Preface

Comparison happens all the time. Common wisdom suggests it is inevitable. By the same token, professional wisdom proclaims that comparison is impossible,¹ at least in an ideal form. What appears to be a contradiction (taken at face value), may be only a matter of perspective. Let’s turn to *Hamlet* for assistance:

HAMLET: Do you see yonder cloud that’s almost in the shape of a camel?
POLONIUS: By th’ mass, and ‘tis like a camel indeed.
HAMLET: Methinks it is like a weasel.
POLONIUS: It is backed like a weasel.
HAMLET: Or like a whale.
POLONIUS: Very like a whale.²

Hamlet, or rather Shakespeare, uses analogies and metaphors of likeness, so he compares. And Polonius follows suit. From this short dialog we may infer that comparison happens – on stage and, since the world is not always a theater, very likely also off stage. But comparison has its pitfalls whether performed by mainstream comparatists in the spirit of innocence³ to demonstrate understanding of the foreign or, as in *Hamlet*, to test and demonstrate honesty and loyalty.

In the everyday as in legal studies, the comparatist has to decide how to compare, what to compare and, especially, what to look out for – similarities or dissimilarities. So comparatists have a choice how to deal with the foreign. More importantly, comparing laws is quite different from comparing clouds with animals, the results of your math homework

³ The varieties of the spirit of innocence are discussed in Chapter 3 in this volume.
with what your friend figured out, or the data of two empirical studies about climate change.

Legal comparison is a social construction. Comparatists bring a thing – a law, institution, ruling, etc. – into a relationship with another. Comparing and contrasting laws means setting up and representing the law, legal situation, event or idea in one cultural context as similar to or different from another. What is more, legal comparison, rather than briefly looking at a natural phenomenon (cloud) and drawing whimsical conclusions, is a performance which involves investigating, selecting, perceiving, interpreting and evaluating data on the basis of one’s reading about unfamiliar, strange, foreign legal phenomena.

The Foreign

This performance is precarious because of the co-presence of the foreign in the comparative space. How we deal with and understand foreign laws and foreign legal cultures is not only a matter of theory and method but has ethical and political implications. To begin with, it makes a difference whether the foreign is treated as a phenomenon in its own right or is domesticated and assimilated as basically similar, a member of the same legal family or derived from one’s ‘own’ law. If the familiar ways of law take center stage, the comparatist yields to ‘the unconscious spell that holds us to see others by the measure of ourselves.’ In consequence, legal regimes, ideas and practices that resist domestication because they are quite different, tend to receive only marginal attention or are allocated an inferior status in the comparative study of the world of laws. Thus, comparative law supports the reproduction of geo-political and economic hierarchies as well as cultural asymmetries.

Critique

Critique may help uncover and dismantle those hierarchies and asymmetries: it may deconstruct hegemony by unsettling settled knowledge. Critique may help us see through the posture of innocence and bring to the fore hidden assumptions and biases, interpretive frameworks and ideological predispositions that privilege the familiar legal ideas and practices. It may demonstrate that there is nothing virginal, natural

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As will be shown in Chapter 4 in this volume.

and inevitable about the ways and means of comparative law’s mainstream schools and scholars – in particular, about their similarity disposition.

When critique has finished deconstructing the dominant paradigms and delegitimizing their ideologies, when it has finished showing that comparison is a social construct and unraveling cognitive structures, when it has finished showing that comparison is a social construct and unraveling cognitive structures, it neither ‘help[s] us decide which social constructs to retain and which to replace,’ nor offers us a blueprint for ‘good comparative practice.’ At best, it suggests that comparatists keep an eye out for intersubjectively ‘available cues,’ ‘shared context[s] of understanding,’ ‘socio-cognitive context[s] and the likes.’ That is as difficult as it sounds and errors have to be reckoned with.

Comparative Law as Critique is intended to challenge the routines of mainstream legal comparison. Rather than presenting a systematic treatise, complete textbook or comprehensive introduction, I try out various approaches and move to diverse venues of critique. Bereft of a single unified guiding theory, I explore critical methods and ideas and hope my project supports attempts to deconstruct Anglo-Eurocentrism in comparative law and provincialize Western law, civil and common. Since I had to rely on trial and error, I probably committed elementary mistakes that I submit to critical scrutiny. What else?

