

Comparative Motley: Offerings from a Comparative Lawyer

Esin Örücü*

Abstract

Comparison is thinking of one in terms of another (or others), and is one of the most fundamental methods of thought process: juxtapose, contrast, compare, seek for differences in the similar and for similarities in the different. The ultimate aim is to understand in the best possible way. In this contribution, comparative law is depicted as a thread running through a necklace. On the necklace are threaded three essential gems of comparative law: theories of methodology; theories of legal systems; and theories of transfrontier mobility of laws. Depicted in this way, one is obviously looking at comparative law pure and simple, rather than comparative contract law, comparative property law, comparative constitutional law, and so on. Although these three gems are the main ones this contribution concentrates on, there are others. It must be pointed out that naming these as gems, and depicting comparative law as joining them into a necklace, takes one directly into the realm of metaphors, which will also be briefly touched upon. In comparative law discourse, controversies—and there are many—are synchronic, never ending, never totally resolved, ever multiplying. This was the case and is still the case.

I. Preliminary Offerings

One of the most fundamental methods of the thought process is comparison. It is fair to say that thinking is *modus vivendi* and comparison is its *modus operandi*. Thinking and comprehension themselves are comparative processes. In fact, the everyday action of thinking involves a series of comparisons. We comprehend the phenomena around us by discovering the differences and similarities, by juxtaposing the unknown to the known. Juxtapose, contrast and compare: thus goes the first lesson. We all know that one cannot assess darkness till one has seen light or light till one has seen darkness.¹ Again, just as the qualities of a yellow, its hue, brilliance and tone are perceived and sharpened most truly by placing it first on or beside another yellow and secondly by placing it in contrast to purple, so we explore the world around us. We think of one in terms of another. The thought process of comparing one to another is to juxtapose, contrast, compare, and seek for difference in the similar and for similarities in the different. Always, the ultimate aim is understanding. Any of the methodologies used for research are for facilitating this understanding in the best possible way.

Comparative law and the comparative lawyer are no different. Indeed, comparative law's main philosophy is the understanding of another. That is why true comparison must

* Honorary Senior Research Fellow and Professor Emerita of Comparative Law, University of Glasgow and Professor Emerita of Comparative Law, Erasmus Universiteit Rotterdam (Esin.Orucu@glasgow.ac.uk).

¹ The painter Bob Ross in his series on television, "The Joy of Painting," repeats in every lesson, "Light against light, dark against dark is nothing. You must put light against dark and dark against light."

end in explanations, answering the question: why? That is also the reason why comparatists' thought process also becomes a lifestyle.

Regarding comparison as thinking of one in terms of another (or others), this contribution intends to dip into some of the run-of-the-mill issues of comparative law/comparative legal studies and try to profess where they can go further than where they are today with the introduction of new areas of interest both topically and geographically. These issues are: methodologies and approaches of comparative law, the place and use of metaphors in comparative law research, new mixes and legal pluralism as units of inquiry, and any burgeoning new topics that have developed or are developing as we speak, mostly delved into by younger colleagues.

We know that by looking at the world of law and the environment in which it lives, comparative law can provide knowledge about "law as rules," "law in context," and "law as culture," thus enabling us to have comprehensive and in-depth knowledge of the legal phenomena and their interaction with other phenomena in society. Comparative law, by drawing from the pool of models to illustrate the general points it is making, can bring additional perspectives to aid our understanding of the world of law and society. Only thus would a continuous desire to look for comparative inspiration be fostered.

Rather than talking about general comparative law, it is more frequent today to talk of comparative family law, comparative contract law or comparative constitutional law, where the term "comparative" indicates a way of looking at an area of law. In this sense, the scope of the comparative approach is becoming increasingly significant as more and more lecturers and domestic lawyers consider this approach, though not labelling themselves as comparatists. In addition, most PhD theses contain elements of the comparative approach though they are not "comparative law" theses. When you ask the candidates, they will invariably tell you in the first instance that they are not and do not aspire to be comparative lawyers. When you discuss with them further and probe into what they are doing, then they admit that there is a lot of work that they have been undertaking which could be labelled as comparative law research. In any case, this is my experience with postgraduate students supervised by other colleagues in their specific areas of law who are directed to me to discuss methodological issues.

The present generation of comparatists are thinking yet again: How far should they engage with other disciplines? If it is true that comparative lawyers cannot work alone, then should they replace or supplement legal, historical and philosophical approaches with concepts and methods taken from political science, economics, sociology, anthropology, or even business studies, geography, literary theory or psychology? Then, for us the old hands, the question becomes: how can we, as old-time comparatists, assist the growth of a new generation of comparatists? What can we offer them? In the process, do we help them or hinder them? This contribution intends to dip into some of these issues. The catchword is "dipping."

In the meantime, here are some questions the reader can toy with. I have toyed with these questions on several occasions myself: What is the difference between comparative

law and comparative legal studies? Are we comparatists or comparativists? Is there a difference? What makes a comparatist? How is comparative law knowledge acquired? Does going beyond Europe actually enlarge our understanding of aspects of law? Can one effectively theorize without working through examples? Is explanation of differences the real aim of comparative law research? When is similarity relevant? How far can comparatists recognize and develop the concept of legal pluralism? How can co-existing laws and their interrelationships be analyzed? Can one actually categorize laws? Can one explain the laws of one people in terms of the laws of another people, especially if starting with and utilizing mainly western legal concepts? Having mastered one's own law, should one live in another country for a while, study the law there, become totally acquainted with the legal and social environment, and only then claim to have become a comparatist?²

Furthermore, is it appropriate to use comparative law as a tool of interpretation by judges in reaching solutions and by lawyers pleading cases? The value of this tool is now being appreciated and accepted in our courts, though often at the level of providing inspiration and lessons. Maybe the most important and true mission of comparative law and comparative legal studies is to inspire the curious mind, ever searching to understand more.

