Pleasures and Torments of Comparative Legal Research

Confessions of an Amateur Practitioner

By Professor Reinhold Fahlbeck, Lund*

SALVE

Some words in honour of a fellow traveller

1. The starting question: To do or not to do comparative legal research?

Tokyo or Lund, Stanford or Stockholm, Ann Arbor or Lund, Sapporo or Stockholm. Such have been the choices of my abode for the past several years. Everywhere my work has been the same, some teaching, mostly study. Research I call it, perhaps presumptuously.

During all these years the object of my study has been twofold. First the immediate task involving a process of discovery. It consists of four steps, i.e. to uncover facts, to learn those facts, to understand those facts and, finally, to try to make some sense out of those facts. A humble task, perhaps. But not to me. Second, and more important, the two *Why*-questions that are the overriding concern for all my comparative work. First: *Why are things the way they are in that foreign country?* Second: *Why are things different in my country and this other country?* The challenge to find

* This article was originally published in Lars Gorton *et al* (ed.) Festskrift till Gunnar Karnell (Stockholm 1999).

answers to such questions is the triggering and ever recurrent reason for me to do comparative work. It is a challenge that I struggle to meet. In vain, I suppose.

What am I talking about? First, I am saying that the subject matter of my study always has been the facts at hand, the reality of my actual place of abode and the reality of the material presenting itself. Second, I am saying that this reality is only the starting point for the trip into the unknown that the two *Why*-questions provoke. In other words, I am talking about explorative legal research of a comparative nature. Since I have spent a good part of the past fifteen to twenty years doing such research one might presume that I should possess quite some expertise in the field. Still, I feel far from being the seasoned expert. I feel more like the amateur practitioner.

How come? I suppose that part of the explanation is that, to the best of my knowledge and understanding, there is no such thing as prescribed or generally accepted methods or techniques that are specific for "comparative legal research", explorative or otherwise. If those existed one could hope to arrive at mastering them and thereby become the seasoned expert. If such techniques and methods exist the fact that I am unaware of them would serve to underline my amateur practitioner status. Another reason for my persistent feeling of amateurism is the fact that there is no substantive body of law that is "comparative law" that I have been able to sit down and learn. Primarily specialising in "labour and industrial relations law" I am used to a vast mass of material in every country that lacks nothing in terms of solidity and substance. Much to sit down and learn, in other words. No problem here: "denn, was man schwarz auf weiss besitzt/kann man getrost nach Hause tragen".[1] That is precisely what I have done. Given time and effort one does indeed become the seasoned expert. But it is a fact that when embarking on the route of explorative comparative research nothing of the same kind presents itself; nothing is "schwarz auf weiss", everything is more like a quagmire.

The third and by far most compelling reason for my feeling of uncertainty is that that my two *Why*-questions often enough cannot be answered in any truly finite way at all. The questions are the ones primarily deserving serious consideration in my world of comparative research. Yet

[1] Johann Wolfgang von Goethe, Faust, Schüler in der Schülerszene ('since, what you have in black and white / that you can safely bring back home')

at the same time there might not be satisfactory answers to them no matter how perceptive and analytical the observer is. And I feel far from being anything like a very perceptive and analytical observer.

So why not give up and be content with the experience of the student in Goethe's Faust? There are certain countervailing factors.

The fact that many books on comparative legal research in general exist is comforting. So is the fact that many books comparing specific legal phenomena in my field of research also exist. Particularly comforting is the fact that some books do provide perfectly reasonable answers to Why-questions of the kind I ask. The fact that I have written a text or two of exploratory nature should also be comforting, in particular since the exercise has given me immense joy. Dampening that joy, however, is the nagging feeling that I have misunderstood or misinterpreted fundamental issues or features.

Positively exhilarating is to learn that to engage in comparative legal research "is like escaping from prison into open air". Jubilation fills you when contemplating such prospects. Promised, in addition, that once you are out of prison you will enjoy, "like the itinerant craftsmen of old, some spiritual Wanderjahre",[2] even the most gloomy person would give up everything else and jump at comparative research.

Or would he? Once I listened to an inaugural lecture by a newly appointed professor. She described the hardships and uncertainties connected with doing research in her particular discipline. Answering a hypothetical question by a hypothetical male student as to whether she would recommend him to start writing a dissertation in her discipline she stated, jokingly but with some poorly subdued seriousness as well: "Don't do it!" Is a similar piece of advice called for with a student venturing into explorative comparative law? Perhaps. In other words, explorative comparative law: to do or not to do?

