

# COMPARATIVE LAW AS A COMPREHENSIVE APPROACH: A EUROPEAN TRIBUTE TO PROFESSOR JACK A. HILLER\*

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## I. Introduction

An aura of "malaise" hangs over the field of Comparative Law<sup>1</sup>- sometimes alluded to as the "drama" of Comparative Law<sup>2</sup> (private and public).<sup>3</sup> Indeed, the comparative scholar is often asked whether his work has any practical importance.<sup>4</sup> This is the question he fears most. A German legal philosopher once criticized the whole approach as follows: "Nobody asks what comparative law is and how it should be pursued. Thus, it is less to build a new structure from the laws compared, but to leave an accumulation of raw bricks in a heap that will never be used."<sup>5</sup> Still today it is unclear what method to follow, and whether a method is necessary at all.<sup>6</sup> Thus, Comparative Law remains to be plagued by the lack of deeper discussions on the notions of "law" and "comparison".<sup>7</sup> To speak of it in terms of practical values might "verge

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<sup>1</sup> See generally Bogumila Puchalska-Tych & Michael Salter, *Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis*, 16 *LEGAL STUD.* 157 (1996).

<sup>2</sup> See generally Frances Olsen, *The Drama of Comparative Law*, 2 *UTAH L. R.* 267 (1997).

<sup>3</sup> See Edward J. Eberle, *Comparative Public Law: A Time That Has Arrived*, in *FESTSCHRIFT GROSSFELD* 175 (1999). See generally James D. Bryce & Bernhard Grossfeld, *A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States*, 2 *AM. J. TAX POLICY* 211 (1983).

<sup>4</sup> See generally BERNHARD GROSSFELD, *STRENGTH AND WEAKNESS OF COMPARATIVE LAW* (Tony Weir trans., Clarendon Press 1990) (1990); BASIL S. MARKESINIS, *FOREIGN LAW AND METHODOLOGY: A SUBJECT AND A THESIS* (1997).

<sup>5</sup> JULIUS BINDER, *PHILOSOPHIE DES RECHTS* 948 (1925).

<sup>6</sup> See Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 *INT'L & COMP. L.J.* 817, 826 (1998).

<sup>7</sup> See Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUDIES* 232, 238 (1996).

on the ridiculous.”<sup>8</sup>

But the questions start already on a more basic level: What does “practice” mean in law as opposed to “theory”? Can practice and theory be separated? After all, concepts of order “live” in the human minds - how then do you distinguish practice and theory? But probably the question has a narrower focus: how important is Comparative Law for legislators, for courts, for attorneys, and for students? I will try to answer the question from a European point of view,<sup>9</sup> from a Europe of which Germany forms a “region.”<sup>10</sup>

This sequence from Europe to Germany seems to be proper today because of the new elan that the European Union brought onto the old Continent. I give the keywords: Rediscovery of common European traditions, meeting of talents in the European institutions, growing European legislation, freedom of establishment for lawyers, tax counselors, and accountants. These ideas blow across Europe like spring storms, changing the European views of the world. Europe has to redefine its legal culture, has to cope with global forces that may shatter old assumptions. To meet this challenge Comparative Law might offer itself as an instrument to better understand the past and to find the future.<sup>11</sup> But is this hope justified?

## II. Europe

### 1. Legislation, Courts

There is no doubt that Comparative Law is very, very practical here. It “analyzes the other”<sup>12</sup> by bringing in foreign ideas of how things can be done, and lets us share foreign experiences. It shows us the background from which our European partners operate, and into which we speak when addressing them. We become aware of what we had almost forgotten in our national enclaves. We only understand each other when we first have a general feeling for our partners’ geographical

<sup>8</sup> See Rudolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1, 2 (1998).

<sup>9</sup> The American view may be different. See generally Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 Am. J. Comp. L. 637 (1998).

<sup>10</sup> See generally Bernhard Grossfeld, *Basic Problems of Comparative Law*, 39 TYDSKIRF VIR DIE SUIDAFRIKAANSE REG/J. OF SOUTH AFRICAN L. 192 (1987).

<sup>11</sup> See generally Abbo Junker, *Comparative Law as a Core Subject*, J. OF SOUTH AFRICAN L. 682 (1994).

<sup>12</sup> Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 Am. J. Comp. L. 657, 657 (1998).

and cultural environment, when we share basic experiences.

This is particularly necessary, when European partners cooperate in order to set up common rules, e.g., European statutes, be it regulations or directives (e.g., arts. 189, 235 of the Treaty establishing the European Community ("EC Treaty")<sup>13</sup>), or judicial decisions. It is a matter of high concern in the European Council, in the European Commission, and above all, in the European Court of Justice. The Court could only achieve and preserve its high reputation because it was able to evoke common European concepts, common cultural denominators and deep European pictures mostly found through comparative work. The intensity of the work does not even appear in printed materials; it is largely achieved through informal discussions among the justices showing us again, that orality is an indispensable factor in Comparative Law, where alphabet - addicts soon come to their limits. This power of orality is far too often overlooked because it is not "visible," and because of the myth in modern Western laws that "quod non est in actis, non est in mundo" (translated to mean, "what is not written, does not exist").

There is strong pressure on the Court to proceed in this culturally sensitive way according to the best jurisprudential traditions.<sup>14</sup> The Court depends, to a large extent, on the willingness of the national courts to cooperate, as most of the cases are referred to the Court by the national courts.<sup>15</sup> That is why the Court watches closely the statistic of references. If the Court loses in status, the national courts will find ways to dodge the Court notwithstanding any obligation to refer. The letter of the law ends where authority from outside the written words ends. This cooperative model explains the success of the European Court of Justice and the willingness of national courts to accept the rulings. Comparative law thus is the basis of the Court's European trustworthiness.

## 2. European Interpretation

Another serious matter for Comparative Law is the concept of European interpretation. The cornerstone is art. 5 of the EC Treaty, which imposes a duty of good faith and fairness on all Member States towards the European Union.<sup>16</sup> Consequently, all national law has to be

<sup>13</sup> See Treaty establishing the European Community, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty].

<sup>14</sup> See generally William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"*, 46 AM. J. COMP. L. 701 (1998).

<sup>15</sup> See EC TREATY art. 177.

<sup>16</sup> See EC TREATY art. 5.

interpreted in view of the European norms that might wear on it: European-minded interpretation is the rule of the day. This again brings in Comparative Law as an instrument to avoid divergences in the law of the Member States. It is indispensable to watch the developments in other Member States to arrive, at least, at homogenous solutions.

### III. Member States

#### 1. Insolvency

But even within the Member States' laws, Comparative Law plays a prominent role. A prime example is the new German Statute on Insolvency that came into force on January 1, 1999.<sup>17</sup> The statute follows American and English patterns concerning reorganizations, and relieves the "honest" debtor from his liabilities after seven years (discharge). This is a drastic change from the old traditions under which bankruptcy normally "killed" the debtor by exposing him to future persecutions for all his life (normally for thirty years).<sup>18</sup> Now, the "honest" debtor might expect a future without debt if he tries to do his best over seven years.<sup>19</sup> The starting point for this revolutionary approach can be pinpointed: it began with a Comparative Law dissertation at the university of Goettingen in 1977.<sup>20</sup>

#### 2. Conflict of Laws

Conflict of laws is another mighty engine for the promotion of Comparative Law. Cross-border activities are multiplying within the European Union, and the Euro gives a new push to it. Contracts, marriages, successions and assets move from one legal realm into the other, and we are then challenged to apply the living, foreign law for quite normal transactions. Only Comparative Law approaches can train us for the "art" to see the foreign as distant and different from us, but as familiar to the foreigner's point of view. Even then, we may run into sometimes-insurmountable hurdles, but we are at least better prepared to

<sup>17</sup> See 1994 Bundesgesetzblatt [BGBl] I 2866 [hereinafter InsO]. Germany voted in favor of the new Insolvency Act, the *Insolvenzordnung*, in 1994. See Klaus Kamlah, *The New German Insolvency Act: Insolvenzordnung*, 70 AM. BANKR. L.J. 417, 417-18 (1996).

<sup>18</sup> See 1935 RGBl 321, 356, as amended [hereinafter VerglO].

