

## REVIEW ESSAY

### Comparative Law: Its Purposes and Possibilities

THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW. By Bernhard Grossfeld.<sup>†</sup> Translated by Tony Weir.<sup>††</sup> Oxford: Clarendon Press, 1990. Pp. ix, 123. Abbreviations, Introduction, Index. Cloth, \$39.95.<sup>‡</sup>

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*The Strength and Weakness of Comparative Law* contains fifteen chapters. The better ones include: Comparative Law, Legal Doctrine, and Law in Practice; Legislation; Private International Law; International Business Law; Domestic Law; Law in the Courts; Constraints; Culture and Law; The United States Example; What Can be Compared?; Geography and Law; Language and Law; and Religion and Law. I will focus on those chapters that provided insight to me on subjects about which I teach and write.

This is a charming, elegant little book, translated brilliantly by Tony Weir, a first rate comparativist in his own right. It is aimed at piquing our interest in and understanding of the purpose and possibilities of comparative law. It is not designed to be a comparative law work, but a rumination on comparative law. It becomes a study, or exercise, in comparative law for the American reader, however, as the author ruminates on the problems and strengths he sees in the comparative law discipline. Professor Grossfeld observes the strengths and weaknesses of comparative law through a prism tinted with his formal training in the Pandectist

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tradition.<sup>1</sup> To illustrate his points, Professor Grossfeld has chosen examples and cases that favor this perspective. His vision and analysis of these examples and cases and of the general uses and weaknesses of comparative law provide a glimpse of how a person from this great tradition thinks about law and legal problems. This is comparative law.

Professor Grossfeld, to be sure, is no *mere* Pandectist. He is also a scholar who has had extensive training and experience in the Anglo-Saxon tradition. He has spent several months in Cambridge, England as a Visiting Fellow at Wolfson College. Professor Grossfeld was also a visiting professor at Southern Methodist University, in Dallas, Texas. He has used English and American scholars as sounding boards for his thoughts and perceptions. These experiences have provided Professor Grossfeld with a useful perspective for a German lawyer. *The Strength and Weakness of Comparative Law* is Professor Grossfeld's attempt to share these perspectives with his fellow Germans. The book is aimed at the German legal community, to provide it with some understanding of the importance of comparative law in practice and scholarship. This he does very well. Although originally intended for this limited audience, the way Professor Grossfeld analyzes the issues provides the American reader with insight into how a sophisticated German comparativist perceives and analyzes law and legal problems.

Comparative law is much more than "matching laws."<sup>2</sup> Professor Grossfeld's short, lively book will certainly awaken its German reader

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1. The German and the French Civil Codes provide the world with the two great civilian codal systems. Nations around the world have essentially adopted and adapted either the German or the French paradigm. Christian Wolff (1679-1754) founded the German Pandectist School, which was most prominent during the nineteenth century. It, like the French tradition, began with the premise that territorial and political unity required a comprehensive, accessible, systematic, and coherent body of law. The Pandectists esteemed mathematical precision in legal inquiry. Wolff's approach excluded all inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms, down to the smallest details; every particular rule is derived from the previous more general one, and so on, in the strictest logical sequence. Structure and analysis requires the exactness of geometrical proof, which is achieved by a logical chain of reasoning by exclusion of the opposite. Thus, a closed system is produced, whose validity is based in its freedom from logical contradiction of all its assertions. This tradition was expanded and developed over the years to its culmination as a movement in 1862 in the work of Windscheid. See Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1019-22 (1980); see also SYMEON SYMEONIDES, AN INTRODUCTION TO THE LOUISIANA CIVIL LAW SYSTEM 50-52 (5th ed. 1989).

2. Pp. 72-74. Professor Grossfeld cautions that, when comparing legal systems, one should question "what can sensibly be compared." Specific factors such as culture, religion, political or economic systems, language, and geography place limitations on com-

to the value, indeed necessity, of comparative law and comparative insights in his or her own practice or scholarly work. This, he aims at the skeptic who may think of comparative law or foreign legal systems as arcane and useless fluff, too luxurious for the hard working “practical-minded” practitioner. Professor Grossfeld throws the cold water of realization into this skeptic’s face. The message being that considering comparative approaches and theory about similar problems may indeed be as practical as one can get. The English translation will do the same for the Anglo-American reader.

