioners and comparativists who brought deep expertise and wide experience to the table. The Commissioners argued, compromised and voted on the modified proposals they eventually adopted. Much of their comparative-law thought process would be buried in the notes or transcripts of these meetings.*

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<sup>82</sup> Ole Lando, *Comparative Law and Lawmaking* 75 Tul. L. Rev. 1015, 1016 (2001).

*Yet for those who had supposed it necessary to see the law in each country “in vivo” before any comparisons or choices could be made, the Commission’s research, at least that part which is visible to the outside observer, could seem thin. The research Notes that follow each Article are only general descriptions. They often lump together rules in three or four countries. Positions taken by a majority and a minority of the countries are summarily described and distinguished. If the law is unsettled in one or two jurisdictions this too is noted. There is no effort to expose variations in the underlying rules themselves, nor an effort to make explicit comparisons between one country and another.*<sup>83</sup>

*Of course every provision adopted by the Commission represents a choice of a single rule from among the options presented by the systems, but neither the Comments nor the national notes reveal why any particular rule was selected. The Comments do explain and illustrate how the rule works, but not why it was drafted. Neither the Comments nor the notes furnish a guide to the policy considerations behind the choices. They are not in any sense the motifs of the drafters nor a set of comparative remarks suggesting which is “the better,” the more “functional” or the more “efficient” rule. That these comparisons are not shown, however, does not necessarily mean they were never discussed. As stated earlier, if one wanted normative explanations and/or explicit comparisons, it would be necessary to review the discussions and deliberations of the Commission. But since a record of these discussions was apparently never kept, the effect (from a nonparticipant’s perspective) is as if they never took place. This nontransparency is perhaps what misleads Gerrit De Geest into criticizing the Commission for lacking methodology with respect to finding and choosing doctrines. “In a sense,” he writes, “they have no methodology: they select on the basis of intuition and—sometimes—compromise (in trying to please the lawyers of all legal families).”<sup>84</sup>*

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<sup>83</sup> As a representative sample of the style, see the following Note appended to art. 2:205 on offer and acceptance:

The systems agree that an offer may be accepted by conduct. Under most systems the contract is concluded when a notice of the conduct reaches the offeror, see on ENGLISH law, Treitel, Contract 17 & 21; on the BW art. 3: 38 (1); for GERMANY, Erman-Hefermehl, s. 147. Rz 2’ for GREECE, Simantiras in ErmAK 189 nos. 2-5; see also CISG art. 18(2), UNIDROIT art 2.6 (2). The same rule applies in IRISH LAW, see *Package Investments v. Shandon Park Mills*, unreported High Court decision of 2 May 1991, 52, However, in SCOTLAND the offeror must know of and consent to the acceptance by conduct, see McBryde, Contract 75-77.

In FRANCE the courts oscillate between the moment the act is performed and the moment notice of the performance reaches the offeror, see Terré., Simler & Lequette no 117. The laws of SPAIN, BELGIUM, and LUXEMBOURG also seem to be unsettled on that point. »

<sup>84</sup> « Comparative Law and Economics and the Design of Optimal Legal Doctrines », in *Law and Economics in Civil Law Countries* Vol. 6 (B. Deffains, T. Kirat eds.) (JAI 2001)

*It is also apparent that The Principles draw no attention to the changes the provisions would bring to the national laws they are designed to replace. A reader familiar with his/her own national system will of course be able to make certain discoveries<sup>85</sup> but to understand how much each law contributed or how far each would be affected is nearly impossible. Of course reasons of space are usually offered as the diplomatic or polite explanation for this absence of explanation, but there are political considerations in raising such issues. Perhaps legal patriotism was not a serious problem among Commission members themselves, but to flag these matters in the Comments and Notes certainly could be an obstacle to the future acceptance of the Principles and it may have been thought politically unwise to do so. Thus, even when veritable icons of contract law like *causa* and *consideration* are jettisoned, or the civilian principle of good faith is generalized to an extent unknown in some systems, or freedom of form wins out over the writing requirements in the national law, the Principles are silent as to the origins and consequences of these changes.*