<sup>19</sup> See David A. Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1385-86 (1998).

<sup>20</sup> See generally ULRICH KRAMER, *DAS ANGLO-AMERIKANISCHE SONDERVERFAHREN ZUR REORGANISATION VON KAPITALGESELLSCHAFTEN NACH ABSEHNITT X DES BANKRUPTCY ACT 1977* (1977).



watch out for such hurdles - and better is better than *not* better. Comparative Law teaches us to reach beyond the poverty of writing, beyond the "exclusive" authority of paper, and to look for the pictures, models and allusions that give meaning to the letter of the law though this often scratches the limits of our abilities.

### 3. International Standards

But the needs for and the virtues of Comparative Law go far beyond that. Right now we are experiencing a revolution from the rules of accounting, i.e., the International Accounting Standards (IAS). In Germany, the new section 292a of the Commercial Code (the *Handelsgesetzbuch*, or "HGB") allows German holding companies largely to skip the German (European) rules for group accounts if their shares are traded on a foreign stock exchange.<sup>21</sup> Now, they are allowed to set up their balance sheets and their earnings - and loss accounts - under International Standards, be it the International Accounting Standards, as mentioned above, or the U.S. American Generally Accepted Accounting Principles (GAAP).<sup>22</sup> There are only some reservations with regard to the European principle of true and fair view (principle of truth). Thus, rules of accounting are opening up a new continent for Comparative Law: To handle the standards properly it is indispensable to know the cultural and technical background from where these standards come.<sup>23</sup>

Consequently, there has to be a constant dialog with other cultures and with the experts there; also, the ongoing developments abroad are closely to be watched. This does not end with law, however: Different economic situations might recommend a different solution under the true and fair view - concept. Comparative law comes back to its basic beginnings: First to talk with the other culture of how she sees the world — and then find out whether we can compare it or not.

### 4. Contracts in a Foreign Language<sup>24</sup>

Another impetus for Comparative Law stems from the fact that contracts are frequently written in English or American and,

<sup>21</sup> See *HANDELSGESETZBUCH* (Commercial Code) § 292a (also referred to as HGB).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57 (1998); Joseph Vining, *The Gift of Language*, 73 NOTRE DAME L. REV. 1581 (1998).

consequently, English or American law is often applicable. But even if German law prevails: What do the foreign terms mean in a German legal text? Or German terms in a foreign language sentence? To what extent can foreign notions, German sentence structures and unspoken underpinnings be reconciled with the foreign words, and how? Hermeneutics turn into lottery far beyond Heidegger's wildest expectations. The matter gets even worse with a quite different writing, be it Hebrew or Chinese. What hermeneutics - which always refer to a special writing - should be applied? Can German legal terms be brought into a reasonable relation with other semiotic systems? The comparativist shudders as he knows that there is no easy answer and probably even no answer at all - but without Comparative Law, we would not even realize that there is a problem, and then try to avoid or to minimize it. We see: Using foreign terms and trying to translate them cannot be done without Comparative Law. Equal or similar names are too often "faux amis."<sup>25</sup>

#### IV. A New Twist

Today we are using Comparative Law mainly as a tool of our curiosity, as an expression of our drive to learn about the world - not just about letters. But that is no longer sufficient. In a globalized world, it is important that others understand us. We have to expose ourselves to our partners in order to be accepted as trustworthy and nonexotic. Comparative Law thus becomes a bridge in two directions: from "them" to us, and from us to "them."

This is what International Accounting is all about. We have to ensure that our national corporations look as beautiful from the figures in their balance sheets as do their competitors from other countries - and that the German "Michel" looks as attractive as the French "Marianne" (remember Gottfried Keller's short story "Clothes Make People"). Only then can our national corporations have a chance to attract capital on international markets for comparably low prices. This is of overwhelming importance for their survival, since in the long run they cannot effectively compete against someone with lower costs for equity or debt (interests and compound interests are the strongest social forces we know of).

Even beyond that technical - though vital - point of view, it is of the utmost importance to clarify how the inner eyes of a foreign culture

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<sup>25</sup> See John H. Baker, *The Three Languages of the Common Law*, 43 MCGILL L. J. 5, 8-9 (1998).

look on us. We cannot learn this from written texts alone, as they might be colored by omissions (writing misses both overtones and undertones), tactics, flattery, prejudices, or even taboos. Only a face to face encounter with the foreign culture and a patient conversation on the basis of mutual respect can help us, since one does not learn about foreign law by studying its legal vocabulary.<sup>26</sup>

## V. European Identity

Within Europe, we are still rather naïve in our comparative law approaches, taking the letters of the foreign law largely as "the" law. This attitude flows from the feeling that there is a common understanding of ordering through law and from the idea that we share a common background of a "silent" cultural environment (which is largely true). We rely on a common European tradition that we take for granted. The rise of the European Union encouraged this belief in a common heritage. Indeed, we are astonished to see how structures in different Member States are much more intertwined with each other than we had ever realized in that we even share a similar history, e.g., Roman law, history of accounting.<sup>27</sup> We are learning a new a European identity in law that includes England.

By the same token, we realize why the exchange of legal views and of legal experiences withered away in modern times. A strong factor is the loss of orality, the loss of pictures, and most importantly, the invention of the printing press (around 1450 in Mainz, Germany).<sup>28</sup> The growing flood of letters washed away pictures, and it became an avalanche of gigantic proportions through Luther's Reformation (1517) with its "sola scriptura."<sup>29</sup>

This impact of writing on communication is particularly strong in connection with our alphabet. The Latin alphabet follows the spoken language (though differently in degrees, as seen in the German and English languages) and it cannot be understood without knowing the language. Thus, the petrifying effects of writing fixes and enlarges the language differences: Pidgin - European will not grow in an alphabetized environment, since the stabilizing power of writing

<sup>26</sup> See Samuel, *supra* note 6, at 826 (quoting D.R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 49 (1990)).

<sup>27</sup> See Bernhard Grossfeld, *Comparative Accounting*, 28 TEX. INT'L L.J. 233 (1993).

<sup>28</sup> See HAROLD INNIS, *THE BIAS OF COMMUNICATION* (1951).

<sup>29</sup> *Sola scriptura* literally means one script or the script by itself. In the context of the Lutheran Church, it refers to the study of Christianity by analyzing the scriptures themselves, and not referring to old traditions and scriptures, as does the Catholic Church. This is a fundamental teaching of Martin Luther.

impedes an "osmotic" mutual penetration. A law that pretends to exist exclusively in letters tends to be void of sensual over- and undertones (logic has no "senses") and thus restricts meetings of the minds as much as enabling them.<sup>30</sup>

## VI. United States of America<sup>31</sup>

### 1. England / America

But does the practical importance of Comparative Law reach beyond Europe - to the United States of America? I am choosing the United States as an example because some authors tend to localize Americans as quite close to Europe. However, this is a mistake. The error is induced by the term "Anglo-American law," which I never use.<sup>32</sup> In my view, English law is part of European law whereas American law has a status of itself. Certainly, there are connecting features like history, writing, and religion. But there are also strong differences in geography, size, climate and language - and they prevail over time as they form the strong local "currents" (order is first "local"). Another important difference between England and the United States is the length of time over which traditions (rituals) and feelings for order develop.

The misconceptions about the closeness of the United States to England partly explain why Europeans first run into so many problems. In addition, we first received an idealized "Readers Digest" marketing picture. Everything looked beautiful, well settled, harmonious, and just rich. The picture displayed more individual homes, more private cars, great schools, more and more and more. But this picture broke down on a second glance; America presented more of its real colors, but also awoke more sympathy and empathy.

### 2. Puzzles

There are a lot of puzzles left. The American jury is difficult to qualify: Does it find the law or does it apply the law? Is it the American law? Are the rhetoric, the body language, and the choice of jurors more important than the written texts we are referred to? What about the

<sup>30</sup> See Bernhard Grossfeld, *Language, Writing and Law*, 5 EUR. REV. 383 (1997).

<sup>31</sup> Cf. William Twining, *Civilians Don't Try: A Comment on Mirjan Damaška's "Rational and Irrational Proof Revisited,"* 5 CARDOZO J. INT'L & COMP. L. 69, 70-72 (1997).

