

# ARTICLES

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## CRITICAL EVALUATION IN COMPARATIVE LAW

*"He who only experiences what is familiar will not gain much insight. It is only in strange and far-away places that true understanding comes to us."*

Theodor Fontane

### I

Evaluation, one of the tasks of the comparative lawyer, has rarely been investigated in depth. Perhaps that is not altogether surprising, although, in the final analysis, the process of evaluation is the central and also the thorniest problem in the science of law. The beginning of Comparative Law is not some grand theoretical quest, but simple curiosity, the empirical question how others perform the tasks assigned to them. Rabel saw the process of evaluating the merits of different legal solutions as something essentially different from Comparative Law as such "because pure legal comparison, conducted on a grand scale, despite all its unavoidable subjectivity, is able to claim for its findings and theoretical assertions a greater degree of general validity than can legitimately be claimed for the value judgments and inferences which are involved when practical problems, in particular problems of legislative policy, are under discussion"<sup>1</sup>. Rabel did not in any way mean to imply that the comparativist should refrain from critical evaluation of the law and that there should be a division of labour in any practical sense, for he continued: "We lawyers would hardly be able to abandon the search for more appropriate solutions: to appraise critically is an ingrained habit and the desire to see the law improved is our constant preoccupation."

In truth, evaluation is an indispensable part of all comparative legal activity. The quest for the "better solution", which obviously involves evaluation, is the essential purpose of Comparative Law in many of its practical applications, e.g., in the preparation of national legislation, in the judicial interpretation of the law or in the international unification of law. Evaluation is equally indispensable to legal science, for example when one aims at gaining true understanding of the legal systems which are being compared or of law as such. The researcher cannot do without it, whether he engages in it consciously or subconsciously. A legal science which aspires to more than mere preoccupation with the formation of systems, concepts and dogmas within some "positive" legal system, is bound to engage in critical evaluation of the law.

It must be obvious that the theory of Comparative Law must interest itself more than hitherto in the problems of evaluation. Elsewhere<sup>2</sup> we have

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1. Rabel, "Die Fachgebiete des Kaiser-Wilhelm-Instituts für ausländisches und internationales Privatrecht (gegründet 1926) 1900-1935", reprinted in Rabel, *Gesammelte Aufsätze*, III (Leser ed., 1967) 180, 186.  
2. Zweigert and Kötz, *Einführung in die Rechtsvergleichung*, I (1971), 48.

commented on evaluation in Comparative Law and have not gone beyond the claim that the criteria relevant to this area are no different from those in daily use in general legal science, *viz.*, to consider and to establish convincingly which of several solutions should be regarded as more just and more expedient. This claim must not be misunderstood as springing from a pessimistic or a self-satisfied attitude. Rather, it is based upon the observation that the available results of comparative researches have not yet been sufficiently scrutinized from this point of view. Fundamental problems of evaluation exist throughout the science of law. The legal comparativist faces a twofold task. He must identify and clarify these problems as they present themselves in the sphere of Comparative Law, and he must work out what kind of contribution he can make to greater understanding of the process and problem of legal evaluation as such. The purpose of this article is to take at least a few steps in this direction. We do not entertain illusory expectations: Comparative Law cannot provide answers to questions concerning law and justice which jurisprudence and legal philosophy have been unable to solve in centuries. Comparative Law may, in view of its empirical and pragmatic orientation, be excused from dealing with the "ultimate questions" in the law. This may even be an advantage, since the question central to any legal comparison ("Which of several solutions to a given problem is to be preferred?") is probably of greater practical importance, and is more tangible and more humane, than are high-flown philosophical problems about ideals and ideal law.

The solutions which different legal systems have adopted for identical legal problems in themselves constitute decisions about conflicting interests; they are based upon evaluations of these interests and they tell us which of them are to prevail in case of conflict. Moreover, they are evaluations invested with authority. Comparative evaluation accordingly involves a judgment, on a higher plane, as to the solutions which ought to prevail in a legal system. However, the methods of the comparative lawyer are empirical and lack the authority of the law. It might have been this apparent contradiction which, during the first phase of Comparative Law this century, led many to infer that there was no value in comparative evaluation. An early essay by Gustav Radbruch concerned with the methods of Comparative Law may be cited as one example: "An 'ought' can never be inferred from an 'is'. Contemplation of a multiplicity of legal systems will never teach us what the law ought to be. What the law ought to be is not an empirical problem, but one to be solved by *a priori* judgments"<sup>3</sup>.

