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DAVID J. GERBER

System Dynamics: Toward a Language of Comparative Law?

Goals and methods define intellectual disciplines and the communities associated with those disciplines. "Where are we going?" and "How can we get there?" are central questions that structure such communities and their activities.[1] The two questions are, or should be, related. Presumably at least, those within the community assume that what they are doing will actually lead to where they want to go. Yet what happens when there is a disjuncture between goals and methods – when there are incentives to achieve new objectives, but the tools that have been fashioned to achieve existing objectives have little relevance to the new goals?

I suggest in this essay that this is what has happened in comparative law – a developmental disjuncture has occurred in the relationship between objectives and methods.[2] Certain "traditional" objectives of those thinking about and using comparative law have shaped its current methods, but new objectives have emerged and others have become more pressing, and current methods often have limited value for achieving them. Focusing on the analytical and cognitive aspects of this disjuncture may, therefore, lead us to more effective strategies for responding to it.

The lack of a language of comparative law symbolizes and thematizes the situation of comparative law. Comparative law has no language! It can point to a small set of specialized nouns as its own, but nouns do not make a language. A language develops where members of a community seek to explain aspects of the data or reality with which they deal.[3] Physics has a language; sociology has perhaps

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1. The force of objectives and methods within communities varies. Sometimes, for example, those within a discipline have an explicit and self-consciously-elaborated methodological canon, but disciplines may also operate with little more than tacitly held assumptions about goals and methods.

2. For discussion of the relationship between "method" and "objectives," see Justus Buchler, *The Concept of Method* (1961).

3. For general discussion of some of these issues, see, e.g., Herbert H. Clark, *Arenas of Language Use* (1992); Dell Hymes, *Foundations in Sociolinguistics* (1974) and Gillian Brown & George Yule, *Discourse Analysis* (1983). Given the introductory nature of this essay and the assigned space limitations, I will normally use footnote references only to provide the reader with general background on ideas and points

more than one. I suggest that the comparative law community has no language because its members seldom pursue objectives that could generate such a language, and that there is much to be gained by pursuing objectives that are likely to do so.

I here sketch this disjuncture between objectives and methods and some of its implications, suggest an analytical framework for responding to it, indicate how such a framework might be developed into a language for comparative law, and describe some of the potential benefits of such a development. Consistent with the theme of this symposium, the focus is on comparative law in the United States, unless otherwise noted. Nevertheless, much of what is true for the U.S. also has relevance for comparative law elsewhere.

I. Situating Comparative Law

In order to situate comparative law, we look first at the objectives that have shaped the discipline. We then review the methods that have developed in response to those objectives and identify some of their implications.

A. *Conventional Objectives*

Four objectives and their concomitant perspectives have been prominent in shaping the current discipline. The relative prominence and influence of these objectives varies from one comparative law community to another, but some combination defines what most comparative lawyers do.

One is framed by "conflicts law" or "international private law." Here the aim is to determine which rules a court should apply in cases where the norms of more than one legal system may have a claim to application, and comparative law is used to identify the relevant rules and assess the consequences of particular choices among them.

This objective has been central in the development of comparative law. Comparative law specialists frequently also specialize in conflicts law, not least because that area of law provides opportunities for practical application of their knowledge of foreign legal systems, and this, in turn, provides economic incentives to acquire such knowledge. These incentives tend to be particularly significant in countries where legal scholars also tend to be heavily involved in private practice. The intimacy of the association between comparative law and conflicts law in the United States can also be seen, for example, in the format of the *American Journal of Comparative Law*,

discussed in the text, particularly those not likely to be well-known among legal scholars.

which includes articles about conflicts law *as if* they were part of the same category as comparative law.

A second objective that has shaped comparative law agendas has been the "unification" of law. Legal unification and harmonization projects require knowledge of existing norms in the to-be-unified jurisdictions and of the differences between them, and comparative law is used to produce such knowledge. When Ernst Rabel began in the 1920s to develop the still dominant methods of comparative law, he did so as part of the project of seeking to unify international sales law.[4] This project has remained prominent in international practice in the decades since the Second World War, eventually leading to the Convention on the International Sale of Goods and accompanying its implementation. In Europe, the process of European integration has foregrounded European unification and harmonization projects in numerous areas. For many, particularly in Europe, such unification projects provide the most powerful justification for comparative law studies.