Comparative law has been, though not necessarily to start with, the domain of private lawyers for a very long time and, to a large extent, it still is. The substantive areas covered have been traditional private law topics such as obligations and contract. The methodological tool for comparison has been regarded as functionalism, which is the search for functional equivalents, the emphasis being on similarities between the legal systems studied. In "common core" studies leading to the formulation of European principles in a number of areas of private law, this methodological tool is still widely in use today. The legal systems studied are nearly always those of the western world, and in fact only the most prominent ones, other areas of the world still being left to the care of "regionalists."

As a result, in the last decade, comparative law has been widely criticized for lacking in theory and being Euro-centric, black-letter-law and private-law oriented. The criticism comes mainly from legal theorists of various shades, international lawyers, sociologists of law, anthropologists of law and some comparatists who are interested in law and society and do not regard comparative law solely as a tool for the practice of law. However, there are still those who see merit in the study of normative rules alone, alongside those who believe that to be meaningful, law can only be studied in context. Research into culture, tradition, identity, distinctiveness, difference and legal pluralism compete with mainstream comparative black-letter-law research. Indeed, comparative law already reached a crossroads at the end of the last century.

² Covered also in Sue Farran & Esin Örücü, *The Continuing Relevance of Comparative Law and Comparative Legal Studies*, 6 J. Int'l & Comp. L. 171 (2019).

II. Some Gems on the Thread of the Necklace Called Comparative Law

A first decision to be made in recent years has been on what the subject should be called: “comparative law” or “comparative legal studies”? Is there a place and space for both? Considering that most courses on offer in universities are comparative law courses, and even most of the new textbooks still appear with the title “Introduction to Comparative Law,”³ it can be claimed that the term is well established, would be easily recognizable, and therefore one should opt for “comparative law.” However, in our day, with the developments that have occurred, “comparative legal studies” is now regarded by many as a more acceptable title for the discipline, as it offers a wide net or an umbrella, encompassing culture, society, religion, ideology, economics, even anthropology.

The second point to remember is that in comparative law discourse, controversies of comparative law—and there are many—are synchronic, never ending, never totally resolved, ever multiplying. This was the case in earlier years and is still the case today. The controversies of comparative law start, as pointed out above, with the name (comparative law / comparative legal studies) and continue with the subject (it does not exist / it is the most sophisticated branch of social science), the content (merely a method / the only approach to law), the methods (there is only one: either functionalism or contextualism / there are many on a sliding scale), and end in the issues, theoretical and otherwise, discussed: legal families (“civil law + common law = the world” / mixed systems / extra-ordinary places); convergence / divergence (stressing either similarities or differences); translate / do not translate; transplant (transposition / transplants are impossible); normative inquiries / cultural immersion; common core / better law; private law / public law; and metaphors (they are useful / they are misleading and an apology for lack of theory).⁴

A critical overview would move us on to contemporary and burgeoning areas of, and new directions and new territories for, comparative law—such as the convergence/non-convergence debate, law in context (culture and economics), cultural distinctiveness and diversity, globalism versus localism, legal families and mixed systems, competition between legal systems, looking beyond the western world, the use of comparative law by judges, the role of comparative law in law reform activities and harmonization, public law comparisons in both constitutional law and administrative law, a new common law in human rights, the “common core” and the “better law” approaches, and comparative law for international criminal justice. A number of other topics, some theoretical such as the post-modern critique of comparative law; theories about peoples’ practices and of different groups of actors of the law; and beyond legal rules, and some substantive topics such

³ A dear friend of mine who was not always an academic asked me what happens after the “Introduction,” and why is it that most textbooks in many other areas too, appear as “Introduction to ...” She wondered when we would talk about the real subject! In fact, a rather recent and very valuable textbook arrived with a slightly updated name: Jaakko Husa, *A New Introduction to Comparative Law* (2015)!

⁴ Again, these are issues I have mentioned time and again in various of my works.

as alternative dispute resolution, e-commerce, environmental law, bio-ethics and food safety are also becoming prominent in comparative law research today.⁵

After these preliminary comments, let us now return to the title of this section, culminating in travels through comparative law and comparative legal studies, regarding comparative law as a thread connecting the essentials, forming a necklace by connecting, among others, three essential gems of comparative law: theories of methodology; theories of legal families; and theories of transfrontier mobility of laws. This way we can then dip into: How to compare (methodology) and what to compare and why (legal systems and transfrontier mobility of laws). These issues are the ones I will concentrate on.

Before doing this, however, I must point out that naming the above issues as gems and regarding comparative law as a thread joining the gems into a necklace, takes us directly into the realm of metaphors. As may be well known, this old hand thrives on metaphors, which I believe offers her and the readers useful visual aids. Having toyed with many metaphors, mostly culinary, in various contexts during my long career, the most recent one has been a horticultural one, “cultivars,” coined while we were analyzing, in a joint effort, European Union laws in the United Kingdom before and after Brexit, having chosen to look at equal treatment and rights of residence.⁶ This time creating horticultural metaphors such as cultivars, runners, cuttings and layering for the laws and cultivators and gardeners for the actors, we added to the plethora of metaphors used by many comparative lawyers a new set of metaphors, including allotment to characterize the soil of Britain. To me, increasing the options in this way is not only useful but opens the doors to further analysis, imagination and thought, in spite of the fact that quite recently resorting to metaphors was questioned as possibly being “empty scholarly coquetry,” with a warning derived from an ancient carving in Apollo’s temple in Delphi: “nothing in excess.”⁷ Old habits are difficult to shed and I must admit I am still looking for more meaningful metaphors, such as the ones I have just created for this offering. This reference to jewelry in the form of a thread, gems, and a necklace may appear not only “coquetry,” but more “coquettish” to my critics, yet, this flirtatious act should be forgiven in a female of eighty! I have, however, digressed too much and must now return to the thread and the gems on the thread of this necklace.

