Reviews

Örücü, Esin. *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*. Leiden/Boston, Martinus Nijhoff, 2004. vi + 242 pp. Casebound. ISBN 90-04-13989-3.

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UNRAVELLING THE MYSTERY OF COMPARATIVE LAW

This important and provocative monograph will cause comparatists of all persuasions at least to rethink some of their treasured positions. This reviewer, it should be conceded at the outset, is not sympathetic to the deliberately musicological structure and musical allegories of the volume, cute and cunningly attractive though they are. The title of the study was inspired by Sir Edward Elgar's 'Enigma Variations', and music generally serves the subdivision of the book into an overture, themes, sub-themes, form variations, finale and so on, and the deployment of the concept of 'transposition' to useful effect.

The overall impression is to me discordant, inharmonious and, most of all, misleading. For reasons that perhaps deserve independent investigation, comparatists in the realm of law are prone to the creation of pseudo-scientific terminology and classifications as though they had some independent value or truth. Countless times in my own lectures I have touched upon the interwar comparatists and watched the eyes of my students glaze over in non-comprehension as I recited by way of example some of the names proposed for the stages of the application of the comparative method. None, happily, have endured, and deservedly so.

In this volume the 'overture' commences with the proposition that comparative law is' an enigmatic, paradoxical, and elusive subject in that, just as one thinks one has mastered it, another puzzle appears on the horizon. The puzzles start with the name of the subject, continue with its definition, aims, objectives, methodology, and its use in practice, and culminate in its value and significance for legal science' (1). Always the mystification, and for what reason? If there are puzzles, they are of our own invention.

Pursuing the musicological structure, the 'overture' is followed by 12 chapters and a brief 'coda'. The first five chapters address comparison per se: 'The Theme Comparative Law: What Is It? What Is in a Name?' (chapter one); 'Comparability: Theories and Presumptions' (chapter two); 'Why Compare?' (chapter three); 'What to Compare?' (chapter four); and 'How to Compare?' (chapter five). Each chapter is subdivided into two 'variations' in which divergent approaches are set out to each of the general questions posed in the chapter title. Some readers may find themselves identifying with

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one or another of the variations; some will identify with both, actually, and question the validity of the dichotomy.

In a brief 'intermezzo' (chapter six), the author pauses to ask whether the variations identified amount to a 'schism'. She is certainly right to observe that those who see comparative law as a method only 'do not fully discuss what that method is' (61). As jurists we seem uncomfortable reducing 'the method' to its essentials — scientific description, generalisation and analysis. How often do we see comparative legal studies dismissed as 'mere description' and comparison as 'more an art than a science'?

The author then turns to 'Comparative Law and Legal Education' (chapter seven); 'Comparative Law and the Tuners of Law', by which is meant judges and practitioners who use the findings of comparative law (chapter eight); and 'Comparative Law and Law Reform by "Transposition"' (chapter nine). Chapters ten and 11 are devoted to 'cadenza and extemporization', in this case the complexities that comparative lawyers confront, the meeting of law and culture, classifications of legal systems, mixed legal systems, limits of comparativism, private law versus public law, and the convergence of legal systems.

Arguably, as lawyers applying the comparative method, we are most deficient at the beginning stage. If the 'description' of legal phenomena is flawed, so too are the subsequent stages of comparison likely to be defective. Legal translation, insofar as the legal phenomena to be compared involve two or more languages, is the foundation of comparative law, or more precisely in this context, the foundation of the application of the comparative method. In this book, translation is acknowledged by Örücü to be an 'acute problem' (164) and discussed in passing as part of the 'limits of comparativism' (chapter ten); HC Gutteridge is quoted to the effect that the 'pitfalls of terminology' are the 'greatest difficulty and danger' encountered by the comparative lawyer. Both, in my view, misstate and understate the problem.

There is neither a problem nor a pitfall here in the process of comparison; this is the essence of comparison. Within a single language terminology is likely to represent an outcome of the application of the comparative method; a word or term was chosen to distinguish a thing or a rule, or a concept from others or something else. Translating the relevant word into the terminology of another legal system — particularly if a foreign language is engaged — involves, I would suggest, the application of the comparative method. If that is so, even more or less, we need to turn to fundamentals that have hardly been touched on in the literature of comparative law. The author makes a number of useful points on legal translation, but these, in this reviewer's opinion, need a separate chapter at the very beginning of the study. Our inability to perceive the magnitude of these properly and their centrality to comparative legal studies says much about the shortcomings of legal education generally.