A goal that is related to both of the above involves the use of comparative law in transnational contractual relations. Here it produces knowledge that is used in deciding what language to put in a contract or what norms will apply to a contract in the absence of particular language. This type of knowledge is in much demand in the marketplace for legal services, and its value there creates incentives that often influence comparative law agendas, methodology and thought.

Finally, comparative law is sometimes seen – and justified – as a tool for shaping or guiding domestic decision-making, particularly legislation.[5] Often it is used merely as a source of ideas, providing decisionmakers with alternatives that have at least been tried somewhere. In some situations, attention is also paid to analysis of the "fit" between foreign ideas and their proposed domestic uses, although this use of comparative law appears to be rare in most countries, and it may be particularly rare in the United States.[6]

A common feature of these objectives is that they are norm-centered. They focus on the norms of one legal system and ask about the degree to which normative arrangements in one system are similar to or different from potentially corresponding arrangements in one or more other systems. These objectives generally pay little, if any, attention to understanding the dynamics of the systems involved.

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4. See Ernst Rabel, *Das Recht des Warenkaufs* (2 vols., 1936).

5. For discussion, see Stein, "Uses, Misuses – And Nonuses of Comparative Law," 72 *Nw. U. L. Rev.* 198 (1977); Kahn-Freund, "On Uses and Misuses of Comparative Law," 37 *Mod. L. Rev.* 1 (1974); and Watson, "Legal Transplants and Law Reform," 92 *L. Quart. Rev.* 79 (1976).

6. Careful investigation of comparative solutions is, for example, a routine part of the legislative process in Sweden. Ulf Bernitz et al., *Finna Rätt* 97 (4th ed. 1997).

B. Methodological Responses and Some Implications

The methods of comparative law reflect the primacy of these goals – they are norm-centered, and they tend to pay little attention to the decision-making process. The function/context methodology initially developed by Ernst Rabel represents what can be considered the standard methodology, at least in Europe and the United States, and thus we can use it as a reference point.[7] Originally designed to aid in the process of legal unification, this methodology basically asks how best to compare specific normative arrangements in one system with those in another. It directs the analyst to identify the *social function* of norms in order to provide a basis for making comparisons of specific normative arrangements. In doing so, the analyst is advised to consider the *context* in which a norm operates in order to evaluate the operation of the normative arrangements effectively. This methodology was a breakthrough of major importance, because it provided a means of comparing normative moments that eliminated or reduced the extent to which the conceptualizations of the legal regimes being compared corrupted the process of comparison.

The predominance of these objectives and the methods shaped by them have important implications for our inquiry. First, their focus is on the *artifacts* of decision-making rather than on the *process* itself. They are, for example, little concerned with questions of how legal actors think or how decisions are actually made – what I call "process" issues. To be sure, the standard methodology calls for attention to the context in which norms function, but in practice it is precisely the predominance of the traditional norm-centered objectives that tends to marginalize the role of process issues. Where the focus is on the comparability of articulated norms, analysts will seldom have strong incentives to engage in extensive efforts to understand the decisional influences within the legal system involved.[8]

Second, these objectives often call for the norms to be, in effect, deracinated. The analysis focuses not on their roles in their "home" system, but on their potential use in a different context. In the conflicts of law setting, for example, the issue is whether and how a norm from system A is to be applied by the courts of country B. There is seldom incentive to explore the many factors that affect its actual use in its home system. Again, conventional methodology does call for analysis of the context in which norms operate, but traditional objectives seldom provide incentives to analyze context in depth.

Third, existing methods produce highly particularized knowledge. Knowledge resulting from their application in one situation has

7. The canonical account of this method is Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* 28-46 (2d rev. ed., Tony Weir tr., 1992).

8. If there were more knowledge about such influences and it were more readily accessible, however, it probably would often be used for such purposes.

no necessary relation to knowledge derived from any other applications of the methods. There is no common theoretical or conceptual structure that provides a framework for organizing knowledge and relating discrete pieces of information to each other. Standard methodology seeks to create knowledge about specific normative arrangements, but without a broader conceptual framework, such knowledge tends to remain particular, specific – and isolated!