First, a few thoughts on the thread that forms the necklace: When I consider comparative law as the thread forming a necklace supporting gems, I am obviously looking at comparative law pure and simple, rather than comparative contract law, comparative property law, comparative constitutional law and so on. Many comparatist colleagues today would present themselves as one of these rather than just as a comparatist. Even then, many areas can be considered as gems by the researcher threading them on the comparative law thread making her/his own necklace. I am a generalist and therefore a comparatist pure and

⁵ Readers familiar with some of my work will readily recognize these concerns of mine from elsewhere.

⁶ See Elspeth Attwooll et al., *EU Laws as Cultivars in the UK Before and After Brexit*, 6 J. Int’l & Comp. L. 331 (2019).

⁷ Jaakko Husa, *Hybrid Law and Culinary Metaphor—Empty Coquetry or Something Else?* in *Comparative Law: Mixes, Movements, and Metaphors* 171 (Sean Patrick Donlan & Jane Mair eds., 2020).

simple. My postgraduate students could be dealing with any topic of their choice and are helped by me on the proper methodology to follow, choice of research questions, the units of inquiry and healthy analyses of findings.

Here I must digress once again as this reminds me of my appointment as the Professor of Comparative Law at Erasmus University Rotterdam in 1981. This was a new post. I was told at the interview that my post would not be attached to any one Department, but I would be a servicing Professor. Any colleague from any Department could approach me for collaboration or for helping to devise a particular course and I would therefore have no Department of my own but float, which also meant I would share a number of secretaries. This went on for only a few years but proved to be impractical both administratively and budget-wise. I did teach a course called, classically, Introduction to Comparative Law, where I was dealing with the gems I mentioned above and want to look into below. Later I was joined onto one of the Departments, History of Law. As years went by, other comparative courses mushroomed in other Departments such as comparative contract law, comparative commercial law, and comparative public law. Thus, my Introduction to Comparative Law course faced either extinction or would be part of these other courses as a preliminary introductory section. Colleagues in our business can immediately imagine the kind of empire-building issues that can arise in such situations. We did not escape this fate. After I retired in 2005, no other Professor of General Comparative Law was appointed there.

At Glasgow University, I retained the position of a generalist from day one in 1976 in the Department of Jurisprudence, which later joined with Legal History. In my Honours Cluster, spread over two years, there was Introduction to Comparative Law, Mixed Jurisdictions, Comparative Institutions, French Law, Harmonization of Laws and Codification, with a final General Paper. Some of these I taught alone, some with other colleagues. When Departments were amalgamated to form the School of Law, I then became a freestanding Professor of Comparative Law, to teach to my heart's content. After my retirement, no Comparative Law Professor was appointed. Some courses dip into comparisons, I am sure.

From my two experiences above, one can deduce that a general comparatist is a thing of the past. I always maintain that I had good innings. Now, for a general comparatist it is more desirable to become involved in a new genre of scholarship and call one's general course "Comparative Legal Studies" indicating the wider umbrella that is more fashionable, unless one is a comparatist of specific topics such as contract, commercial, family, constitution or whatever else. A generalist, however, may be welcome to profess on the philosophies of comparative law, such as this publication.

Now to the gems on the thread to form the necklace. The first gem is theories on the methodologies of comparative law. Since comparison is a way of looking, it is a mode of approaching material, a method in the process of cognition used alone, the "comparative method" can be employed in various fields of discourse. In this sense it is an empirical, descriptive research design using "comparison" as a technique of cognizance. Yet, when

the term “comparative” is included in the name of a subdivision of a field such as comparative architecture or comparative linguistics, it denotes an area of study and in that context, the word “comparative” in the title no longer depicts a method, but indicates an independent branch of that science, in our case, legal science. This subject then, develops its own methods, though mostly feeding on others.

A. Methodologies for Comparative Law/Comparative Law Methodologies

Comparative lawyers have not “invented” their methods or the “process” of the methods and techniques employed. They have borrowed methods such as the historical, structural, functional, empirical, statistical, thematic, and evolutionary, and have creatively applied them to the problems of comparative law research.

I have recently been asked to update my entry titled “Methodology of Comparative Law” in the *Elgar Encyclopedia of Comparative Law*⁸ for its second edition and suggested to the editors that the new entry have a different title, “methodologies of comparative law” or “comparative law methodologies,” since we know that there is no one methodology to be used in researching our subject. My suggestion was readily accepted by the editors. Thus, there are different approaches we have to consider. We could put this in various ways, as we are talking of how we approach law comparatively.

The first thing to note is that any one thing can be compared with any other thing depending on the purpose for which the comparison is undertaken, the research question.⁹ Yet, this has not prevented comparative lawyers from entering a wide discussion of the concepts “comparability” and “methodology.” The discussion starts with the claim that “things to be compared must be comparable,” and revolves around the words, “like” and “similar.” What is “like” in law? How much “like” do things have to be to be “comparable”? What is meant by “only comparables can be meaningfully compared” and by concepts such as “sufficiently comparable,” “reasonably comparable,” or “fruitfully comparable”? Such statements can be easily found in many comparative law works. These could in fact be regarded as enigmas.

When “functional equivalence” was presented as the method for comparison, comparatists readily embraced it. Nearly all through the twentieth century this was the undefeated approach, though anthropologically or sociologically oriented scholars did raise their voices from time to time to point to its inadequacies as a research method. However, this was the research design utilized by most black-letter-law-oriented scholars. Functional equivalence is still used in efforts to create European principles in various areas of law and in common core studies.

