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Comparative Legal Research: Its Function in the Development of Harmonized Law

Most jurists assume that the law of a single country can be studied independently of the law of others. Law students study the law of their own nation. Judges consult national codes and case law. An American or a German scholar assumes that he can write about American law or German law without examining French or Italian law. Even scholars in comparative law often assume that they should first find out what the American, German, French and Italian law is, and then make comparisons.

I do not think the law of a single country can be an independent object of study. To understand law, even as it is within that country, one must look beyond its boundaries, indeed, beyond one's own time.

Curiously enough, the need for such a transtemporal transnational approach to law was explained most clearly by Portalis, the architect of the French Civil Code. We associate the Code with the emergence of national legal systems in the 19th century. Eventually, nearly every country enacted its own code, each supposedly containing a distinct law. Portalis explained that the French Civil Code could not be the unique source of French law. It could not "govern all and foresee all." Indeed, virtually every case would present the judge with a problem that the Code by itself could not resolve since "no one pleads against a clear statutory text."2

Unlike 19th century French jurists, he did not say that answers were to be found by exegesis of the Code. He did not say they were to be found by consulting precedent. "Few cases are susceptible of being decided by a statute, by a clear text. It has always been by general principles, by doctrine, by legal science, that most disputes have been

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decided. The Civil Code does not dispense with this learning but, on the contrary, presupposes it."

The legal science to which he referred was not one he hoped would emerge in the future after the Code was enacted. It already existed. It was based on the study of principles that could be found in all enacted legislation. These principles were reflected in those "valuable collections for the science of law" made by the Roman jurists. Since the 16th century, jurists such as Jean Domat had managed to formulate these principles more clearly. They had studied enacted laws with "a reason exercised by observation and by experience," "compared enacted laws to enacted laws," and "studied them in their relationship to the rights of man and the needs of society." As a result, Portalis said, in France "[i]t is only too fortunate that legal studies form a science" to which "[a]n entire class of men devotes itself," becoming a "sort of seminary of magistrates." The cultivation of this legal science "presupposes compendia, digestes, treatises, and studies and dissertations in numerous volumes." It was to these compendia that the judge should turn. In Turkey, he said, the magistrate can "declare whatever he wishes" because "legal studies are not an art."

In the early 19th century, French commentators and French courts thought, as Portalis did, that the Code should be interpreted by looking beyond the Code, indeed, by looking beyond French sources. In discussing property rights, Toullier, who wrote the first commentary on the Code, cited Pothier, Blackstone, Bynkershoeck, Heineccius, Pufendorf, and Wolf. It was not unusual for French courts to cite Roman law or foreign jurists.

And then it stopped. The motto of the jurist became that of Demolombe: "the texts before all else." It is a paradox. Nineteenth century French jurists claimed to base their work on the the exegesis of texts drafted by a man who claimed that one could not understand his texts through exegesis, that one needed a transnational legal science.

In Germany, the process repeated itself. The century began with a leading jurist explaining why legal studies could not be based on

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3. Portalis, supra n. 1, at 471.
4. Id. 476.
6. Id. xcvi-xcvii.
7. Portalis, supra n. 1, at 471.
8. Id. 471.
9. Id. 471.
the texts of a national civil code. It ended with legal studies based on them. The jurist was Savigny. In his famous debate with Thibaut over whether Germany should have a code like France, he argued, like Portalis, that it was not possible to interpret a code exegetically.13

Savigny's solution was not that of Portalis. The true source of law, he claimed, was the Volksgeist, the national mind or spirit. But he and the jurists of the Pandektschule sought the dictates of the German Geist in the very Roman texts which, according to Portalis, embodied transnationally valid principles. Savigny and his successors built a legal science that was more than German. It transformed legal science throughout the world, although not in English-speaking countries and not in France. When Ihering revolted against the conceptualism of this school, he disputed its conclusions on the basis of the same Roman texts. And many of the conclusions he drew from these texts were again adopted throughout the world. Examples are his doctrine of culpa in contrahendo,14 which was meant to explain, among other things, why the seller of a res sacra had an action ex empto even though the sale was invalid;15 and his theory of nuisance,16 which was meant to explain why the owner of a Roman cheese shop couldn't discharge smoke into the apartment upstairs.17

Then the change took place that Franz Wieacker has called the movement "from scientific to statutory positivism."18 The Germans ended with a national legal science based on the study of a code.