On balance I would most affirmatively say: "Do it!" The field of explorative comparative studies in labour and industrial relations law is rich in pleasures and pitfalls, nature being bountiful in both respects. Challenges are as numerous as dandelions in June. So are the many days of despair when everything seems opaque and incomprehensible. But rewards are more delicious here than elsewhere, making the toil and trouble worthwhile.

[2] Lawson, Comparative Law, Selected Essays, volume 1 (Amsterdam 1977), p 73 and p 68.

2. The clarifying question: What we are talking about really?

It is necessary to define what we are talking about when using the expression "comparative legal research", in particular the explorative variant. Leaving the words "legal" and "research" behind without further ado as known concepts the issue is what "comparative" and "explorative" mean. Comparative law, we are told, "is a study of the relationship ... between legal systems or between rules of more than one system".[3] I shall stick to that definition.

In his famous lecture 'On Uses and Misuses of Comparative Law',[4] Otto Kahn-Freund (Sir Otto, really) distinguished between three purposes of comparative law, i.e. as a tool of research, of education and of legal reform. The methods differ radically between these three purposes, he says. One of the things that I think that I do know about comparative legal research is that Sir Otto is perfectly right in this respect. While Sir Otto focused on legal reform the present observations focus on legal research. When discussing legal reform the overriding questions are two *If*-questions: "*If* what we see in that other country works there, will it do so in our own country as well?" and "*If* it is appropriate there, will it be so here as well?" When doing explorative comparative legal research the overriding questions are the *Why*-questions asked above. Different questions not only produce different answers but also call for different ways of proceeding.

3. The choice question: Why-research or What-research?

Are these *Why*-questions a mandatory element in comparative legal research? No, definitely not, I would say. Mainstream comparative

[3] Watson, Alan, Legal Transplants. An Approach to Comparative Law (University of Virginia Press 1974), p 9. In the same paragraph Watson also tells us that the relationship to be studied is "above all the historical relationship". Since I completely disagree in this respect I did not quote that part of Watson's statement in the text and shall not discuss it separately. Suffice to say here that in my opinion the prime relationship to be studied is a functional one, i.e. the functional relationship between the legal system (or those parts of it that are studied) and society at large in those countries that are compared. It is quite another matter that the historical aspect is an important one when studying the functional relationship.

[4] *The Modern Law Review*, volume 37, 1974.

research asks *What*-questions. The lodestar for *What*-research is ascertainment. For Why-research it is understanding.

The scholar must make a personal choice between these two approaches, between *What* and *Why*. *Per se* none is better or more relevant than the other. The choice depends on the goal of the study and the personal inclination of the scholar. For me the Why-approach has always been the preferred route.

The approaches differ profoundly in all truly important respects. They have different purposes, they ask different questions and they call for different kinds of knowledge.

The questions differ. The *Why*-approach asks the *Why*-questions mentioned. The *What*-approach asks these questions: "*What* is the law in that other country in this respect?" and "*What* contribution can what we see there make on this present study on domestic law?"

The purpose also differs. As we all know traditional legal research focuses on stating the law as it is, perhaps also proposing solutions to loopholes and lacunae. Legal dogmatism is at the heart of such research. Comparative legal research can be part of such research. Its aim is to provide additional insight into and understanding of the domestic legal issues studied.

For such comparative legal research no other questions are asked than those in every other dogmatic legal study, i.e. "What is the law in this respect?" and "What should the law be in this specific situation where so far no authoritative answer has been given?" The purpose is the same, i.e. dogmatic elaboration *de lege lata*. The material needed for such comparative research does not differ from that used for domestic research. It consists of the material that all legal scholars use and are familiar with, e.g. statutes, case law and legal writing. The field of knowledge is also the same, i.e. the techniques for researching the law and the analysis of the legal material.

It is quite another matter what contribution such comparative research can make to a domestic study. It may not provide much. Law has become to such an extent a domestic affair in its details that it does not easily lend itself to clarification by making use of non-domestic material. This is not to deny that many fields of the law have foreign roots, are influenced by foreign law or is the result of a common international effort. In all such instances much useful insight can be gained by studying the appropriate foreign law. In addition, the higher the level of abstraction the more insight is to be gained.