This, in turn, has a profound effect on the structure and operation of the community of comparative law specialists and their discourse. Gains in knowledge produced by a member of the community are not part of a shared project that renders that knowledge usable by others. As a result, there is little basis for community among those applying the method. There is, in other words, little room for "science" if one understands science to be a process by which a community seeks to create new knowledge that is useful to its members.[9]

The predominance of these objectives and their associated methods also often tends to create a convergence bias in the comparative study of law, particularly among those involved in legal unification projects. Where the goal is unification, the comparative law specialist is supposed to find commonalities. This creates incentives to emphasize similarities between systems – their "common core." The narrative of the comparative law scholar successfully "bridging the gaps" between divergent norms is often powerful. From this perspective, discussion of broader issues such as how information is processed and how decisions are actually made may be seen not only as irrelevant, but even inimical to the norm-centered objectives being pursued.

Finally, such particularized knowledge is not easily or readily transferred. There is no language that is designed to convey it, and there is little incentive to transfer it. The knowledge produced by one application of the method is likely to have little value for other potential users of the method. If knowledge does not have significance beyond its own specific context, only those who are interested in that context – here, the specific normative arrangement – have incentives to seek the relevant knowledge. If, for example, A is concerned with the conditions of validity of a contract for the sale of securities, she is likely to gain little benefit either from knowledge of norms relating to child custody or from B, who has such knowledge. A's and B's simply have little to say to each other.

The circumstances of comparative law in the United States intensify some of the above effects, particularly insofar as they relate to the comparative law community. In Europe, for example, such communities are relatively small, with geographical proximity and relatively frequent personal contact often facilitating the informal

9. See, e.g., David L. Hull, *Science as a Process* (1988).

exchange of information about and among community members. Such communities tend also to enjoy high status both within academic circles and in relation to the legal community generally, not least because of the practical value of the skills and knowledge of their members. Such social factors provide a basis for community, and thus they create incentives for producing and exchanging information within the community.

Their counterparts in the U.S., in contrast, tend to be scattered geographically, and they frequently are not part of any well-developed social network of individuals dealing with comparative law issues (whether scholars, practitioners or policy makers). In addition, most operate in an academic environment in which foreign experience and comparative insights are often not highly valued. Under these circumstances, the lack of a common intellectual framework means that there is little basis for community among the members of the group – other than perhaps the instinct for self-preservation.

This perceived lack of common purpose and generalizable knowledge in the field of comparative law tends, in turn, to weaken the position of comparative law within U.S. law school and university communities. As a result, it tends to undermine support for comparative law projects by impeding their justification. Moreover, particularly in an era of raised consciousness about national origins, it can easily lead to claims of undue attention or bias in favor of one or another country or part of the world. As one senior law professor told me not long ago, "Our faculty can't hire a comparatist. How would we decide which country to go for and how could we justify the choice?"

II. Changing Objectives

In recent years changing legal, economic, and political circumstances as well as changing intellectual tools and expectations have increased the potential value of different kinds of comparative law information and thereby urged new objectives for the comparative law community, but that community has yet to create methods appropriate for achieving them. I locate these objectives in three categories. One is "scientific" and seeks new knowledge about how legal systems work. A second is practice-related, by which I refer broadly to the application of legal knowledge for legal practice or policy purposes. Related to both of the above is a third, which involves the transmission of information about legal systems.

The desire for better knowledge of the operation of legal systems is a central goal and a base for achieving progress toward the other two goals. As we have noted, conventional comparative law methods tend to produce little generalizable knowledge about the processes of legal systems, focusing instead on the artifacts they produce. Long protected from outside scrutiny by barely penetrable factual densities

and guild-mentality-based restrictions on access to knowledge, the dynamics of legal systems have remained remarkably resistant to systematic investigation. The knowledge that does exist is often based on personal experience and, as a consequence, both unsystematic and generally inaccessible to rigorous examination. Moreover, it is almost always contained and conveyed in a discourse used primarily by a relatively small legal community operating within the specific system from which the knowledge comes.

This opacity is becoming less acceptable. One reason is that the social, economic and political importance of understanding the operation of such systems increases the value of such information. Incentives for acquiring this type of information have simply increased. Another reason is that changing intellectual perspectives have highlighted the inadequacy of knowledge about the operations of legal systems. In the United States, in particular, the traditions that developed from sociological jurisprudence and legal realism have focused attention in some circles on knowledge of how decisions are made rather than on the normative outcomes of the decision-making process, which remain the focus of legal scholarship in much of the rest of the world. Yet there has been relatively little effort to develop the implications of this perspective for the study of comparative law. Finally, improved analytical tools in related areas such as cognitive science and sociology urge their own use: failure to explore their capacity to yield knowledge about legal systems becomes less defensible.

