

Book Review

INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE. Edited by William E. Butler. The Netherlands: Sijthoff & Noordhoff. 1980. Pp. vii, 315. \$42.50.

REVIEWED BY HENRY J. STEINER*

What might a "comparative perspective" upon international law mean, or reveal? The phrase evokes the tradition of "comparative law" with its related methods and purposes. That tradition is rooted in the study of national legal systems. Scholars within one such system explore another or several others—a cross-cultural inquiry serving both practical and broad scholarly aims. However illuminating, these explorations cannot be viewed as indispensable to the study of national law. They stand at the periphery rather than core of most students' or scholars' concerns.

Does a "comparative method" within international law serve a similarly confined purpose? Or should we understand it as more central and pervasive a phenomenon, even vital to a threshold inquiry into the nature, norms and processes for development of international law?

Such are the questions stimulated by this very useful book edited (and contributed to) by William Butler. Seventeen essays develop doctrinal, jurisprudential and sociological perspectives upon the meaning and relevance of a comparative method in international law.¹ Most of them address the formal legal contexts

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1. The authors, in order of appearance of the essays, are H.C. Gutteridge, W.E. Butler, A.C. Kiss, M. Bothe and G. Ress, B. Dutoit, Iu. Ia. Baskin and D.I.

in which comparative inquiry has figured—the search for “general principles” informing international law, the work of codification conferences, the opinions of courts interpreting treaties creating regional organizations. Some essays treat the historical evolution of scholarly recognition of a comparative method’s contribution to understanding international law. A few attribute an ideological function to comparative analysis—for example, an attempt to describe capitalist values expressed within Western legal systems as universal norms. Other essays note the contribution of a comparative method towards understanding the ideological tensions within international law.

This range of informative perspectives constitutes the book’s significant contribution to the study of international law. Of course the essays vary in quality. The reader encounters some repetition of viewpoints, even of illustrations—a likely if unfortunate feature of a group of essays devoted to one theme. But what the book loses in the systematic development of a point of view which a single author could have provided, it gains in informing the reader how diverse are the historical, cultural and jurisprudential understandings of the employment of a comparative method.

The essays implicitly suggest how differently we must understand the role of a comparative method in national and international legal systems. The discipline of “comparative law” holds a special position within the study of national law. Viewed technically, it offers insight into alternative modes of legal ordering—how other (generally more similar than different) nations handle the accident problem, or resolve tensions between freedom of contract and the unconscionability norm, or approach issues of choice of law, or design institutions to respond to problems of environmental damage, or regulate anticompetitive practices. Such comparisons may serve a pedagogical purpose, or the practical goal of contributing to reform of a national law. Foreign experiences expand the imagination, reveal alternatives, perhaps point the way.

Alternatively, the study of comparative law within national settings may deepen one’s understanding of law itself, through the awareness it develops of diverse national traditions, substantive conceptions, institutional structures, legal ideologies. By viewing a national system in a comparative context, the student understands it the more deeply. Comparative law, writ large, merges

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into comparative legal sociology or the comparative social theory of law. It becomes equivalent in a cross-cultural sense to historical study that examines law in its relationship to periods in a nation's development in a vertical rather than a horizontal dimension.

How then is a comparative method to be understood in an international context? In what ways might it inform normative argument about international law? Does an answer depend on whether argument relies on norms that are based on a positivist conception of custom, or on treaties, or on postulates of right or a goal of welfare maximization?

The cautious and traditional response would point to an obviously relevant text that figures in several of the essays, Article 38(1) of the International Court of Justice's Statute.² Clause (c) instructs the Court, "whose function is to decide in accordance with international law," to apply the "general principles of law recognized by civilized nations." The traditional and perhaps dominant interpretation of that clause directs judicial inquiry to principles within national legal systems, characteristically principles of "private law" such as *res judicata* or *estoppel*. That inquiry looks to the derivation of international-law principles from those internal to (many or representative) national systems. It is "comparative" in the strict and conventional sense.

This initial response, both accurate and inadequate, should expand to embrace a more spacious conception of the method and functions of comparative research. Consider, as do several essays, as basic a feature of international law as custom. Clause (b) of Article 38(1) instructs the Court to apply international custom "as evidence of a general practice accepted as law." Characteristically, diplomatic officials, lawyers or judges would proceed upon positivist premises to identify customary norms. They would look to interactions among states creating patterns of conduct or abstention that build expectations of continuity, coupled with a sense of obligation of those states to continue to act consistently with them—a sense of normativeness. The interactions at once constitute a practice and create a norm.

This positivist approach—with its stress on the consent of states expressed through their practices—is inherently "compara-

2. The Statute, annexed to the Charter of the United Nations, is set forth in 59 Stat. 1055 (1945), T.S. No. 993 (at p. 25).

tive" in nature. It looks both to the comparison and aggregation of practice. Is a practice sufficiently "general" to support a universal norm binding all? Which states have "accepted" it in their relations with other states or in their internal legal systems? Unlike the use of "comparative law" to give content to clause (c)—to reveal shared principles of national law governing intrastate conduct—the method as here employed stresses conduct and normativeness in the interstate arena, between states. It is "comparative" nonetheless.