Something similar happened in England and the United States. There is no civil code.19 Legal studies are based on case law. They are not based on the case law of a single jurisdiction. A California court can cite a case from New York or England. An English court can cite a case from Australia, or, in the unlikely event it wished to, from California. In the United States, legal education is based on the study of collections of these cases called casebooks. California stu-

15. Dig. 18.1.62.1.
17. Dig. 8.5.8.5.
19. At least not one that matters. Several of the American federal states enacted civil codes including my state of California. But courts interpreted the codes by looking to the prior case law they codified, and then to the subsequent case law supposedly interpreting them. The California Supreme Court adopted a rule that the negligence of the plaintiff would not completely bar his claim despite the language of the civil code, arguing that the code was not intended to fossilize the law. Li v. Yellow Cab. Co. of California, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
dents use the same ones as students in Massachusetts or New York. Nevertheless, the courts cite, and students read, only common law cases. As in countries with civil codes, legal studies are confined to a set of texts that are authoritative within certain political boundaries, even though the boundaries cover most of the English-speaking world, and the authoritative texts are judicial decisions.

At the beginning of the 19th century, it was not so. New translations appeared of Grotius, Pufendorf, Pothier and Domat. Courts and treatise writers used them. An English judge praised Pothier as the highest authority one could cite next to an English case. A New York court consulted Grotius, Pufendorf, and Barbeyrac to decide who owned a fox caught on Long Island, a decision that still appears in many American casebooks. More significantly, as Simpson and I have shown, Anglo-American law was restructured by borrowing massively from continental authority. For the first time, the common law was organized into familiar civil law categories such as contract, tort, and property. Previously, it had been organized by forms of action such as covenant, assumpsit, trespass, and ejectment. Many of the doctrines that common lawyers today take for granted, such as liability for negligence in tort law, or offer and acceptance, mistake, and the limitation of liability to foreseeable damages in contract, were borrowed from civil law. The judges and legal scholars had not simply been reading their own cases.

Indeed, as William LaPiana has shown, leading American scholars warned us not to pay too much attention to our case law. Joseph Story, James Kent and Nathan Dane cautioned that the cases are, at most, evidence of the principles that constitute the law. In their writings, they drew upon their own broad learning to establish these principles. As one of Story's biographers described his times:

“The learned and successful lawyer was a student not only of existing law but of legal history and philosophy. In the course of his private search for correct precedents and principles, he had examined all the original sources—the Corpus Juris Civilis, the writings of the great legal thinkers, and the statutes and reports, both English and American.... He

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knew where he was going because, in a sense, he knew where he had been.”

By the end of the century, however, Oliver Wendell Holmes was telling Americans not to study civil law because “it tends to encourage a dangerous reliance...on glittering generalities” instead of “the exhaustive analysis of a particular case with which the common law begins and ends.” Christopher Columbus Langdell was explaining that study of the cases was “the shortest, the best, if not the only way of mastering doctrine.” He compared the Anglo-American scholar to a natural scientist, and described the cases as the empirical data to be explained. The scholar induced from the cases a general law that explained their outcomes. A court could then apply this law to subsequent cases.

Story, Kent and Dane had warned in advance not to expect so much of the case law. In the 20th century, the methodological fallacy has often been pointed out. As Jerome Frank noted, in any litigated case, both parties will be able to draw analogies to other cases that have been resolved in their favor, and either analogy, if one wishes, can be stated as a general principle covering the case in issue. The cases alone show two principles that need reconciliation but not how to reconcile them.

In the early 20th century, this conclusion was drawn in the United States by the scholars known as the American legal realists. In Germany, during the same period, the so-called frei Juristen reached a similar conclusion about impossibility of extracting answers in a civil code by logic alone. So did François Gény in France in 1899. And, indeed, their arguments were like the ones Portalis and Savigny had made at the beginning of the 19th century.

