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Johannes Landbrecht

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APPLIED COMPARATIVE LAW — FIVE STEPS TO SUCCESS

Johannes Landbrecht[1]

Résumé

Le débat en matière de droit comparé se focalise traditionnellement sur l'approche méthodologique utilisée, les buts visés, son utilité pratique ainsi que sur l'approche à adopter pour son enseignement. Néanmoins, un aspect semble souvent être oublié dans le débat ainsi que dans l'enseignement du droit comparé. C'est la question de savoir comment préparer les juristes à un dialogue effectif et efficace à travers les ordres juridiques. Ni les scientifiques ni les praticiens ne disposent eux-mêmes des moyens de faire systématiquement l'intégralité des recherches comparatives souvent requises. Être capable de communiquer à travers les ordres juridiques devient alors indispensable lorsque l'on applique le droit comparé en pratique, par exemple dans le contexte d'une procédure arbitrale. Dans cette perspective, cet article présente une approche en cinq pas – testés en pratique – afin de rendre la communication entre juristes d'ordres juridiques différents effective et efficace. En outre, l'article cherche à guider les futurs scientifiques et praticiens dans leur quête afin de mieux se préparer pour une application du droit comparé en pratique.

Mots clés : arbitrage, communication, contentieux transnational, dialogue comparatif, droit comparé, langage juridique, pratique juridique.

Abstract

A long-standing debate deals with comparative law methodology, the goals of comparative law, its practical usefulness, and how to teach it. Yet one aspect seems to be missing, both from the debate and the curriculum of comparative law, namely how to prepare lawyers for effective and efficient legal communication across legal orders. Neither scholars nor practitioners have the capacity to do all the comparative research that is often required themselves. Skilful legal communication across legal orders is therefore a prerequisite for applying comparative law successfully, for instance in the context of arbitration proceedings.

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This article lays out a five step roadmap—tested in practice—for effective and efficient legal communication between lawyers from different legal backgrounds. Furthermore, it seeks to give guidance for prospective scholars and practitioners on how best to prepare for applied comparative law.

Keywords: arbitration, communication, comparative law, comparative dialogue, cross-border litigation, legal language, legal practice.

TABLE OF CONTENTS

I. EFFECTIVE AND EFFICIENT LEGAL COMMUNICATION BETWEEN LAWYERS FROM DIFFERENT LEGAL BACKGROUNDS

Legal research and scholarship centre on understanding law—foreign and domestic. Legal practice, on the other hand, focuses on applying law to facts. If a comparative (foreign) law element is involved in the latter context, the need for 'applied comparative law' arises, i.e. for the application of a comparative (foreign) law analysis to the facts of the case.

The English term 'comparative law' and its French equivalent *droit comparé* are somewhat unfortunate. Despite being ambiguous, these terms are generally not meant to refer to a specific legal order (like English law) or field of law (like family law),[2] although this view is not undisputed.[3] The German term *Rechtsvergleichung*, meaning literally the comparison of or the act of comparing law(s), brings out more clearly the aspect of comparative law as a methodological approach to (studying) law—a distinct type of legal analysis and reasoning.

In line with this focus on a distinct approach, 'comparative law' is used in a broad sense throughout this article, encompassing any type of legal analysis, and for whatever purpose, that is not limited to one legal order.[4] More specifically, the article's focus is on the communication aspect of comparative law that arises whenever lawyers from different legal backgrounds interact—rather than on any ontological understanding of what comparative law 'is'.[5]

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[2] Maybe this is what André Tunc had in mind when he famously observed that 'comparative law does not exist'; *see* the quote in Banakas, *The Method of Comparative Law and the Question of Legal Culture Today*, Tilburg Law Review 113, 113 (1994).

[3] Cf. Pfersmann, *Le droit comparé comme interprétation et comme théorie du droit*, 53(2) Revue internationale de droit comparé, 275, 277 (2001), who discusses, and rejects, the notion that comparative law would be a legal order of its own.