⁸ Esin Örücü, *Methodology of Comparative Law*, in *Elgar Encyclopedia of Comparative Law* 442 (Jan Smits ed., 2006); Esin Örücü, *Methodological Aspects of Comparative Law*, 8 *Eur. J.L. Reform* 29 (2006).

⁹ I used to say to my students that not only could you compare an apple to an orange if your purpose is for instance to detect colors, but you could even compare an apple to a china plate if the aim of your research, your research question, is to test whether biting into one or the other can break your teeth!!

There are two distinct currents of functionalism on offer. The first current is the *functionalist method*, also known as the *functional-institutional* approach, one of the best-known working tools in comparative law. The second is functionalism in the sense that law responds to human needs and therefore all rules and institutions have the purpose of answering these needs.

First, a *functional-institutional* approach seeks to answer the question, “which institution in system B performs an equivalent function to the one under survey in system A?” From the answer to this question the concept of *functional equivalence* emerges. Comparative lawyers seek out institutions having the same role, that is, those that have *functional comparability*, or solve the same problem. This can also be called the *functional juxtaposition* of comparable solutions.

Second, the other side of the same coin—the problem-solving approach—asks the question, “how is a specific social or legal problem encountered in both society A and society B resolved?” In other words, this approach looks at which legal institutions, or other institutions, cope with this problem in the two societies under survey. This approach is similar to the *functionalist* approach because it springs from the belief that similar problems have similar solutions across legal systems, though reached by different routes. Once the above questions are answered, they are immediately translated into functional questions. Functional inquiry also suits the utilitarian approach to comparative law.

For the first approach, one either starts with a social problem or need in one society. Next, one discovers the institution that deals with it, and then looks to other societies for institutions, legal or otherwise, which deal with the same problem or need through the concept of *functional equivalence*. For the second approach, one starts with an institution in one society, and asks what is the purpose or function of the institution in that society. Having ascertained it, one then searches for a functionally equivalent institution in a second society, and then, if so wished, in a third. In this methodological approach, the underlying assumptions are that there are shared problems or needs in all the societies under comparison. Though the means of solving these problems may be different but comparable, their functions are equivalent.

Another way of stating the issue is that *the approach should be factual*. Here, similarity of factual needs met by different legal systems makes those legal systems comparable. Hence, the starting point is a *concrete problem*. As noted, even the incomparable can be compared, provided that the focus is on the same facts. In the *factual approach*, if facts are not the same there is no comparability. In the *universalist approach*, the similarity of solutions is paramount. If this were not so, there would be no place for comparisons. That is why certain areas such as family law, where moral and religious values are prominent, have been neglected for such a long time.

When institutional facts encountered in one legal system have no comparable counterpart in the other legal system, would this methodological tool work? Does the answer lie in the fact that comparisons should be carried out between legal systems of some similarity?

This allocates a rather limited role to the comparative law researcher and offers a rather limited scope for comparisons.

The *functionalist method*, in any of its forms, is not the sole approach in comparative law research, though it has recently gained a special place in common core studies in Europe. When law is regarded as a body of rules only, and comparison at the mezzo- or micro-level is directed at these rules, then the functional approach would be useful, since a body of rules is created for the purpose of solving shared human problems. Thus, in the context of the European Union, for example, where comparative law is a driving force and has a decisive role in the harmonization process, the *functional comparative analysis method* provides the potential for convergence of both the legal systems and the legal methods of the member states, leading to gradual and eventual legal integration. Building on similarities may be desirable and decisive. However, the comparison of differences and contexts, and therefore the extension of comparison beyond functionally equivalent rules, require other approaches.

The functional-institutional approach does not solve the issue of comparability between a western legal system and a religious system or a developing legal system. Additionally, many areas of law may be regarded as beyond the scope of comparison since they are deemed to not lend themselves to comparison, being determined by specific histories, mores, ethical values, political ideologies, cultural differences, or religious beliefs. As such, comparatists have to look elsewhere.

There is also the problem of one institution or rule having many functions. In such cases, a number of methodological options exist. Most of these are contextual approaches, such as analysis of existing rules and institutions in historical, economic, political, “religious,” ideological, or cultural contexts. Some of these are dubbed as post-modernist approaches, intermingled with legal realism. Whereas the functional method was adopted to do away with the *local dimensions* of rules and to reduce the rules to their operative description *freed from the context* of their own systems, the contextual approaches specifically stress the *local dimension*.

This leads to the question: since there is no one single method to be followed, which methods can and should be used by comparative lawyers? The main approaches to answering the question of how to compare include: *functional equivalence* and the *problem-oriented* approach; *model-building*, *common core* studies and the *factual approach*; the *multi-axial method* made up of the historical, functional, and dogmatic axes; the law as a system of rules in a national context; and *method in action*. Comparative law research is moving towards the exploration of backgrounds, contexts, and interrelationships by employing a *system dynamics* approach.

Traditional black-letter-law-oriented comparative law research is normative, structural, institutional, and positivistic, and would not use any approach other than the reading of statutes, cases, parliamentary debates, and doctrinal works, believing description and identification to be the final stages of the inquiry. For those concerned with law in action and law in interaction with social and cultural systems, rule-based research is not satisfactory

since it may lead to only partial truth and a misleading picture. Creative comparative law research may be interested in suggesting *core concepts* and point out the way to *ideal systems*, or at least to the *better law* approach. In relation to the search for *better law*, there is also scope for evaluation and prescription, but the legitimacy of this activity will always remain questionable.

