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An Introduction to Comparative Law Theory and Method

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BOOK REVIEW

GEOFFREY SAMUEL, AN INTRODUCTION TO COMPARATIVE LAW
THEORY AND METHOD

(Hart Publishing, Oxford and Portland, Oregon 2014)

Reviewed by Jacques Vanderlinden*

This is not a review in an ordinary sense of the word, i.e.: “7. a. A general account or criticism of a literary work (esp. a new or recent one) ...”¹ or, according to Geoffrey Samuel, “a critical piece aimed at the public on a particular book by a particular author”.² Comparing (or is it juxtaposing?) these definitions, they include a common idea behind a radical: the review must be “critic-al.” Here I am, sent back to my *Shorter English Concise Dictionary* in two volumes, which gives me no solace, as the first two definitions—apparently the most relevant—imply a judgment, even if it is a “careful” one. To pass a judgment on anyone or anything is something I intensely dislike. My first reaction was indeed to send the book back to the *Journal*, as it was so completely overwhelming me.

At the same time, it attracted me irresistibly as, due to my limited knowledge, I was willing to agree that it was “the single (my underlining) introductory work exclusively devoted to comparative law methodology” (at back cover). Thus I could only infer that I had in my hands a rare thing and my curiosity was even more awakened than it was permanently by nature.

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1. WILLIAM LITTLE, H. W. FOWLER, AND J. COULSON, *SHORTER OXFORD ENGLISH DICTIONARY* (C. T. Onions ed., 1973).

2. GEOFFREY SAMUEL, *AN INTRODUCTION TO COMPARATIVE LAW THEORY AND METHOD* 26 (European Academy of Legal Theory Series, vol. 11, 2014).

Further, the book immediately revealed at first sight in some places a use of figures; their quality delighted my inner self interested in teaching. I personally had rarely been fully satisfied by my quasi-total incapacity at concretizing imaginations that frequently erupted in my personal work. Finally, why should not Geoffrey Samuel's work provide an answer to questions which sometimes appeared to be of paramount importance whenever I was confronted with the wish or the obligation to compare a piece of law foreign to the one I had been taught at university—if ever so—many, many years ago? These were my expectations. They certainly contributed to my final decision to embark on this non-review. All things having been considered with due care, I decided accordingly to roam in the book leisurely according to my mood and my personal remembrances, leaving to the Editor of the *Journal* the responsibility to incur or not the wrath of the Author by publishing or not these pages.

1. I had an immediate question. Why, in 2014, should one keep in the title of such a fundamental and innovative book a reference to a “strange,”³ and for me non-existent, topic: “comparative law?” Could it not be adequately replaced in English by “comparing laws”? Especially since Pierre Legrand—one of, if not, the most quoted authors in the book—has for five years proposed replacing these two words in French with the more adequate “*comparer les droits*.”⁴ To which, quite unusually, he added in the title of his book, the adverb “*résolument*,” which leaves me perplexed and of which I would dispose easily if I was Samuel. Was he referring to his own determination—this is doubtful as he never appeared as someone cultivating shyness—or did he only wish his work not to be confused too easily (at first sight of course) with that of Vanderlinden bearing the same title but for the adverb?⁵ Let us

3. *Id.* at 8.

4. *See, e.g.*, PIERRE LEGRAND, *COMPARER LES DROITS, RÉSOLUMENT* (2005).

5. *See* JACQUES VANDERLINDEN, *COMPARER LES DROITS* (1995).

only hope that Legrand did not imply that the latter was irresolute—for whatever it means—in his approach to comparative law! *Chi lo sa?*

2. Quite quickly I realized that I was confronted with a monument of sophistication of which I had no previous idea whatsoever. For one more time indeed (but this had happened in other branches of law), it came to my mind that I had been for decades in the position of Molière's Mr. Jourdain, comparing without knowing what the verb really meant and thus ignoring what I was really doing. Since 1953 indeed, when René Dekkers—then a professor of Roman Law at Brussels Free University—threw a young student (with two years' experience at swallowing essentially literature in the humanities and trying to reproduce it to the letter for two years in June) into the cauldron of the comparison of laws by suggesting that he start a thesis devoted to a study of codification without any limit throughout space and time, I never, never bothered either with methodology or with legal theory concerning what I was doing, which I believed was a kind of comparison of laws. I was a simple avowed empiricist. Full stop.

