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Edward J. Eberle

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EDWARD J. EBERLE*

Comparative law involves comparing the law of one country to that of another. Most frequently, the basis for comparison is some foreign law juxtaposed against the measures of one's own domestic law. More specifically, comparative analysis entails comparing one body of legal data in relationship to another and then assessing how the two bodies of legal data are similar or different. The essence of comparison is aligning similarities and differences between data points and using those measurements to understand both the content and range of the data points. Several key questions need to be asked. What is the substance of the data point? How is it similar or how does it diverge from the point it was compared to? What is the nature of the similarities or divergences? What do the similarities and divergences reveal? And on what data are the revelations based?

Comparative analysis, however, can reveal more than the mere relationship between various legal systems. It can be a window into our own society's perceptions and intuitions. We know our native culture well, have learned to appreciate it and, in some instances, we may assume it to be superior to others. Sometimes we may be right, but just as often we are wrong. Exposure only to a single legal system can be insulating and distorting.

By comparing various legal systems to our own, it can cause us to question our society's view of the law. For instance, do we see law as only rules or commands that channel us along prescribed paths? Do we see

* Distinguished Research Professor of Law, Roger Williams University School of Law. I would like to thank Vivian Curran, Jay Krishnan and Louise Teitz for helpful comments on this essay.

law only through native predispositions associated with our society? Is this a form of "cognitive lock-in" that colors our perceptions or, even, blinds us? This might, of course, be quite natural, as we all reflect our own acculturations. Or, do we see law as illusion? Do we sense a disjunction between law as written versus law as applied or law as practiced within a given culture? Is there some operation code or hidden formant we are missing that actually drives the pattern of law?

Perhaps we are not accustomed to asking such questions. Most of us are situated within our own native culture, and within that culture we work with the common clay of material that we have grown up with and are accustomed to. "We live in a multicultural world, where the light in which a person sees cultural values depends on the social environments to which he is accustomed."[1] Comparative law offers us avenues by which to observe other patterns of thought and organization different from those we are familiar with. By studying different legal cultures, we are exposed to different "patterns of order that shape people, institutions, and the society in a jurisdiction."[2]

The study of different legal cultures can be enriching for any student of comparative law. We might sense commonalities in legal systems, such as rules, categories or patterns of thought or order that resonate across national borders and sit also in our domestic law. This may lead us to ask certain questions. For example, are there common archetypes embedded within multiple legal systems? If so, what does this mean? Does this lead to a quest for universal principles of law? This was likely a main mission of a group of professors, émigrés from Europe, who left in the wake of Hitler.[3] Perhaps their quest was based on a pursuit of natural law, principles that would stand over and above human nature as an extrinsic code of conduct to regulate behavior. Perhaps commitment to such universal principles would have warded off the demons of base human nature the émigrés experienced in the time of Hitler and Stalin.

Certainly, the quest for common unifying principles has been a goal of post World War II international law. We could point to the creation of the United Nations and its many missions and treaties, such as the United Nations Convention on Human Rights and the United Nations Convention for the Rights of the Child. We might also point to the United Na-

1. Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 305 (1986-87).

2. Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L. J. 292, 292 (2003).

3. Vivian G. Curran, *Cultural Immersion, Difference and Catgories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 71-73 (1998).

tions Commission on International Trade Law (UNCITRAL) sponsored movement toward harmonization of private law, including the highly successful Convention on International Sale of Goods (CISG) which bridges civil and common law contract principles. The unification of private law is also "a task undertaken by the Institute for the Unification of Private Law (UNIDROIT)."[4] We might also consider the International Bill of Rights that consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. In fact,

> [w]e can find the notion of human rights in all societies and at all times, in Europe as well as in Asia and Africa, in antique as well as in modern Chinese philosophy, in Hinduism, Buddhism, Christianity, Judaism, and Islam. The idea of human dignity is common to all these concepts, which emphasize different values according to the different conditions and diverse societies in which the human beings happen to be living. Human dignity and tolerance constitute the basic core of human rights.[5]

The pursuit of common principles might form a bridge between different cultures, facilitating mutual cooperation and understanding, if not, hopefully, a coming together of peoples.

However, this is just one purpose of comparative law, and international law. As we know, the pursuit of universals can be quixotic. Unfortunately, there is almost always a disjunction between ideals subscribed to and behavior actually undertaken. That is the reality of law as law, in itself, is limited. We are still left with the baseness of the common clay of humanity.

More importantly, comparative law is about understanding the framework of another culture. One who compares law is like an archaeologist: mining the mass of data from a foreign source in search of uncovering patterns of thought and order that undergird and form a legal culture. This work is, by definition, exotic: studying the legal culture to see what rules apply, how they function, how effective they are and how they influence and form the culture. We thereby learn much about rules, but as importantly, about that society's culture. Why are the rules formed this

4. Sompong Sucharitkul, *Unification of Private Law and Codification of International Law*, 3 UNIF. L. REV. 693 (1998).

5. Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 306 (1986-87).

way? Do the rules reflect cultural predispositions? Do the rules influence the culture? What does the culture consist of? How do the elements of the culture influence the law?