Some of the German free jurists, the American legal realists, and, currently, some members of the American critical studies movement have concluded that there cannot be a legal science. I think the correct conclusion is the one drawn by Portalis. One can interpret a code—one can interpret case law—but only because it is not our only source of knowledge of the principles it embodies. We can ask ourselves what values or purposes are served, for example, by protecting private property or enforcing contracts or imposing liability for fault. We can ask what rules are consistent with these values or purposes.

31. François Gény, Méthode d'interprétation et sources en droit privé positif (1899).
We can ask how best to reconcile one value or purpose with another when they seem to conflict. If these questions are unanswerable or the answers to them are arbitrary, a national science of law is not possible. Codes and and case law cannot be interpreted. But if some answers to these questions are better than others, Portalis was correct, and we should not have a national science of law. What matters is not a person's nationality but whether he has a good answer. If the same questions arise for jurists of different nations, legal science should be transnational.

Many legal problems are conceptually the same wherever they arise. Jurists confront the same problem, for example, whenever a legal system protects private property, but allows the owner's rights to yield in cases of necessity; whenever it enforces contracts, but allows a party to escape when he was under a fundamental mistake; whenever it holds a person liable in tort for his own fault, but determines fault by the objective standard of the conduct of a reasonable person. In each case, the problem is to reconcile two seemingly conflicting norms. We want our property law to protect owners but also people in urgent need. We want our contract law to bind parties who have later regrets but not those who never made an informed choice. We want our tort law to impose liability for fault but yet according to an objective standard. Reconciling these norms is difficult, and solutions are often imperfect. But the problems are the same wherever they are encountered.

The case for a transnational approach to such problems is clearest when jurists of different nations are not only confronting the same problem but their codes or case law give them the same guidance or lack of guidance as to how to solve it. For example, in dealing with necessity, article 904 of the German Civil Code provides:

“The owner of a thing is not entitled to prohibit another from dealing with the thing when such conduct is necessary to avoid a present danger, and the damage threatened by it is unreasonably large compared to the damage arising to the owner from dealing with his thing. The owner can require compensation for the damage that occurs to him.”

Most Americans would consider that to be an accurate statement of American law. We have two cases in which a boat was tied to a pier to save it in a storm without the pier owner's permission. In one, the pier owner was held liable for cutting the boat loose.32 In the other, the boat owner was held liable for damage his boat did to the pier even though the court said that he had the right to dock there.33 French law isn't so clear. There is no provision in the French Civil Code, but Carbonnier thinks a French court would recognize a simi-

lar exception to the normal rules of private property.\textsuperscript{34} He points to a 19th century criminal case in which a starving person stole in order to eat. He did not suffer the same fate as Hugo's character, Jean Valjean. The Cour d'appel of Amiens refused to convict.\textsuperscript{35}

Anything useful a jurist in one of these countries had to say about the proper scope of the necessity doctrine would be useful to jurists in the other countries as well. The drafters of the German Civil Code argued that the law should not treat property as an absolute right since a boat owner should not be allowed to prevent a drowning man from climbing aboard to rescue himself.\textsuperscript{36} That argument would be just as strong if it were addressed to a French court that was considering whether to recognize the necessity doctrine. A French court might find it reassuring that law and order did not collapse when the court in Amiens refused to convict the starving person who stole food. The case should be as reassuring to an American or a German court.

Only in a qualified sense can we even say that the German, the American, and the Frenchman are writing about the law of their own countries. They are addressing a problem that arises in each of their own countries but neither the problem nor its solution are any more German than American or French. Engineers at Daimler Benz, Ford and Peugeot all address the problem of how to build a car but the principles of engineering are not German, American or French.

When we a pick up a law book, we usually know whether it is about German or American or French law because the author talks only or mostly about the statutes, cases and scholarship of his own country. But he should not do so if the German drafting committee's arguments would be equally persuasive if made by a Frenchman, or the French case would illustrate the same point, whether or not it had occurred in France. A Harvard law student once chose an overly large topic for a paper. Unable to finish, he turned in a thesis on the law of states beginning with the letters A through M. The fact that one can choose to ignore the law of states N through Z does not mean that they have one law and state A through M have another.

