

COMPARATIVE LAW

THEORIES AND PRACTICAL ADVICE

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13 OCTOBER 2021



COMPARATIVE LAW – MANY FACES



- **METHOD OF LEGAL RESEARCH**
 - APPLYING COMPARATIVE RESEARCH-TECHNIQUE TO ANY FIELD OF LAW.
 - COLLECTION OF "APPROACHES": FUNCTIONAL, STRUCTURAL, CRITICAL, POST-COLONIAL, ECONOMIC, HISTORICAL ETC.
- **WAY OF THINKING:** COMMITTING TO BORDERLESS NON-DOCTRINAL "ATTITUDE".
- **ACADEMIC DISCIPLINE**
 - ACADEMIC TRIBE: A SOCIAL GROUP WITH FAIRLY SIMILAR SCHOLARLY INTERESTS & QUALITIES, CLOSE TO LEGAL HISTORY AND SOCIO-LEGAL STUDIES
 - PART OF LEGAL EDUCATION
- **TOOL**
 - LAW DRAFTING (TRANSPLANTS, MODELS ETC).
 - JUDICIAL DECISION-MAKING (DRAWING INSPIRATION, FILLING GAPS).
 - PRIVATE INT'L LAW .
- **NOT A FIELD OF LAW!**

MANY FACES = "BROAD CHURCH"

- COMP LAW/LEGAL STUDIES TODAY IS A *BROAD CHURCH*: CONSISTS OF BELIEFS AND ASSUMPTIONS THAT INCLUDE WIDE RANGE OF OPINIONS AND IDEAS ON BASIC ISSUES.
 - *WHAT IS LAW (THAT WE COMPARE)?*
 - *HOW DO WE COMPARE (SO THAT IT MAKES SENSE)?*
 - *WHY DO WE COMPARE (WHAT ARE THE GOALS)?*
- DIFFERENCE WITH THE PREVIOUS PARADIGM THAT:
 - SEARCHED FOR ONE CORRECT WAY OF COMPARING
 - OFFERED CERTAIN SET OF BELIEFS & ACCOMPANYING METHODS AS "THE TRUTH" OR AT LEAST "THE MOST PRACTICAL APPROACH"



METHOD IN COMPARATIVE LAW

- **METHOD** (FROM GREEK; WALKING ALONG THE ROAD)
 - WAY IN WHICH SERIES OF RESEARCH STEPS ARE TAKEN IN A PREDETERMINED MANNER
 - PROCESSES, TOOLS, AND TECHNIQUES BY MEANS OF WHICH A RESEARCH TOPIC IS ADDRESSED/APPROACHED
 - HEURISTICS (I.E. “RULES OF THUMB”)
 - EARLIER STUDIES ARE EXAMPLES THAT CAN BE APPLIED OR THEY CAN INSPIRE
 - CANNOT BE COPIED AS SUCH
 - PRACTICAL APPROACH THAT DOESN'T NEED TO BE PERFECT (AS LONG AS IT WORKS)

METHOD(OLOGY) DEBATE

- DURING THE LAST 40 YEARS THE “CORRECT” METHOD:
OBJECT OF INTENSIVE DEBATE (DISCOURSE OF LAMENTING)
- DEBATE HAS (AT LEAST) THREE EFFECTS:
 - IT HAS PRODUCED RICH SCHOLARSHIP ON THEORY OF COMP LAW
 - IT HAS BEEN SCARING ALL THE OTHERS AWAY
 - IT HAS BEEN PAVING THE WAY FOR NEW EMERGING PARADIGM
- PLURALIST METHODOLOGY (OR METHODOLOGIES) 2 KEY IDEAS:
 - 1) IDEA OF **TOOLBOX** *vs.* ONE CORRECT METHOD (OR SET OF METHODS)
 - DIFFERENT RESEARCH QUESTIONS → DIFFERENT APPROACHES
 - 2) DECISIVE SIGNIFICANCE OF **RESEARCH QUESTION** *vs.* SCHOOL OF THOUGHT



COMP LAW METHODOLOGY – MORDOR OF LEGAL SCHOLARSHIP?