At the other end of the scale is the so-called *contrarian challenge*. It advocates that the comparative lawyer be interested only in difference. In its extreme form, assuming an epistemological pessimism, there could even be denial of comparativism, as each culture is unique. In this extreme position, cultural differences would bar any meaningful comparative law research. Since any attempt at understanding the “other” would only lead to misconceptions and misleading results, the “other,” or the “untranslatable,” would always remain a mystery. In its more flexible form, however, comparative law will work, though it must be involved only with differences between systems. There is a natural link between the *contrarian challenge* and the *difference theory*. One solution is *cultural immersion*. Another solution is the suggestion that an *organic method* be developed to contextualize objects of comparison.

Because comparative research is carried out for a number of purposes, the methodology and techniques used can differ according to these purposes.

In law reform by legislators or the courts for example, comparative law acts as a provider of a pool of models, using foreign law to modernize and improve the law at home. Looking for legal systems in socio-cultural and legal cultural affinity, systems which share the same problem but deal with the problem in different ways, better ways, and more efficient ways, etc., will lead the comparatist to a specific kind of methodology.

If the comparatist is carrying out research for purely theoretical purposes, to enhance understanding of legal phenomena and create legal knowledge, then the choice is open and extreme positions should be sought, as the more diverse the systems, the more valuable the findings. Here the methodology used will again differ from the above.

Recent changes in theoretical and methodological outlook and ways in which methodological questions are posed have brought practical orientation, dogmatic orientation, law and society orientation, and creative comparative law to the foreground. It is important to think of the methodological consequences of these different approaches. Today, nets can be cast as widely as wished to include the comparison of the “ordinary,” the “extraordinary,” the “similar” and the “different,” the bases being the assumption that “everything is comparable.”

Here is the first gem threaded. This is a major gem on the necklace.

B. Legal Systems Revisited

I have stated on numerous occasions that all legal systems are mixed and mixing and that there are no pure legal systems. Hybridity is the catchword in our day.¹⁰ The mixture could be overt or covert, historical or contemporary, structured or unstructured, complex or simple and so on. There are few home-grown legal systems. All are crosses. Not only that, but they are intertwined and overlapping hybrids.¹¹ Please beware that here the word “mixed” or “hybrid” is not used in the sense of “mixed jurisdictions,” which seem to point to a specific category of legal systems,¹² but is used to apply to all legal systems.

Let us first consider the legal systems historically divided so neatly into legal families. By taking a fresh look at the classification of legal systems—re-assessing their positions in relation to each other, according to their parentage, their constituent elements, and the resulting blend, and then re-grouping them on the principle of predominance—we see that what appeared like individually distinctive legal systems, which sometimes even appeared irreconcilable, are members of intertwined and overlapping family trees.¹³ When viewed in this perspective, identity, difference, and uniqueness all seem to fade away. This perspective reflects reality.

Deconstruction and re-construction of legal systems in Europe, for instance, will reveal that although parts of the new landscape resemble the old, other parts and the whole look different. Even when the significantly similar are put together, in that similarity, the differences making them distinctive are also to be highlighted. Between the groups there is a definite difference and even irreconcilability. Originality, derivation, and common elements surface behind the efforts of classifications. Yet, relationships are of utmost importance. Out of this is born also the mixedness, though this is not a claim at “derivation.” All legal systems are related historically and today more than ever before. In fact, additionally, legal systems that may be grouped together for the purposes of one subject matter may be regrouped differently with others for the purposes of another subject matter. Legal systems that belonged together at a certain time period may shift their positions in another time period. Legal systems can never be placed in fixed positions for all time and all areas of law. Furthermore, the above must be coupled with the overlaps to be exposed through the deconstruction of legal systems.

¹⁰ See an analysis of a number of hybrid systems in *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Sue Farran et al. eds., 2014); see also *Comparative Law and Hybrid Legal Traditions* (Eleanor Cashin-Ritaine et al. eds., 2010).

¹¹ Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, in *Studies in Legal Systems: Mixed and Mixing* 335 (Esin Örücü et al. eds., 1966).

¹² See specifically Vernon Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2d ed. 2012).

¹³ Esin Örücü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in *Epistemology and Methodology of Comparative Law* 359 (Mark Van Hoecke ed., 2004); Esin Örücü, *A General View of “Legal Families” and of “Mixed Systems,”* in *Comparative Law: A Handbook* 169 (Esin Örücü & David Nelken eds., 2007).

When we look beyond rules, substance, and structure towards legal tradition and legal culture, the interrelationships become more obvious, although this may sound like the reverse of what is normally claimed. It is usually claimed that rules and solutions may look alike but legal cultures and traditions differ. In essence, rules and structures may have developed differently over time, but the legal traditions and cultures overlap. What is being claimed here is that though one can see a picture of systems “united in diversity,” deconstruction of legal systems may portray another aspect of these so-called diverse legal systems—the overlap.

Thus we see that English common law was an overlap of Roman law, civilian ideas, canon law, equity, and domestic common law. Some continental systems in Europe are combinations of Roman law, French law, German law, and Indigenous law (as in Holland), some of canon law, Roman law, French law and German law (as in Italy), some of customary law, neo-canon law, German law, French law, Swiss law, Greek law, and Roman law, even Ottoman law (as in Greece), and some of Antique Greek, Roman, Byzantine, Franco-Venetian, Ottoman, and British law (as in Cyprus). Roman law itself has elements of the laws of Hammurabi and ancient Greek laws. French law and German law are themselves outcomes of overlaps of different ingredients. All legal systems are crosses. In fact, they are all mixes.