3. Furthermore, I never claimed that any of my publications was either a “significant and influential contribution to legal knowledge” or “ranked amongst the most elegant and insightful contributions” to the same.⁶ My only excuse for having possibly been part of “a tradition in comparative legal writing that can at best be described as theoretically weak and at worst startlingly trivial,”⁷ is that, obviously, the book under (non-) review had not yet been published, and also that, as Sacco wrote in 1996, any of my “proposal[s] could have been richer if [I] had taken advantage of the analyses that others had sketched previously.”⁸ If I was an empiricist, the circumstances of my life were such that I rarely had

6. Samuel, *supra* note 2, at 25.

7. *Id.*

8. Rodolfo Sacco, *Comparer les droits. À propos de l'ouvrage de Jacques Vanderlinden*, 3 REVUE INTERNATIONALE DE DROIT COMPARÉ 659, at 667 (1996).

much time to spend on “some serious preliminary reading and research” as defined in five lines by C. Hart and adopted by the author.⁹ For some time the necessities of earning a living, followed by a huge diversity in my teachings in different places, some of them with quasi-inexistent legal documentation, a variety of administrative tasks either in faculty or in running international associations, and a respectable number of publications which had no other pretence than ensuring that I would not perish, certainly prevented me from reading the normally required “analyses that others had sketched previously.”¹⁰ Full stop again.

4. My only concern today is for the undergraduate student, or even the postgraduate one, “whose work involves comparison between legal systems”¹¹ or who should have reached that stage in his studies in order “to look beyond law as a discipline”¹² and to take a course in comparative law. He has first to reassess and master what law is (i.e. being able to choose between, in alphabetical order, Dworkin, Hart and Kelsen, among others) before being “introduced” to comparative law by the author, even if “the concerns of the comparatist are different” of those of the legal theorist.¹³ My concern is also for all those—far more numerous—who are apparently excluded from the magic kingdom where law is being compared. I have, of course, been one of them, whenever I erred in accordance with the rule model (or any other) without knowing of the existence of the latter, or even of what law truly is since the Humanists (by the way, who are they?). Clearly this “introduction” is conceived—and again this is a choice which lies within the complete freedom of the author—for a self-proclaimed intellectual elite and this (non-)review should never have been entrusted to me. And yet, I am fascinated by the book, as it deals with two words (although I would have preferred the

9. Samuel, *supra* note 2, at 26.

10. Sacco, *supra* note 8, at 667.

11. Samuel, *supra* note 2, at vii.

12. *Id.* at 5.

13. *Id.* at 121.

following three: comparison of laws) with which I have been familiar for slightly more than half a century.

5. This fascination is tinged with some regrets as my own experience has been mostly outside the limits that the author—and again this is his privilege—has assigned to his work. He seems to deal most not with “law” as such, but with laws as they developed in Western Europe and spread in the academic world around the globe from the Renaissance onwards, i.e. the ones he mentions when presenting the rule model: “a matter of propositional knowledge expressed in symbols (natural language) themselves conforming to a system (linguistic) and thus being capable of treatment and manipulation, to a greater or lesser extent depending upon the system, by logical operations. It is this logical aspect of propositional knowledge that has traditionally inspired jurists since the Humanists to construct ever more coherent systems based on analogy between law and mathematics.”¹⁴ There we are.