The German, American and Frenchman may be addressing people in their own countries who may, in turn, have a special obligation to pay attention to them or to do what they say. The textbook of a scholar may be addressed primarily to students in his country. The German drafting committee addressed the German legislature, rightly expecting that its opinion would carry special weight. A French court settles disputes among Frenchmen. A higher court may

\textsuperscript{34} Jean Carbonnier, Droit civil (8th ed. 1975), III, § 45.
\textsuperscript{35} Cour d'appel, Amiens, 22 avr. 1898, S. 1899.II.1.
\textsuperscript{36} Protokolle der Kommission für die zweite Lesung des Bürgerliches Gesetzbuches (1899), IV, § 419.
address its opinion, not only to the parties, but to lower courts who, to a greater or lesser extent, may be obliged to defer to its views. We can say that each jurist is writing about his own law in the sense that he is addressing people within his own country, and perhaps only certain people within his own country. But that is a rather narrow sense. All of them are writing about the same problem. I would rather say that all of them are writing about a problem of general or transnational law.

Thus far, I have been considering the simplest case. Not only is a legal problem the same in different countries, but the codes and cases of these countries do not try to solve it differently. Now let us suppose that they do. I will argue that even then, a problem does not lose its transnational character and become purely a problem of national law. Its solution still requires a transnational method.

To begin with, we should not think that because the judges or drafters of different countries have tried to solve the same problem in different ways, they have necessarily adopted different solutions, and the law of these countries is therefore different. Some problems are notoriously difficult to solve. A drafter or a judge may not have a clear and definite solution. Nevertheless, he has to address the problem, however inadequately. He may say the most helpful thing he can think of, pointing a finger, so to speak, in the direction in which he hopes a solution may lie, but not intending to speak with finality. If we are to be faithful to his intention, we should not behave as though he did speak with finality. Nor should we feel bound to look only in the direction in which he has pointed. Consequently, drafters who used different language may nevertheless have been seeking the same solution to the same problem.

As an example, consider a problem mentioned earlier. Nearly everywhere, a contracting party who commits a sufficiently serious mistake is not bound. The sort of mistake required is described in the French Code as one in the substance of a performance (art. 1110); in the German Civil Code as concerning a vehrkehrswesentliche Eigenschaft (§ 119); in the Italian Civil Code as concerning a quality that is essenziale in that it determines consent according to common appreciation or in relation to the circumstances (art. 1429(2)). By the Swiss Code of Obligations the characteristic must be wesentlich in that one of the parties willed a different thing (art. 24(2)), or a much bigger or smaller thing (art. 24(3)), or the mistake must concern a necessary basis of the contract according to good faith (art. 24(4)). The American Second Restatement of Contracts says the mistake must concern a "basic assumption" (§ 152(1)).

My respect for all of these drafters is sufficiently great that I cannot believe any of them thought he had found a clear and definitive solution. It would arrogant of anyone to imagine he could. The prob-
lem has defied clear solution since Ulpian said that consent is lacking when copper is sold for gold, or lead for silver, or wine for vinegar, and suggested that the difference might have something to do with the *materia* or *substantia* or *ousia*. Differences in these formulations do not indicate a difference of opinion as to whether, for example, a contract is invalid when copper is sold for gold. They are imperfect attempts to characterize such mistakes.

My description of these statutory provisions as giving a hint or pointing in a helpful direction may seem odd. Statutes are laws, and laws are supposed to command. They don’t hint or point. As the drafters of the German Civil Code said, a code must “instruct” rather than “instruct.” Nevertheless, statutory provisions are solutions to legal problems. If the drafter doesn’t know exactly how a problem can be solved, he is in the position of a divisional commander who does not know exactly how an entrenched enemy position can be attacked. The commander may issue general orders for an attack, leaving the rest to the initiative of battalion commanders. The drafters may indicate that there shall be cases in which a contract is voidable for mistake, leaving the rest to the wisdom of courts and scholars.