The idea that by comparing aspects of legal system operations one can gain insights into the operations of such systems is not new – it has been heard at least since Aristotle. Little attention has been paid, however, to developing methods to pursue such knowledge effectively, presumably because of insufficient incentives and the lack of appropriate and adequate analytical tools.[10] In recent years, the predominance of the conventional objectives and methodologies outlined above has further tended to preclude or devalue such efforts.

The changing contexts of practice – both private and public – also encourage development of information that is outside the scope of traditional comparative law methods. "Smaller world" is a convenient, if overused, coding for this set of factors. As international investment and economic cooperation increase in importance in relation to the sale of goods in international commerce, for example, knowledge about the actual *operations* of foreign legal systems increases in value in relation to knowledge based on the extraction of

10. This issue has not, to my knowledge, been systematically studied. I suspect, however, that the role of natural law thinking in the eighteenth century and deductive methodologies in the nineteenth century tended to obstruct the development of a language of comparison of actual systems.

discrete data from them. Such longer-term relationships tend to increase the value of understanding the systems themselves – their actors, institutions, modes of thought and the like. Factors that are necessary for cooperation with foreign legal professionals – whether lawyers, judges or bureaucrats – become increasingly important. Here it is often not the norms of the foreign system that are central, but the other factors that influence decisions. These practice contexts emphasize the need to understand how legal actors think, talk, process information, interpret conduct and make decisions.

Both sets of objectives increase the value of effectively transmitting information about one system to those outside the system. They focus attention on improving the capacity to interpret and communicate effectively across the cognitive and cultural boundaries and landscapes of legal systems, whether verbally or in writing and for practical and policy purposes as well as for scholarly and scientific ones.

A theme underlying all three objectives is their focus on the legal process – the dynamics of legal systems. They seek knowledge that will improve the capacity to interpret what legal actors have done and predict what they are likely to do. Their primary concern is for improved knowledge of the processes by which decisions are made rather than for information about the results of those processes – the norms they produce. The object of study is thus fundamentally different from the conventional objectives discussed above. Note the concepts of "decision" and "system" in this context, for we shall soon see that they are critically important in fashioning tools to respond to these objectives.

III. Shaping the Tools

The growing urgency of these objectives and thus the increasing value of the kinds of knowledge they demand create incentives for the comparative law community to develop methodological tools that yield such knowledge.[11] This requires the development of an analytical framework – and, eventually, a language – that can effectively

11. There is a substantial literature on comparative law methodology, but I have found little that relates specifically to the issues that I identify here. For discussion and a useful selection of references, see, e.g., Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Tony Weir tr., 1990).

Some comparative law scholars disparage discussions of methodology in the field. See, e.g., Bernstein, "Book Review," 40 *Am. J. Comp. L.* 261 (1992). This stance appears, however, to be premised on the assumption that the contexts in which comparative law operates remain unchanged. On that assumption, the claim is that careful use of the standard methodology in specific circumstances will build up information about discrete substantive areas and is more valuable than theorizing about different methods. If the objectives of comparative law are perceived as changing, however, then such resistance to methodological inquiry will – I hope – evaporate.

detect, express and convey both commonalities and differences in the operations of legal systems.[12]

A. The Contours of the Enterprise

If such a language is to be developed, the process will necessarily be a gradual one in which individuals seek the knowledge called for by the "new" objectives sketched above. To the extent that comparative law scholars begin to focus their attention on the operation of legal systems rather than on the norms produced by such systems, they will perceive patterns in those operations and construct causal propositions relating to them. They will attach terms to such patterns and propositions, and where these "signifiers" gain acceptance they will acquire the capacity to transmit information across system boundaries. As connections are perceived and developed between and among these concepts, the resulting network will acquire sufficient density to be referred to as a "language" of comparative law. This, at least, is one scenario, and recognition of the potential value of particular kinds of knowledge is the key to both initiating and propelling the enterprise.