> Two examples more or less at random! – Swedish equal opportunity law and the law of protection against discrimination provide fertile ground. That body of law is primarily made of foreign cloth. US law is *the* model for all European law in these respects. The student does well to keep that in mind. – The law of collective agreements is of older vintage. Swedish statutory law in this respect was based on extensive study of German law. Incidentally, German law also heavily influenced Japanese law on collective agreements. In a funny twist of coincidence the net result is that Swedish and Japanese law on collective agreements is rather similar despite that fact that they have had no contact of any sort at any time! It is less astonishing that equal opportunity law looks rather much alike in many Western countries. They are all fashioned from the same model and they have been made at a time when interaction in the legislative field is very much indeed the vogue.

Mainstream comparative legal research is perfectly suitable even if the aim of the legal study is broadened to provide answers *de sententia ferenda*. The purpose would again be to use foreign material to enrich the discussion on domestic law. Most scholars would probably agree that mainstream comparative research is at its forte in this particular respect. New ideas and solutions are being offered free of charge and can be studied gratuitously.

On the other hand, the mainstream comparative scholar is not – or at least should not be – competing with the domestic scholar in ascertaining the minute state of the law in the foreign country under study. Nor is one engaged in finding solutions to disputed legal issues or material to fill loopholes in the law of the foreign country. In most instances it would be brash, foolish at worst, to try to achieve what scholars in the foreign country have failed to do.

Much to its credit mainstream comparative legal study tends to produce some other wholesome and valuable results. One wholesome result is a sobering relativism. The comparative scholar realises that what exists in his/her country is not the sole and single way of doing things. It is, I suppose, a rather common experience for comparative scholars to come to the conclusion that "everything" exists somewhere, that "everything" works in some environment and that "everything" can produce more of less the same result as the – purportedly superior – regulation found in the author's country

> Let me illustrate by referring to a personal experience dating back nearly fifteen years. I was involved in an international exercise in comparative labour law. One of the themes dealt with who is to provide the rules for

> employment conditions in the labour market. Alternatives such as these were to be discussed: employers unilaterally (e.g. by means of company manuals), employers and employers (e.g. by means of individual employment contracts), the social partners (e.g. by means of collective agreements) or society (e.g. by means of statutes). Some twenty national reports were submitted to me. In great detail they all described the genesis of employment rules in their respective countries. Countries differed considerably; "everything" existed. However, what struck me most was that all authors, explicitly or implicitly, seemed eager to express that the way their country produced employment rules was the best conceivable! I was surprised to notice this. Perhaps I should not have been. "Ubi patria, ibi bene", "My home, my country"![5]

Another wholesome result of mainstream comparative research is a better understanding of the law of the scholar's own country It might seem a curious and rather unexpected result of the study of foreign law; a dysfunctional result one might feel tempted to say. Still, it might even be that the scholar learns more about domestic law than foreign law as a result of the study of – foreign law! Be that as it may the experience of learning about oneself is there.

> By means of illustration let me quote one of the most perceptive contemporary scholars in comparative labour and industrial relations research. "The path of comparative law seems an unduly long and tortuous one to reach self-awareness. Do we really need to study another labour system to ask searching questions to our own?" Yes, he answers. "Most of us are bound by unconscious premises and have difficulty envisioning what we have not seen. When we have known only one labour system we are captives of its purported premises and their claimed consequences. We cannot easily imagine that essential parts might be otherwise; we do not see many of the questions worth asking. Studying another system is particularly useful for those of us whose imagination is limited and whose mind shrinks from the bold".[6] There is nothing new here, of course. For example, some two hundred years earlier German national poet Johann Wolfgang von Goethe, whom we have already met, reached the same conclusion during his travels in Italy: "Das Bekannte wird neu durch unerwartete Bezüge, und

[5] For a summary of this exercise, see Fahlbeck, R, *Collective Agreements – A Crossroad Between Public Law and Private Law* (Acta Societatis Juridicae Lundensis, No 95, 1987 ISBN 91-544-1931-X)

[6] Summers, Clyde W, Comparison in Labor Law: Sweden and the United States, Svensk Juristtidning, 1983, p 615. It must be added, however, that Summers most definitely does not belong to the category whose "imagination is limited and whose mind shrinks from being bold".

> erregt, mit neuen Gegenständen verknüpft, Aufmerksamkeit, Nachdenken und Urteil."[7]

At best the mainstream comparative legal scholar can hope to uncover hidden biases and assumptions and to pinpoint traits and characteristics in the regulation or set-up of that other country Domestic scholars and observers might not think about those. After all, nothing is more difficult to perceive and put into perspective than the well known, the obvious. Here is where the foreign observer can harbour some hope to make a contribution to the understanding of arrangements of the foreign country. The non-domestic scholar enjoys the privilege of possessing an unbiased mind and of being able to see things with fresh eyes. That gives him an advantage that can – and should be – be exploited.