What kind of definition can cover all instances of mixing: historical or contemporary, overt or covert, structured or unstructured, complex or simple, blended or unblended?¹⁴ Are mixed legal systems simply formations at the points of contact between different legal traditions? If we call mixed legal systems phenomena at points of contact, living on the periphery of established legal families, are we not also assuming definitions of legal families and accepted criteria for dividing and allocating legal systems to pre-determined groups? And yet we have refuted this already. Can we say that mixed legal systems come into being in areas of expansion of these families¹⁵ or where legal systems have drawn

¹⁴ See Joseph McKnight, *Some Historical Observations on Mixed Systems of Law*, 22 *Juridical Rev.* 177 (1977), who, in addition, uses such categories as “mixed,” “mildly mixed,” “pervasive,” and “selective” mixes, “mix superimposed upon mix,” “mixed by choice,” and “mixed by force.”

¹⁵ A study by McPherson, for instance, traces the history of the colonial expansion of Britain as far back as the twelfth century invasion of Ireland by England, and assesses the principal elements in the process of reception as well as how, why, where, and to what extent reception took place and with what consequences. Similar to the English language, transposing English law overseas has “produced different accents and usages involving adjustments and changes to many of its rules.” He looks at how English law was received (imposed) in early colonies—Canada, Australia, New Zealand and the Pacific, West Africa, East Africa and the Persian Gulf, India and South East Asia—as methods and formulae (standard and territorial) of reception, at the “natural birthright” (first used in 1655), “colonial birthright” (first suggested in 1693) or “inheritance” doctrine as the theory behind the expansion, and at its necessary supplement, legislation, adopting (local) or imposing (imperial) English law. McPherson also considers the impact of people and religion, geography, land use, and socio-economic factors as differentiating factors. He discusses the role of “tacit” reception through the use of the concepts of “justice, equity and good conscience.” See B.H. McPherson, *The Reception of English Law Abroad* (2007).

closer to each other, at which point osmosis takes place?¹⁶ What is to become of socio-cultural traditions? How can a mixed legal system be differentiated from “legal pluralism”? Can these two co-exist?

As stated above, I regard the new norm to be that all legal systems are mixed and mixing legal systems. Some are simple mixes, some are complex ones; some are overt, some covert.¹⁷ For example, the one I live and work in, the Scottish legal system, is a simple overt mix, as well as being regarded as an example of a classical “mixed jurisdiction.”¹⁸ The one I also worked in, part-time, for twenty five years, the Dutch legal system, is a blend of Roman law, French law, German law, and Indigenous law, with the appearance of being a pure legal system. The one I was born, studied, and taught in for ten years, the Turkish legal system, though appearing as a pure legal system, is a complex and covert mix.¹⁹

I will not consider the Scottish legal system here, since this overt and simple hybrid is quite well documented and researched, as well as being rather typical of a number of “mixed jurisdictions.” I have referred to this legal system through one of my culinary metaphors as a “mixing bowl,” where civil law, common law, and Indigenous law, which show socio-cultural affinity but legal cultural diversity, have overlapped.²⁰

Looking at the Dutch legal system in detail should be left to Dutch historians. It may be more worthwhile to look at Turkey instead. We see that Turkey’s legal system is definitely not a mix of civil law and common law, as is the case in quite a number of mixed legal systems. Turkey is not a “mixed jurisdiction” in the classical sense, nor does she have an overt mixed legal system. Following the collapse of the Ottoman Empire in 1920, legal evolution in the newly established Turkish Republic was instigated through a strong desire to become Western and contemporary, and even today, some law reforms are introduced in order to fulfill the requirements of the European Union *acquis communautaire*, in the hope of joining it. Legal evolution has happened through a succession of imports from the civilian world, rather than being home-grown, and has relied on major translation work. In fact, the legal system of the Turkish Republic has the appearance of belonging to the civilian

¹⁶ According to Ancel, when legal systems meet (or confront) each other, among the problems created, the most important one is the effect this meeting has on the definition and classification of the systems; these problems are created as a result of the “relativity,” “mobility,” and the “permeability” of the systems. See Marc Ancel, *Le comparatiste devant les systèmes (ou “familles”) de droit*, in *Festschrift für Konrad Zweigert* 358 (Herbert Bernstein et al. eds., 1981).

¹⁷ See Esin Örücü, *What Is a Mixed Legal System: Exclusion or Expansion?*, in *Mixed Legal Systems at New Frontiers* 78 (Esin Örücü ed., 2010).

¹⁸ See Esin Örücü, *Legal Culture and Legal Transplants: The Scottish National Report*, 1 *ISAIDAT L. Rev.*, Special Issue: *Legal Culture and Legal Transplants* (2011); Esin Örücü, *The Judge and Jurist in Scotland: On the Verge of a Second Renaissance*, 78 *Tul. L. Rev.* 89 (2003).

¹⁹ In various of my publications, I have called this system a system without history, a recreated system, a broth, a hyphenated system and recently a covert mix. See especially Esin Örücü, *Turkey’s Synthetic Civilian Tradition in a “Covert” Mix with Islam as Tradition, A Novel Hybrid?*, in *Mixed Legal Systems: East and West* 185 (Vernon Palmer et al. eds., 2015).

²⁰ See Esin Örücü, *A Theoretical Framework for Transfrontier Mobility of Law*, in *Transfrontier Mobility of Law* 5, 12 (Robert W. Jagtenberg et al. eds., 1995).

tradition, with the ingredients borrowed from Switzerland, Germany, Italy, and France. It is therefore eclectic and synthetic.

Although the Turkish legal system is not a mixed one in the orthodox sense, it is mixed in three other significant and different senses. Derived directly from the above developments, it was legislatively reconstructed, initially between 1926 and 1930, by receiving, adapting, and mixing laws from various foreign Western sources and melting them down in the Turkish pot to form the overlay—the civilian legal system. It is interesting to observe how this amalgam works, with most of its parts hailing from Roman law, a source alien to the endogenous traditions. This is the first sense of being mixed, using mixed sources in the construction process.