It seems a strange contradiction to hear Radbruch, in the same breath, praise the value of legal comparison: although it cannot be expected to guide the legislator to one of a number of possible solutions as a matter of logical necessity, it will nevertheless often present us with some real solution which we might never, *in vacuo*, have envisaged as one of the possibilities. Legal comparison in this role of presenting us with a comprehensive picture of possible legal solutions should be gratefully accepted<sup>4</sup>.

Does this mean that legal comparison merely widens our horizons and does not also provide us with a method of evaluation and of determination? To accept such a suggestion means underestimating the potential of Comparative

3. Radbruch, "Über die Methode der Rechtsvergleichung", (1906) 2 *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* 422, 423.

4. *Id.*, 424.

Law. Assuming, contrary to common sense, that there is such a thing as the ideal legal solution to any legal problem, it must be conceded that the comparativist, with his method of subjecting several legal systems to empirical and rational scrutiny, is not able to offer an infallible guide to that solution. There simply is no branch of legal science which gives us such a guide. Moreover, where two legal systems present the comparativist with fundamentally different solutions, his methods will, in the last analysis, not provide him with the kind of insight which will cause him to prefer one to the other. We shall have to revert to this point later in this article. However, Comparative Law has other lessons in store which show that the quest for the "ideal solution" tends to be based upon an excessively "legislative" understanding of the law. Comparative Law is a functional method; one can only meaningfully compare things which fulfil identical tasks or functions. This implies what is in fact one of the most basic insights in this field; *viz.*, that every society assigns fundamentally the same tasks to its legal system, although different legal systems often solve these tasks in different ways, with different or (perhaps more often) with the same end result. The hub of Comparative Law is the concrete "social problem" or "legal need". The objects of comparison are the solutions to such problems in different legal systems. Research must extend to all facets of such legal systems; only in this way can we expect to uncover all that is relevant to legal solutions. If consideration is confined, for example, to individual legal principles, a totally false picture may emerge, because highly relevant aspects of judicial practice may be left out of account. Objects of study must be substantive principles as well as procedural enforcement, statute law, judicial decisions and academic writings, types of contract, standard form contracts, commercial customs and usages, legally relevant facts and even wholly extraneous circumstances, in short, the true-to-life reality of a legal system. The true and complete solutions provided by different legal systems must be compared and evaluated, and they often consist of heterogeneous elements of this kind. If viewed in this way, legal solutions often present just as many (if not more) factual elements as legal elements, and the degree to which the respective merits of differing values are to be weighed is lessened in consequence. This problem will not be pursued further in this article. It leads directly to the depths of legal theory, in particular theory concerned with the sources of law. It is not the purpose of this contribution to deal with such matters.

## II

The method to be used for evaluation must depend upon the purpose which the particular comparative investigation is intended to serve. The quest for the better solution will be pursued in different ways and by application of different criteria, depending upon whether it is pursued by the legislator, the judge who seeks the help of comparative considerations in the interpretation of legal norms, the pure theoretician and critic or the draftsman of uniform international legislation.

We have already alluded to the varied considerations which the comparativist needs to bear in mind in order to have before him the complete solution provided by a legal system—from legislative provisions, case law and academic contributions to customs, usages and even extra-legal facts. The researcher who engages in comparative study to gain insight and understanding is free to give all these elements their due weight and place in his evaluation. A national legislator who relies upon preparatory comparative studies enjoys rather less freedom of movement, despite his seeming omnipotence. Not all legal solutions

are capable of being transplanted. Even more difficult is the importation of foreign habits concerned with the practical application of legal principles, since these are greatly shaped by many imponderables. Problems of this kind become even more acute in the quest for the best solution to be embodied in uniform international legislation which is intended to produce identical results in legal systems with widely divergent styles. The national judge faces similar limitations when he wishes to use comparisons with foreign law for the interpretation of his own law, or when he, in conflicts cases, has to adapt and apply together widely divergent laws. In many such cases little more is really feasible than the absorption of small segments, the transfer of individual elements of foreign solutions, or possibly the construction of improved new solutions from separate elements taken from diverse legal systems. When limitations of this kind exist, the question, "Which is the better solution?" does not always pose itself so comprehensively that all relevant factors must be thrown upon the scales. Such limitations, necessitated by the particular purpose of the investigation, are not always a disadvantage: they make the problem more concrete and manageable. The particular concrete task yields concrete criteria and one is not thrown back upon the diffuse and difficult criteria of justice and convenience in the most general sense. To go beyond the task at hand is then unnecessary. By far the majority of comparative tasks serve such practical purposes, either in fact or by virtue of the hypothetical task which the researcher has set for himself. It is significant that problems of evaluation of a fundamental or methodological type rarely arise in work of this kind.