[4] *See* already Vallindas, *A Plea for an International Legal Science*, 8(4) The International and Comparative Law Quarterly 613, 614 (1959): 'Comparative law as a branch of legal science ought necessarily to have an international character, as it does deal with more than one national legal system.'

[5] This avoids a discussion of what comparative law 'is' as much as it avoids a detailed analysis of what it is that scholars and practitioners actually do under this heading.

'Legal practice' is also understood broadly. Legal scholars and professors, when preparing research projects or exams, also apply comparative legal research to factual scenarios. These scenarios may be hypothetical, but the methodological way to deal with them can be identical to handling 'real' cases (on which they are often based)—and is therefore legal practice of sorts. Quite appropriately, some understand comparative law as 'disciplined practice'.[6]

In today's globalised world, most lawyers—academics as much as practitioners[7]—come into contact with foreign legal orders. They will then have to apply comparative law in the broad sense used herein. Few modern-day lawyers can thus avoid applied comparative law.[8]

Many comparatists consider the practical use of comparative law to be relevant[9] and prepare their students accordingly.[10] It has been rightly pointed out that, in the study and teaching of comparative law, the tasks of educating prospective lawyers (practitioners) and conducting comparative research should be clearly distinguished.[11] Others do neither—although that may be due to a narrow understanding of 'comparative work'[12] or a concern about

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[6] Adams/Bomhoff*, Comparing law: practice and theory* in Practice and Theory in Comparative Law, 1, 4 (Adams/Bomhoff (eds.), Cambridge University Press: Cambridge, 2012) (emphasis added).

[7] Squelch/Bentley, *Preparing law graduates for a globalised world*, 51(1) The Law Teacher 2, 4-5 (2017) (from an Australian perspective).

[8] Similar terminology (*angewandte Rechtsvergleichung*) use v. Bar/Mankowski, Internationales Privatrecht, Vol. 1, § 2 no. 95 (2nd ed., Beck Verlag: München, 2003). However, they only refer to comparative law activity by *courts*, on which *see* also *infra* note 28.

[9] *See* e.g. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 The Modern Law Review 1 (1990).

[10] E.g. Kischel, Rechtsvergleichung, § 2.B.I.3 (C.H. Beck: München, 2015) highlights challenges for *practising* lawyers in a cross-cultural environment.

[11] Husa, *Comparative law in legal education—building a legal mind for a transnational world*, The Law Teacher (2017) (DOI: 10.1080/03069400.2017.1340532).

[12] *See* e.g. Legrand, *Comparative Law* in Encyclopedia of Law and Society, 220, 222 (Sage: Los Angeles, 2007): 'The vocation of comparative work about law is intrinsically scholastic and its agenda is, therefore, incongruent with that of practitioners or lawmakers seeking to elicit epigrammatic answers from foreign laws.' That is of course a legitimate way to see things and a way to define 'comparative work' although—intentionally—not one that is oriented toward legal practice.

promising too much[13] rather than a general disdain for legal practice. Many, if not most, comparatists aim at being practical in at least some respects.[14]

Yet it is respectfully submitted that the traditional approaches to researching and teaching comparative law focus too much on the acquisition of knowledge and the skills to be developed by individual lawyers. They thereby fail to prepare for exchanges between lawyers in a comparative law setting, i.e. for legal communication between lawyers from different legal backgrounds.

However, given the capacity constraints of individual researchers, scholars and practitioners alike, it is precisely the effective and efficient legal communication between lawyers from different legal backgrounds that is often a prerequisite for being able to apply comparative law successfully—in academia as well as in legal practice.

Preparing for legal communication should therefore be added to the traditional goals of comparative law (II). While important pitfalls exist that potentially hamper such legal communication (III), they can be avoided by structuring it in five steps (IV). Lawyers should specifically prepare for such legal communication (V).

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[13] *See* e.g. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 1, 2 (1991): 'the effort to justify comparative law by its practical uses sometimes verges on the ridiculous'. The quote is from a section in which Sacco defends comparative law against perceived pressures to justify its usefulness in practice, although, for Sacco, the 'primary and essential aim of comparative law *as a science* … is better knowledge of legal rules and institutions' (*ibid.*, 5) (emphasis added).

