

Foreword: A Miniature Vignette on and a Fervent Plea for Comparative Law

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‘Vor dem Gesetz steht ein Türhüter.’
(Franz Kafka)²

This ‘Special Issue: Liber Amicorum of Mads Andenas’ is dedicated to honour Mads Andenas on the occasion of his 60th birthday. During his academic life so far, Mads Andenas has profoundly contributed to and impacted on scholarship in multiple areas of law covering the national, international, supranational and comparative level in a way that only few European scholars did before. These multiple areas of law have profited from Mads Andenas’ academic accomplishments, his teaching and long-standing engagement in the relevant international and European scientific community as well as from his passionate interest in and profound knowledge of European culture. In times of increasing volume, complexity and a constant reform mode of law, legal polymaths have become a rare species. Apart from being a legal polymath, Mads Andenas escapes any further professional categorization. Taking nevertheless the liberty of ascertaining a *‘domaine à clef’* of his work the most evident choice would be the comparative law. Inspired by this choice, this tribute is designed as a miniature vignette on and a fervent plea for comparative law. Following a *Woolfian* stream of consciousness rather than a strict dogmatic structure, this miniature vignette – framed by literary quotations – begins with some methodological fundamentals of comparative law and ends with highlighting its most outstanding virtues.³

Comparative Law – A School of Humility, Utmost Caution and a Panoramic and Holistic View

Comparative law is a *‘discipline à clef’* for legal understanding as such. Comparative law – like any other realm of law or legal methodology – differs in the various juris-

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² Franz Kafka, *Vor dem Gesetz* in Franz Kafka, *Die Erzählungen*, 162 (Fischer Taschenbuch Verlag 1997).

³ The volume and richness of literature on this topic are overwhelming. The space allotted to this tribute is, however, limited. Thus, references are kept to the methodologically justified minimum, covering only selected, mainly exemplary sources.

dictions and legal traditions. The geographical,⁴ historical,⁵ philosophical,⁶ and religious⁷ roots and developments of a legal system including political, ideological, institutional, economic and technical factors and those related to legal practice and academia particularly shape the foreign legal system to be explored and the relevant prevailing national comparative law approach⁸ alike. Comparatists might only to a limited extent – if at all – escape the confines of their native legal systems. They are thereby susceptible to conscious and unconscious (legal) preconceptions and bias.⁹ This comparatists' dilemma and the parallel existence of multiple (national) variants of comparative law call for putting forward some (more) universal methodological principles as to 'how' a comparative law analysis shall be conducted. The following three maxims spring to mind, here: (1) humility before complexity, (2) utmost caution, and (3) taking a panoramic and holistic view.¹⁰ One might well reply that these maxims are already general principles of (legal) scientific research or even common sense. In the realm of comparative law, however, their strict observance is to be regarded a *conditio sine qua non* for achieving any meaningful results. These maxims require sophisticated balancing and calibration: The maxim of humility before complexity shall neither result in resignation nor 'hiding one's light under a bushel'. The maxim of utmost caution shall not mean acting overcautiously prone to end in *Wittgensteinesque* silence. The maxim of taking a panoramic and holistic view calls for a macro-perspective approach to the foreign legal phenomenon considering it an integral, minuscule element of a complex system which does neither follow logic nor

⁴ Bernhard Grossfeld, *Dreaming Law*, 12 (German Law Publishers 2010).

⁵ For more information on comparative law and legal history, see e.g., James Gordley, *Comparative Law and Legal History* in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 753 (Oxford University Press 2006).

⁶ For more information e.g. on the role of Confucianism in Chinese law, see Gudula Deipenbrock, *Die vielen Gesichter des Konfuzius – Vorüberlegungen aus rechtsvergleichender Sicht* in Wilhelm Schmeisser, Thomas R Hummel, Gerfried Hannemann, Dirk Ciupka (eds), *Internationale Geschäftstätigkeiten in Asien: Länderkulturforschung anhand ausgewählter Länder*, 17, 23 et seq. (Rainer Hampp Verlag 2005).