### III

Even in the context of purely theoretical work, Comparative Law is no longer lost for answers. It is now possible to make a survey identifying areas in which evaluation is practicable and those in which it is not.

1. There is a phenomenon which comparative lawyers encounter so frequently that one might be tempted to call it (perhaps not without a little exaggeration) a fundamental comparative principle: despite all the differences in their historical evolution, their theoretical and systematic structure and the style of their practical application, different legal systems tend to adopt, even in detail, identical, or at least perplexingly similar, solutions. This has been shown elsewhere and demonstrated with the help of examples.<sup>5</sup> Therefore, in such cases, the legal systems evaluate the interests involved in particular social situations in the same way. The question how Comparative Law is to choose between different legal values does not arise.

Continental legal systems place a statutory agent (which may be a state agency) with comprehensive authority for all purposes by the side of infants or people who have been deprived of capacity, whilst the Common Law works with a variety of very diverse legal institutions—next friend, guardian *ad litem*, administrator *durante minore aetate*, ward of court, trustee. These are very different technical legal means: there may even be significant underlying differences of legal philosophy. However, the legal needs to be met are identical, and they are in fact being met to almost the same extent on the basis of much the same evaluation of the interests involved.

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5. Zweigert, "Des solutions identiques par des voies différentes", (1966) 18 *Revue Internationale de Droit Comparé* 5.

Not infrequently this identity of solution is to be found even where, on first examination, it appears that the legal values which prevail in different legal systems are contradictory. Different legal systems often contain strongly contrasting fundamental principles (people without experience in legal comparison are apt to confuse fundamental principles with fundamental values), but the exceptions to these principles are so numerous and so weighty that the careful observer finds it difficult to think of concrete cases which would actually be resolved differently under the legal systems which are being compared. In such a case the internal consistency of one or other of these systems may be open to doubt; such problems, however, do not fall into the sphere of Comparative Law.

Even in such cases, a great many things remain to be evaluated. Identity of ultimate solution in different legal systems does not mean that one is faced with dull conformity. The attainment of very similar solutions in different systems is usually marked by colourful mosaics of widely divergent means and methods. Here lies the "reservoir of solutions" (Zitelmann), and the "all-embracing life of the law" (Radbruch), the presentation of which has always been regarded as the strength of Comparative Law as a discipline. The problem is not one of deciding how to weigh conflicting interests, for in this regard the different legal systems are at one. Rather, the question is how this common evaluation is best translated into the reality of a legal system. The values involved are of a legal-technical kind, the evaluation required is that of ways and means. This field is the lawyer's exclusive and unchallenged preserve. The quest for the better solution, even within the limitations here given, is still very extensive; it stretches from questions of legal style—*elegantia juris*, clarity and transparency of regulation—right across to hard and fast calculations of how much society has to pay for one method of satisfying a legal need as against another method: how much more litigation is occasioned, for example, by the American system of road accident liability which is based upon "negligence" than by the German system which is based upon strict liability. This kind of evaluation does not differ fundamentally from the kind of evaluation to which the lawyer, who is confined to his own national system, is accustomed as part of his daily activity, or in which he could engage if he made a practice of looking around to see how other legal systems achieve similar aims with the help of quite different methods. It does not seem a particularly fruitful task for Comparative Law to seek to develop new criteria for evaluation in this sphere; its value in this area seems to lie mainly in the fact that it develops an open mind and sharpens one's judgment through constant confrontation with the multiplicity of possible solutions. Possible alternatives to the existing law can undoubtedly be conceived simply within a particular legal system by use of one's imagination; alternatives, however, which are indicated by comparative study have the advantage of having stood the test of practical implementation in some real jurisdiction where their prerequisites and qualifications, their success or failure, may be studied empirically. Such empirical evaluation is likely to be more reliable than even the most intelligent speculation.