<sup>32</sup> Cf. Paul D. Carrington, *Moths to Light: The Dubious Attraction of American Law*, in Festschrift Grossfeld 143 (1999).

"central staff" of the Appeal Courts? How are these staff judges appointed? Are the relation, the closeness, or the distance of the written texts to jurors and judges similar to the ones we are accustomed to? Is "hermeneutic" the same when the "distance" to the text is different? How real is "stare decisis" given the wide choices available and the American imagination with words? Is American law less restrained by traditions? Is "stare decisis" the same in England as in the United States? We are perplexed by "Clinton and Monica," confessions on the Internet, and an aborted impeachment. Is the U.S. Senate a "court" when being prosecutor and judge at the same time? We are at odds to catch the dynamics that occasionally come to surface in a society that is so different from ours in size, structure, history and power.

## VII. Asia / Japan

### 1. Exoticism

This feeling of foreignness, of otherness, is particularly strong when we go into Asia and, in particular, into Japan. For Europeans "Miss Saigon" often means "Asia," and Japan has been for a long time the exotic country par excellence. "Madame Butterfly" stands for this proposition. We meet an island culture isolated from contacts with foreigners for almost 300 years. We experience a population density beyond any European experience; we see a semiotic system that makes Europeans alphabet addicts. Together this creates a picture that is very hard to understand from the outside world: three writing styles and a tradition of group consciousness different from the European concept of the autonomous individual. Certainly, we know that the Japanese imported larger parts of the German civil law, but did this law based on the concept of equality find its roots into the Japanese soul and from there into the Japanese life? Does it motivate our Japanese partner from the inside of his heart or is it a kind of plastic material not smoothly fitting into a hierarchically structured world and not being felt as part of the natural environment? Grave doubts exist, as the concepts of Western law do not work,<sup>33</sup> at least as we see it. Are the Western names used to paint a Western law impression or do they express the reality of social relations?

### 2. Social Structure

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<sup>33</sup> See Janet E. Ainsworth, *A Tribute to Professor William C. Stones. On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 WASH. U. L.Q. 547, 548-49 (1996).

We hardly understand the Japanese social structure, as we are not accustomed to such closely interwoven networks with a lack of transparency because of the closeness, of the population density. We know practically nothing about informal social controls in a country in which our "at arm's length" approach cannot be the standard due to the lack of space. We know nothing about the effects of rituals, nor the impact of traditional roles, be they private or public. What about family registers scrupulously kept for hundreds of years? What experiences and pictures, which we do not share, prevail?

We are baffled by the fact that some young people from certain families, which we cannot identify as peculiar, do not have a chance to enter bourgeois professions or any decent professions at all. The choice left to them is to become "yazuka," to become members of a Mafia-like group that does not only "underground" but also "overground" work, sometimes with a Robin Hood type reputation. Members of Yazuka are active in gambling, prostitution, and extortion, but they also execute debts for creditors by blackmailing the tardy debtor or by molesting him with loudspeakers right in front of his house so that the neighbors hear what an irresponsible guy he is. As "sokay," they extort money from corporations in exchange for promising not to disturb the shareholder meetings, thus enabling management to get along with the proceedings as fast as possible (shareholder democracy?). Corporations are not allowed to succumb to those pressures, but such is life.

### 3. Chances

This does not mean, however, that Comparative Law has no place with regard to Japan.<sup>34</sup> From my own experience, law in Japan is contract law,<sup>35</sup> corporation law, rules of accounting,<sup>36</sup> administrative law,<sup>37</sup> the handling might be difficult for us to understand because of the lack of transparency. This is not the fault of the Japanese. The problem

<sup>34</sup> See generally Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639 (1997).

<sup>35</sup> See generally Veronica Taylor, *Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan*, 19 MELB. U. L. REV. 352 (1993).

<sup>36</sup> See Masaso Kishida, *Japanese Legal Accounting System*, in Festschrift Grossfeld 569 (1999). See also Joseph J. Norton, *Reform of State-Owned Enterprises in the People's Republic of China*, in Festschrift Grossfeld 809 (1999); Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A New Era of Law and Development*, in Festschrift Grossfeld 959 (1999).

<sup>37</sup> See Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT'L L.J. 396, 398 (1996).



is ours when we take a fundamentally Western environment for granted, however we define it (European or American?). It is also foolish to discuss informal or non-legal aspects of order only with respect to Japan and to overlook similar features in our own culture. Japan "is" tradition, but so "are" we. The same is true elsewhere. We find differences in degree but not to an extent that puts research into Japanese law outside the realm of Comparative Law - if it is more than just textism.<sup>38</sup> Not to see this is exactly the "malaise" with the present state of discussion, with the "comparative political correctness" which some regard as being "scientific."

### VIII. Language<sup>39</sup>

#### 1. Social Position

Due to the closeness of language to law<sup>40</sup> (sometimes overstated), we regard different languages as the strongest impediment for Comparative Law. Language certainly is a problem and it might be even greater than most of us expect it to be. When we meet non-Western cultures we often even do not know the position, which the spoken language might have there. Do people feel bound by the spoken word? Does it depend on circumstances we are not aware of? Do only matter facts and actions (rituals)? Is not the word in the beginning but the doing (Goethe), the ritual of repeated performances? Poets sometimes share this feeling with Goethe even for our own culture, as did the German poet Guenther Eich, when he wrote his "Inventory" (as prisoner of war in a prison camp):

<sup>38</sup> See Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 649-51 (1997).

<sup>39</sup> See Jack A. Hiller, *Law, Language, Creativity and the Divided Mind: Are We Producing Half-Brained Lawyers?*, in Festschrift Grossfeld 365 (1999) [hereinafter Hiller, *Half-Brained Lawyers*]. See also Stig Joergensen, *Sprog og Virkelighed*, *Tidskrift for Rettsvaesen* 769 (1995); Hanne Petersen, *On Law and Music Song Duels to Rhythmic Legal Orders?*, 41 J. LEGAL PLURALISM & UNOFFICIAL L. 75 (1998). See generally Jack A. Hiller, *Language, Law, Sports, and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law*, 12 VAL. U. L. REV. 433 (1978) (this article has been reprinted in expanded form in M.L. MARASINGHE & W.E. CONKLIN, *LAW, LANGUAGE AND DEVELOPMENT* 151 (1985)).

<sup>40</sup> See Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227, 1228 (1993); John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 98 (1997); Peter Sack, *Law, Language, Culture: Verbal Acrobatics and Unofficial Law*, 41 J. LEGAL PLURALISM & UNOFFICIAL L. 15, 17 (1998).

"This is my cap,  
 this is my coat,  
 this is my shaving stuff  
 in the cotton sack

....

In my bread bag  
 You'll find a pair  
 of woolen socks and a few  
 things I won't tell anyone."  
 (Hilde Domin)<sup>41</sup>

## 2. Reality?

We are trained to believe in language and to accept it as reality:  
 A word credo takes the position of facts:

"Word and thing  
 lay closely pressed  
 against each other  
 the same body warmth  
 in thing and word."  
 (Hilde Domin)<sup>42</sup>

But this belief in language depends on our familiarity with the environment in which our language operates and that we share with the speaker. The sense for taking words a reality also stems from our longing for security, for our looking for the safety in the word (Cf. Luther's "the word they should leave standing"). But there is a qualification to be made: real life is more skeptical, as shown by the often heart remark "Sounds good" (judgment reserved!).

## 3. Differences

Differences exist in particular with regard to China, where the

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<sup>41</sup> GUNTER EICH ET AL., *FOUR GERMAN POETS* 73 (Agnes Stein ed. and trans., Red Dust 1979) (poem by Hilde Domin).