In the second sense, the legal system is a mix of these diverse laws with the lives of a people, the majority of whose values and demands reflect a different socio-culture related to one past element of the legal system—that of the Ottoman Empire, whose laws the Turkish Republic erased—which is significantly different to the socio-cultures represented by the incoming laws. The Ottoman legal system was legally pluralistic, enveloped in Islamic law until 1839 and thereafter, until its collapse, a legally pluralist mixed legal system with the added ingredient being borrowed from the French one. In its hay-day, the Ottoman Empire was an Islamic state with a minority Muslim population ruling a majority of non-Muslims. Today's legal framework has been synthetically constructed through “imposed receptions,” voluntary “receptions,” “imitations,” “adaptations,” and “adjustments.”²¹

This unique composite makes it possible to consider the Turkish legal system “a covert mix”: a novel hybrid. In addition, today, it is also worthwhile to look at the place of Islam and tradition, which are on the rise, in this laic civilian legal system.²² The messages sent are mixed. The present situation is ambivalent and suffers from conceptual incoherence. The gap between what is in law and what is in fact is as wide as ever. As the social deficit widens, it impacts the distance between official and unofficial “legalities” in Turkish practice. At this moment, the formal legal system in Turkey performs a balancing act, at times trying to maintain a firm stance, at other times allowing the traditionalist views to be heard. This *modus vivendi* and the complex relationship between the state and non-state legalities contribute further to the emergence and development of the covert mixed legal system. With more space allocated to Islam and tradition, this “mixture” is strengthening and becoming more overt today. In fact, as seen above, the interaction between the “modern layers” is of utmost importance for the functioning of the legal system, but so is the interaction between the modern layers and the underlying layers, such as the traditional and religious. Thus, one can claim that the legal system is a covert mix, a novel hybrid, and that this can be regarded as the third sense to be attributed to its mixedness.

²¹ Esin Özü, Turkey: Change Under Pressure, in *Studies in Legal Systems: Mixed and Mixing* 89 (Esin Özü et al. eds., 1996); Esin Özü, The Impact of European Law on the Ottoman Empire and Turkey, in *European Expansion and Law* 39 (Wolfgang J. Mommsen & Jaap de Moor eds., 1992).

²² See Esin Özü, How Far Can Religion Be Accommodated in Laic Turkish Family Law, in *The Place of Religion in Family Law: A Comparative Search* 117 (Jane Mair & Esin Özü eds., 2011).

So, the question becomes, what can the proper place for Islam and tradition be in laic Turkish law: “accommodated,” “tolerated,” or “reconciled”? Will the outcome be a novel hybridity with a more pronounced role for Indigenous culture and Islam, thus more than a weak legal pluralism enveloped in the monolithic legal system? How can a good synthesis be achieved between the positive aspects of traditional cultures and Islam, and demands of laicism, modernity, and democracy? The future lies in a covert mixed legal system, a novel hybrid. So much for this example here. It is time to move on. However, this is a legal system that should be on the map of comparatists and sociologists alike in the years to come.

Returning to Europe, if we look at it today, the mere existence of the European Union itself implies an active role for comparative lawyers in the development of general principles of private law at least. In fact, the European Union itself has been dubbed as a Mage Mix elsewhere.²³ The number of “common core” projects and Commissions set up to prepare European Codes, General European Principles, European Case Books, Restatements, and to develop theories of “competing legal systems,” in addition to regulations, directives, and conventions of the European Union and the Council of Europe, and the European Convention of Human Rights, bear witness to a plethora of activity in building the groundwork for convergence. We see also the development of a *communis opinio doctorum novum* to supply answers to shared problems from this new pool of “rule of reason.” One of the most important roles that comparative law plays is in harmonization and unification activities. In fact, comparative lawyers are involved in the preparation of the many projects to achieve these ends. Thus, although our century is witnessing a major shift from private law to public law, the areas prepared for harmonization and unification at present are mostly private law areas, whether the starting point is “common core” or “better law” studies. The place of comparative law in all this is crucial.

Here is the second gem threaded.

C. Transfrontier Mobility of Laws

The second gem takes us directly onto the third one. Legal systems cross and overlap with each other, and the birth of “mixed jurisdictions” are all connected to the transfrontier mobility of laws. Having regarded law as transposition, I have created yet other metaphors, this time hailing from musical instruments and tuning, in discussing the “fit” of the moving laws to their new climate, similar to the tuning that has to take place when a piece of music written for the piano for instance, has to be transposed so that it can be played on the clarinet.²⁴ On the concept of “fit,” though in a different vein, I have more recently turned to diffusion and “wave theory” or “wave hypotheses,” and stressed the

²³ Noreen Burrows, European Community: The Mega Mix, in *Studies in Legal Systems: Mixed and Mixing* 297 (Esin Örücü et al. eds., 1996).

²⁴ Esin Örücü, Law as Transposition 51 *Int'l & Comp. L.Q.* 205 (2002).

importance of infusion, that is the steeping process, of the diffused in order for the diffused to “fit” and become internalized.²⁵

It was usually the case that tracing relationships between legal systems was carried out by legal historians or comparatists. Historically related systems, borrowers, colonies, recipients, and systems related in any other way are studied vis-a-vis the institutions that have moved, in order to understand the changes that took place in the moving institutions. Explanations for the movement and the change are to be sought. Both vertical and horizontal comparisons are needed. The specific problems that can arise are anachronism and a lack of appreciation of social history. The relationships can be complex. Sometimes the model (mother) can learn from the offspring. Here, the choice of systems is pre-determined by history, and the methodology to be used will be different to the other activities above.