6. This definition clearly has a merit which is too rarely met among comparatists: being careful that things compared are comparable. Dworkin, Hart and Kelsen may differ as to what exactly they consider “law”; they all refer to the same basic social material and way of thinking. After having practised taxonomy on a very formal basis and having frequently criticized particular taxonomic approaches, including those of David or Zweigert and Kötz, I tend, under a radical pluralist’s view of laws, to limit the usage of the word “law” in a comparative approach to very near that adopted by Samuel. I do not believe that Islam (the only “exotic” “law” he refers to indirectly, citing Glenn) has enough in common with the law as defined at the end of the previous paragraph to be “comparable” with the latter.¹⁵ Let me only bring back to the attention of the reader three more or less explicit definitions of the *shari’a* by three specialists: a) “The *Shari’a* is the path laid down by the creator; in following it men will find

14. *Id.* at 122.

15. *Id.* at 50.

both moral and material well-being. The *Shari'a* regulates in great detail the dealings of individuals with each other and with the community; it encompasses all man's duties to God and his fellow-men."¹⁶ b) "Floating above Muslim society as a disembodied soul, freed from the currents and vicissitudes of time, it represents the eternal valid ideal towards which society must aspire."¹⁷ c) "The sacred Law of Islam [*shari'a*] is an all embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules."¹⁸ Would any of these definitions fit the one quoted in the above paragraph? Asking the question is answering it. This is, of course also true, of what Glenn has absent-mindedly called "chthonic" legal tradition, providing us with a good example of cultural and legal imperialism to which the author quite rightly and frequently objects and where I completely share Legrand's views about "alterity" as much as he does.¹⁹

7. Thus, there is no room in Samuel's theory and method of comparisons for space and time beyond the most classical theoretical limits of the Western world. This limitation has my complete sympathy, because it avoids the indescribable confusion which has spread in "legal" science by putting in the same basket pre-colonial African, American, Asian or Australasian, without forgetting religious laws. The comparative taxonomy, which René David fathered from the 1950's onwards, was in many cases unjustifiable whatever method or scheme one adopted. It unfortunately necessitated a rag-bag in which to forget whatever was left hanging after categorization or, even worse, was eliminated from the field of laws and systems, as was the canon law of the Catholic Church. Yet, Islamic law, was kept in good

16. H. Afchar, *The Muslim Conception of Law* in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. II 86 (Rene David ed., 1975).

17. NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 2 (1964).

18. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964).

19. See, e.g., Samuel, *supra* note 2, at 129-130 and 165-166.

place, being admitted that one, in this instance, did not refer to its parts kept in force in colonial systems; the latter were an integral part of the state system of colonial powers and were denied the quality of “Islamic” law by some experts in the field, among them Schacht.

8. Having personally experimented—for better and for worse—with the space and time dimensions of comparison at the very beginning of my research activity when working on a comparative history of the concept of code (1954) and African customary laws in the field (1959), and when comparing the drafting of customary laws in France and the Netherlands from the 15th to the 18th century as a teacher, I immediately met the problem of a) defining the object of my comparisons and b) transferring notions from one language to another, be they African or European. In the former was also included the task of deciding where was law, as my freshly and poorly acquired legal education had led me to believe it laid. I had, of course no real training in anthropology or history. In the eyes of Samuel and Legrand, who, happily enough for me, were still young, I would have been one of the many who even did not figure that a problem of method existed and just went along discovering comparison “by gradual trial and error.”²⁰ No wonder that, in front of Samuel’s book, I feel like a dinosaur in front of Rosetta (not Champollion’s stone, but the latest space vehicle.)