In this sphere of legal-technical evaluation Comparative Law does not lead to the adoption of fundamentally new legal values, nor does it lead to any new "evaluation *aporiae*," of a fundamental nature. Different solutions will often be equally valid, or, as Rabel has said<sup>6</sup>, will be such that "they make

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6. Rabel, "Deutsches und amerikanisches Recht" (1957) 16 *Rabels Zeitschrift* 340, 357.

an intelligent and definite choice difficult". This, however, is not the result of fundamentally different legal values prevailing in different legal systems, but is based upon the fact that highly developed legal systems which can look back upon ancient traditions and much learning have developed solutions which may show great differences of style, but are nevertheless well-balanced in themselves and well attuned to the purpose which they are meant to serve; a comparative lawyer must not take it for granted that he will be able to identify a "better solution" in every case. Often one cannot go beyond establishing a presumption, based upon comparative experience, that the solutions of particular legal systems in particular areas are likely to be preferable. Similar presumptions are applied when one selects legal systems for comparative analysis<sup>7</sup>.

2. Even where the legal systems being compared are equally highly developed, some may have gathered greater experience in particular areas than others; some may, for whatever reasons, have concentrated greater interest upon certain legal problems than have the others and may have invested greater energy towards their solution. The U.S.A., for example, with her huge national economy and her very large legal profession, the members of which collectively handle such a wealth of cases and gather such varied experience, has developed more differentiated and better-informed solutions in the fields of stocks and shares or of anti-trust law than many other countries: there is surely a presumption that greater experience must lead to superior solutions in the long run. German lawyers, in accordance with a long tradition, have shown interest in, and given energetic attention to, detailed and exact theoretical underpinning of legal solutions. The Scandinavian legal systems have done much valuable work in the field of family law. Interest and experience of this kind are of significance in the process of comparative evaluation and should not be ignored. Of similar significance may be the fact that a legal system has recently paid attention to legal reform in a particular area; this also would justify the expectation that better solutions—*i.e.*, solutions which are clearer, more modern and more practical—will have been achieved than in a legal system in which comparable solutions have grown wild, as it were. Examples might be the law relating to standard form contracts in Israel<sup>8</sup>, or the legal regulation of traffic accident compensation in Poland, Finland and in the Canadian province of Saskatchewan<sup>9</sup>.

A caveat is appropriate at this point. Even where, in these areas, there is no impediment to agreement in principle about the aims of a comprehensive evaluation of different solutions in their entirety, there is nevertheless reason for caution in some cases. There are values which we are inclined to regard as technical and which are nevertheless not interchangeable because they cannot be evaluated on a purely functional basis. Some legal institutions are affected, within the legal systems to which they belong, by values which the comparative observer might be inclined to regard as obsolete or even as based on prejudice, but which he will nevertheless have to accept as facts of life for purposes of his evaluation. This may be the case even in areas where we, basing ourselves upon Continental legal systems, are inclined to think only in terms of technical-legal values. Thus the participation of the jury in American civil procedure, which is of great practical significance in accident

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7. See Zweigert and Kötz, *op. cit.*, 40 *et seq.*

8. Standard Contract Law of 1964; *cf.* Hecht, "The Israel law on standard contracts", (1968) 3 *Israel L.R.* 586.

9. See *v. Hippel*, *Schadensausgleich bei Verkehrsunfällen* (1968), 55 *et seq.*

law, seems to us merely a technical thing, and an annoying one at that, since not infrequently it seems to prevent a sensible solution being found to the problems. However, we must acknowledge that the jury is enshrined in the U.S. Constitution (as part of the Bill of Rights in the Seventh Amendment) and that it is not just an historic relic, but an institution with deep roots in American legal consciousness. This, however, will not prevent us from concluding in the area of accident liability, on the basis of comparative evaluation, that this institution is legally inexpedient, and we shall, *e.g.*, in the context of the proposed reception of foreign solutions, carefully refrain from adopting it. However, we cannot deny that, as regards comprehensive critical comparative evaluation, we have reached the limit of what can be achieved. Similar considerations apply to "natural justice" in English law which defines the minimal requirement of fairness which must be observed in every case and which has been given an exclusively procedural content.

3. The further one carries legal comparisons, the more weight must be attributed to considerations of this kind. The institution of the settlement, particularly the settlement arrived at in pending proceedings, seems to us purely legal-technical in character. It appears almost as a subsidiary method for the solution of conflict—so much so that we are inclined never to take it into consideration when we investigate solutions to substantive problems. This approach is no longer appropriate when we include the legal systems of the Far East in our considerations. Even in Japan, which has adopted western modes of thought to a greater extent than China, we find a dislike of litigation and a tendency to voluntary settlement under a superficial layer of western law and western judicial institutions. So strong are these sentiments, that non-litigious methods for the solution of social conflict must be regarded as major elements which go to make up the style of these legal systems<sup>10</sup>.