The process itself consists of using abstraction to structure information; in this sense, theory formation, theory testing and theory refinement are its core. Accordingly, its rate of development and its capacity to produce useful information will depend on the perceived value of the theoretical structures employed. Progress toward an effective language of comparative law will depend, *ceteris paribus*, on the degree to which these structures are perceived as effective in identifying, analyzing and representing the operations of legal systems.[13]

Note that such a language would be "constructed" by a community of individuals seeking a common knowledge objective. It would thus be a self-consciously created "scientific" or "formal" language. Accordingly, it would be independent of any specific system or systems. It would be specifically designed to apply across the boundaries of legal systems, and thus its referential base would include any legal system. This "neutrality" of perspective, which presumably could not be achieved in any other way, would be a key to its value.

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12. I emphasize that this sketch of a response to the problems outlined here is preliminary and superficial. Many of the propositions and claims I make here require much more elaborate development and further support, but I leave that for another day.

13. On conceptual development, see, e.g., Paul Thagard, *Conceptual Revolutions* (1992).

B. *Focusing the Analysis*

"What is it, exactly, that we are supposed to be studying?" will necessarily be a basic question at the inception of the enterprise. How those involved answer it will shape their investigations, and thus their answers become very important. We noted above that the "new" objectives identified here call for information about process – the dynamics of legal system operation. In order to focus the inquiry effectively, however, its object will need to be defined more operationally; i.e., using more analytically useful concepts. These will need to meet three basic criteria: (1) They will have to refer to specific behavior, so that the analysis can be grounded in observable "data"; (2) they will need to capture causation relating to the behavior, because the objectives call for better understanding of how and why things happen; and (3) they will have to be sufficiently inclusive to capture the full range of potentially relevant causative factors.

I submit that combined use of the concepts of "decision" and "system" meets these criteria and may provide a means of effectively focusing and framing the inquiry. Using the concept of decision provides an operational focus for the analysis, while the concept of system serves to frame it.

For purposes of this analysis, I am defining "decisions" in a broad and functional sense rather than in a narrow and formal sense. I use it to refer broadly to choices by legal actors – whether individuals, groups or institutions.[14] It includes not only formal, authoritative decisions such as those of courts, but all decisions of those actors. Decisions of legal professionals concerning which kinds of arguments to use in litigation or which kinds of language to use in explaining a legal situation to a policymaker or how to interpret specific language – all belong in this category.

Using the concept of "decision" as the core analytical unit has several advantages. First, it refers to objective conduct. Decisions can be experienced, observed and quantified, and thus they provide an operational basis for the inquiry (in contrast, for example, to the concept of process). Second, decisions are a unit of behavior that can be compared across national boundaries. Influences on decisions change, as do their contexts and consequences, and there may be many kinds of decisions, but decisions themselves are endemic to the operation of legal systems. Third, they are not reducible: they represent the smallest unit of behavior that we can investigate operationally across sys-

14. A more developed version of this argument will require discussion of what is meant by "legal." For present purposes, however, we can define the term broadly to refer to the process by which societies (and, in some cases, communities) articulate, apply and enforce conduct norms. At the margins, the issue of what is "legal" may pose difficulties, particularly with regard to Asian systems in which Western concepts of "law" often do not fit easily, but I suspect that for most purposes this definitional issue will not pose major problems.

temic boundaries. And, finally, the concept of decision implicitly relates to causation, because decisions are the result of a process of decision-making – i.e., a set of causal relations. More specifically, they are the behavioral points at which causative influences interact.

The use of "decision" as the central object of analysis also allows us to develop a concept of legal "system" that serves our objectives. In the context of law, the concept of "system" is typically used in a vague way to refer to the totality of factors involving law in a particular jurisdiction. Hence, "United States legal system" tends to be used in a general way to refer to the courts, laws, etc. of the United States. This usage does not purport to capture relationships among system components, nor does it contain propositions about their impact and interactions, and thus it has little analytical value. Social scientists, in particular sociologists, have occasionally used the concept in a more analytical way to refer primarily to patterns of social interaction relating to law.[15] In most cases, however, this reduces law to sociology and thereby excludes consideration of many influences on legal decision-making.