⁷ For more information on comparative law and religion, see e.g., Harold J Berman, *Comparative Law and Religion* in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 739 (Oxford University Press 2006).

⁸ See e.g., Part I with chapters on the various national or regional developments of comparative law in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 35 et seq. (Oxford University Press 2006).

⁹ For more information on this with further references in context with a comparative law approach to Chinese contract law, see e.g., Gudula Deipenbrock, „Der Vorsichtige wird nichts Falsches tun“ – eine methodisch-rechtsvergleichende Annäherung an das chinesische Vertragsrecht 103 *Zeitschrift für Vergleichende Rechtswissenschaft* 374, 375 et seq. (2004).

¹⁰ For more information on this with further references in context with a comparative law approach to Chinese company law, see Gudula Deipenbrock, *Grundüberlegungen zum neuen chinesischen Gesellschaftsrecht und seinen Anwendungsvoraussetzungen aus der Sicht ausländischer Investoren* 53 *Recht der internationalen Wirtschaft* 771, 772 et seq. (2007).

the law of nature.¹¹ Comparatists who observe these maxims might not avoid but at least mitigate the ubiquitous risks of misconceptions and misunderstandings.

Comparative Law – Key Factors

The above maxims address mainly the professional subjective stance of comparatists. In substantive terms, comparatists should – as Bernhard Grossfeld has most fervently and convincingly put forward – explore and consider the following two crucial factors: (1) geography as a term for the physical world, and (2) signs such as language, numbers and pictures including their networks.¹²

The Material World

As Bernhard Grossfeld rightly stressed, legal issues need to be ‘allocated’ first requiring comparative law to start bottom up with the land as the basis of law where climate, territory and location define any concept of order.¹³ Putting geography first is in the present author’s view a comparative law ‘*axiom*’ that has gained not lost momentum in times where the dynamics and rapid acceleration of globalization¹⁴ and digitalization attempt to make us believe that the (virtual) ‘anywhere’ has superseded the (actual) ‘somewhere’. When exploring the multiple elements of geography that might have been or failed to have been influential on a foreign legal phenomenon or legal system, comparatists engage in ‘fieldwork’ in a more literal than figurative sense. It allows immediacy of experience and thereby a less distorted insight.

Means of Communication

The relevance of signs such as language, numbers and pictures and their webs for comparative law¹⁵ might equally be considered a comparative law ‘*axiom*’. Law and

¹¹ For more information on this with further references in context with a comparative law approach to Chinese company law, see Gudula Deipenbrock, *Grundüberlegungen zum neuen chinesischen Gesellschaftsrecht und seinen Anwendungsvoraussetzungen aus der Sicht ausländischer Investoren* 53 *Recht der internationalen Wirtschaft* 771, 772 et seq. (2007).

¹² See the works of Bernhard Grossfeld in the realm of comparative law. See e.g., Bernhard Grossfeld, *Dreaming Law*, 10 (German Law Publishers 2010) and e.g., Bernhard Grossfeld, *Kernfragen der Rechtsvergleichung*, 24 et seq. (JCB Mohr [Paul Siebeck] 1996).

¹³ Bernhard Grossfeld, *Dreaming Law*, 12 (German Law Publishers 2010).

¹⁴ For more information on the impact of globalization on comparative law, see Horatia Muir Watt, *Globalization and Comparative Law* in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 579 (Oxford University Press 2006).