- “ONE DOES NOT SIMPLY WALK INTO COMPARATIVE-LAW-ACADEMIA, ITS BLACK GATES ARE GUARDED BY MORE THAN JUST PROFESSORS, THERE IS ARROGANCE THERE THAT DOES NOT SLEEP AND THE GREAT SCHOLARS ARE EVER WATCHFUL, IT IS A BARREN WASTELAND RIDDLED WITH EPISTEMOLOGY AND WILD ASSUMPTIONS, THE VERY AIR YOU BREATHE IS A POISONOUS FUME, NOT WITH TEN THOUSAND FOOTNOTES COULD YOU ENTER IT, IT IS FOLLY.”



PROFESSOR BOROMIR

MINAS TIRITH COMPARATIVE LAW CHAIRHOLDER

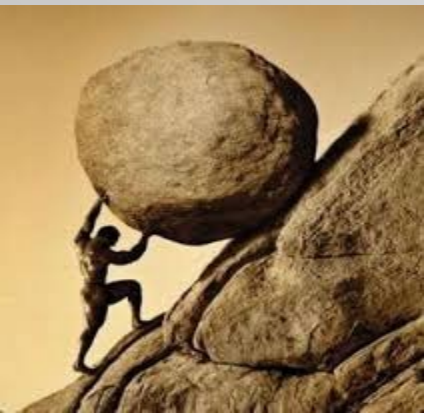
CLIMB TO MOUNT COMPARATUS

WHERE THE GODS OF COMPARATIVE LAW DWELL

UNDERLINING THE SCHOLARLY IDENTITY OF COMPARATIVE LAW
AND COMPARATIST LEADS TO DEMANDS PILE UP TILL...

“SCHLECHTE RECHTSVERGLEICHUNG IST SCHLIMMER ALS KEINE.“

PAUL KOSCHAKER (1879-1951)



YET, BASIC IDEA IS NOT COMPLICATED...



- STUDY OF DIFFERENCES AND SIMILARITIES AND ATTEMPT TO EXPLAIN THEM
- MAKING SAME/SIMILAR QUESTION(S) TO DIFFERENT SYSTEMS
 - "THIRD" POINT NECESSARY (EXTERNAL VIEW, YET INTERNALLY INFORMED)
- FINDING A BALANCE (IF "FULLY" COMPARATIVE)
 - STRUCTURE & SOURCES
- **KEY ISSUES:**
- 1) DOES STUDY OF FOREIGN LAW SERVE A PURPOSE OR IS IT JUST FOR DECORATION?
- 2) DOES ONE UNDERSTAND FOREIGN LAW *SUFFICIENTLY* (NOT PERFECTLY) IN ORDER TO BUILD A RECONSTRUCTION?
 - RECONSTRUCTION: NOT "RIGHT VIEW" YET "POSSIBLE VIEW"

FREEDOM: BOON OR BANE?

”ON THE PROFESSOR OF COMPARATIVE LAW THE GODS BESTOWED THE MOST DANGEROUS OF ALL THEIR GIFTS, THE GIFT OF FREEDOM.”

OTTO KAHN-FREUND



PRACTICAL ADVICE

- **BUILD ON THE RESEARCH QUESTION**
 - IF QUESTION REQUIRES COMPARISON, THEN, GO FOR IT.
 - IF QUESTION DOES NOT REQUIRE COMPARISON, THEN, DON'T DO IT.
 - COMPARISON MUST MAKE SENSE → DONE FOR A PURPOSE → NOT DECORATION OF PHD THESIS → ADDED VALUE IS IMPERATIVE!
- **BALANCED OR NOT?**
 - DECIDE WHAT KIND OF COMPARISON YOU NEED: GOING ALL THE WAY OR CONTEXTUAL