Even when statutory language is different, then, jurists of different countries may not only be confronting the same problem but seeking the same solution. A French court gave relief when a party mistakenly thought he was purchasing a Rubens. A German court did so when a party did not realize he was selling a Ming vase. An American court did so when the violinist Ephraim Zimbalist Sr. mistakenly thought he was buying a Stradivarius and a Guarnerius. But a French court denied relief to the buyer of a genuine Delacroix who falsely believed that it hung in the painter’s bedroom and would not have bought it otherwise. And an American court did so when art historians believed a painting to be by Bierstadt at the time it was sold, but later research showed it was by someone else. When we describe these decisions as applications of German or French or American law, we mean little more than that the court making the decision had jurisdiction because the case arose in these countries. There was nothing distinctively German, French or American about the decisions themselves. If a scholar ever develops a good theory of mistake, it will explain why these results are right, or else which of them are wrong. A scholar should test his theory against all of them.

37. Dig. 18.1.9.
42. Trib. civ. Seine, 8 déc. 1950, D. 1951.50.
Once again, we are dealing with a problem of general or transnational law.

Sometimes the legislatures or the highest courts of different countries do not hint or point in different ways at the same solution. They adopt different and opposing solutions. I would argue that even then, if the problem is the same, scholars and courts cannot simply discuss and apply national law.

To see why not, consider another problem mentioned earlier: almost everyone imposes liability for negligence, but nearly everyone defines fault as the failure to meet an objective standard, the care of a reasonable person. Almost everywhere, jurists have asked why the standard should be objective. They have seen two possible answers. Some believe in an “objective theory.” In principle, personal fault does not matter. Liability is imposed because tort law, unlike criminal law, is concerned with compensation rather than with punishment. A person should pay compensation for failing to meet the objective standard even though he, personally, could not conform to it. In this objective sense, children and insane people are at fault, and should pay, if they fail to show the care of a sane adult. Others hold a “subjective theory.” In principle, liability is based on personal fault. Otherwise it would not matter why the defendant harmed the plaintiff, whether because he failed to meet an objective standard of care or because a cyclone dropped him the plaintiff, like Dorothy Gale in the Wizard of Oz. According to this theory, the law uses an objective standard only because it is usually the best evidence, and, indeed, the only evidence of the degree of care of which the defendant was personally capable. Consequently, the law should take into account characteristics that show the defendant was only capable of a lesser degree of care. Children and insane persons are not at fault for failing to display the care of the sane adult. If the law imposes liability on children and the insane, it must be for some other reason.

In France, in 1968, a statute imposed liability on insane people.\footnote{44} In 1984, the highest French judicial authority, the Assemblée plénière of the Cour de cassation, held that children were at fault for failing to meet a standard to which, the court admitted, they could not conform.\footnote{45} In contrast, both the German and the Italian Civil Codes provide that the insane or underage defendant is not liable because of fault. Nevertheless, the court may award the plaintiff an indemnity that is “equitable” if the plaintiff cannot recover from those in charge of caring for the insane person or the child.\footnote{46} Thus, the French solution is not only different from the Italian and German, but it seems to rest on a different theory.

\footnote{44}{Loi 3 jan. 1968, now French Civil Code art. 489-2.}
\footnote{45}{Cass. (Ass. plén.), 9 mai 1984, D.S. 1984.525.}
\footnote{46}{German Civil Code §§ 827-28; Italian Civil Code § 2046.}
I would argue that even in this case, it is a mistake, or at least an oversimplification, to say that negligence has different meaning in French law in German and Italian law, and that the French scholar or judge who wants to understand the law of his own country need not concern himself with the law of Germany or Italy. If one says that negligence has a different meaning in French law, it is not in the same sense in which the word “dog” has a different meaning than the word “cat.” Partisans of the objective and subjective theories are not simply using the word negligence differently. If they were, the debate would end as soon as they realized it. It would be like an argument in which someone unfamiliar with the English language insisted that dogs climb trees and chase mice. The debate continues because its partisans differ over how the same legal problem should be resolved. The rules in force are different, not because negligence has a different meaning in different countries, but because judges and drafters of statutes in different countries disagree about what negligence truly means.