We may ask, how did all this mixing and overlapping and crossing happen? The simple answer is that it happened because laws move. Although legal rules cannot walk or fly, they can seep, but even for that to happen they need human intervention. Since laws cannot move from one zone to another, and sometimes even travel extreme distances by themselves, then they must have been moved.

The significance of “transfrontier mobility of laws” becomes apparent when legal systems are analyzed. The fact that law is not static lies at the bottom of all hybridity. Another dimension to this phenomenon is the moving and shifting populations. The mobility of law and mobility of peoples are at the root of all mixing. Law moves across boundaries and crosses borders. This movement takes various forms with diverse paths. Usually, the distances covered are long, the methods used are varied, and the end results are, even when similar, never the same. The size of the movement, its characteristics, the elements of force or choice inherent in the movement, and the socio-culture surrounding the movement impact the end result. Even today, laws are being constantly moved. The recent movements, which can be regarded as the problems of tomorrow for legal systems, are the migration of peoples in large numbers from diverse cultural and legal backgrounds. But in the last resort, the fact that laws moved and many consequences followed in the past is a truism. Today, the paths of movement may be different and the movers too. The future is pregnant to many more consequences for legal and social systems directly related to the novel and increasing migration of peoples. Transfrontier mobility of laws and peoples give rise to very significant consequences, and legal pluralism of sorts may become the norm for tomorrow.

In historical terms, the simplest, most easily defined and understood forces behind these movements are expansion, occupation, colonization, efforts of modernization, and the ensuing impositions, imposed receptions, voluntary receptions, infiltrations, inspirations and imitations, contamination, and concerted or coordinated parallel developments. Along these paths, legal ideas, concepts, structures, and rules have moved and are moving

²⁵ Esin Örucu, *Infusion of the Diffused: Four Circles of Diffusion Infusing the Legal System of Turkey*, in *The Diffusion of Law: The Movement of Laws and Norms Around the World* 7, 9-14 (Sue Farran et al. eds., 2015)

from one legal order to another. In modern times, migrations and mass movements of displaced peoples are to be considered beyond the classical paths.

There is considerable confusion among the comparative lawyers on terminology to be used to refer to such mobility. Concepts such as transplants,²⁶ contamination, reception, cross-pollination, cross-fertilization, horizontal transfers, and, more recently, diffusion and infusion have all been put forward, defended, and challenged.²⁷

We must also remember that there are even those who refute the fact that such transfers are possible, and yet transfers, by any name, are in the essence of coming into being of all legal systems. The very existence of mixed legal systems and the increasing number of new mixes is problematic for those who adhere to the decisive role of the cultural context. In fact, it should prove to be a challenge. Which culture does a mixed legal system, a hybrid or a legal pluralism represent? Yet, as I regard it, if mixedness is not a manifestation of a transition, but the final outcome—which I believe it is—then the answer must be: “mixedness is itself the culture.”

Here is the third gem threaded.

III. Concluding Remarks

This comparative motley comes to an end on a cheerful note: comparatists of all hues are indispensable. During this past decade we have witnessed increasing interest in all forms of comparative, international, and transnational law. The character, quality, and quantity of work have increased and changed, but the basic problems have remained the same. There is no one definition of what comparative law and comparative method are. However, the emphasis has shifted from concern with justifying the practical utility of the subject and avoiding superficiality, to regarding comparative law as a big tent covering a number of different kinds of scholarship. Younger colleagues are looking into applied comparative law, quantitative legal comparisons, numerical comparative law, implications of online tools for comparative law, and so on.²⁸

Comparative law is one of the fundamental sources of any Europe-wide project, in fact, of European law itself. Comparative law is the main tool for working towards European integration. It aids in overcoming exclusive nationalism and shows that the *ius commune novum* must be based on intercultural communication leaving room for diversity. This is the first point. Second, the kind of comparative law that facilitates intercultural communication

²⁶ This concept, especially, is quite controversial. See for instance, Roger Cotterrell, Is There a Logic of Legal Transplants? in *Adapting Legal Cultures* 71 (David Nelken et al. eds., 2001). However, de Plessis, in his conclusions, highlights the fact that “aspects of the donor legal culture itself can be adopted, thereby facilitating the borrowing of the rules.” Jaques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in *The Oxford Handbook of Comparative Law* 477, 510 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

²⁷ See contributions in *The Diffusion of Law: The Movement of Laws and Norms Around the World* (Sue Farran et al. eds., 2015).

²⁸ See, e.g., Special Issue: The Relevance of Comparative Legal Studies in the Twenty-First Century, 6 J. Int'l & Comp. L. (2019).

is the one that goes beyond juxtaposing, contrasting and comparing. This strengthens the call for comparative lawyers to be trained in interdisciplinary research problems, to have knowledge of, and familiarity with different legal cultures, to have a good command of languages, knowledge of history, economics and politics, and also to receive training in methodology. Third is that it is the work of comparative lawyers in facilitating the achievement of this interrelationship between the overlapping circles which opens our eyes, and brings about intercultural recognition and understanding. Comparative law facilitates our understanding of ourselves and others.

Comparative lawyers, whether they are generalists or interested in the burgeoning areas of law or in new approaches, will always have a vital role to play, alone or with members of other disciplines, in increasing comprehension and knowledge. Let us look everywhere, near and far, at the similar and the different, at every new area of law, and go beyond our comfort zones. The world is getting smaller, and the facilities are multiplying and more readily available. The aim is to value and preserve thinking as the *modus vivendi*, and comparison as its *modus operandi*. Let us pass on our knowledge and curiosity to the next generations of comparatists who are decidedly better placed than we were when we started.