<sup>42</sup> *Id.*

real "language" is the Chinese writing<sup>43</sup> and ritual, but also with regard to Japan where linguistic rituals and linguistic elegance may be more important than exact meanings. Missing the proper rituals leads to the exclusion from the group. Therefore, many over- and undertones produce vagueness to a much greater extent than we are accustomed.<sup>44</sup> One has to listen to the music and rhythm of language, to the body language accompanying it, to get a feeling for the meaning. Likewise, the "language of silence" might be different and more important.<sup>45</sup>

#### 4. Precision?

It also our cultural view that there should be no chaos (God created the world "orderly"):

"I want you  
 . . .  
 A square bowl he (Confucius) says  
 must  
 have corners  
 he says  
 or the state will perish  
 . . .  
 nothing else, he says is necessary  
 call round, round  
 and square, square."  
 (Hilde Domin)<sup>46</sup>

We even believe that language is the prime tool for ordering. This is shown by the German word: "bestimmt" (meaning precise); it says: "defined by voice" (lit. "bevoiced"). But that belief always remains a dream, an illusion<sup>47</sup> - nurtured by the mathematical - algebraic structure of the alphabet. There can never be precision in such a complex set.

<sup>43</sup> Cf. Claudia Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, 31 U. BRIT. COLUM. L. REV. 205 (1997).

<sup>44</sup> See generally BRIAN BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY* (1993).

<sup>45</sup> See Peter Tiersma, *The Language of Silence*, 48 Rutgers L. Rev. 1, 1-2 (1995); KING-KOK CHEUNG, *ARTICULATE SILENCES* 18 (1993); TILLIE OLSEN, *SILENCES* 239 (1978).

<sup>46</sup> See EICH et al., *supra* note 41, at 78-79.

<sup>47</sup> See generally James Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 522 (1994); ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 13 (1992); Arthur Ripstein, *Law, Language and Interpretation*, 46 U. TORONTO L.J. 335 (1996).

Language is and remains "Delphi" and the search for more and more precision soon reaches its economic limits<sup>48</sup> - though there are differences in degree among various cultures. In the long run the "dance of contingency, of the indeterminable, outwits us all."<sup>49</sup>

The pseudo-precision in Western legal terms, as an expression of wishful, religiously inspired thinking, has closed our eyes to the fact that law is more than analysis and static regulation; it is more than finding reasons for suing one another. Through law communities try to understand themselves. Law is the ongoing dynamic conversation of a culture with herself, is the sharing of experiences and hopes, is the exchange of know-how with all means of expressions and rituals, with the body and with the mind. The European wordcentrism and textism has blinded our eyes for too long. We are language- and alphabet- addicts being trained to see language as our servant. We thus belittle language's power over us, its many colors- which we never frilly comprehend- and blind ourselves for the environment that makes meaning out of sounds.

## IX. Silence

Words get their meaning from the silent environment, they are drifting on an ocean of silence; they form "das Gelaute der Stille" ("words are the carol bells of silence") as Heidegger used to say. We will never frilly find out how silence drifts into the words, acts as a kind of software that we cannot reproduce - but we can be sure that silence gives color to the words and receives color from them. We are much less prepared to meet these challenges than we pretend to do.

Silence can be read in many different ways. It can mean active or passive approval, but also active or passive resistance. What is said and what is not said shapes each event - but there exist gradual differences between talk and silence among cultures: "Silence and its counterpart storytelling derive their specific meanings from specific contexts."<sup>50</sup> "Beredtes Schweigen" (talking silence) - as we say in Germany - is not just a natural silence in the cycle of life, but an active silence. It is not a simple or even inferior rhetorical symbol; it must be read polysemously and multivalently.<sup>51</sup> It may be "heart" as a listening to cultural discrepancies or as the waiting for an appropriate time to

<sup>48</sup> See generally Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 553-554 (1994).

<sup>49</sup> LOREN EISELEY, *THE STAR THROWER* 169, 175 (1979).

<sup>50</sup> Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L. J. 4, 23 (1995).

<sup>51</sup> See *id.* at 25.

intervene; it can mean approval, contradiction or opposition.<sup>52</sup> Thus, a "narrative of silence" deserves our focus in its own right<sup>53</sup> It may be an instrument of seizing or of relinquishing control and in this respect is as incommensurable as the voice. Silence, as control, might sometimes even be more powerful. However, learning from the grammar and from the voice of silence may be more difficult than to learn from sounds.<sup>54</sup> This is particularly true with Asia: The interpretation of silence there stems from contexts that may give other meanings to silence and the voice than we are accustomed to.

## X. Translation

### 1. Words Cannot Be Translated

We build our life through language and we see, through the focus of the inner eye, that language construes in us even before we were born (cf. "mother-language"). Without being refocused we tend to believe that the world created by our language is the real world. But how can we translate "views of the world"?<sup>55</sup> We have learned, that words (alone) cannot be translated<sup>56</sup> in order to translate even a single word without distortion "one would have to transport the entire language around it."<sup>57</sup> But that is not even enough: To translate a text without changes in meaning "one would have to transfer its audience as well."<sup>58</sup> Only meaningless words can be displaced from one jurisdiction to another<sup>59</sup> - but how to find out whether a word is meaningless? That is already part of the question.

### 2. Common Experiences

What can be translated at all if we lack common experiences? Every language is a conglomerate of feelings, experiences and traditions that we cannot filly disentangle. We cannot even describe exactly the meaning of one language in another language. There is no culturally

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See IVAN ILLICK, *CELEBRATION OF AWARENESS* 32 (1970).

<sup>55</sup> Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47 (1986).

<sup>56</sup> Vivian Grosswald Curran, *Cultural Immersion, Differences and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

<sup>57</sup> See EVA HOFFMAN, *LOST IN TRANSLATION* 175 (1989).

<sup>58</sup> *Id.* at 275.

<sup>59</sup> See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHTS J. EURO. & COMP. L. 111, 120 (1997).

neutral language<sup>60</sup> and no semiotic system can be fully caught by another: The connotations are inevitably different and unpredictable (try to express music in words or poetry in music!). Language is the poetic song of culture and every culture sings a different song with a different rhythm referring to a different background and to different imprints from earliest childhood.

### 3. China

#### a. Indeterminacy

The problems of translation are of greatest concern with regard to China. Translations into language clash with each different idea, not only about the status of orality but even more about precision in the language.<sup>61</sup> Whereas we take for granted that statutory language should be clear, comprehensive and unambiguous this is not the expectation in China. Certainly, some indeterminacy is unavoidable everywhere (language is always "Delphi") - but there are important differences in degree. Intrinsic vagueness characterizes Chinese statutes; the cause is the language itself, its lexicon and its grammar.<sup>62</sup> Therefore, this feature of Chinese law is deeply culturally embedded and is not easily avoided.<sup>63</sup> Certain syntactic structures and words with similar but not identical meanings create vague obligations (shall/must or may/should). They are very difficult to capture by translation.

#### b. Moral Principles

The problem is aggravated by the fact that not just language makes for vagueness. Language operates within a network of powerful moral principles (Confucianism) that encircles "law" more than we are accustomed to. The Confucian heritage assumes the form of ethical imperatives with an aura of being immutable and self-evident. Even though Confucianism is often not consciously and wholesomely abided today, many of its ethical tenets have become part of everyday life. They introduce the principles of benevolence and loyalty into every social

<sup>60</sup> See David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?* 46 AM. J. COMP. L. 719, 720 (1998).

<sup>61</sup> See Anne S.Y. Cheung, *Towards a Bilingual Legal System - - The Developments of Chinese Legal Language*, 19 LOY. L.A. INT'L & COMP. L.J. 315, 323-24 (1997).

<sup>62</sup> See Claudia Ross & Lester Ross, *Language and Law: Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Language*, 31 U. BRIT. COLUM. L. REV. 205, 207-10 (1997).

<sup>63</sup> See *id.* at 252.



interaction to balance potentially inflexible encounters.<sup>64</sup> It is, therefore, highly cherished to leave latitude for negotiation.<sup>65</sup> That is why Chinese show a stylistic preference for vagueness and ambiguity even if the language would allow for a clear meaning.