Support

Critical thought is a fragmented terrain with an uneven topography. What is more, in the field of comparative law, critique does not come wholesale. So, writing about comparative law in the mode of critique is enhanced by contexts amenable to intellectual experiments and companions generous enough to supply comments and suggestions. Comparative Law as Critique enjoyed both kinds of support and drew inspiration from many sources. I am indebted to various settings, projects and approaches, which have animated the critique of comparative law and helped me

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rethink ‘Critical Comparisons.’9 While ‘Critical Comparisons’ was inspired particularly by discussions in the context and spirit of Critical Legal Studies (in the old times), this book was developed in the environment of New Approaches to Comparative and International Law (NAIL) and, more recently, the IGLP network.10

Discursive contexts are not free-standing but constituted by people who are willing to share ideas. There were many versions of the different chapters, and there were many colleagues and friends who helped me rewrite them. For their generous comments and encouraging ideas along the road to the final text, I thank, in particular, Helena Garcia Alviar, Claudia Baumann, Jorge Esquirol, Priya Gupta, Ratna Kapur, David Kennedy, Maria Rosaria Marella, Giovanni Marini, Lena-Maria Möller, P.G. Monateri, Horatia Muir Watt, Anne Orford, Nikolas Rajkovic, and Larissa Vetters. Claudia Baumann, Jana Gawlas and Eric von Doemming helped me get the manuscript ready for print. As always Edward Elgar Publishing provided a very professional and supportive team: Elizabeth Clack and Stephen Gutierrez encouraged me to go on with this book project. Nick Bromley and Nicky Crane did a fantastic job of copy-editing the text and preparing it for publication respectively. I also thank Katharina Fritsch for allowing me to use her ‘Company at the Table’ (‘Tischgesellschaft’), for the cover of this book. So it is fair to say that Comparative Law as Critique has been an exciting cooperative venture. Nevertheless, albeit unfortunately, all mistakes, misreadings and misunderstandings are private property.

Content

Comparative law is introduced as a discipline (Chapter 1) in the light of the self-interpretations of comparatists. The Cinderella complex and fantasies of comparative law as queen of the legal sciences compete as

9 See the overview of critical approaches in Chapter 2 in this volume.
10 IGLP (Institute for Global Law and Policy at Harvard Law School) has, for several years, organized conferences and workshops attended by young scholars from all over the world and provided an institutional basis and forum for transnational debates on global legal thought, comparative and otherwise. The 2015 participants in an Advanced Writing Workshop in Cambridge discussed an earlier draft of the first two chapters in this volume. I presented Chapters 3 and 4 at the IGLP Workshop in 2014 and also at the Inter-University Center in Torino, and Chapters 5 and 7 at the University of Perugia and Melbourne University School of Law. Research fellows from the Max Planck Institute for Social Anthropology in Halle (Germany) provided comments on the lecture version of Chapters 3 and 4 in this volume.
constitutive elements of the discipline’s imaginary. Thereafter, critical approaches are reviewed, albeit briefly (Chapter 2). The review concentrates on diverse concepts of and possible criteria for critique. Whether they have any purchase in comparative legal studies and how they might actually enhance a good comparative practice will be tried out in the following chapters.

To achieve some distance from the official narratives and to identify their characteristic features, notably a shared view of the tools, concept, and purpose of comparative law at a given time, I focus on the major schools and styles of legal comparison (Chapter 3) and their rhetoric, methods, and theories as variations of innocence. The ethical and political dimensions of the mainstream ‘tracks’ of comparative work are represented by means of a ‘grid’ that allows one to capture and discuss the dilemma of interpretation (similarity/difference) and the problem of positionality – whether the comparatist recognizes that she is always already anchored in her ‘own’ legal culture and how she relates the familiar to the foreign (detachment/commitment) (Chapter 4). Turning from academic discourse to the practice of dealing with normative pluralism and the negotiation of differences, and shifting the attention from cognitive to visual phenomena, the grid is then applied to the legal-judicial discourse on Muslim veiling (Chapter 5).

The last part of the book concentrates on a comparison of human rights narratives – discussing, first, human rights law in general and its narratives of justification (Chapter 6) and then Kafka’s story of the human right of access to justice (Chapter 7). Narrativity is considered in the closing remarks (Chapter 8) as a possible ingredient of ‘thick comparison.’