To get to the bottom of these questions, we must understand what law is. Many of us think of law as rules, and this is surely part of law. Generally, we can look to constitutions, statutes, codes, regulations, and cases as sources of law. We might think of this part of law as law in its external manifestation. External law is the readily identifiable form of law. In the western tradition, the majority of external law is written. The written word - *sola scripta* - is powerful because written words convey authority and respect, or so they have come to be within the western cultural tradition. Westerners are accustomed to think of law as written where the words on the page convey most of the meaning. Therefore, we only need to deal with semiotic systems and translate their meaning.

However, not all external law is written. Ancient societies relied on orality, ritual or tradition to convey meaning, respect, rules and regulation. This was the custom among many Native Indian tribes in the Americas before their status was relegated to "domestic dependent nations."[6] It is still the custom among many indigenous people. Hopefully,

> the evolution of national legal awareness of the need for a contemporary society to provide reliable political, economic, cultural and social security safety nets for its indigenous people has contributed in no small measures to the growing international consciousness of the imperative necessity to protect the precious cultures, traditions, ways of life and civilizations of every indigenous people in the world. . . . [they] must be preserved intact as distinct but unique social, cultural, political and economic grouping within the same national community. . . the study of comparative law is vital to the basic understanding of international legal developments. . . . use of comparative law techniques can serve to promote, reinforce and accelerate the process of crystallization of emerging norms of international law designed to preserve and protect the political, economic, social and cultural values of indigenous peoples populating the earth.[7]

Non-written communication can be effective in forming and regulating legal culture. For example, despite the pell-mell passage of a plethora of

6. Sompong Sucharitkul, *The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. Supp. 3, 15 (2002) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

7. *Id.* at 3-5.

written statutes designed to embrace the global marketplace, norms of China are still most likely regulated more by the customs and teachings of Confucius or other traditional authority. We might say the same of Japan, which views order and harmony as prime values of the culture, also a legacy of Confucianism - and this greatly influences legal relations.[8] Or consider modern India, another emerging global economic powerhouse. Like China, India is pursuing a course of modern economic development. However, underlying classic Hindu law is the notion of social ordering, which perpetuates a socio-legal based caste system that pervasively channels social behavior.[9] As with China, progress in India is proceeding along western oriented economic planes, but not in other respects, as measured from a western criterion, itself a potentially distorting lens.

Furthermore, not all law is external or readily identifiable on the surface. A second, deeper part of law lies beneath the surface and is less visible. These are the underlying forces that operate within a society to help form and influence law and give it substance. We might call this the "invisible" dimension of law. Not that this invisible dimension is wholly unknown or unrecognizable, but more that this dimension of law is one we tend to assume, take for granted or perceive just dimly.[10] We might think of these invisible patterns as underlying crytotypes - "the pattern to be revealed" - or legal formants - "non-verbalized rule[s]" or "implicit patterns."[11] Or we might think of this dimension as "substructural, often unarticulated, categorizations."[12] We might also refer to this dimension of law as internal: forces that operate beneath the surface of external law, but which infuse the law with meaningful content. Examples of internal forces might be custom, history, religion, geography, language, interpretation or translation. The point, simply, is that there is a deeper dimension to law than that which manifests itself overtly. We all have a tendency to seize upon the readily identifiable and ascribe meaning to it. But this can be a mistake. The internal dimension of law can exert powerful meaning on legal culture. Accordingly, we need to change our perspective and look at law with eyes wide open rather than half shut. Several examples explain my point.

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8. Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies*, 10 NW. J. INT'L L. & BUS. 195 (1989).

9. Comments by Professor Jayanth Krishnan to Edward J. Eberle on this essay (Sept. 30, 2006).

10. Grossfeld & Eberle, *supra* note 2, at 294.

11. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 AM. J. COMP. L. 343, 385 (1991).