¹⁵ See e.g., Bernhard Grossfeld, *Dreaming Law*, 10 (German Law Publishers 2010).

language are closely linked; comparative analysis is one of translation.¹⁶ Legal language expresses the ‘inner grammar of legal systems, cultures, and mentalities’.¹⁷ Any adequate legal translation requires a ‘sense’ for the less evident elements of both, the source and target languages, their assumptions, patterns and connotations and emotions seminal to behaviour.¹⁸ Comparative legal linguistics exploring the features of legal language comes into play, here.¹⁹ In addition to language, other signs exist. Here, comparative legal semiotics exploring signs and their use in a (foreign) legal context is crucial for the understanding of foreign legal systems.²⁰

Comparative Law and the European Peace Order

This miniature vignette on comparative law now turns to highlighting its most outstanding virtues. Comparative law as a discipline is a ‘*quantité indispensable*’. It impacts all areas of law. It fulfils multiple pivotal functions. It thereby serves manifold purposes. Its most remarkable function manifests itself in the European Union: Comparative law might well be considered the ‘*domaine à clef*’ for designing European Union law. Comparative law has been acting as methodological ‘intermediary’ between the diverse legal cultures and traditions of the peoples of Europe by exploring and juxtaposing their idiosyncrasies paving the way for the design of a common European approach. It has thereby played an important part in the promotion of the European project.²¹ From the multiple facets of the European Union such as the geographical, historical, political, economic, social and environmental ones its cultural, spiritual and moral ones deserve particular emphasis, here. It is the Charter of Fundamental Rights of the European Union that invokes most stirringly the spiritual and moral ground on which the European Union has been built. It distills its vision and mission. The Preamble of the Charter of Fundamental Rights of the European Union

¹⁶ See e.g., Vivian Grosswald Curran, *Comparative Law and Language* in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 675, 678 (Oxford University Press 2006).

¹⁷ See e.g., Vivian Grosswald Curran, *Comparative Law and Language* in Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 675, 678 (Oxford University Press 2006).

¹⁸ For more information on this with further references, see Bernhard Grossfeld, *Dreaming Law*, 65 (German Law Publishers 2010).

¹⁹ For more information on this, see Heikki ES Mattila, *Comparative Legal Linguistics*, e.g., 19 et seq. (Ashgate Publishing 2006).

²⁰ For more information on this with further examples and references, see e.g., Jack A Hiller, Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?* 50 *The American Journal of Comparative Law* 175 (2002); Bernhard Grossfeld, Josef Hoeltzenbein, *Globalization and the Limits of Languages: Comparative Legal Semiotics* 35 *Rechtstheorie* 87 (2004); see also Bernhard Grossfeld, *Dreaming Law*, 18 (German Law Publishers 2010).

²¹ For more information on the development of the European contract law – as one important area of law in this context – with further references, see e.g., Hein Kötz, *Europäisches Vertragsrecht*, 2 et seq. (2nd edition, Mohr Siebeck 2015).

states, inter alia, that the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. It continues that, conscious of its spiritual and moral heritage, the European Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, and that it is based on the principles of democracy and the rule of law. According to the Preamble the European Union contributes to preserving and developing these common values while respecting – amongst other issues – the diversity of the cultures and traditions of the peoples of Europe. Promoting the European project has thereby become tantamount to promoting peace. This has rightly been acknowledged particularly by awarding the European Union the Nobel Peace Prize 2012. Comparative law has hence contributed to facilitating the European peace order. As this greatest achievement of the European Union is at the same time its most valuable but also vulnerable good calling for devoted protection, comparative law has also to play an important role in preserving it.

This miniature vignette began with words by Franz Kafka. It ends with words by Federico García Lorca. Each quotation reveals a dilemma. Both reminded the present author of the comparatists' dilemma. Allowing this tribute to end nevertheless on a comforting note, making it thereby a holistic and true comparative experience, the following words might best be contemplated while listening to a suitable piece of music. Why not choosing *Spiegel im Spiegel* by Arvo Pärt to this end?

*‘Die Antwort ist genau
die Frage in anderer Maske.
Sie geht hinaus als Quelle
und kommt als Spiegel zurück.’
(Federico García Lorca)²²*

²² This is the last stanza of the poem *Reflexión (Spiegelung)* by Federico García Lorca, translated into the German language by Gustav Siebenmann in Federico García Lorca, *Poemas Gedichte*, Spanisch/Deutsch, ausgewählt, übersetzt und herausgegeben von Gustav Siebenmann, 21 (Philipp Reclam jun. 2007).