[14] Incidentally, one of the world's leading comparative law institutes, the Max Planck Institute for Comparative and International Private Law in Hamburg, was originally founded (as *Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht*) partly with a view to providing legal advice to the German business community. The institute's founding director, Ernst Rabel, was not only one of the most eminent scholars of comparative law of the 20th century, but also incessantly curious about practical matters; *see* Kunze, Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926-1945, 53-54 (Wallstein Verlag: Göttingen, 2004).

II. COMPARATIVE LAW'S PLURALITY OF GOALS AND PERSPECTIVES

In recent years, a lively debate[15] has emerged regarding the appropriate methodology of comparative law analysis.[16] There appears to be less of a debate about comparative law's goals and perspectives,[17] to which we must briefly turn. Comparative law is traditionally centred on comparative research (A), while many seem to overlook the need to prepare for practical aspects precisely of legal communication between lawyers from different legal backgrounds (B). This need is particularly felt in the context of international arbitration (C).

A. The Traditional Goals and Perspectives

It has been stated that '[n]o single universally-accepted, unequivocal, homogeneous set of goals of comparative legal research'[18] has yet been identified, although 'standard lists of the discipline's practical uses and educational benefits'[19] have been drawn up. This appears to be a fair summary. The following lists can indeed be considered 'standard' only in the sense of having been established by comparative law scholars that were probably most influential in the study and teaching of comparative law in the second half of the 20th century.[20] They continue to be influential in particular with regard to comparative law training.

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[15] *See* Akkermans, *The Functional Method in Comparative and European Property Law*, 2(1) European Property Law Journal 1, 2 (2013).

[16] For overviews *see* Siems, Comparative Law, Part I and Part II (Cambridge University Press: Cambridge, 2014); Oderkerk*, The Need for a Methodological Framework for Comparative Legal Research*, 79 RabelsZ 589 (2015); Kischel, Rechtsvergleichung, § 3 (C.H. Beck: München, 2015).

[17] But *see* e.g. Michaels, *The Functional Method of Comparative Law* in The Oxford Handbook of Comparative Law, Section III ('Functions of Function') (Reimann/Zimmermann (eds.), 2nd edn., Oxford University Press: Oxford, 2019); Werro*, Notes on the Purpose and Aims of Comparative Law,* 75 Tul L Rev 1225 (2001).

[18] Oderkerk*, The Need for a Methodological Framework for Comparative Legal Research*, 79 RabelsZ 589, 599 (2015) (emphasis added).

[19] Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 American Journal of Comparative Law 671, 697 (2002).

[20] Siems, Comparative Law, 77 (Cambridge University Press: Cambridge, 2014).

The French scholars René David and Camille Jauffret-Spinosi summarise the relevance of comparative legal analysis under three headings.[21] First, comparative legal analysis benefits legal scholarship in the context of historical and philosophical studies as well as in the context of a study of general legal theory (*théorie générale du droit*). Second, comparative legal analysis helps better understand and improve a particular domestic law. Third, comparative legal analysis furthers the understanding of foreign peoples and thereby potentially improves international relations.

Konrad Zweigert and Hein Kötz also identify a long list of functions and goals of comparative legal research:[22] 'discovery of models for preventing or resolving social conflict'; comparative law as an *école de vérité*, enriching the 'supply of solutions' (Zitelmann); offering the opportunity for finding the 'better solution' for the time and place of the comparing lawyer; dissolving national prejudices; helping to 'fathom the different societies and cultures of the world'; increasing international understanding; supporting law reform in developing countries; contributing to the development of one's own system through creating a 'critical attitude'; aiding the (domestic) legislator; as a tool of construction, as a component of the curriculum at universities and law schools; contribution to the unification of law.[23]

To bring order into this plethora of goals and perspectives, some distinguish 'normative' and 'non-normative' goals.[24] While normative research has 'evaluative' or 'regulatory' aims, non-normative research focuses on

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[21] David/Jauffret-Spinosi/Goré, Les grands systèmes de droit contemporains, nos. 3-6 (12th edn., Dalloz: Paris, 2016) (the leading French textbook on comparative law).