The underlying assumption is, that normally conciliation and mediation precede litigation, and that the chances to obtain fulfillment of the obligation depends on the consensus of the parties that performance serves their mutual interest. Thus, we know very little to nothing about how obligations are enforced. There is almost no published information concerning Chinese court proceedings and very few actual cases of enforcement.<sup>66</sup> Strong taboos and vague "explanations" surround the whole matter.<sup>67</sup> It is also important that the question of right or wrong cannot be answered in an abstract way. "Justice" is relational and varies with the relative status of the parties; contracts do not put parties on level grounds (like in Europe), as ritual behavior does not apply equally to all parties.<sup>68</sup> "Policy itself is law."<sup>69</sup>

### c. Wide Hallows

Generally, notions have loose meanings and wide hallow (or shades?): Any action that shares even remote characteristics with enumerated actions will be considered to fall into the same class. Take for instance references to modifications or rescissions caused by force major or "some other cause", the other cause not being defined.<sup>70</sup> A sentence like "nulla poena sine lege" does not enter the Chinese mind.<sup>71</sup>

## XI. Writing

### 1. Key Cultural Technique

This impediment to Comparative Law is even stronger when we consider different writings as cultural memories. The hurdles thus

<sup>64</sup> See generally Hoiman Chan & Rance P.L. Lee, *Hong Kong Families: At the Crossroads of Modernism and Traditionalism*, 26 J. COMP. LEGAL STUD. 83 (1995).

<sup>65</sup> See Ross, *supra* note 62, at 229-30.

<sup>66</sup> See Todd R. Benson, *Taking Security in China: Approaching U.S. Practices*, 21 YALE J. INT'L L. 183, 194-95 (1996).

<sup>67</sup> See generally Liang Zhiping, *Explication "Law": A Comparative Perspective of Chinese and Western Legal Cultures*, 3 J. CHINESE L. 55, 55-63 (1989).

<sup>68</sup> See Ross, *supra* note 62, at 231.

<sup>69</sup> Benson, *supra* note 66, at 190.

<sup>70</sup> See Ross, *supra* note 62, at 249-50.

<sup>71</sup> See *id.*, at 248.

erected are hard to overcome, and they are more disturbing because we often do not realize that they exist. We normally believe that we translate languages; whereas, in reality, we translate writing, for example, from the Hebrew or the Chinese writing into our alphabet or vice versa. Writing is the key technique in modern cultures; it regulates and identifies societies (e.g. the "Holy Scripture"). It is more than a tool; it is our master; it is the perfect example of the subliminal influence of signs on our concepts of order.<sup>72</sup> Signs "make" order!

We know that semiotic systems of whatever nature, particularly writing, bind groups together as strongly as they separate them from other groups. Exclusive signs – exclusive codes – are at the core of any successful minority in business. For example, consider the strength of Chinese merchants in Southeast Asia.

## 2. Power

Cultural discipline, modes of thought, and views of the world receive their form and logic from writing. According to the Jewish Talmud, God played with the 22 letters of the Hebrew alphabet before the creation of the world, and the letters offered themselves to him so that he might use them to build the world. Under this concept the letters form the grammar of the cosmos guarantying its existence, and God is the author of the world. When only a single letter is missing the world will collapse, as the world is "sola scriptura." The overwhelming importance of writing has long been overlooked. We all know that the Latin alphabet formed the European culture. Indeed, writing has a key role in binding cultures together and in separating them from others. Its tends to indicate completeness; whereas, in reality, the gaps between the letters are always wider than the space occupied by letters themselves.

By the same token, different writings suggest a different view of the world and train different intellectual abilities. Alphabetic letters and ideograms (or pictograms) induce other techniques and lead to other hermeneutics and to other "conversations" with the text. Our hermeneutics are scripture-bound: different writings evoke different songs of life! Writing is never passive, but it is subliminally wry and very active. Therefore, Comparative Law is to a great extent comparative semiotics.

The power of writing, however, has made us to forget that the word "creates" and that the letter may "kill." Voice has more life and color in it than the writing, body language and gestural language that

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<sup>72</sup> See generally Grossfeld, *supra* note 30.

often accompany voice,<sup>73</sup> and we have to keep this “more” alive.<sup>74</sup> According to Greek mythology, Orpheus went into the empire of death with nothing but his voice, and with it, he stood up against death.

### 3. Mental Model

#### a. Voice vs. Letter

Not having really understood the power of writing and its relation to the voice, we are even misguided with regard to our own law. We are too often tempted to believe that the letter is the law and that law is a process of logical deduction from letters. We are alphabet addicts.<sup>75</sup> The reality, however, is different even in our own laws though the degrees of distance between letter and law might vary even within Europe. Certainly, letters are very powerful signs, but their power has limits. The reason is simple: the law exists in the mind and is always different from its form in the book.<sup>76</sup> Law is a shared mental model of communities, and written rules are only a greater or smaller part of this model.<sup>77</sup> In reality, the law of a country consists of an immense mass of ideas concerning human behavior accumulated during centuries through the contribution of innumerable cooperators.<sup>78</sup> The letters are just signs on paper intended to call up certain pictures in the reader's mind, and the pictures receiving their color from elsewhere count.

#### b. Simplicity

The mental model “law” reaches beyond language; it operates with pictures not expressed in words (the silent environment).<sup>79</sup> Though more broadly based, the model tends to be simpler than the written law due to the cognitive limits of the human mind. Rules of thumb abound, leaving logic behind and making complexity understandable.<sup>80</sup> The rule

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<sup>73</sup> See Michael C. Corballis, *The Gestural Origins of Language*, 87 AM. SCIENTIST 138, 145 (1999).

<sup>74</sup> See generally Grossfeld, *supra* note 30.

<sup>75</sup> See Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1498 (1996).

<sup>76</sup> See, e.g., Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES MAG., Feb. 28, 1999, at 51, 53.

<sup>77</sup> See, e.g., LoPucki, *supra* note 75, at 1501-04.

<sup>78</sup> See generally KARL OLIVECRONA, *LAW AS FACT* 25-47 (Stevens & Sons, 2d ed. 1971).

<sup>79</sup> See ROUNDTABLE ON LAW AND SEMIONICS, *LAW AND THE CONFLICT OF IDEOLOGIES: NINTH ROUNDTABLE ON LAW AND SEMIONICS* 67-69, 73-74 (Roberta Kevelson ed., 1996).

<sup>80</sup> See LoPucki, *supra* note 75, at 1542.

of the written law in our culture is thus largely a myth used to give an orderly impression to outsiders and to lend authority to decisions that often depend on unwritten considerations (controversial cases are not decided by logic but "from the gut"). The mental model might be resistant to changes in the written law. A famous example is the 1978 U.S. Bankruptcy Code that provided for the discharge of all debts except those specifically excepted; no exception was made for debts secured by mortgages.<sup>81</sup> Nevertheless, in practice everybody knows that a debtor can not free his home of a mortgage by filing bankruptcy, and everybody acts accordingly.<sup>82</sup>

LoPucki tells us that experienced lawyers work relatively little with the written law.<sup>83</sup> Experienced lawyers generally admonish young lawyers to watch and listen to other lawyers' work and not to rely too heavily on written law, as such reliance may make the lawyer appear to be an "obstructionist."

### c. Legal Strategies

Not being aware of the interface between the shared mental model and the written law makes us blind to the room for legal strategies not intended by legal decision-makers.<sup>84</sup> Forum shopping and case-selection are widespread examples for the efficiency of these strategies. They remind us that legal systems must be analyzed for the role of strategy in them.<sup>85</sup> Only then do we have the chance to go beyond what the written law says and to find out what it does. It is this delivered law that matters.<sup>86</sup>

### d. China

China is further away from our views than we think. The vagueness of language is partially corrected by the choice of many ideograms. But the cultural characteristics prevail: modern written law and practice may be worlds apart. The actual functioning of the system often differs substantially from what one should expect from the

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<sup>81</sup> See *id.* at 1526.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 1529.

<sup>84</sup> See *id.* at 1522. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limit of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

<sup>85</sup> See LoPucki, *supra* note 75, at 1547.

<sup>86</sup> See *id.* at 1553.

published sources. The dichotomy between paper and life (delivered law) is immense.<sup>87</sup>

The structure of Chinese writing is likewise important. This writing still reflects its origin in pictographs, and the "discerning eye" (Oliver Wendell Holmes) discovers many metaphorical allusions.<sup>88</sup> The Chinese refer, quite accurately, to their writing as "drawing"; Jack A. Hiller makes this the center of his discussion and gives wonderful examples.<sup>89</sup> He sees the alphabet as an expression of a mathematical mind, resulting from analysis and synthesis, like a system of numbers, and thus, a constant invitation to a mathematical mode of thinking ("half-brained lawyers.")<sup>90</sup> In contrast, the Chinese signs are more symbols and pictures; they favor an intuitive, comprehensive approach. According to Hiller (a friend and great teacher in these fields) the consequences for the law are inevitable.