By tying the concept of decision to that of system, however, we can define a "legal system" in a way that is both operationally grounded (through its focus on decisions) and broad enough to capture the full range of factors involved.[16] In this usage, a system of law consists of the decisions of legal actors acting in legal capacities together with the factors that regularly influence such decisions.[17] The operation of these factors and the interactions among them then represent a system's "process" or "dynamics." This concept of system is purposive, its circumference being defined by the normative objectives that we associate with "law."

This usage of the concept of "system" frames the inquiry by defining its scope. Moreover, it captures the critically important causal element in the analysis by focusing on the factors that influence decision-making and on their interactions. It is thus sufficiently capacious to capture the interrelated factors that drive legal decisions.

Defining the object of the inquiry in this way has an additional, and critically important, feature. It captures the specific characteristics that make a legal system "legal." Its premise is that the opera-

15. For examples of valuable attempts to use sociological system theory in the field of law, see, e.g., Günther Teubner, *Law as an Autopoietic System* (Anne Bankowska & Ruth Adler trs., Zenon Bankowski ed., 1993) and Niklas Luhmann, *A Sociological Theory of Law,* (Elizabeth King & Martin Albrow trs., Martin Albrow ed., 1985).

16. For an insightful discussion of the potential value of systems theory in legal scholarship generally, see LoPucki, "The Systems Approach to Law," 82 *Cornell L. Rev.* 479 (1997). Ugo Mattei's discussion of the "common law" as a "model" points in the direction that I here follow. See Ugo Mattei, *Il Modello di Common Law* (1996).

17. Valuable recent work by Rodolfo Sacco focuses on related issues of causation. See, e.g., Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1 and 39 *Am. J. Comp. L.* 343 (1991).

tions of what we call legal systems can only be understood by using a conceptual framework designed specifically to capture those characteristics and that by analyzing the decisions of legal actors and the patterns of influence on those decisions we can gain knowledge of the operation of such systems. Analytical perspectives from other disciplines will often be helpful, but they are often too narrow to reach the interactions that influence legal decisions.

C. Sketching Some Starting Points

I offer here some preliminary suggestions for beginning to structure this analysis of the operation of legal systems.[18] These are merely starting points; other structures may prove equally or more convincing, and those that prove useful will require continual refinement, adjustment and elaboration. At a minimum, however, they serve as examples of the kinds of structuring tools I envision.

Given that the object of the enterprise is to capture and represent influences on decision-making, it will be necessary to provide cognitive structures for penetrating the complexity of those interacting influences and providing conceptual bridges between legal systems.[19] In this context, I suspect that in any legal system the principle influences on decision-making fall within four basic categories: texts, institutions, decision-making communities and patterns of thought.

Authoritative texts – e.g., statutes, regulations and judicial opinions – are important in most legal systems, because they express the authority that is central to such systems.[20] In modern legal systems, legal decisions are seldom made without reference to such texts, but there is great variety in the kinds of texts involved and in the roles they play. They guide, channel, and justify legal decisions, but we do not have an analytical language by which we can in any very refined or precise way talk about such texts, the influence they exert and the ways they exercise such influence.

The enterprise I envision would, therefore, seek to reveal patterns in the ways that texts operate in legal systems – how they influence decisions and are influenced by those decisions. It would, for example, seek to capture similarities and differences in the characteristics of texts. Statutes vary significantly among legal systems

18. I have previously experimented with elements of this type of analysis. See, e.g., David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998) and id., "European Union Law: Thinking About It and Teaching It," 2 *Col. J. Eur. L.* 379 (1996).

19. For an interesting recent presentation of some similar issues, see Ewald, "Comparative Jurisprudence (I): What Was it Like to Try a Rat?," 143 *U. Pa. L. Rev.* 1889 (1995).

20. The role of texts in influencing legal systems has parallels in the analogous role of texts in many religious systems.

with respect to factors such as levels of abstraction, degrees of systematization, and specificity of language, and decisions of courts vary with respect to factors such as their factual density, the specificity of the language they employ, their reliance on external sources (e.g., codes) for meaning, and so on. The analysis of texts would also pursue patterns in the ways in which various types of text are produced, the expectations of influence attached to them, and the methods used in interpreting them. There would be great benefit in possessing a language by which these influences and their roles could be analyzed and conveyed.