To actually reach this stage is *nirvana* for the mainstream comparative scholar, I would suggest. It is not an easy stage to reach it. It should not be. Dangers lure. Self-overestimation, or downright hubris, is the devil that might lure the scholar into believing that he/she has reached *nirvana* when such is in fact not the case. The scholar might feel tempted to phrase *the* revelation in grandiose statements. The risk is imminent that on closer examination these might turn out to be little more than meaningless or superficial platitudes and generalisations. Everyone who has done comparative work knows that it is easy to arrive at conclusions of a generalised and seemingly perceptive nature. But we also all know that we often find ourselves in difficulty when challenged by a domestic scholar in possession of the intimate knowledge that we all have about our own country.

A *What*-scholar who arrives at meaningful "behind-the-screen" answers of this kind will also have reached common ground with the *Why*-scholar, I assume. They start with a different set of searchlights but here they find common ground. How come? It is time to examine the task of the explorative comparative scholar.

When studying a foreign system in search of *Why-answers* one is confronted with an entirely different situation. Purpose, questions and field of knowledge take on a radically different character.

The purpose of the *Why*-approach is not to state domestic law as it is, nor to propose solutions *de lege* or *sententia ferenda*. Its purpose has no such

[7] Quoted from Schregle, J, *Überlegungen zur internationalen Vergleichung im Arbeitsrecht*, In Memoriam Sir Otto Kahn-Freund (Beck'sche Verlagsbuchhandlung, München, 1980), p 675.

practical orientation. It aims at explaining domestic and foreign law in its environment and its symbiosis with that environment. It is functional rather than dogmatic, explorative rather than ascertaining, inquisitive rather than affirmative. It does not use foreign legal material to analyse or supplement domestic law. Foreign law is not used as a means to reach other goals. Foreign law is the goal in itself. Foreign law is not an intermediary but an end. Foreign law is not used to illustrate anything related to domestic law or vice versa. In a way explorative comparative research is not comparative at all.

The purpose of the *Why*-study is understanding rather than ascertaining. That purpose is twofold. First the scholar aims at understanding foreign arrangements in the respect studied. Second the scholar aims at using that understanding for the second purpose, i.e. to understand the differences between the domestic model and that of the foreign country.

The knowledge needed is different as well. The locus of knowledge is equally divided between home and host country.

The immediate task for the scholar is to try to comprehend what makes a foreign rule, a foreign complex of rules or arrangements or an entire foreign system work. Such an insight is not easy to reach. It is a daunting task *per se.* It calls for extensive knowledge about the country studied. Such knowledge cannot be confined to legal matters. It must go far beyond the legal realm and probe the environment of the legal system and its foundations. Jokingly, perhaps, a German scholar once stated that "without a knowledge of Goethe's writings a non-German cannot expect to fully grasp what is behind "co-determination"![8] The same author also states the following: "The famous 'Book of Tea', published at the beginning of this century, in which Kakuzo Okakura explains Japanese values and patterns of behaviour to the Western world, naturally does not explain present-day Japanese labour relations but the book is nevertheless a must for anyone attempting to understand industrial relations in Japan".[9] Exaggerated? Ridiculous expressions of highbrow superiority? No, I do not think so.

If the knowledge needed is what Johannes Schregle says who can hope to manage? "An industrial relations comparativist", I still submit, "must ... be a polyhistor of sorts! Without a sound understanding of the

[8] Schregle, Johannes, Comparative industrial relations: pitfalls and potential, *International Labour Review*, volume 120, 1981, p 29.

[9] Ibidem p 28 et seq.

political power structure of the society under examination the industrial relations comparativist is more likely than not to go astray. Furthermore, since economic domination of men by other men seems to be ubiquitous regardless of political system, familiarity with the religious and moral values of the society under scrutiny – their spiritual history and status, as it were – seems to be of paramount importance."[10] Apparently it does not get easier!

However, difficulties differ according to the level of abstraction chosen. Detailed rules are often astonishingly similar in different countries so studying them is completely different from studying at an overall perspective. When writing about or engaging in exploratory comparative legal research I usually conceptualise a three-level approach, the grass root level, the tree top level and the eagle's level, i.e. low, medium and high level of abstraction. Another way of expressing the same idea is to talk about the surface level, the rose root level and the deep subsoil level.