[22] Zweigert/Kötz, Einführung in die Rechtsvergleichung, § 2 (3rd edn., J.C.B. Mohr: Tübingen, 1996); the classic 20th century textbook on comparative law in Germany, translated into English by Tony Weir: Zweigert/Kötz, Introduction to Comparative Law (3rd edn., Oxford University Press: Oxford, 1998).

[23] The goals identified by Uwe Kischel in the most recent comprehensive textbook on comparative law in German language (Kischel, Rechtsvergleichung, § 2 (C.H. Beck: München, 2015)) are very similar to the list drawn up by Zweigert and Kötz.

[24] Oderkerk*, The Need for a Methodological Framework for Comparative Legal Research*, 79(3) RabelsZ 589, 600 *et seq.* (2015).

'describing' and 'exploring'. Another way to classify goals of comparative law involves distinguishing between 'knowledge and understanding', 'practical use at [the] national level' and 'practical use at [the] international level'.[25]

B. The Needs of Legal Practice

Comparatists thus follow many goals, all of which have their place. Yet for applying comparative law successfully in practice, it is precisely the effective and efficient exchange of legal analyses between lawyers from different legal backgrounds that is decisive—as no individual comparatist will be able to learn and research all that might be required under several different legal orders.

Academics and practitioners alike face the challenge of legal communication between lawyers from different legal backgrounds. However, some potential pitfalls are especially troublesome for practitioners—for they need a fully accurate analysis, and they need it fast.

First, legal practitioners—be they advocates in judicial proceedings, legal advisers, judges, or arbitrators applying an unfamiliar law—require fully accurate information. Otherwise they risk professional liability.

The financial risks are inherently lower if the purpose of comparative law is solely one of research or inspiration, for instance in the case of legislators, contract drafters, or academic scholars. All of them aim at obtaining a correct understanding of the foreign law. Yet what matters most to them is that their understanding is helpful to their own particular exercise that motivated them to conduct a comparative law analysis in the first place (of drafting a statute, a contract, a harmonisation project etc).

For instance, whatever the risks of legal transplants in theory,[26] legislators take responsibility for such transplant within their own system—no

[25] Siems, Comparative Law, 3 (Cambridge University Press: Cambridge, 2014). For further possibilities to classify the goals of comparative law *see* the references *ibid.*, 2, fn. 2.

[26] Siems, Comparative Law, 191 *et seq*. (Cambridge University Press: Cambridge, 2014).

matter how it functioned in its environment of origin. Even if misunderstood (and although this is unsatisfactory from an intellectual and potentially a scientific point of view), a foreign solution can inspire a useful solution at home. After all, if the purpose is to seek inspiration, such inspiration could come from texts that are no longer in force (historical comparison[27]) or never reflected the state of the law (such as books of authority advocating reform).

The situation is similar for a court seeking foreign law inspiration when dealing with a situation still unresolved in its own law. The court will have to fit the foreign-inspired solution into its own legal order. Whether it is permitted to do so is a question of legal theory.[28] Yet it matters little whether the result fully corresponds to the law as in force abroad.

Second, practitioners often operate under stringent budgetary and time constraints. Their clients rarely afford them the opportunity to study a foreign law at the level of sophistication needed for properly serving those clients all by themselves. Rather, they must generally seek advice from foreign lawyers.

In other words, it is more important for practitioners to be able to communicate across legal orders than to be able to conduct comparative legal research themselves. It is therefore respectfully submitted that the current approach to the teaching of comparative law, i.e. focusing on the individual comparatist gaining knowledge and methodological understanding in foreign law(s), while neglecting the preparation for communication between lawyers from different legal backgrounds, should indeed by turned on its head—prioritising the preparation for effective and efficient comparative law communication.

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[27] Comparative law and historical analysis are not identical but share common traits, *see* Siems, Comparative Law, 290 (Cambridge University Press: Cambridge, 2014).