It must remain doubtful whether there is any possibility in a situation such as this of establishing which substantive solutions are superior, considering that all western solutions have been devised with litigation in mind, or have indeed been derived from litigation. Despite all scepticism, one should not altogether exclude the possibility of comparative evaluation, but there is at present a dearth of material in relation to concrete problems and the question must remain unanswered for the time being.

It should not be thought that legal comparisons involving western and far-eastern legal systems are useless or even impossible. On the contrary, the insights to be gained are considerable and quite sufficiently fundamental. One may ask, to revert to the example of the compromise, whether the voluntary settlement of disputes even in western legal systems does not open the door to a new kind of justice, which aims at social harmony and reconciliation rather than at the litigious enforcement of the interest which may be judged superior from time to time; and one may further ask whether this type of justice has not been traditionally rather badly neglected in our western cultures.

Nevertheless, the differences in fundamental social assumptions are so great that they prevent any simple and direct questions and evaluations aimed at revealing the "better solution".

4. There is a grey area between the sphere of readily possible legal-technical evaluation (the substantive goals being identical) and the sphere of conflicting

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10. For further detail, see Zweigert and Kötz, *op. cit.*, 419 *et seq.*

evaluation of basic interests which are inimical to comparative evaluation. When we speak of "solution", we assume rather rashly that substantive problems in legal systems are always resolved upon the basis of a clear and definite evaluation of interests. This, however, is not usually the case. Codifications of recent origin may in fact deal with a problem of comparative interest explicitly and in detail. The American Uniform Commercial Code contains solutions based on such evaluation. However, that is not the rule. A clear and fundamental fiat of the legislator ("thus it shall be") which also enjoys unlimited acceptance in the particular legal system is rarely to be found in practice. This observation is particularly true for legal systems which are based upon case law: conflicting interests are evaluated afresh in every new case, and even where a firm rule has evolved, there always remains an unresolved residue of uncertainty. The situation in codified legal systems is not so very different. Many code provisions are couched in rather general language; their true contemporary meaning is disclosed only when one studies their interpretation by courts and legal science. This is true, for example, for provisions in Continental codes concerned with delictual liability. Other provisions, though not lacking in clarity, are obsolete; they are no longer applied or may actually have been "overruled". Examples are Arts. 1119 and 1120 of the French Civil Code concerning the contract for the benefit of third parties and para. 253 of the German Civil Code concerning damages for non-financial loss. Finally, there are extensive fields of law which have developed almost completely outside the written law, as exemplified by substantial portions of German and French private international law<sup>11</sup>.

In all these areas the codes have been buried under a mass of case law and academic dogma, yielding a picture which, from the point of view of interest-evaluation, is no clearer than common law systems. The first task of the comparative lawyer in such a situation is to identify and state clearly the solutions, the interest-evaluations which the various legal systems have evolved. Not infrequently, the result is doubt about the "policy" of the particular legal system, if not a complete *non liquet*. This has a profound influence upon evaluation, indeed upon the possibility of evaluation, in Comparative Law. The comparative lawyer has to ascertain the reasons for such confusion of legal values and the consequences which flow from it. Why it is that a legal system has developed a *diffuse* solution, is of the greatest interest to someone who is searching for the "correct", the better solution.

A suitable example is the German law relating to credit for the purchase of goods. The prevailing security is the chattel mortgage which is based upon customary law. Compared with it, the possessory pawn-type chattel security which the Code recognizes has lost all practical significance. The customary chattel mortgage requires neither delivery nor registration. The German solution implies a decisive preference for the interests of the buyer-borrower whose powers of disposition over the goods suffer, at least *de facto*, no diminution of any kind. The interests of others—of further and other creditors, and also those of the seller-creditor himself—are treated as subordinate. Does this mean, for the purposes of comparative evaluation, that it is the policy of German law that these interests be neglected, that a conscious evaluation of interests has taken place and that there is consequently no point in

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11. See Lawson, *A common lawyer looks at the civil law* (1955), 56; Dawson, *The oracles of the law* (1968), 432 *et seq.*; Zweigert and Puttfarcken, "Statutory interpretation—civilian style", (1970) 44 *Tulane L.R.* 704, 715 *et seq.*



confronting German law with a superior foreign solution, for example that embodied in Art. 9 of the American Uniform Commercial Code (Secured Transactions) with its far-reaching duty of registration? The answer must be negative. Understanding a legal system often requires research into the genesis and the evolution of legal institutions. In the case under consideration, the judicial and academic tendency has been to deny legal efficacy to the chattel mortgage because of the fact that it was too secret a transaction. It is true that the needs of commerce to have a non-possessory form of chattel security prevailed in the end. To the comparative lawyer that is the German "solution". However, the fact that, in the process, the desirability of some form of public notice was ignored is based upon chance, or better, upon accident or incapacity, not upon a deliberate evaluation of the relevant interests.