More importantly, Professor Grossfeld provides the perspective of a deep thinking German scholar on problems relating to the meanings of law, thinking, and being. These may seem abstract philosophy to the readers of this Essay, but Professor Grossfeld’s thoughts on these issues provide the keenest insight into how a German scholar approaches the law, legislation, cases, doctrine, philosophy, and life. There is little that is more practical to an American comparative law scholar or an American practitioner who faces problems of continental law and practice from time to time. Grossfeld provides the reader with insight into the discipline of comparative law; but more importantly, he provides the readers of all nationalities with insight into how a German law practitioner and scholar approaches legal problems. This is comparative law. Professor Grossfeld intends to, and succeeds, at writing a book about comparative law. He has produced a work of comparative thinking—of comparative law.

In some ways, this is a spiritual-metaphysical book. Professor Grossfeld discusses the impact of religion on the law, but more importantly, his discussion of language and culture has metaphysical qualities. For example, he considers Naom Chomsky’s thesis that people are born with a deep linguistic structure, a “proto-human-grammar” embedded into them, from which all human grammars flow<sup>3</sup> and wonders whether there is some deeply embedded notion or grammar of law in each of us.<sup>4</sup> In this light, Professor Grossfeld brings our attention to Goethe’s reference to “the law innate in us.”

Laws are transmitted, like some dread disease,  
Father to son, and spread from place to place.

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parative law, but “they can open our eyes to factors which have affected the substance of law within our own cultural circle.” *Id.* at 74.

3. P. 103 (citing NOAM CHOMSKY, *LANGUAGE AND MIND* 76 (2d ed. 1972)).

4. Pp. 103-05.

Reason turns to folly, boon becomes a bane  
 To later generations. Yet the law  
 Innate in us is meanwhile quite ignored.<sup>5</sup>

Professor Grossfeld's discussion on language and the law is the most interesting part of the book.<sup>6</sup> His discussion is stimulating and erudite. He quotes Kipling's aphorism that language is the "mightiest drug" of humankind and notes that this drug has legal side-effects.<sup>7</sup> Professor Grossfeld discusses language as a creative force, focusing on the Bible, the Odyssey, Wagner's *Lohengrin*, Goethe's Faust, and the beliefs of the Bambara in West Africa, in all of which, creation, even of ourselves, occurs with the "word."<sup>8</sup> No doubt, language gives our perceptions form. Learning a language gives us a new personality. It is through language, our own and any others that we take the time and effort to learn, that we become what we are. I recall three years living in France as a young man. When I arrived, I did not speak a word of French. I decided to study hard every morning and to memorize phrases to use during the day. I also challenged myself not to think idly in English, but to force my mind continually to work on phrases in French. I forced myself to speak only French and to do so continually. This method caused me to *become*, rather quickly, a person who spoke French. I remember distinctly the feeling of astonishment that I once was unable to understand the language; it seemed so natural and so much a part of me. By immersing myself in the language and using it all day, everyday, I *became* a person different from what I was before. Wittgenstein's aphorism that "the limits of language (*the* language I understand) mean the limits of *my* world."<sup>9</sup> Grossfeld reminds us that "[w]hen we learn another language we unconsciously adopt its speakers' world of thought: '[L]anguage thinks in us.'<sup>10</sup> Referring to language's ability to shape a people's cultural history, the poet Schiller wrote of "a developed lan-

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5. P. 44 (citing JOHANN WOLFGANG VON GOETHE, FAUST, pt. 1, The Student Scene). Professor Grossfeld asks us to compare this with Thomas Jefferson's view that "[t]here should be a revolution every twenty years." *Id.* at 44 n.18 (citing GARY WILLS, INVENTING AMERICA, JEFFERSON'S DECLARATION OF INDEPENDENCE 124 (1978)).

6. Pp. 85-105.

7. P. 86.

8. Pp. 88-91. This is simply the theory that "it is through the 'word' that things obtain their existence." That is, things do not exist until a name is bestowed upon them.