The author has much pertinent to say about the inadequacies of the term 'comparative law' (especially in the English tongue; continental terminologies are, as the author observes, more precise) and our inabilities to define the parameters of our 'field'. Comparison as a method of scientific inquiry is universal in range, applied by all sciences without exception and by the human species generally, as a principal means of perception and cognition. Our quite frankly rather pathetic attempts over the centuries to demarcate the boundaries of 'comparative law' have served as exercises in limitation usually to the prejudice of legal science; that is, however sweeping the definitions postulated, they have in fact operated to exclude legal phenomena from the purview of 'comparative law' *a priori.* From that perspective, I find the author's 'finale' (chapter 12) mostly beside the point.

Perhaps in the 21st century greater attention will be given, and deservedly so, to the study of national legal systems throughout the globe. The Anglo-American preoccupation with French and German law, as the principal focus of comparative law teaching in law schools, will be recognised as the 'regionalism', and increasingly less relevant regionalism, that it is. The vital importance of the comparative method for comprehending the law of the European Union and other regional communities, or the interface between public international law and regional and national legal orders, will achieve greater acknowledgement and not be 'defined out' of comparative legal studies. These are not 'shifting and changing horizons of comparative law' (203), though; they have always been there, and it is only our arbitrarily self-imposed constraints that have restrained us in addressing them.

'Comparative law' cannot, against these observations, be understood as a 'subject in its own right'; what is intended is the comparative description and analysis of identified phenomena, perhaps legal, perhaps from an interdisciplinary perspective. What many of us want to do under the rubric of 'comparative law' is to engage in the investigation of national legal systems, either in their own right or in direct, selected comparisons with one another. Perhaps it is especially in this domain that new consideration has to be given to language and comparison. I am inclined to believe that budding comparatists interested in national legal systems using different languages should, as a matter of course, cut their teeth on the translation of a major code and grapple empirically, at first hand, with the challenge itself and with its lessons and implications for the application of the comparative method. Legal translation is one of the laboratories of comparative legal studies.

The author is surely correct in suggesting that we need to re-examine our classifications of legal systems, including how useful it is to classify legal systems into 'families' or 'traditions' at all. As an analytical prism, such classifications are perhaps instructive; as statements of 'fact' they are deeply misleading. The dangers are unintentionally illustrated by the author's observation that 'a large number of legal systems are in "extraordinary" places' (204). In the eyes of Mongolian comparatists, Scots law may be as 'extraordinary' a phenomenon on this planet as there can be, and I am not sure how helpful it is to divide the world's legal systems into 'extraordinary' and 'ordinary'. But she pursues this line to suggest that 'comparative law is the building of bridges' and should address bridging problems arising 'when legal systems which have never been part of a single legal tradition […] look towards civilian or common law systems' (205). Imagine, she says, 'the German Code of Bankruptcy in the Kyrgyz Republic'. Imagine, indeed, continental legislation in the Ottoman Empire.

The 21st century does not, at least yet, pose new challenges to the application of the comparative method to legal phenomena. The challenges are long established, but the opportunities for addressing them are considerably greater.

Having read this book, which gives deserved attention to the enhanced relevance of foreign law to the analysis of domestic law issues including by courts and in law school teaching, I nonetheless remain persuaded that the true central importance of this relevance is eluding us. In my experience, the principal arena for the day-to-day application of the comparative method, including with respect to foreign law issues, is the law firm and those components of litigation and arbitration that are not routinely accessible to comparative legal research (briefs, legal opinions and reports, and supporting documentation). Only in those, I suspect, relatively uncommon situations when a court actually cites relevant doctrinal writings or foreign law in published opinions do we witness the comparative legal dimension at work. Legal practitioners, if I am correct,

confront comparative legal problems far more commonly than academic comparatists realise, and not necessarily successfully. What they need is what any comparatist needs in whatever field of analysis is involved: not harmony, but the rigorous and, if one may say so, scientific application of the comparative method to legal phenomena wherever the results may lead, including a profound and informed awareness of the role and limitations of language in comparative description and analysis.