Decisions are also made within institutions, and the decisionmakers are subject to the pressures of particular institutional environments. A second component of the analysis would examine, therefore, the decisional influences within these environments. These include, *inter alia*, decision-making procedures, structures of power, and the roles of education and social status. There is currently only the most rudimentary language for representing and communicating these influences, and the analytical enterprise I envision would thus seek patterns in the way such influences operate and interact with each other.

Note again the importance of our conception of legal system in framing the analysis. The objective is to understand how decisions are made by legal actors, and thus it requires analytical tools that capture the interplay of influences on those decisions. Political science, economics, sociology, and anthropology are each likely to provide insights relating to the operations of institutions, but each of these languages is too narrow to capture the full range of institutional influences on legal decision-making and the relations between institutional and other influences.

Institutions are not coterminous with communities, however, and a third principal source of influence on legal decision-making is found in patterns of "community" within legal systems. I use the term "community" to refer to regularized patterns of relationship – here, among actors that affect legal decisions. The enterprise I envision would, therefore, investigate the structures of such communities – issues such as patterns of relationship between judges and practicing lawyers and between judges and legal scholars and patterns of prestige and status. It would also, as a further example, map roles within legal communities and seek to reveal the factors that determine which legal actors play which roles. These "community" relationships are often of great importance in influencing legal decisions, but again we do not have a developed language for representing them, and, as a

result, they often remain "unseen."[21] Sociological scholarship will be useful in revealing and coding some of these influences, but it cannot capture the full range of community influences on legal decision-making – as, for example, where structures of power are intertwined with methods of interpreting texts.

Finally, decisions are made by people, and thus patterns or modes of thought are key factors in their making.[22] People talk and think about law in different ways in different systems, and yet we have no analytical language for adequately capturing and representing those patterns. For example, scholars have demonstrated, particularly in recent decades, the degree to which the "discourse" which communities use affects individual patterns of thought and the decisions that arise from them,[23] and yet this scholarship has seldom been used in the comparative analysis of legal systems.

The enterprise would, therefore, investigate patterns of thought and discourse within legal communities, asking, for example, how discourses code experience, how particular patterns of coding affect decision-making, etc. In this context, the role of traditions of thought within legal systems and the forces that strengthen and/or weaken the influence of such traditions is likely to be central. "How have certain patterns acquired power and achieved stability within legal communities and why?" will be a prominent question.

These factors are necessarily interrelated, and a key function of the analysis should be to "perceive" them as part of a system – i.e., to see their interrelationships.[24] For example, the influence of texts on decision-making will be tied to patterns of thought and interpretation, which will, in turn, be tied to the structures of power and influence within communities and institutions. These interrelationships and interactions will often be inaccessible with analytical tools from other disciplines that have been designed for different purposes.

These rudimentary suggestions for structuring the analysis will, of course, have to be developed, and their utility will have to be tested. The enterprise envisioned here represents not a body of knowledge, but a process whose contours will have to be explored in use. It is for that reason that it is likely to be particularly important to give careful consideration to focusing the object of study and thus shaping the enterprise itself.

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21. I explore the role of such relationships, in Gerber, "Authority, Community and the Civil Law Commentary: An Example from German Competition Law," 42 *Am. J. Comp. L.* 531 (1994).

22. For an insightful and detailed discussion of modes of thought in law and religion, see Wolfgang Fikentscher, *Modes of Thought: A Study in the Anthropology of Law and Religion* (1995).

23. See, e.g., Howard Margolis, *Paradigms and Barriers: How Habits of Mind Govern Scientific Beliefs* (1993).

24. Mirjan Damaška's work has been valuable in exploring such interrelationships. See, e.g., Mirjan Damaška, *The Faces of Justice and State Authority* (1986).

erful tools for predicting and interpreting conduct within those systems.

The enterprise is also in a unique position to legitimate legal theory itself. To generalize about law on the basis of experience with a single legal system is a common enough form of entertainment (particularly in the U.S.) but hardly of great analytical value. Only when theoretical propositions can be tested in more than one legal system can they legitimately claim any degree of validity, and the more often they are used and the more rigorously and successfully they are tested, the stronger those legitimacy claims become. In short, a conceptual framework for analyzing the operations of legal systems can "pay off" for legal theory generally, providing a means of testing abstract propositions about the operations of those systems that standard comparative law methods do not provide.