[28] *See* e.g. Kadner Graziano, *Rechtsvergleichung vor Gericht. Legitim, nützlich, praktikabel?*, 60 Recht der Internationalen Wirtschaft 8, 473 (2014); Coendet, Rechtsvergleichende Argumentation (Mohr Siebeck: Tübingen, 2012).

To focus on the (practical) goal of being able to make a 'skilful choice between different laws'[29] is too imprecise. On the one hand, the choice of law and forum is, in practice, most often driven by bargaining power, tax considerations, tradition, habit, or mere chance, for instance which law is known or familiar to a relevant external advisor or in-house counsel.[30] A 'skilful' choice is rarely what clients are ready to pay for. More often than not, parties lack not only the inclination but also the means and material[31] for a fully 'rational choice'.[32] On the other hand, a 'skilful' choice would require either extensive research by one lawyer[33] or communication between lawyers from different backgrounds. Again, preparing for and improving legal communication between lawyers from different legal backgrounds is what matters most.

The needs are somewhat different for comparative law scholars. But they also face constraints of time and cost and often rely on hints and support from foreign colleagues for research 'shortcuts'. Legal communication between lawyers from different legal backgrounds becomes even more important where scholars collaborate on large comparative law projects.

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[29] Siems, Comparative Law, 4 (Cambridge University Press: Cambridge, 2014).

[30] Siems, Comparative Law, 229 (Cambridge University Press: Cambridge, 2014), correctly observes that 'it cannot simply be assumed that individuals and firms compare the advantages and disadvantages of all legal systems'.

[31] The cost of fully researching several laws that could be chosen would often be discouragingly high and out of proportion to possible gains as regards the quality of the solution, *see* v. Bar/Mankowski, Internationales Privatrecht, Vol. 1, § 7 no. 76 (2nd ed., Beck Verlag: München, 2003).

[32] The notion has its origin in economic studies, *see* van Aaken, "Rational Choice" in der Rechtswissenschaft (Nomos: Baden-Baden, 2003).

[33] Cf. e.g. Wagner, Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit (C.H. Beck: München, 2018) on forum selection. Considering that Wagner conducted this study (only) from a German perspective, it becomes apparent how voluminous a fully comparative study from various perspectives would need to be. One recent example where extensive comparative research was considered worthwhile in practice is private enforcement in antitrust matters, *see* e.g. Basedow/Francq/Idot (eds.), International Antitrust Litigation. Conflict of Laws and Coordination (Hart Publishing: Oxford, 2012).

C. Applied Comparative Law in Arbitration

Being able to communicate effectively and efficiently with lawyers from other legal backgrounds is particularly important in the context of transnational dispute resolution, and, even more so, in arbitration. The term 'arbitration' is used to designate the proceedings conducted by and in front of decision-making bodies that are appointed ad hoc to decide individual cases. The focus on this type of decision-making bodies is due to the fact that they lack a uniform communication context and their members lack a uniform educational background—which makes legal communication potentially difficult and, in any event, which most often results in the need for effective and efficient communication between lawyers from different legal backgrounds.

The specific challenge of legal communication in transnational dispute resolution is at least twofold.

First, in transnational dispute resolution generally, many legal orders interact and need to be coordinated. This concerns domestic court proceedings, for instance if a French judge ascertains a party's capacity to contract under Italian law, but also regimes of public international law, for instance in the context of investor-state dispute settlement.

Second, and more specifically to arbitration, the context of legal understanding, i.e. the communication context, is often far from clear. While also state court judges (or any judges of a standing decision-making body) may have to deal with a transnational scenario, their own communication context is known and mostly uniform. Even in international decision-making bodies, if they are standing bodies and although not belonging to a domestic legal order, like the Appellate Body of the World Trade Organisation (WTO)[34] or the European Court of Human Rights,[35] such specific communication context can develop over time.

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[34] Established in 1995 under Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *see* www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

[35] *See* www.echr.coe.int.

Yet the arbitrators of an individual arbitral panel may come from very different legal backgrounds. They may have a very different level of experience with regard not only to arbitration but also with regard to communicating with lawyers from different legal backgrounds. They may never have met before, they may never sit together again—and not all arbitration counsel may be equally familiar with the arbitrators' respective backgrounds. As an additional challenging factor, there is not even a need for an arbitrator to have any kind of legal training (unless the parties agree otherwise).