## XII. Religion

### 1. Deus Geometra

Slowly, slowly we wordy rationalists realize that religious pictures deep in the background of cultures act as subliminal guidelines for feelings of order, as they express the fears and hopes (even into eternity) that shape every detail.<sup>91</sup> Certainly, we have a kind of feeling for it when we talk about the Christian basis of Western Constitutions or about the Confucian heritage in Asia. But we have to be far more sensitive to it even in places where we expect it least: in our Western rationality.<sup>92</sup>

For example, the Continental European law (the "law of the geometric mind" as the Japanese comparativist Yoshiyuki Noda called it) is instilled with the medieval picture of the "deus geometra." He created the world with a circle from chaos, and built a "cosmos," not a "jungle." He cares for numbers (he has counted each hair on our heads) and geometry (he ordered the world by measure, numbers, and weight).

<sup>87</sup> See Benson, *supra* note 66, at 186.

<sup>88</sup> See generally Bernhard Grossfeld, *BILDHAFTES RECHTSDENKEN* (1996).

<sup>89</sup> See Hiller, *Half-Brained Lawyers*, *supra* note 39, at 381.

<sup>90</sup> Cf. LOREN EISELEY, *THE STAR THROWER* 267 (1979).

<sup>91</sup> See Abraham Seidenberg, *The Ritual Origin of Geometry*, in *ARCHIVE FOR THE HISTORY OF THE EXACT SCIENCES* 488 (1960). See generally ALAN WATSON, *JESUS AND THE LAW* (1996).

<sup>92</sup> See generally Alfred Gierer, *Fin Spiegel der Natur erkennen wir uns selbst*, in *WISSENSCHAFT UND MENSCHENBILD* (1998) (for background in Newtonian physics).

He even expresses himself in numbers (one God, three persons). Small wonder then, that the "mos mathematicorum" of the Middle Ages and the "mos geometricus" of the 17th and 18th centuries of enlightenment stand behind our rules of accounting, and even behind Adam Smith's "invisible hand."<sup>93</sup> Both concepts are derived from religious ideas about order.<sup>94</sup>

## 2. Numbers<sup>95</sup>

Due to their religious background, Europeans (who love to "construe" rules) tend to see the "rule of law" much like the "rule of geometry" and like a "rule of numbers."<sup>96</sup> At first glance this looks strange, but it probably has to do with the origins of counting and speaking, and its transition into writing (particularly the alphabet).<sup>97</sup> Numbers are a technology of distance in space and time; they derive their power from their capacity to create and overcome distance.<sup>98</sup> They are a powerful mode of communication, easily reconstructed and defended, justifying actions and legitimizing authority. They standardize, produce uniformity, and have an enormous "constitutive power."<sup>99</sup> "Sacred" numbers are prime instruments to transfer concepts of order from one generation to the next (e.g. the seven days of the week).<sup>100</sup> Numbers tend to erase the local and to paint an abstract view of the world.

<sup>93</sup> See Samuel, *supra* note 6, at 829-33.

<sup>94</sup> See Bernard Grossfeld, *Europaeisches Erbe als europaeische Zukunft*, 54 JURISTENZEITUNG 1 (1999); Grossfeld, *supra* note 27.

<sup>95</sup> See Bernhard Grossfeld, *Numbers in Law*, J. OF S. AM. L. 396 (1995). See generally Debiprasad Chattopadhyaya, *HISTORY OF SCIENCE AND TECHNOLOGY IN ANCIENT INDIA* (1986) (for the cultural and technical background).

<sup>96</sup> Wendy Nelson Espeland, *Authority by the Numbers: Porter on Quantification, Discretion, and the Legitimation of Expertise*, 22 L. & SOC. INQUIRY 1107, 1128 (1997); cf. Steven Lubet, *A Tour on the Calculus of Justice*, 92 NW. U. L. REV. 1035, 1035 (1998).

<sup>97</sup> Cf. Corballis, *supra* note 73; see, e.g., BERNHARD GROSSFELD, *ZEICHEN UND ZAHLEN IM RECHT* (2d ed. 1997) (for Indo-European languages (nomadic background)). Numbers are derived from fingers ("digits"); the German word "Zahl" means "number", the similar Dutch word "taal" means "language." In the verb "to tell" both meanings come together, as in the German words "zaehlen" and "erzaehlen". Other languages, e.g. Chinese, seem to be more sound oriented and therefore less number oriented (rice growing culture). Cf. BERNHARD GROSSFELD, *KERNFRAGEN DER RECHTSVERGLEICHUNG* (1996).

<sup>98</sup> See generally THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1995).

<sup>99</sup> See Espeland, *supra* note 96, at 1117.

<sup>100</sup> See generally BERNHARD GROSSFELD, *ZEICHEN UND ZAHLEN IM RECHT* (2d ed. 1997).



They also establish a mechanical objectivity as an alternative to individual trust or to personal knowledge. All relations get a touch of objectivity -- coloring legal relations more like material objects than like personal interactions. Thus, numbers "remake" the world, as they create modes of thought, new categories<sup>101</sup>, and new entities to fill these categories. Their impact on law is strong, as "numerically jaded moderns" have "become numb to their influence."<sup>102</sup> However, let us be cautious: numbers can be misleading - as statistics demonstrate.<sup>103</sup> Life is too erratic to conform to the demands of science. That is why "mechanical objectivity" is always more ambiguous than it appears to be.<sup>104</sup>

### 3. Abstract Views

Certainly, there is more in numbers than religion and mechanical objectivity, and there is more in abstract rule than just mathematics. The cognitive limits of the human mind also leads to abstract rule: they operate as a tool to simplify complexity.<sup>105</sup> Supported by a mathematical approach and the alphabet, this impetus creates the illusion of equality in law in the treatment of what language sees as "like" in a "like" manner. But due to differences in space and time, every case is different.<sup>106</sup> Nevertheless, we attempt to treat cases alike because of the mental efficiency thereby achieved: "If one can safely gloss over 'minor' differences such as whether the plaintiff is a widow or a great corporation, one need maintain only a simple mental category rather than a thousand."<sup>107</sup>

### 4. China

This mathematical/geometrical alphabet-supported abstract view is particular to Europe, at least to a large degree. It does not fit into the Chinese "empire of (different) signs, "which numbers more than 50,000. In China, we do not meet a single God or a rational creature of the world nor an alphabet free of pictures. Hence, we do not run into abstract rules originating from an abstract source (e.g. the number one). In the absence

<sup>101</sup> See Espeland, *supra* note 96, at 1115.

<sup>102</sup> *Id.* at 1130.

<sup>103</sup> John Leubsdorf, *Stories and Numbers*, 13 CARDOZO L. REV. 455, 455-58 (1991).

<sup>104</sup> See Espeland, *supra* note 96, at 1120.

<sup>105</sup> LoPucki, *supra* note 75, at 1498.

<sup>106</sup> See *id.* at 1542.

<sup>107</sup> *Id.*

of a compelling need for the notion of general laws, thoughts in the mind of God so to speak, little or no search was made for them.

### XIII. Narratives

This brings us to narratives, a story told with pictures. As alphanumeric addicts that have lost contacts with pictures, we accommodate a reduction of complexity within our own environment, and that is why we do not accept the complexity of the world for others. The alphabet becomes our moral guidance, describing how the world should be seen; however, we are outsiders of the foreign culture, and like other outsiders, we can only bridge the gap by narratives by unembellished storytelling.<sup>108</sup> Only then may we avoid squeezing their narrative into our rigid alphabet, i.e., squeezing specific categories into our "appropriate" topics (e.g., the "Hegelian view") and methodologies, and thereby determining names and overpowering the foreign narrative. Absent such unembellished storytelling, we will never succeed because "such representational practices are the proverbial peg in a round hole."<sup>109</sup>

### XIV. Limits

There are limits to our understanding that hurt. We are nailed to a concept of law that ultimately comes from heaven (e.g., the term "father heaven").<sup>110</sup> We rarely know how other cultures converse about order, what they feel about it, and what pictures they see. Is equality, or hierarchy, the order of life? Is mathematical and geometrical precision desirable, or artificial? Do numbers represent a natural order, or do they have an inhuman touch that does not fit into personal relations? We know very little of the procedures followed in and out of foreign courts, how these courts find facts,<sup>111</sup> and how judgments are enforced.<sup>112</sup> This

<sup>108</sup> Chon, *supra* note 50, at 4.