Consequently, the disagreement does not end even when the legislature or the highest court intervenes. A French subjectivist could not deny that liability has been imposed on children and insane persons, but he could deny that it is really liability for fault. He could describe it as strict liability, like the liability sometimes imposed on such people in Italy and Germany. Indeed, even when a French court obeys the legislature or defers to the views of the Assemblée plénière, it ought to consider the possibility that the subjectivist is right. Members of the French legislature did not vote on a theory. They voted on a law. The Assemblée plénière did not decide an academic debate but a case. It may be that the drafters or some of the legislators or judges held an objective theory of negligence. But some of them may merely have thought, like the legislators of Germany and Italy, that insane people and children who hurt others should pay. In any case, the issue they settled was whether such people were liable, not why they should be. A judge or a scholar has to ask why in order to decide whether the statute or judicial decision should be interpreted widely or narrowly.

Moreover, even if the legislature had enacted a theory, the debate should continue among scholars. The fact that a theory was widely held when the legislation was enacted does not mean it should prevail forever. But it will prevail longer than it should if scholars think that their task is merely to comment on the solution the legislator has provided. Their job as commentators on the law within their own country requires them to consider how else a problem might have been solved. Looking beyond the authoritative texts in force in their own countries not only makes that task easier. It makes it possible.
I conclude, then, that there is no such thing as a French law or German law or American law that is an independent object of study apart from the law of other countries. Even when a national legislature has adopted a distinct solution, that solution can only be understood through analysis of the problem it was designed to solve. If the problem is transnational, one has to look outside one's national boundaries to understand it. And sometimes, neither the problem nor its solution are national. Jurists are seeking solutions that are general or transnational.

Our method, however, is not yet transnational. Jurists write about law in their own countries as if it could be studied independently. One reason is that we still have not shaken off the influence of the positivism of the last century. We know that our codes and case law cannot be interpreted exegetically. But we still do not look beyond them.

A second reason is that we have been trained in our own codes and case law. Looking beyond them seems like a very large task. An Italian once told me that the project sounds wonderful, but only Hein Kötz could do it. We cannot expect every professor of private law throughout Europe and America to be Kötz. One might ask in response how many French professors know their own national sources of law as well as Planiol, or how many Americans know their case law as well as Williston or Corbin. We are engaged in a cooperative enterprise. And in any event, our criterion for choosing what to read should be relevance, not geography. If I cannot read the law of all the American states, I should not for that reason write books about the law of states A through M.

I was asked to address the topic "Comparative Legal Research: Its Function in the Development of Harmonized Law." Let me now admit that I have not really done so. I have argued that one needs a transnational method simply to understand the law within one's own country. If I am right, that law can rarely be described as a purely national law. It is in large part a transnational law. The method needed to understand it is transnational, indeed, transtemporal. It is not comparative research in the sense of comparing one national law to another. The goal is to understand the law within a country, not to harmonize the law of different ones.

Nevertheless, I think that by pursuing this goal with this method, one can achieve the kind of harmonization that is most worth having. If a majority of the French legislature thinks insane people should invariably be liable for harm they do, and a majority of the German legislature does not, I do not see why each should not legislate according to its own view. The law doesn't need to be the same everywhere for people to know which law will be applied to them, even if they needed to know, which insane people do not. Mak-
ing the law uniform will not make it better unless we know which solution is better, the German or the French.

The harmonization that is worth having, in my view, is the development of a common transnational legal science. We will understand legal problems and their solutions better if we help each other. Moreover, we will have a clearer view of the problems themselves if we are less concerned with accidental aspects of the way they are presented in our own codes and case law. We shouldn’t think we can find an answer to the problem of mistake by parcing the phrase *wesentliche Eigenschaft* or processing an extra ton of our own case law. Ugo Mattei has noted that the periods in which countries have produced their greatest jurists, and exercised the widest influence, are those in which the concerns these jurists addressed were the least national.\(^{47}\) I would say that is because truly important problems are also the least national.