12. Curran, *supra* note 3, at 45.

The first is from riparian or water law. The transfer of English common law to the United States often involved adjustment. "Under English riparian rights, owners of adjacent land possessed water rights."[13] England is a country with plenty of water. Transfer of English water law, accordingly, would work well in areas of the United States with abundant supplies of water, such as New England, the Upper Midwest or the Middle Atlantic. However, English water laws would, naturally, not work well in arid parts of the United States, like central California, Colorado, Oklahoma or Texas. Faced with this, courts in the dry southwestern United States developed an alternative theory: appropriation. Under appropriation, the age old adage "first in time is first in right" applied. This meant that those people who made a "reasonable use" of water first, got preference.[14] We can see that the internal force of geography (an arid rather than a green climate) made the difference in the change in water law from riparian rights to appropriation. Thus, the traditional notion of the law changed based upon the underlying phenomenon of geography.[15]

The second example involves the interaction of German and Italian private law. The German Pandectist movement heavily influenced the 1865 Italian civil code, just like it had many other countries.[16] When Italy adopted a new civil code in 1942, scholars continued to look to German legal science. "They were convinced that the new code was incomprehensible without an understanding of the concepts underlying it, and these concepts had been described with unsurpassable accuracy by the German writers. Therefore, they consulted German doctrine to interpret the law in force."[17] Thus, the Italian civil code depended on a particular world view of German Pandectists, which provided the underlying framework for the understanding of the written law. The external law was given substance by an internal force of interpretation.

A third example illustrates the cross-currents of influence among different cultures that an open-eyed approach to comparative law can yield. But what is the influence on German law, and might the answer to that question help explain Germany's hold on Italy? German law, especially private law, is heavily influenced by Roman law. Professor Rodolfo Sacco states that "the fortunes of Roman law in Germany were tied to the fact that university education in Roman law was the only route to practice before courts and in offices."[18] The role of university training in

13. Grossfeld & Eberle, *supra* note 2, at 299.
14. *Id.* A representative case is *Coffin v. The Left Hand Ditch Co.*, 6 Colo. 443, 446-47 (1879).
15. Grossfeld & Eberle, *supra* note 2, at 299.
16. Sacco, *supra* note 11, at 345.
17. *Id.*
18. *Id.* at 349.

Roman law also had an effect in France. By contrast, "the kings of England, Poland and Hungary defended the legal traditions of their countries by preventing future judges from studying Roman law."[19]

These examples illustrate that law is not just words we read on a page, even in a word-bound western society. A range of forces lie beneath the external law, and it is a main mission of comparative law to offer the tools by which to examine the full range of forces that comprise the internal dimension of law so that we can understand better how law actually functions within a society. Law sits on the surface of culture and is vested with its meaning and, in turn, vests the culture with meaning. Accordingly, we must look at law in a more complete way as: 1) external law; 2) internal law; and 3) the culture in which the law sits. We are not studying law so much as studying legal culture. In this way, we obtain a more complete view of law—with both eyes wide open–imparting a truer understanding.

It is the aim of comparative law to examine the legal rules and patterns of order that drive a given society. For subjects of a particular legal system, this is a question of acculturation. Being the product of a culture, we often intuitively sense the hidden forces that play out below the surface of the external manifestation of law. Therefore, this task becomes more difficult when we find ourselves dealing with a foreign legal system. We must then call upon the tools of the anthropologist or archeologist: studying the underlying substrata of data that lie within a culture.

For the comparativist, this means we must engage in "cultural immersion," as Vivian Curran advocates. This "requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in which the legal system operates. It requires an explanation of various cultural mentalities. . . ."[20] To understand a culture, we need to employ the tools of acute observation, linguistic skill and immersion both into the milieu and various social settings. Once we have uncovered the cultural context of law, we must translate one world view into another. Translation calls for understanding the multiple semiotic systems and linguistic contexts that situate ideas, and then determining how to adjust and transfer over that particular world view into that of another.

By learning and appreciating that law is not just the words on the page or the chant of a sage, we gain a greater understanding of the underlying

19. *Id.*
20. Curran, *supra* note 3, at 51.

socio-philosophic context that both reflects and helps mold law. For example, can we really understand the United States Constitution without an appreciation of the influence of the Enlightenment, natural law or Republican or English Whig theory? Why, after all, do we refer to it as our "higher law?" Comparative law allows us to gain a fuller appreciation of, not just law, but legal culture and offers access to different and alternative patterns of thought, like a passport to a foreign land.

Employing the insights of other fields (anthropology, philosophy, linguistics, sociology or history) has much to offer us in understanding law. In particular, we benefit in the skill of decoding the effect of forces entrenched within law, helping to uncover the framework on which law sits. Decoding is an essential part of the work of comparative law: discovering and translating the invisible powers in a legal culture leads to uncovering the patterns of order that actually operate within a society, and yield content. We must, of course, be careful to see and understand the elements that actually exist and operate within a given society, as ordered by that society, and not as we may often view them through our own cultural perspectives.