A developed language for analyzing and representing the operations of legal systems would also create the capacity to compare those operations. Its classifications, categories and causal propositions provide the vehicles for relating knowledge of one system to knowledge of other systems. They become, in effect, the *tertium comparationis* between legal systems – "neutral" points of reference to which information from diverse systems can be related. Recall that the components of this analytical language are *not* drawn from a single system. The premise is that they are created specifically to be applied to any system of law. In this sense, they also build on the core insight of standard comparative law methodology: that effective comparison presupposes the use of concepts and categories that are not drawn from the systems to be compared.[28]

The existence of such a language also improves and enhances communication regarding the operations of legal systems. Its terms and structures convey knowledge precisely because they are shared – a community attaches meaning to them. Moreover, without such a language, efforts to acquire knowledge of a foreign legal system are likely to be distorted by the use of other languages. If, for example, X (operating in system A) seeks to acquire knowledge about system B, X will perceive the operations of system B through the concepts and categories of system A – normally the only lenses available to her. The information will be shaped by the use of those categories. Similarly, Y, operating in system B, will generally provide knowledge of system B in system B's terms. The capacity to acquire knowledge of system B's operation is thus impaired by the use of at least one – and

profession, procedures, styles of thought and presentation etc. Currently there is no general language that provides such information.

28. In standard methodology it is the conceptualization of a "social function" to be served by particular norms in different systems that plays that mediating role.

framework would facilitate the use of such "imported" knowledge by comparative law scholars and make the work of comparative law scholars more accessible and valuable to members of those communities. This, in turn, would increase incentives for the latter to contribute to the comparative law enterprise and for comparatists to contribute to the projects of other knowledge communities.

The type of analytical framework discussed here is also likely to have pedagogical value, offering some of the same benefits for teaching that it provides for scholarship. It can be used to generate insights into the dynamics of foreign legal systems and present them in a form that is accessible to law students. The teaching situation intensifies the need for abstraction and accessibility. Students typically have little background knowledge about foreign legal systems and little time and few resources to invest in learning about them. They need, therefore, tools that can penetrate the factual diversity and density of foreign systems and provide a means of navigating foreign institutional and intellectual landscapes. They need the tools to know which kinds of questions to ask and where to look for information.

This vests value in a pedagogical focus on developing tools and abilities rather than transmitting discrete information, which is currently the focus of many comparative law courses. The accumulation of specific knowledge about particular systems is often of little value, unless it is related to more general propositions about the operation of legal systems. One benefit of the enterprise envisioned here is that it organizes information in terms of the relationships among components of a system and thus places material within a manageable conceptual framework while at the same time efficiently revealing features of the landscape within which students will need to orient themselves.

Note that the assumptions underlying these pedagogical claims are not very different from "business as usual" for many American law professors. As in teaching domestic legal subjects, the objective is to help the student recognize and assess influences on decision-making. What changes is the system being taught and the relationship of the student to that system, and effective teaching is likely to require awareness of the consequences of those changes.

In the university setting, the creation of this type of analytical structure should also incidentally improve the capacity of comparatists to explain and justify their enterprise to others who control resources – whether law school deans and faculties or university administrations. The more generalizable knowledge comparative scholars can produce, the more they can contribute to knowledge about how legal systems operate; and the more they can provide access to such knowledge, the more value is likely to be attached to their enterprise and the greater their access to resources for engaging in such

enterprises is likely to be. These benefits may be particularly valuable for scholars in the U.S., where there is often less recognition of the value of comparative law than is common in many other countries.

One final set of benefits relates to the conventional objectives of comparative law. The enterprise that I envision in this essay would not replace the comparative law project of the twentieth century, but complement it. In addition to addressing the new objectives discussed above, it would provide additional tools for analyzing the context of specific normative arrangements, and to that extent it would also enrich standard comparative law analysis.

V. Concluding Comment

"What kind of knowledge do we want to create?" and "How can we create it?" I have suggested here that in order to respond to a growing disjuncture between objectives and methods and to address objectives that have become increasingly pressing, comparative law needs a more capacious analytical framework – a language designed specifically for analyzing the operation of legal systems. To the extent that the comparative law community is successful in developing such a framework, it will generate knowledge of value not only to legal scholars and lawyers, but to all who seek better knowledge about the operations of legal systems, particularly systems other than their own. In an increasingly inter-related world, the value of such an enterprise is not likely to be small.