This is just one of many examples which could be given to show that critical comparative evaluation remains meaningful and feasible, even where legal systems in fact provide different solutions for identical substantive problems.

5. It is in a similar way that legal comparison frequently helps to bring to light particular parallel interests in different legal systems. In the sphere of non-contractual liability, for example, all the developed legal systems have adopted as their starting point the proposition that compensation is only payable for culpable infliction of damage<sup>12</sup>.

Admittedly, every legal system also provides for strict liability in certain exceptional situations, but in every case it still seems that the culpability principle preponderates. It is only when one makes a comparative survey of all such exceptions, including the ways in which they developed in the different legal systems, that one discerns a common principle of strict liability which, albeit with varying degrees of intensity, is struggling for implementation in all legal systems. This observation provides a criterion for our comparative evaluation—the social need for strict liability in some situations—which no two of the legal systems under investigation provide equally clearly, but which nevertheless flows from the overall comparison in a way which is legitimate if not outright self-evident. One might be permitted the incidental observation that legal comparison, even before one reaches the stage of evaluating different solutions and independently of that process, is a continual process of "value clarification": one identifies the interests which are relevant to a given substantive problem, and one is able to do so more convincingly than one could if one were confined to a single legal system.

Nevertheless, there are substantive problems left in the end, in relation to which different legal systems arrive at different solutions, and do so for reasons which preclude any meaningful evaluation. Whether the testator's freedom of disposition should be limited so as to secure the position of his spouse or that of his relatives, whether and under what circumstances a marriage may be dissolved, whether the children of an adulterous relationship should be legitimated when the parents marry, whether and under what circumstances a maintenance claim by the illegitimate child against his validly married father should be permitted—all these are questions to which

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12. See for detailed examination of this problem, Zweigert and Kötz, *op. cit.*, II (1969), 368 *et seq.*; Kötz, "Haftung für besondere Gefahr", (1970) 170 *Archiv für die civilistische Praxis* 1.

different legal systems often give very different answers. The human relationships involved in these areas are affected by strong moral and ethical values which have their origins in particular religious attitudes, historical traditions, cultural developments or national characters and which may therefore vary very markedly from country to country. In such cases—which are particularly common in family law and in inheritance law—the comparativist often encounters “evaluation *aporias*”: social, ethical or economic arguments may, but legal arguments cannot possibly, establish which solution is superior and which inferior. Comparative Law may facilitate the answering of such questions by helping to elucidate the true nature of such differing solutions, but it cannot, with the limited means which it, as a legal discipline, has at its disposal, provide the whole answer. Comparison remains meaningful, since it enhances our understanding of the way in which law is bound up with prevailing social values, but this very connection deprives the law of its independent standing and thus precludes any purely juristic quest for the better solution.

#### IV

There remains the further question whether and to what extent it is feasible to engage in critical and comparative evaluation where not only social decisions in particular areas have been made differently, but where the economic and social organisations which form the basis of the legal systems to be compared are wholly different or even contradictory. One can distinguish three basic possibilities.

The first of these is merely the natural extension of the fact, as just explained, that legal fields such as family law and inheritance law are affected by strong extra-legal values. We find these phenomena, restricted to particular areas such as divorce or the legal position of illegitimate children, within the legal systems of western cultural orientation, although this does not involve fundamental differences of whole systems. The situation is different when one includes other cultural areas in the comparison. There is little sense in the attempt to compare European marriage or child law, in whatever respect, with Islamic, Far-Eastern or African marriage or child law with a view to finding the “better” solution. Common legal criteria simply are not available when one compares European *mores* with such totally different social circumstances as exist where second wives are permitted, where divorce by unilateral repudiation is allowed, or where a purchase price must be paid for a bride. All this is vividly demonstrated by the reception of European laws in other continents. Whether we examine Japan, Thailand or Islamic countries, we always find the same pattern: contract, tort and property law are being modelled on western precedents, but family and inheritance law are exempted and subjected to legal regulation which accords with indigenous traditions and social structures. Even occasional concessions to western concepts cannot obscure the fact that legal reforms in these areas are greatly impeded by the inertia of social realities.