Numerous disciplines, arising within the last 30 years, have also provided a different perspective on law. Law and economics, for example, teaches us to appreciate and evaluate the economic and practical efficiency of law and its rules. Critical Legal Studies and its vast genre teach us to learn and appreciate the power relationships (economic, racial, gender based, immigrant or other) embedded in a law or its rules. Law and literature teaches us the power and complexity of language in shaping legal data. Words, their syntax, grammar, style and the like convey the particular context in which words sit, and form meaning. As Rodolfo Sacco observes, "Our visible, superficial language is the result of identifiable transformations of latent linguistic patterns that are more permanent that the visible ones."[21] We should be careful to heed the lessons of post-modernism and post-colonialism by applying the rubrics of legal science as situated within our own cultural setting. Are we missing, glossing over or distorting the wonderfully unique aspects and structures of individual societies, especially societies and cultures outside dominant world views? Is comparative law itself–as a western-oriented field–an imposition of power on undeveloped or developing countries or their indigenous populations?[22]

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21. Sacco, *supra* note 11, at 385.

22. Comments by Professor Jayanth Krishnan to Edward J. Eberle on this essay (Sept. 30, 2006).

By employing the insights of other fields, such as anthropology, philosophy, linguistics, sociology, or history, we are aided in our understanding of the law. In particular, we benefit from the skill of decoding the effect of forces entrenched within law, helping to uncover the framework on which the law sits. Decoding is an essential part of the work of comparative law. Discovering and translating the invisible powers in legal culture leads to uncovering the patterns that order a society. We must, of course, be careful to see and understand the elements that actually exist and operate within a given society, as ordered by that society. We must avoid viewing them through the lens of our own cultural perspectives. Furthermore, we must learn to be foreign sojourners, shedding our natural predispositions and adopting an eyes wide-open perspective. We must follow the ways of the archeologist or anthropologist, not just the ways of a legal scholar.

Comparative law is a quest for the exotic, the different, the other – the dimensions and forms of law and culture outside the normal ken of one's visage – in the hope that one can gain new and different perspectives, on law, culture and patterns of order. As importantly, comparative law ultimately focuses back on native culture: by comparison, is our culture better or worse, in what way and, if so, what is to be done? The real aim of comparative law is to offer insight and perspective so that we are better equipped to self-reflect critically about ourselves and our own legal culture. Only by comparison can we assess where we are, where we came from, and where we go from here.

To accomplish these goals we must keep our eyes wide open and remember that the first level of law is its external manifestation in words: codes, statutes, cases rules and the like. However, the words are simply the external manifestation of the expression of ideas that sit within a culture. Only by understanding language and culture can we appreciate the range and effect of the forces that operate on law and legal culture. To translate language, we must understand and give meaning to the words, ideas and concepts of one language, and transmute them to another. However, much transmutation will call for more than mere literal translation.

We must also look beneath the words at the underlying subsurface of forces that vest words and legal culture with meaning. We must examine the full range of forces that lie beneath the external law and vest it with meaning. This involves an examination of forces like religion, history, sociology and economics and the like. Only then can we convey the fuller picture of a world view of law.

This brings me to the purpose of this essay: honoring the work of Professor Sompong Sucharitkul. Professor Sucharitkul has spent his academic career investigating international law, international terrorism,[23] indigenous law,[24] Thai law and comparative law. He has approached foreign systems as an explorer, equipped with the hard-headed sense of a trained legal academic and cultural anthropologist. For example, he has "examin[e]d the inherent links between Buddhist Law and Thai law, their coexistence, interrelations and mutual influence within the existing legal system and the religious order of Thailand."[25] This examination has uncovered the internal dimension that helps form the external law.

> Until recently, scholars thought of "Buddhist legal influence" as an empty category, a contradiction in terms. In the last decade, that view has been challenged by researchers in Buddhological circles. Buddhist legal traditions are now recognized as predating Hindu Dharmasastras, as having their own distinct content and as being a major Indian contribution to Thai and Southeast Asia culture in general.
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> Clearly, the substantive law of Thailand must be linked to the teachings of the Buddha. Not every part of Thai law is specifically influenced by the Buddhist doctrine, but the civil law, particularly the law of persons, family law, the law of properties and the law of transactions and obligations must be imbued with legal norms based on Buddhist principles.[26]

Professor Sucharitkul has performed with distinction the role of the comparativist: bringing technical expertise and cultural awareness together so that we may obtain an informed and reasoned awareness of a different legal culture. Illumination can only come from such work.

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23. Sompong Sucharitkul, *International Terrorism and the Problem of Jurisdiction*, 14 SYRACUSE J. INT'L L. & COM.14 (1987-88).

24. Sompong Sucharitkul, *The Inter-temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3 (2002).

25. Sompong Sucharitkul, *Thai Law and Buddhist Law*, 46 AM. J. COMP. L. 69, 69 (1998). "The expression 'Thai' or Tai meaning free or free man has long been used to refer to an independent ethnic group known as the Thai race who today populate the whole of Thailand and Laos, the whole of Shan State in Myanmar, the whole of Yunnan Province (at times known as the Thai Autonomous State in Southern China) and the Thau Yuan or Thai Dum or Black Thai in Northern Vietnam." *Id.* at 73.

26. *Id.* at 77, 85.