9. P. 92 (quoting LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 62 (1933)).

10. P. 96 (quoting EMIL WEZEL, SPRACHE UND GEIST iv (1935); KLAUS HOLLDACK, GRENZEN DER ERKENNTNIS AUSLANDISCHEN RECHTS 82 (1919)).

guage that composes and thinks for you.”<sup>11</sup> Language is certainly “a world picture given form.”<sup>12</sup> Similarly, humankind “has as many hearts as [it] has languages.”<sup>13</sup>

Grossfeld’s discussion of language brought this back to me and ought to stimulate all comparativists to continue developing language skills. Also, both Professor Grossfeld (through his writings) and I believe that learning to become a lawyer is analogous to becoming a person who speaks a foreign language. One becomes a French speaking person; one becomes a person who can efficiently and correctly solve legal problems. One must do the things that are necessary to become such a person. The things that one does in the classroom, in one’s own mind, study-table, work-desk, and later in one’s “practice” is what allows one to become such a person. Professor Grossfeld prompts us to understand this and that comparative law helps us to remember it—remembering that it is an ongoing process, not an event. Too many of us believe that becoming a lawyer or a scholar or whatever we think we are is like being “born again”; but the process of becoming a lawyer is fluid, not a moment in time.<sup>14</sup>

Grossfeld reminds us that law is language and that the “constitutive and cognitive power of language is especially significant for law, for only in language do the concepts of positive law have any being at all.”<sup>15</sup> Different languages represent different “world-views.”<sup>16</sup> The term “verdict,” in its Latin derivative, means telling the truth, *verum dicere*. Grossfeld’s discussion does not dwell on criminal law or criminal justice, but what he says is very interesting in relation to comparing the philology and focus of the continental, formerly inquisitorial, systems of criminal justice with that in the Anglo-Saxon systems. I have discussed elsewhere the implications of evolution in these two systems, which today seem to be converging.<sup>17</sup> The goal of the continental investigation

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11. P. 96 (quoting Johann Christoph Friedrich von Schiller, *Dilettant in Tabulae Votivae*, I *Werke* 319 (1952)).

12. P. 92 (referring to Gottfried Benn, *Worte*: “Alone: really alone — just you and words.”).

13. Pp. 95-96 (citing JAKOB BURCKHARDT, *UBER DAS STUDIUM DER GESCHICHTE* 276 (Ganz ed., 1982)). Also, didn’t Victor Hugo say that a person has as many personalities as he or she has languages?

14. Perhaps being “born again” is that, as well.

15. P. 92.

16. P. 96.

17. See generally CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW & THE PROTECTION OF HUMAN LIBERTY* (1991) [hereinafter BLAKESLEY, *TERRORISM, DRUGS*]; CHRISTOPHER L. BLAKESLEY & R. CRAIG CURTIS, *INTRODUCTION TO THE LAW*

and trial remains to find the "objective truth." During ancient times and the Middle Ages, finding the truth was so important that there were formulaary tortures to be applied to those putatively hiding the truth.<sup>18</sup> Grossfeld's discussion of language and the value he puts on words such as "verdict" tells us a great deal about his instinctive reaction to the word, based on his cultural perspective and predilection. Indeed, he assumes that the United States system must be the same, because it utilizes the same term, "verdict." In reality, however, the term "verdict" came to mean something different in the United States constitutional system, although the current Supreme Court seems to be moving the American legal system toward the continental model. Historically, the Bill of Rights and its evolution through judicial interpretation represented the don't-tread-on-me vision of the proper relationship between the state and the citizens espoused by revolutionaries such as Thomas Payne and Patrick Henry. Barriers were established to prevent government from having so much power to "find the truth" that it could also establish a police state.<sup>19</sup>

Thus, language and perception of etymology tells us a great deal of each other's legal culture and this enables us to understand how each other thinks about legal issues. We take our own world-view for granted as the product of our natural common sense, but in reality it is provided by our mother tongue. *Vox populi, vox dei.*<sup>20</sup> This feeling is a weakness, not a strength. It is a weakness that many United States lawyers and scholars suffer; understanding comparative law overcomes this weakness.

Another example of this comes to mind. The term "to represent" in English is the same in French. Yet the conceptual meaning and mental picture created by the word in the mind of a United States attorney and his or her French counterpart is startlingly different. In a case in which the United States sought the extradition of Willie Holder, who

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OF THE UNITED STATES (forthcoming Dec. 1991) (manuscript ch. 15, on file with author) [hereinafter BLAKESLEY & CURTIS, INTRODUCTION TO THE LAW]; 2 CHRISTOPHER L. BLAKESLEY & R. CRAIG CURTIS, LE DEVELOPPEMENT DU DROIT PÉNAL AUX ETATS-UNIS (1991) [hereinafter BLAKESLEY & CURTIS, LE DEVELOPPEMENT].