Therefore, without a thorough understanding of the challenges of applied comparative law, and without appropriate and, admittedly, fairly cumbersome and thorough preparation for legal communication between lawyers from different legal backgrounds, arbitration practitioners—whether acting as counsel or as arbitrators—cannot hope to perform to the standards required to serve the users of arbitration well.

III. POTENTIAL PITFALLS HAMPERING LEGAL COMMUNICATION

The key to effective and efficient legal communication between lawyers from different legal backgrounds is awareness of the risk that there will be misunderstandings—and why these misunderstandings are bound to occur.

The most important structural cause of such misunderstandings arises from the fact that every lawyer approaches any type of legal analysis with baggage in the form of intellectual predispositions as to how legal reasoning should be conducted (A). More dangerous still, such predispositions are often unconscious (B). An example of contract interpretation serves to highlight the pitfalls that this creates (C). Such risks can be defused to some degree by communicating on the basis of factual scenarios rather than legal categories (D).

A. (Legal) Convictions (*Vorverständnis*)

Trained lawyers have a predetermined understanding (unconscious convictions) of legal reasoning, given that they use terminology and a language, their 'legal language', that deviates from 'everyday language'.[36] This understanding, and extensive training needed to acquire such understanding, are required to facilitate legal communication within a legal order—rendering such communication more efficient and setting the legal professional apart from the lay person. Yet this understanding potentially inhibits legal communication between lawyers from different legal backgrounds.[37]

A detailed reconstruction of legal communication, i.e. of communication using legal language, and in particular of legal communication between lawyers from different legal backgrounds, using the tools of modern communication theory and epistemology, is beyond the scope of this article. It suffices to highlight that legal communication between lawyers from different legal backgrounds, in contrast to communication between lawyers from the same legal order, has additional layers of complexity. This is due to the fact that the communication context (context of understanding) is not uniform: both sides operate in their own—and differing—legal contexts, both have their own and differing 'horizons'[38] of understanding, both have their own and differing unconscious convictions, as we shall see. In essence, and in contrast to communication between professional and lay person in general, communication between lawyers from different legal backgrounds is communication between professionals from a different 'trade'—for instance professionals of Swiss law and professionals of Canadian law. A lay person will understand that it may have difficulties following a legal discourse. For lawyers, who are both legal professionals, this may be less obvious.

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[36] Luhmann, Law as a Social System, 340 (Oxford University Press: Oxford, 2004).

[37] *See* Kischel, *Vorsicht, Rechtsvergleichung!*, 104 Zeitschrift für vergleichende Rechtswissenschaft 10, 14 (2005); Vogt, *The International Practise of Law and the Anglo-Internationalisation of Law and Language* in Festschrift Tugrul Ansay, 455, 457 (Kluwer Law International: Alphen aan den Rijn, 2006).

[38] Immenhauser, *Wozu Hermeneutik im Rechtsdenken?*, in Festschrift Eugen Bucher, 297, 324 (Stämpfli Verlag: Bern, 2009).

B. The Unconsciousness of Convictions in Particular

Nietzsche famously observed that the truth has more potent enemies in convictions than in lies.[39] Yet more serious for present purposes is the fact that convictions can be conscious and unconscious. While Nietzsche probably referred to the former, the more dangerous ones for legal communication between lawyers from different legal backgrounds are the latter.

The key concern when conducting comparative legal analyses is not a purposefully wrong or incomplete understanding[40] of a foreign law. Rarely will someone consciously misunderstand, mischaracterise or misjudge a foreign law.[41] The main concern arises when lawyers are oblivious to the very existence of their own unconscious convictions.