9. This does not mean that I did not occasionally discover in Samuel’s work situations where it would have been most useful by opening new windows and qualifications on facts I have met in the past. It also means that I could appreciate the connexion between some of them and my own attempts at comparing or relativize them in the light of an enlarged comparison. Among the latter stands the problem of acquiring the basic knowledge required for the comparison to take place. Admitting that one cannot ask many people to be sufficiently familiar with the language, the law and

20. *Id.* at 3.

the social fabric of more than two laws, the consequence of it is that apparently not many would qualify as comparatists according to Legrand's requirement, which Samuel seems ready to accept. The way he presents it is quite satisfying, but, if it was strictly applied, one may wonder how many people would still qualify as comparatists, if only at the level of linguistic and cultural aptitudes.²¹ As early as 1985, I was meeting the English word "home" and could only escape the immediately realized near-impossibility of translating the word into French by reference to a popular English song.²² In order to go much further, i.e. in Japanese law, I was fortunate to have the assistance of a friend and colleague who had a doctorate in both law and Far Eastern languages. When confronted with the Japanese "*honkyo*" we started with dictionaries: they sent us to the equivalents "tower of a castle" and "headquarters of an army." The possible difference between the two appeared in two different translations of the Japanese Civil Code, the one into French using the word "*siège*" and the other into English using the word "centre." Having discussed the problem in a conference attended by some Japanese colleagues that I presented at the Institute of Advanced Legal Studies of the University of London, no consensus could be reached among them as to a definite choice. Beyond the dictionaries, I had brought into the picture the military character of traditional Japanese society, the partly French, partly German education of Japanese lawyers at the time of the drafting of the Code, the *mittelpunkt* (hence centre) dear to Dernburg and in conflict with the wording of the B.G.B., etc. Thus, I was exploring avenues in the same way that I had been trying to identify the *sende* or the *ira* in the Zande land tenure system as early as 1959.²³

21. *Id.* at 144-147.

22. Jacques Vanderlinden, *Ubi domicilium, ibi ius universale?*, 37 REVUE INTERNATIONALE DE DROIT COMPARÉ 303, at 314 for "home" and 312 for "honkyo" (1985).

23. See Jacques Vanderlinden, *Principes de droit foncier zande*, 26 REVUE DE L'INSTITUT DE SOCIOLOGIE 557 (1959).

But this was apparently not comparative law as Samuel defines it. The only positive point could perhaps be that in both cases I was decidedly, but perhaps not sufficiently and thus unsuccessfully, fighting an automatic direct projection of my own prejudices into foreign legal systems. But was I therefore an imperialist in the depth of my multiple selves? God, in whom I do not believe, will decide on the day of Judgment.

10. Yet one point still leaves me puzzled. How does one decide to subject two notions or concepts to comparison before starting the job? The more so as we know and agree that “focusing on words and dictionaries is not comparative law.”²⁴ But is it totally excluded at the very beginning of a jump into the unknown? When René Dekkers launched me on the path of codification, what was I looking for? Anything, called in a Romance language, *codex*, *code*, *codice* and *codigo*? This would have provided a very limited answer to his concern. The more so as the word had been attributed by comparatists and historians to many documents without much reflexion as to what it covered. Having read Samuel, I have the feeling that I still do not know what was in theory my solution of solving the problem by creating a group of “unnamed” codes on the basis of a first identification of words found in dictionaries.

12. Reading Samuel also led me to some introspection regarding the reason why one is attracted by the comparison of laws, a point which, ultimately is not necessarily of interest for his purpose. As mentioned before, I was pushed into it by the hazards and necessities of life, and believed that I had entered into comparison long before getting my first law degree, as I am sure a majority of students are led to believe by their teachers, including myself, while studying comparative civil law.