<sup>109</sup> *Id.* at 23.

<sup>110</sup> Cf. MASS. CONST. of 1780, pt. 1, art. XXX ("A government of laws and not of men").

<sup>111</sup> See Mirjan Damaska, *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT'L & COMP. L. 25, 25-29 (1997).

<sup>112</sup> See generally Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997) (analyzing the American and German legal systems); John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L L. 41 (1997) (examining Oscar Chase's *Legal Processes and National Culture*); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (comparing some aspects of German court system with those of the American system); John C. Reitz, *Why we probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L.

refers to both the United States and Japan, as well as at home, in Europe. We do not know much about the procedures of our European neighbors.

In addition, no culture readily informs us about who bears the costs of legal efficiency and rationality. This is often not discussed within the culture. The law instead gives us a reassuring picture and celebrates itself as an instrument of happiness; but there is no law without sacrifices for somebody, and this darker side of law is normally a taboo subject,<sup>113</sup> particularly to foreigners.

Even if we employ all of our patience and humility, face-to-face encounters remain a "diasporic experience."<sup>114</sup> But this is also a chance. Local experiences and globally felt categories can meet and test against each other. We narrow the gap between our experiences, and we share the sense that we have slightly different experiences; but both experiences may lead to a shared recognition. There will always remain a "foreign" component that we should not try to explain. To the contrary, the hybrid of multi-cultural experiences can transform cultural differences into vital sources of creative energy.<sup>115</sup>

## XV. Universals

This discussion now leads us to a question of legal universals. Do human beings share the same or similar ideas about order? Do all cultures have certain features of order in common? Is there an invisible hand that creates patterns of orders without being noticed?<sup>116</sup> But what is order? Is it a feeling "in the soul" as Blaise Pascal explained it? The question indicates that the answer is not easy. Our impetus for commonalties may not mislead us "to proclaim sameness" and to blind our eyes to human differences.<sup>117</sup> Only on a basic level we might be optimistic: we all have similar bodies, similar fears, and similar hopes in common, and thus an inner eye that makes us see the world. However, we live in different geographical environments, we are exposed to

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REV. 987 (1990) (examining John Langbein's *The German Advantage in Civil Procedure*).

<sup>113</sup> See Bernhard Grossfeld, *The Invisible Hand: Patterns of Order in Comparative Law*, J. S. AFR. L. 648, 649 (1997). See generally BERNHARD GROSSFELD, *RECHT ALS LEIDENSORDUNG* (1998).

<sup>114</sup> See REY CHOW, *WRITING DIASPORA* (1993).

<sup>115</sup> See Chon, *supra* note 50, at 9.

<sup>116</sup> See Bernhard Grossfeld, *The Invisible Hand: Patterns of Order in Comparative Law*, J. S. AFR. L. 648, 650-51 (1997).

<sup>117</sup> See generally Curran, *supra* note 12.

different semiotic impressions, which we have internalized in our early childhood and cannot escape.<sup>118</sup>

## XVI. Doubts

### 1. "Innocent" Words

We have entered Comparative Law with much optimism. Comparative Law is important, very important, for all types of practical purposes, no doubt about it. Nevertheless, doubts creep into our minds, just like a cold fog creeping into the evening. This fog blurs our views and causes us to become uneasy about where to go. Our job is probably more difficult than we ever expected. The term "Comparative Law" itself is indicative of this difficulty. The problem begins with the "innocent" word of law,<sup>119</sup> and is only exasperated with the word "comparative."

### 2. "Legal Transplants"<sup>120</sup>

It goes without saying that we cannot argue any more in "unqualified" terms of "legal transplants."<sup>121</sup> It is quite probable this term is derived from a concept of "law as geometry"<sup>122</sup> as Legrand asserts. This is contrary to the literal meaning of the term. "Legal transplants" may devote undue attention to the written law without considering sufficiently that the letters get their meanings from interpretative communities; letters and formulated rules lie on the surface of culture, "whose true dimensions are found elsewhere."<sup>123</sup> Certainly, ideas may be exported and imported, (whereas a valuable exchange of new ideas are rare) but the "invested meaning cannot be transferred from one culture to another. Additionally, the transferred letters move into a different frame of intangibles and are immediately invested with a new and normative content by the importing community. The German Insolvency law is a fine example of this phenomenon. Only

<sup>118</sup> See Grossfeld, *supra* note 116.

<sup>119</sup> See Mark van Hoecke & Mark Warrington, *Legal Culture, Legal Paradigms, and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L. Q. 495, 520 (1998).

<sup>120</sup> See John D. Jackson, *Playing the Cultural Card in Resisting Cross Jurisdictional Transplants*, 5 CARDOZO J. OF INTL & COMP. L. 51, 63-66 (1997).

<sup>121</sup> See Pierre LaGrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHTS J. OF EUR. & COMP. L. 111, 111 (1997).

<sup>122</sup> *Id.* at 116.

<sup>123</sup> *Id.* at 119.

the "honest debtor" will be discharged from debt, but it is a formidable hurdle. In the United States; however, it is the opposite. Both the "honest" and "dishonest" debtor will likely be discharged from debt.<sup>124</sup> This phenomenon should be of little concern to us, since we cannot create transplants. All we can do is sow the seeds and then watch the plant grow, never knowing which direction it will grow nor how it will like the new soil and climate.

### 3. Comparison

The text-orientated approach towards law can no longer be upheld. The attacks by Legrand<sup>125</sup> and Curran<sup>126</sup> are devastating; How do we find the "tertium comparationis," the function of a foreign legal institution, if we cannot find such functions in our own law? Quite often we have to admit the law is just there, whether it can be explained or not. Law grows more than it is planted, and its roots are often hidden under an impenetrable cushion of traditions, rituals, and interests. What social norms abroad correspond to our "law" and under what conditions? What institution abroad is a "court"? What does "to compare," mean? The hermeneutics already begin at home.

Other people may not even share the basic assumption with us, to look at law as functional. It may even be forbidden to ask for the function of the law (as in many religious laws). Searching for a function might belittle the new law or might be perceived as an invitation to bend the laws interests to those who question it. Even Houdini cannot escape from this dilemma. We are always susceptible to determining the function of the law from our point of view, thereby overlooking the other view under the guise of "science"; we unconsciously import our legal concepts into a foreign mind. Making function the "tertium comparationis" is nothing more than an extension of the mathematical and geometrical approach into a foreign environment.

### 4. Beyond Geometry

There is no strictly construable geometry in human life; there is no starting point outside our own illusion. Comparative law is not like comparing triangles to squares or multiangles. Law expresses a commonality of experiences and feelings, and gives "music" and

<sup>124</sup> See LoPucki *supra* note 70, at 1498.

<sup>125</sup> See Pierre LeGrand, *How to Compare Now*, 16 L. STUDIES 232 (1996).

<sup>126</sup> See Curran, *supra* note 56; Curran, *supra* note 12.

"rhythm" to life.<sup>127</sup> Therefore, comparative law deals with infinite aspects of human concepts, human experience, and human rhythms. It is an external and internal dialog with another culture about concepts of order and about experiences in different environments. A dialog with human beings which share with us similar bodies and minds, hopes and fears, although we can never fully imitate their inner eyes.<sup>128</sup> There always remains a "shadow" or "parallax."

### 5. Is there a Method?

Given the vastness and non-transparency of Comparative Law it is very difficult, if not impossible, to find a consistent method. Consistency cannot be found in a field that is largely unexplored; where we only know the outlines. There will always remain much trial and error, and a consistent concept will evolve along the way, and it may not be the front-runner. It is here again that geometrical views meet their limits. We have to test our chances knowing that we can learn by using all of our senses when confronting the unexpected. The inherent limits of this trial and error staggering along cannot be named malaise, because they form part of the human condition with its miraculous secrets.