Between these confined and spacious understandings of a comparative perspective—general principles of national law, practice among states to identify customary norms—lie the numerous illustrations recurring through these essays of resort to comparative inquiry to resolve issues of or to develop international law. Codification through multilateral treaties frequently follows research into the internal and external practices or norms of states. The negotiation of treaties on establishment or enforcement of judgments must build upon (and modify) internal norms and institutions of the prospective parties. Descriptions of institutions such as the corporation created under differing national laws—and hence comparison of those laws—may be indispensable to the application of international-law norms such as those governing diplomatic protection. Interpretation of a multilateral treaty may depend upon the internal practices of its parties in giving it effect. Within regional organizations such as the European Community the elaboration of norms by legislative or judicial organs will draw upon the codes, legal cultures and constitutional traditions of the member states.

This catalog of illustrations could grow, but its point is made. If we mean by a comparative method the investigation of the formal legal systems or the broader practices and legal-political cultures of different nations, then the method inheres in the study of international law. It is vitally a part of the scholar's, diplomat's, advocate's or judge's inquiry. It lies at the core rather than the periphery of study. It is neither narrowly practical nor broadly cultural, but simply inescapable.

The method is inescapable because of the most rudimentary characteristics—legal, political, historical—of international law. Tensions exist in the international legal system between national sovereignty and supranational rules, between autonomy and international regulation, between individualism and community (both writ large). The source of international legal norms lies within, rather than in phenomena independent of, the conduct, principles and aspirations of states composing the international

system. The legitimacy of those norms stems in important part from their origin, in one form or another, within state practice or national legal orders. These observations hold whatever may be one's jurisprudential or political point of departure towards legitimating international law: positivism, some variant of natural law, other ideal norms. Even ideal norms find their initial expression within national systems.

The briefest comparison between the international system and a federal nation underscores this point. One cannot equate international decisionmakers (who of course include interacting national officials as well as officials of international organs) with the relatively autonomous federal lawmaking authority within a nation such as the United States—whatever the political metaphor of social contract to legitimate the federal norms or the historical origin of the Constitution in the consent of constituent states. The interests of the fifty states are represented in a more complex and organic way within the federal government. But much international decision-making continues to be the work of interacting state officials, whether through the formation of custom, the negotiation of treaties, or their representative participation in international institutions.

Of course the international legal system possesses some autonomous character. Its structure of customary or treaty rules constitutes a normative system distinct from (and hierarchically superior to) those of states. Slowly it achieves some degree of institutional autonomy—more strikingly in regional than in global organizations. Nonetheless, absent an international government including executive and legislative as well as judicial organs, the normative argument about international law of advocates or judges necessarily draws upon national practice and law, directly or indirectly.

The sustaining forces of international law lie within those very states which are its principal subjects—in their interests, power, or principles. Even within a more developed form of a regional international organization—treating economic integration, human rights, and so on—the tension survives in all organs of its government. Even there, attention to diverse national laws, traditions and ideologies remains inescapable. Explicitly or implicitly, the creation of or argument about international norms continues to invoke a comparative method.

When legal argument rests less upon an empirically oriented positivism than upon ideal norms—such as reliance upon natural-right postulates to urge recognition of particular human rights—it nonetheless profits from the support that comparative inquiry offers. The ideal and the extant interact pervasively and complexly in the international as well as national systems. The realization in the practice or laws of many states of ideal norms fortifies such international-law argument. Acceptance of a particular human-rights norm within many or representative national traditions both nourishes the argument for an international norm and defends the advocate against a charge of a provincial conception of right.

Of course comparative inquiry hardly “resolves” international-law problems. Comparison may yield irreconcilable conflicts among interests and ideologies, or “shared” principles expressed on so abstract a level (perhaps “unjust enrichment”) as to escape ready specification of the principle to resolve the problem at hand (perhaps compensation for expropriated property). But it is indispensable nonetheless. Comparison exposes the roots of problems in divergent legal conceptions or reasoning, concepts of the right or good, or interests. It thereby constitutes a necessary first step towards resolution. At a minimum, it can clarify what *is* at issue. Perhaps comparative inquiry can penetrate the opposition of formal normative claims and expose the substantial grounds for opposition. Perhaps it can offer points of departure, or reveal a fund of human experience out of which international legal norms may develop.

Leading treatises and casebooks on international law suggest, however, that the student is led to a narrow and misleading perception of how comparative analysis informs international law. Custom, treaty interpretation, or the exploration of the roots of disputes in differing national interests or ideology are treated as distinct from Article 38(1)(c), which itself becomes the classic and proper illustration of the use of “comparative law.” Surely this collection of essays goes far to repair that misunderstanding.

Perhaps the problem can be viewed simply as one of definition, *i.e.* what we *mean* by a comparative method. But it reaches more deeply. The student, diplomat or judge must guard against a tendency to perceive the international legal system as autonomous, as providing its own internal materials for decision. International law’s political foundation and normative structure do not yield a substantive and institutional autonomy analogous to the federal government’s *vis-à-vis* the fifty states—no political structures closely analogous to a national congress, executive, and judiciary.

We must see the international system in its continuing dialectic with national law and power. In its content and growth, it is at once distinct from and dependent upon national system, separate and bound.

By definition, any normative system must achieve more than the description or rationalization of the behavior of those subject to it. It must constitute a source of both criticism and justification of behavior. But international law's influence upon the behavior of states suffers from its political and institutional fragility. The critical power of its norms is both independent of and derived from national power, interests and law.

These varied essays nourish that perception. By viewing a "comparative method" spaciouly, they do more than expand the definition of the term "comparative." They say something significant about international law itself.