But what about the objectives of comparison? Going through the volume, one finds:

24. Samuel, *supra* note 2, at 147.

– the advancement of knowledge which, as the Author understands it, is not only acquiring the knowledge of any law, but also exploring beyond the words of the law and going “deeper into the histories, sociologies, economics and politics” of the compared law.²⁵ This being done, comes:

– the “access to legal mentalities” which comes from a curiosity about the “other” and especially his inner selves, which some “critical” or “radical” pluralists (to whose I belong) consider to be the place where anything legal, normative or willingly factual starts.²⁶

– the acquisition of a relative look at things legal, including one’s own system and, consequently, pushing away any attempt to “normatively imposing one’s own epistemological interests on others” (citing Jansen, and immediately punctuated by Samuel’s “Quite so.”)²⁷ In fact, the comparatist might believe that he has become a social anthropologist, which of course is not true. But between affirming the interest of acceding to foreign mentalities and realizing such objective there is evidently a formidable gap, even for an excellent postgraduate student. And, finally:

– the realization of “a dialectic between the domestic body of law and a foreign body of law” in order to give the comparison of laws its “meaning and sense”.²⁸ Here comes again the already mentioned Legrand’s idea of “alterity” with which I am in full sympathy.

The three objectives just mentioned do not exclude more limited ones, of which a characteristic is their relativity. Such is the case for the elucidation of information between two laws which may have “some practical value”.²⁹ But this is immediately discarded, as either, with the support of Sacco, it can “verge on the

25. *Id.* at 10-11.

26. *Id.* at 6.

27. *Id.* at 6.

28. *Id.* at 11.

29. *Id.* at 12.

ridiculous,”³⁰ or, with the support of Legrand, “often be just vacuous.”³¹ Samuel points at the considerable development of the discipline in the last twenty years and suggests that the existing literature may contribute to a more theory-oriented discipline with the risk of a closing itself on itself with the result that “students may never actually ever get to compare any laws.”³²

But these are far less contestable objectives than the one which is often concealed behind questionable alibis (the need for “development” is one of them, which followed the detestable one for “civilisation”, both under the rags of “modernisation”): imperialism, be it academic, cultural, ideological, intellectual or legal.³³ Happily enough, the author has no pardon for comparison covering such justifications.

13. All in all, comparison blows up the young lawyer’s mind, and I strongly believe that this can be done without too much theory or method. As Samuel quite rightly underscores: “comparative law, at every level, is by no means easy,”³⁴ the more so because if one wishes to enlarge the scope of comparison to societies distant in space and time, the scholar is confronted with a dramatic lack of the reliable empirical data needed for any theoretically valid conclusion. One quickly enters the realm of what I call conjectures and hypotheses, which look more “serious” than fraud and cunning. But even within such limits the effort is worthwhile. As soon as the student gets a glimpse at it, comparison gives him the impression of enlarging his perspectives through times and spaces as to what law is far away from the canvas he often must painfully swallow during his first contacts with law.

14. Last but not least, a careful reading of Samuel reveals that he rarely takes a definite stand on the multiple elements which he brings to the attention of his reader; he is, in most cases, satisfied

30. *Id.* at 15.

31. *Id.* at 16.

32. *Id.*

33. *See, e.g., id.* at 6, 9, 17, 63, 78, 121, 129, 130, 147, 151, and 165.

34. *Id.* at 9.

with introducing—is it not precisely what the title of his book declares straightaway?—various methods and theories and the pros and cons concerning each of them without passing a “judgment” on them. Bigotry is evidently not his cup of tea, as it is for some imprecators against anything which is not their own conception of comparison in the field of law. In a sense, he definitively is a pluralist, as he himself emphasizes in the closing lines of his book. But does he realize that such commitment has its consequences? If he is what I would call a “traditional” pluralist, i.e. those who carry on setting pluralism within the State legal structure, there is not much problem. However, in the view of critical and radical pluralists like Rod Macdonald and me, he has to locate it within the infinite variety of individuals’ inner selves, permanently defining their own law, in which case he might find that comparison is practically impossible as no single mentality is comparable to another. This reinforces Legrand’s perspective and his suggested characterization of comparison as an intercultural dialogue replacing the traditional approach to comparison. But, if the author is fundamentally—at least so does he appear to me—a pluralist, he cannot discard contemptuously any other approach to the comparison of laws. This should enable him to prepare many editions of the present capital and most interesting work.