### XVII. Comprehensive Approach<sup>129</sup>

We must look beyond texts and functions. We have to start with the geographical background, as all concepts of order are local at first.<sup>130</sup> We may move onto the density of the population (telling us about chances for transparency) over distance, or look at neighborhood orientated relations. We have to ask what concepts of time are (linear or circular) and analyze the farthest advancement in technical achievements in any society. We also must look at interests and compound interests, and we should never forget to ask who suffers the most from the law and how they feel about it. To understand law and order in any society,

<sup>127</sup> See Hanne Petersen, *On Law and Music: From Song Duels to Rhythmic Legal Order*, J. OF L. PLURALISM & UNOFFICIAL L. 75, 78 (1998). See also WILLIAM H. MCNEIL, *KEEPING TOGETHER IN TIME, DANCE AND DRILL IN HUMAN HISTORY* (1995).

<sup>128</sup> See Vivian Grosswald Curran, *Herder and the Holocaust: A Debate About Difference and Determinism in the Context of Comparative Law*, in THE HOLOCAUST: ART, POLITICS EDUCATION (Frederick De Coste ed., forthcoming 1999).

<sup>129</sup> See Grossfeld, *supra* note 116.

<sup>130</sup> See Bernhard Grossfeld, *Geography and the Law*, 82 MICH. L. REV. 1510, 1511 (1984). See also Roy H. Andes, *A Triumph of Myth over Principle: The Saga of the Montana Range*, 56 MONT. L. REV. 485, 486-87 (1995); John G. Sprankling, *The AntiWilderness Bias in American Property Law*, 63 U. CHIC. L. REV. 519 (1996).



anywhere, one must first understand the society's culture, including its history and traditions.<sup>131</sup> Only then will we get a feeling for the connection between law and societal "rhythms."<sup>132</sup> Law is an expression of culture, but it also shapes retroactively the context from which it originates and operates.<sup>133</sup>

#### XVIII. Chances<sup>134</sup>

It is this cultural awareness, this cultural sensitivity that opens new chances for comparative law. Seeing the hurdles is the first way to decrease and eventually overcome them. By placing our work into a wider frame, it supports our claim for plausibility and reliability. Then, Comparative Law can achieve this result - the ability to learn from each other. A personal example is in my primary field of legal expertise, corporate law. Through Comparative Law Germany learned a lot about American Corporate Law, financial instruments, and vice versa. Germany heard about the "Delaware Syndrome" in the competition for corporate charters,<sup>135</sup> and tried to prevent the same in the European Union.<sup>136</sup> We learned about the worldwide spread of rules on insider trading,<sup>137</sup> International Accounting Standards,<sup>138</sup> and principles of evaluation of corporate shares.<sup>139</sup> Codes of conduct for transnational corporations would never have seen the light of day without Comparative Law,<sup>140</sup> nor would the Daimler-Chrysler merger. The

<sup>131</sup> See Grossfeld, *supra* note 130, at 1518. See also David L. Cohen, Comment, *Article 69 and European Patent Integration*, 92 NW. U. L. REV. 1082, 1087-88 (1998).

<sup>132</sup> See Peterson, *supra* note 127.

<sup>133</sup> See Samuel, *supra* note 6, at 818-25.

<sup>134</sup> See generally Nora V. Demleitner, *Challenge, Opportunities and Risk: An Era of Change in Comparative Law*, 6 AMER. J. COMP. L. 647 (1998).

<sup>135</sup> See ROBERTO ROMANO, *FOUNDATIONS OF CORPORATE LAW* 87 (1993).

<sup>136</sup> See generally Werner Ebke, *Company Law and the European Union: Centralized versus Decentralized Lawmaking*, 31 INT'L LAWYER 961 (1997).

<sup>137</sup> See generally Thomas J. Andre, *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69 (1998); Peter M. Menuninger, *The German Insider Law: Introduction and Discussion in Relation to United States Securities Law*, 11 FLA. J. INT'L L. 189 (1996).

<sup>138</sup> See Susan Binns, *The EU Commission's Strategy with Respect to Accounting and Disclosure*, in *BERICHT UEBER DIE FACHTAGUNG DES INSTITUTS DER WIRTSCHAFTSPRUEFER IN DEUTSCHLAND* 35 (Institute of Wirtschaftspruefer ed. 1998) (Wirtschaftspruefer is roughly equivalent to a Certified Public Accountant).

<sup>139</sup> See Grossfeld, *supra* note 27.

<sup>140</sup> See Ryan P. Toftoy, Note, *Now Playing: Corporate Codes of Conduct in the Global Theatre. Is Nike Just Doing It*, 15 ARIZ. J. INT'L L. AND COMP. L. 905, 907 (1998).

growing globalization of institutions and relationships work in our favor!<sup>141</sup>

Within this broader culture orientated, anthropological approach,<sup>142</sup> even the functional method adds something if applied to carefully chosen technical questions in well defined environments,<sup>143</sup> although there will always remain loose ends.<sup>144</sup> The functional method is often suited for market activities and market regulations. Markets, especially global markets, are strong environmental factors, exposed to similar necessities of life, and create a similar business and investment convention. Comparative Law tells us, for example, whether shares in a foreign corporation have sufficient legal content for investment. The answer is "probably"; we believe in the "wisdom" of the market more than Comparative Law, but even so, law is one factor on which markets conventions are based, even subliminally.

## XIX. Conclusion

Does Comparative Law help? The answer is "Yes!"<sup>145</sup> Probably not as much as some of us has hoped, and we are still searching for a functional comparison everywhere, for a transfer of legal rules from one culture to another. It is hard to learn from foreign experiences, as every child knows so well. The Comparative Lawyer is often exposed to a foreign language that does not flow from his heart and when he expresses himself in a foreign language he loses some control. Chon tells us about how her Korean mother tried to teach her daughter "American." Only now do I realize the control she gave up by speaking my first language instead of me speaking hers. For one thing, she will never experience the act of belittling me, because I cannot say things "right."<sup>146</sup> We all cannot say it right.

Comparative law leads us into temptations we never dared to contemplate; imagination, intuitive perception, discipline, and our

<sup>141</sup> See L. Amade Obiora, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AMER. J. COMP. L. 669, 681 (1998).

<sup>142</sup> See Laura Nader, *Comments, Symposium: New Directions in Comparative Law* 46 AMER. J. OF COMP. L. 751, 751-53 (1998).

<sup>143</sup> For a balanced approach, see John C. Reitz, *How to do Comparative Law*, 46 AMER. J. COMP. L. 751 (1998).

<sup>144</sup> See RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* (1996); William Ewald, *Posner's Economic Approach to Comparative Law*, 33 TEX. INT'L. L. J. 381 (1998).

<sup>145</sup> See James Gordley, *Is Comparative Law a Distinct Discipline*, 46 AMER. J. COMP. L. 607 (1998).

<sup>146</sup> Chon, *supra* note 50, at 27.

courage will be tested. We lose our traditional shelters and sometimes regret entering this vast and dangerous field. We will be inclined to give up:

“Landscape in Motion

...

One must be able to leave

Yet be like a tree:

as if the roots stayed in the ground,

as if the landscape passed and we stayed firm.”

(Hilde Domin)<sup>147</sup>

But the rewards are worth the risks. The comparative lawyer might gain the chance to present practical results, not just transplants, but new ideas and wider exposure. Seeds he can sow. Above all; however, he will learn about himself, about his own law, about his own culture. He will see the World with new eyes, and he will get accustomed to meet others with humility, empathy and courage. He will accept distance and difference<sup>148</sup> and will hold back the “fast comparisons.” The foreign is and will remain what it is, foreign. The ways in which these insights will bear fruit are hardly foreseeable, but fruit will be borne. It is an “opportunity not to be missed.”<sup>149</sup>

<sup>147</sup> GUNTER EICH ET AL., *FOUR GERMAN POETS* 73 (Agnes Stein ed. and trans., Red Dust 1979) (Poem by Hilde Domin).

<sup>148</sup> See Guenther Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARVARD INT'L L. J. 411, 453 (1985).

<sup>149</sup> Udo Mattei, *An Opportunity Not to be Missed: The Future of Comparative Law in the United States*, 46 AMER. J. OF COMP. L. 709 (1998).