The other two areas in which comparative evaluation faces distinct limits, concern differences of economic structure. The first area involves comparisons between western-capitalist and socialist legal systems, the second involves comparisons between developed and developing countries.

## V

There is much controversy on both sides of the Iron Curtain concerning the question whether meaningful legal comparisons between capitalist and socialist legal systems are possible<sup>13</sup>.

One of the main arguments against comparison maintains that the role of law in a socialist society and the role of law in a capitalist society are totally different. The guiding principle of Marxist jurisprudence is the idea that law has no value in itself and that it must be completely converted into a politico-social tool. Marxist jurisprudence further teaches that bourgeois law has a seemingly autonomous, formal and legalistic existence, but that this is only a façade to hide the fact that it is a weapon in the hands of the ruling class to further its cause in the class struggle.

This alleged difference of function does not seem to be any real impediment to legal comparison, whether it be comparison of the "contrasting"<sup>14</sup> or the evaluating variety.

Comparative Law only becomes interested in theoretical differences of this kind when, and to the extent to which, they manifest themselves in the reality of a legal system. Even a bird's-eye view shows that the socialist systems with their court structures, their codifications and their legal theories have developed a kind of "legalism" in the western sense, but this is not to negate the primacy of politics. The European socialist states outside the Soviet Union have probably never abandoned this "legalism". Hazard even goes so far as to classify these systems, having regard to the structure of their laws, as belonging *in toto* to the Romanist-Germanic legal tradition<sup>15</sup>.

Conversely, one might observe incidentally, all western legal systems contain, side by side with legal institutions such as "freedom of contract" and "unlimited private property" which are in fact the manifestation as well as the tool of the late-capitalist economic system, broad areas of legislation which have as their primary aim the moulding of society in accordance with modern, reformist ideas.

There are obviously legal institutions upon which socialist aims have had a real and decisive impact. Within the sphere of private law this is particularly true for socialist property law, for establishment and organisation of state enterprises and for the law relating to plan contracts (*i.e.*, for contracts between state enterprises which are intended primarily to assist with the implementation of state economic planning), which means it is true in general for the core of economic law. Time and again we encounter legal phenomena in western legal systems with identical or similar orientation, as, for example, in the ever-increasing social obligations which the law attaches to property, in the *de facto* separation between ownership and management of large industrial concerns, in increasing planning of the economy, in the creation of duties to conclude specified contracts or in government-dictated contractual terms. In his book concerned with the government-dictated contract, Loeber has demonstrated that Comparative Law faces a tremendous

13. See, *e.g.*, Loeber, "Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftsordnung", (1961) 26 *Rebels Zeitschrift* 201 *et seq.*, with citations from Soviet jurisprudence. See also Bilinsky, *Das sowjetische Wirtschaftsrecht* (1968), 18.

14. See Loeber, *loc. cit.*, 211 *et seq.*, following Jerome Frank.

15. Hazard, "Area studies and comparison of law; the experience with Eastern Europe", (1971) 19 *American Journal of Comparative Law* 645.

task in identifying parallels of this kind<sup>16</sup>. André Tunc's view that the contract laws in East and West are developing towards each other and may eventually converge, seems an acceptable working hypothesis<sup>17</sup>.

As things stand at present (perhaps one should say: "As the extent of comparative understanding makes them appear"), all these areas are so much affected by fundamentally differing aims and by differing evaluations of conflicting interests that western and socialist laws are not measurable by the same scale of values. Incompatibility is evident even in the most insignificant detail. For example, in the law of contract the typical western method of assessing damages for non-delivery (*viz.*, to award the difference between the contract price and the price of a substitute or the market price) cannot be applied in a planned economy, since there is no free trade in goods and there are only fixed, not fluctuating, market prices (the method has even been expressly disallowed<sup>18</sup>); contractual penalties, a common alternative to damages, are fixed by law, and all the parties can do is increase them by agreement, not lower them<sup>19</sup>. When faced with such situations, the comparativist cannot meaningfully ask whether the one or the other solution is superior. It is obviously possible to stretch the concept of functional correspondence so far that a seeming basis for comparison is eventually reached. For example, it would be possible to say, that both the western and the socialist systems of property and contract law pursued the aim of regulating the production and distribution of goods in a given economic system. That, however, would only be an empty formula: it ignores the substantive purpose of the differing legal solutions. Such purposes influence even detailed legal regulation and, accordingly, any attempt at a comparative evaluation is bound to become a critical evaluation of the system as such. Whether a scientific base for such an evaluation can be found will not be further examined here. Suffice it to say that to find it cannot be the task of Comparative Law.