In German legal theory, unconscious convictions (*Vorverständnis*[42]) are predispositions that determine or influence the choice of a legal method, or, more specifically, that determine the way an orthodox methodology (in the

[39] Nietzsche, Menschliches, Allzumenschliches I, 483 (Colli/Montinari (eds.), Kritische Studienausgabe, Vol. 2, dtv de Gruyter: München, 1999): '*Feinde der Wahrheit. – Ueberzeugungen sind gefährlichere Feinde der Wahrheit, als Lügen.*'

[40] One might call this 'prejudice', although no 'fault' may be involved. Indeed, the term 'prejudice' did not always have its present day negative connotation, *see* Gadamer, Truth and Method, Part II, 4-1, 268 (3rd edn., Continuum: London, 2004). Gadamer uses the term 'prejudice' in a more neutral way as 'a judgment that is rendered before all the elements that determine a situation have been finally examined' (*ibid.*, 273), not in the sense of a false judgment, which makes this notion suitable in the present context.

[41] If this happens, it is not an exercise of comparative law (in the sense of a comparative legal analysis) but legal propaganda or, in more neutral terms, legal marketing. It would seem that lawyers from some legal orders are more adept at such marketing than others. It may make a difference whether practising law is considered a business or a profession in the respective system.

[42] The German '*Vorverständnis*' (literally: pre-understanding) does not translate easily into English. The English 'understanding' has several meanings. On the one hand, it can refer to the activity of making sense of something (*Verstehen*). On the other hand, 'understanding' can refer to the result of such activity, i.e. how something is actually understood (neutral as to whether that is correct) (*Verständnis*). The process of understanding (*Verstehen*) may be distorted by a predisposition, an unconscious conviction (*Vorverständnis*), affecting the way something is understood, i.e. affecting the outcome (*Verständnis*) of the process of making sense of something.

sense of a methodology accepted by most) is applied within a legal order.[43] In the following, the term 'unconscious convictions' is used more broadly, referring to any methodological predisposition that can be traced to a lawyer being used to his or her home jurisdiction, being predisposed to a certain kind of legal reasoning.

The specific challenge for legal communication between lawyers from different legal backgrounds is thus at least twofold.

On the one hand, there is the general epistemological problem of discovering truth (primarily on the part of the lawyer requested to provide input). This is a problem encountered in all endeavours of human understanding and not particular to comparative law. Although an important consideration in view of potential unconscious convictions, the epistemological problem can be remedied, at least to a degree that is sufficient to avoid problems for the purposes of legal practice or scholarship, by selecting appropriate (i.e. sufficiently competent) foreign law experts.

On the other hand, unconscious convictions (on the part, and this is very important to keep in mind, of *both* the requesting and the requested lawyer) are particularly problematic, even more so in a practical setting given the time pressures involved.[44] First, unconscious convictions influence the way queries are made by the lawyer requesting input. Considering her unconscious convictions, she may have difficulties asking the 'right' (i.e. helpful for the particular purpose) question to begin with. Second, unconscious convictions influence, albeit potentially in a dissimilar way, the understanding of the query by the requested lawyer. Third, they influence the input provided. Finally, they influence the way the input is understood by the requesting lawyer. Thus, at all stages, unconscious convictions potentially distort the legal communication between lawyers from different legal backgrounds.

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[43] *See* Laudenklos/Rohls/Wolf/Rückert/Seinecke in Methodik des Zivilrechts – von Savigny bis Teubner, no. 1542 (Rückert/Seinecke (eds.), 2nd edn., Nomos: Baden-Baden, 2012).

[44] *Supra* Section II.B.

The following example of contract interpretation demonstrates that lawyers from different legal backgrounds need to communicate very carefully in order to avoid misunderstandings. In particular legal practitioners are less concerned about the correct legal reasoning (all the steps of the legal analysis) than they are about the correct outcome of the analysis. They must plan their communication accordingly.[45]

C. Example: Contract Interpretation

The principles of contract interpretation may differ from one system to another, but the outcome in a particular case can still be identical.