18. BLAKESLEY, TERRORISM, DRUGS, *supra* note 17, at 1-31.

19. See generally BLAKESLEY, TERRORISM, DRUGS, *supra* note 17; BLAKESLEY & CURTIS, INTRODUCTION TO THE LAW, *supra* note 17 (manuscript on file with author); BLAKESLEY & CURTIS, LE DEVELOPPEMENT; Christopher L. Blakesley, *Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 65-68 (1991).

20. P. 97.

had been charged with the hijacking of an American airliner,<sup>21</sup> the French *Avocat General*, who “represents” the United States government before the French courts in extradition matters, presented the evidence against Holder and then proceeded to recommend to the French court that Holder not be extradited. As the *Avocat General* saw it, the crime was excepted from the extradition treaty because it was a political offense.<sup>22</sup> The United States government was outraged that the *Avocat General*, the person ostensibly “representing” the United States in France, would simply present the evidence and then argue against the United States’ position.<sup>23</sup>

The problem arose because of the differing meanings given to the term “represent.” The American vision of “represent” conjured up the aggressive adversarial paradigm. The French *Avocat General* was functioning, however, under the French concept of the term “*representer*,” which requires him to present all the papers, but to speak to the court as his perception of justice would require. Thus, he must present exculpatory evidence and arguments, if he feels that they are appropriate. Both sides in this controversy were right, based on their own notion of “representation.” Notwithstanding the use of the same term, misunderstanding also arose because of the different visions of criminal justice triggered by the term.<sup>24</sup> This is but one example of why a practitioner needs to become familiar with the legal culture behind the legal language.

Perhaps it is true, as Professor Grossfeld indicates, that “our feeling for play, rhythm, and proportion [including our sense of right and wrong] is inborn” in language and in law.<sup>25</sup> Law, if it is really law, he says, causes an appropriate response in everyone’s “spiritual wavelength.”<sup>26</sup> Professor Grossfeld does not go into this in depth, but raises the issue to trouble us. Comparative law and comparative thinking help us address these issues. He recognizes that what is called law may function for good or evil. Some “law” may trick people and pull them along to basic danger or illegality, like music in the Pied Piper of Hamelin.<sup>27</sup> He suggests that the almost magical quality of law enhances the efficacy of a legal rule: “Language [and law] uses the cultural sensibility we have

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21. See *In re Holder*, reprinted in *Extradition 1975 DIGEST* § 5, at 168-75.

22. *Id.* at 174-75.

23. *Id.*

24. The French call terms that are the same in two languages, but have a different meaning in each, *des faux amis* (false friends).

25. P. 104.

26. *Id.*

27. *Id.*

inherited with our genes; we obey the law from a consensual, inner impulse which we experience as moral duty, even as joy. Law resonates within us, is our own; we now want to do what we should do because we are in harmony with it."<sup>28</sup> Can harmony and joy come from rules leading to evil? There are, of course, "laws" or "rules" that are bad. The classic example is presented by the German "laws" that permitted the Nazis to commit their horrid acts in the 1930s and 1940s. Professor Grossfeld is not clear on this, but the tenor of his discussion triggered in me the thought that "rules" that lead people to do evil things are not law. They are inconsistent with our inner harmony. Indeed rules may be established that trigger our need to conform, to be in rhythm with authority and lead us to illegality. I am not sure that this is what he is saying, but his discussion of these qualities of language and law triggered these thoughts in me. The exercise was stimulating. I would love to read more of his thoughts on this topic.

*The Strength and Weakness of Comparative Law* was a quick, enjoyable, yet provocative read. It provided me with insight and provoked me to consider what I am trying to teach my students in both my domestic and comparative courses. It prompted me to consider what I want them to come to understand about law in general, about "our law," and about approaching legal problems in general. It will provoke practitioners to think about their own system in a manner different from how they have done in the past. It will prompt the reader to find some time to do comparative research in cases in which there is a foreign, transnational, or international element.

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28. *Id.*