At grass root level the comparison focuses on precise, well-defined and mostly rather detailed phenomena. The area studied is limited. There is little need for knowledge about political, cultural or other characteristics of the countries studied. At tree top level the area studied is larger. A concomitant need to broaden the study in other respects as well arises, e.g. into the historical, political and cultural environment of the area studied. Yet there is no need for extensive surveys since the area studied is rather limited after all. At the eagle level the perspective is widened radically, sometimes covering vast areas, perhaps an entire legal field, e.g. labour law, family law or constitutional law. The task here is to map and analyse this area, this system, and its components, from an overriding perspective. Much like an ecologist, the comparative scholar here looks for structures and balances within an eco-system.

The eagle's level is the true territory for the *Why*-scholar. It is also at this overriding level that the daunting difficulties present themselves. It is when engaged in this kind of study that the scholar needs to be familiar with Goethe if Germany is studied or the 'Way of the Tea' when Japan is examined. At the same time, it is at this level that the dangers are the greatest. The ambitions are high and so are the stakes. Pretentious and pointless generalities lure.

[10] Fahlbeck, R, *East is East and West is West? The Swedish Model for Industrial Relations* (Acta Societatis Juridicae Lundensis, No 73, 1984, ISBN 91-544-1701-5), p 35.

Indeed, daunting difficulties arise even if the task is to analyse one's own national system to a foreign readership. Tadashi Hanami has written an analytical introduction to industrial relations in his own country, Japan. It proved less than easy. "The second problem which caught my attention when writing this book is one which is more elusive and at the same time more fundamental to comparative studies in general. I began to appreciate more and more the overwhelming difficulty of comparative studies and the reasons why the researcher is often driven to desperation and tempted to give up altogether".[11]

4. The impossible question: Why, all things considered, is it so there and here?

The time has come to introduce one or a few *Why*-issues of the kind that present themselves at the eagle's level in my part of the airspace. Here are three!

Why is union density very high in Sweden and not falling when it is very low in the USA and falling? Why is the same true in Japan?[12]

Why are employers in the USA adamantly opposed to unions when Swedish employers are not, indeed even accept them?

Why is statutory collective labour law very extensive, detailed, collectivist and based on heavy intervention by an agency of the federal government in the USA when nothing of all this is found in Sweden?

The two first questions are standard in the comparative literature on labour and industrial relations. The third question is much less discussed. All three, however, are perfect illustrations of *Why*-issue research in my field. The questions are also quite intriguing, making them even more interesting.

It is outside the scope of the scope of this contribution to even sketchily discuss these three issues. Only a few words.

Why is unionism density low in the USA? A standard explanation is that employers oppose them and have fought them ever since they first appeared. There is much to that explanation. But the curious will not stop

[11] Hanami, Tadashi, *Labor Relations in Japan Today* (Kodansha & John Martin Publishing Ltd, 1979/80), p 15.

[12] If indeed it is true, which is debatable. See e.g. Fahlbeck, R, *Unionism in Japan – Declining or not?* In *Labour Law and Industrial Relations at the Turn of the Century: Liber Amicorum in Honour of Prof. Dr. Roger Blanpain* (Kluwer, 1998, ISBN 90-411-1084-4).

there. A further question is: Why are employers in the USA adamantly against unions? Standard explanations here include answers like the following. Wages and other employee benefits are higher at unionised places making it more expensive for employers to operate in a unionised environment. The presence of a union also circumvents employer freedom to act unilaterally. Unions might engage in industrial actions crippling production. All these explanations are perfectly reasonable and all certainly influence employers. No wonder that employers in the USA adamantly oppose unions. Or?

Do these explanations provide truly satisfactory answers in a comparative perspective? It can be doubted. The reason is that these same three factors also operate in Sweden and with the same force. So why do these factors produce different reactions in the USA and Sweden? This is the exact point where the true difficulties begin. This is also the point where knowledge other than that limited to labour matters strictly begins to become necessary. This is in fact the point where the true challenge begins.

Is it necessary to face the challenge? Yes! What can be said to meet that challenge? Much! Can enough wisdom and insight be mustered to meet the challenge? No! Is it impossible to meet the challenge? Yes, it probably is. But that is another story.

VALE

"All things considered, there are only two kinds of men in the world – those who stay at home and those who do not. The second are the more interesting".[13]

We all know what kind of men that Gunnar Karnell belongs to!

[13] Rudyard Kipling, quoted from Donald Richie, *The Honorable Visitor* (Tuttle 1994), p 88.