## VI

The legal systems of economically highly developed countries on the one hand, and of developing countries on the other, give rise to problems of comparative evaluation which are similarly complex. Any attempt to find a simple formula will quickly prove futile. "Developing countries", when used as a generic term, may have a distinct meaning economically, but it comprises too many heterogeneous things when it is applied to legal systems. Admittedly there is a basic pattern which one seems to encounter everywhere; always there are, side by side, a sphere of indigenous culture and economic activity and a developed economic sphere. It is obvious that we shall rarely find better solutions for the problems which are relevant to us in the first sphere (tribal laws, laws involving magic).

The extensiveness of the second sphere and the stage of development it has reached differ from country to country. In some countries this is merely a slender superstructure on a mass of tradition; in others it has advanced so far that the islands of primitive culture within it appear like foreign

16. Loeber, *Der hoheitlich gestaltete Vertrag. Eine rechtsvergleichende Untersuchung über den Planvertrag im Sowjetrecht und den "diktierten Vertrag" im Recht der Bundesrepublik Deutschland* (1969).

17. Tunc, "La possibilité de comparer le contrat dans les systèmes juridiques à structures économiques différentes", (1963) 27 *Rabels Zeitschrift* 478, 493.

18. See District Court in Karl-Marx-City, VS 1967, 506.

19. Para. 52 of the *Contract Act* of the German Democratic Republic.

elements. It is in this second sphere that we find legal problems comparable to ours, and the farther development has proceeded, the more likely it is that we shall find independent legal phenomena which command the attention of the researcher who evaluates solutions. Functional aspects of the laws being compared must be watched with particular care: has development really proceeded to a point where the substantive problems to be solved by the legal systems have become comparable? If so, are the aims and values involved so different that comparison becomes chancy? One must not expect pioneering solutions in the field of company shares where private entrepreneurial initiative is in its infancy, nor seek inspirations in the field of trade practices legislation (intended to control an overflow of economic energy and guide it into proper channels) in states which face the problem how to kindle and encourage such energy. Such different aims in the laws of developing countries always deserve special attention, even in the field of ordinary private law which tends very largely to be based upon western models and where one should therefore not normally expect to encounter impediments to comparative evaluation. In the developed countries of the northern hemisphere, private law is in a sense the product of the economic system. In the main, it serves to ensure the stability of the economic system: within limits it also steers it and develops it further. Developing countries often hope, depending upon the developmental stage they have reached, that the adoption of developed models of the private law will stimulate economic activity, or at least create the right conditions for it. This inverted relationship between law and economic life, between regulation and object of regulation, must make us wonder, even where the law seems to be dealing with the same substantive problems, whether, considering the underlying aims and legal reality, we are not dealing with phenomena which we cannot measure with our own yardsticks.

These problems also bedevil "legal development aid": in what way, and on the basis of which models from developed legal systems does one construct legal systems for developing countries? How is one to establish court structures capable of applying law which has been so adapted? How, and with what consequences are such legal systems to be translated into the legal reality of the "recipient countries"? This is not the place for dealing with such questions: these problems involve huge legal and social experiments of the first order. Comparative Law must play an important, but probably not the principal role in such tasks, since the problems go far beyond those of critical comparative evaluation. Practical questions are the first to be answered, not so much those concerned with theory and method<sup>20</sup>.

To sum up the results of this survey: comparative evaluation in the search for better legal solutions is meaningful and practically feasible whenever the legal systems to be compared rest on similar foundations, so far as factual conditions and social aims are concerned. Mere differences in the legal solutions encountered are no impediment even where actual results seem to indicate differing evaluations of the interests involved. Critical comparative evaluations—not legal comparisons as such—cease to be feasible where differences in social conditions prevent the existence of problems which can be classed as comparable, or where fundamental differences of social orientation mean

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20. See David, "A civil code for Ethiopia: considerations on the codification of the civil law in African countries", (1962) 37 *Tulane L.R.* 187, 192; Sand, "Current trends in African legal geography: The interfusion of legal systems", (1971) 5 *African Legal Studies* 1; Seidman, "Law and development: a general model", (1972) 6 *Law and Society Review* 311.

that different legal systems face different tasks, provided that such social orientation has not remained mere theory, but has been translated into the life of the law. Critical evaluation of such basic social orientation goes beyond the jurisprudential sphere; in particular, it is not a legitimate task of Comparative Law.