In reflecting on the work of the Commission, we can observe three broad variables that legitimately affect the shape of comparative law methodology. One is the researcher's concept of a legal source and how far non-official sources (those lying beyond statutes, scholarly writings and judicial decisions) will be pursued. Will he investigate what practitioners are actually doing with the legal rules? Will he examine standard forms, conduct surveys, hold interviews, collect data from newspapers, issue questionnaires, gather oral history, penetrate within agencies to see for himself? How far will she go to establish "the law" in action as opposed to the law on the books? Each legal system may prescribe its list of official sources of law,<sup>86</sup> but this list, which is only designed to internally bind judges and courts, does not necessarily bind a comparatist, particularly not an academic comparatist. Since there are theoretically no stopping points to the pursuit of information about legal rules, only the practical constraints imposed by a sense of relevance, available time, and limited resources apply. Based on the written record, the Lando Commission stayed close to the official sources of law and did not probe far below the level of treatise writers. We should remember that such conservatism is not necessarily due to methodological unawareness nor is it necessarily a matter of free choice. The benefits of going deeper were perhaps slight compared to the time and expense involved in so doing. Omniscience is an

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<sup>85</sup> See for instance G. Alpa, "The 'Principles of European Contract Law' and the Italian Civil Code: Some Preliminary Remarks," 14 Tul. Euro. and Civ. Law Forum 1 (2001)

<sup>86</sup> As when Art. 1 of the Louisiana Civil Code declares quite dogmatically « The sources of law are legislation and custom. »

excellent end but it is not invariably appropriate and cannot be the everyday standard of comparative law.

The second variable illustrated by the work of the Commission is the limits imposed by the particular aims and ends of the researcher, as well as the particular audience he is attempting to convince. The fitness of method follows from the choice of goal. Generally speaking there are three main user groups: the scholars or academic comparatists, the legislative or reform comparatists, and the law-applying comparatists. No single method or set of procedures is workable for all three since each has a distinguishable goal. For instance the Lando Commission, which might be regarded a kind of law-reform body constructing soft law at a European level, obviously cannot use the same method that a legal historian would use to discover where his country's contract rules originated. The historian wishes to discover an historical truth and has no political aim or legislative agenda. Unlike a commission constituted to make choices, the historian tracing the filiation of laws does not in any proper sense "choose" solutions. S/he cannot "will" the outcome of a search into the past. Further, to make her discovery known and convincing, she will set forth the chain of evidence and never hide it. The Lando Commission has no similar aim nor similar constraints. It compares in order to pick and choose one rule over another, or perhaps to splice together a new rule from two or three others, or even to reject all existing rules and devise an original solution. It will inevitably discard what it cannot use. The acid test of adoption is whether the rule satisfies a majority of the members on the Commission. And there may be minimal transparency. The bulk of the comparative thought process is concealed in discussion, deliberation and side writings.

The final variable to be mentioned is that the depth and scope of research will be determined by cost/benefit considerations. Even the capacity, credentials, and quality of the researchers are subject to these constraints. Rouland refers to the inbuilt parameters of research, which include language, the limiting factor of time, and the choice of informants. Marc Ancel refers to the problem of means in terms of time, materials, documentation, the possibility of collaboration.<sup>87</sup> This variable may not produce any method of its own, but certainly it influences the choice between methods. Just as it is clear that juxtaposition is less labor intensive method than a system of explicit comparisons and in a crude sense is "cheaper", so it can be said that projects restricted to textual comparisons or a comparison of leading treatises present the advantage of speed and efficiency. If it is fairly infrequent to encounter legal research pursued to the deepest levels, the

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<sup>87</sup> "Les Buts Actuels de la Recherche Comparative », in *Mélanges de Droit Comparéen l'Honneur du Doyen Åke Malström* (Stockholm 1972) at p 6.

reason is often fairly clear: someone (the client, the employer, the judge or the researcher himself) is refusing to pay for the added information cost. Perhaps there are times when no more than a black-letter glance is cost-justified.

### *Conclusion*

In this Essay I have argued that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow. The tasks of teaching, research, of law reform, or historical investigation are too varied and contingent to be achieved by a single approach. It would be a serious blow if all matters had to be analysed from one angle or perspective, or treated with the same detail and depth, or prepared to the same degree or in the same way. I believe that there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs. We cannot say *a priori* that one method is always better than another until we know these variables. I have also attempted to show that prescriptions about method must carefully distinguish the principal user groups, for the complex methods of scholars may be unworkable in the practical world where comparisons must be cost-justified. The message from Mount Olympus must not be that comparative law is always forbidding and difficult. It must be accessible and its methods must be flexible.