Example: S(eller) and B(uyer) sign a sales contract with the provision 'Item sold: Hoover'; the price is specified. S sells all types of vacuum cleaners, including one model produced by Hoover and several models produced by Siemens. The Hoover model and one Siemens model (the 'Siemens SuperClean x56') have the same price, i.e. the one indicated in the contract. S sells also a wide range of other household appliances.
Variant 1: To the contract is attached a detailed description of the item sold, namely a vacuum cleaner 'Siemens SuperClean x56'.
Variant 2: The type of vacuum cleaner sold is not further specified in the contract. However, S and B had concluded the contract in view of a specific item that was on display in S's window on that specific day. There was only one vacuum cleaner (a 'Siemens SuperClean x56') on display on that day for the price stipulated in the contract. B has a picture of the vacuum cleaner and the price tag. The Hoover model was on sale for the same price as stipulated in the contract, but S and B had never talked about the Hoover model. Yet S and B had discussed other appliances on sale and displayed in the window.
Question: In case there is a dispute between S and B as to whether the Hoover model or the 'Siemens SuperClean x56' was sold, what

[45] For further details *infra* Section IV.

does the contract provide for? Does the answer differ depending on whether the contract is governed by German or English law?

The apparent 'problem' in this example is that the item sold is not specified in the contract beyond doubt. The reference to 'Hoover' could mean a particular brand of vacuum cleaner or a vacuum cleaner in general (British English term). The contract thus needs to be interpreted.

A detailed comparative account of the principles of contract interpretation under German and English law is beyond the scope of this article.[46] Suffice to mention—in necessarily simplified terms—the two principles most frequently pointed out. First, English law follows an objective approach, interpreting the contract from the perspective of a third party,[47] whereas German law focuses primarily on the parties' (subjective) joint actual intentions (*übereinstimmendes tatsächliches Verständnis*).[48] Second, English law focuses on the words used. As Lord Hofmann formulated in *ICS* (fifth principle), the '"rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents'[49]. Yet under German law the wording will ultimately play a limited role.[50]

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[46] *See* e.g. Spellenberg, *Stellvertretung und Vertragsauslegung im englischen Recht* in Festschrift für Ernst A. Kramer, 311 (Helbing & Lichtenhahn: Basel, 2004); Hadžimanović, Auslegung und Ergänzung von Verträgen (Schulthess: Zürich, 2006); Stölting, Vertragsergänzung und implied terms (Sellier European Law Publishers: München, 2009); Czarnecki, Vertragsauslegung und Vertragsverhandlungen (Mohr Siebeck: Tübingen, 2011); Egli, *Parol Evidence Rule*, Jusletter 27. Februar 2012; Landbrecht, *Treu und Glauben im englischen Vertragsrecht*, Recht der internationalen Wirtschaft 592 (2013). Focusing on the contract drafting perspective Triebel/Vogenauer, Englisch als Vertragssprache (Helbing Lichtenhahn: Basel, 2018).

[47] For details *see* McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification (3rd edn., Oxford University Press: Oxford, 2017); *Wood v Capita* [2017] UKSC 24; U. K. Supreme Court, 29.03.2017 (note *Hübner*), Zeitschrift für Europäisches Privatrecht 684 (2018).

[48] Flume, Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft, § 16.2.a (4th edn., Springer: Berlin, 1992).

[49] Per Lord Hofmann, *Investors Compensation Scheme Ltd v West Bromwich Building Society* (HL) [1998] 1 WLR, 896 (913D).

[50] *See* German Federal Court of Justice, Neue Juristische Wochenschrift 1528, 1529 (1994): the parties' joint intention prevails over the wording of the contract and any other approaches to interpretation; German Federal

This summary is not wrong. However, it is also not nuanced enough to be fully accurate, let alone usable in practice. Therefore, the question remains whether the outcome of a legal analysis of the above example under German and English law differs. Is there any doubt what the term 'Hoover' in the contract 'means'?

Variant 1: Under German law, the parties' joint actual understanding of the content of their agreement would prevail over any objective reading of its text (subjective approach).[51] Yet no such understanding (other than what is reflected in the text of the contract) can be ascertained. The normative interpretation, which then comes into play, has as the starting point logical and grammatical elements (i.e. the wording in the context of the agreement as drafted).[52] The detailed product description points to the Siemens model. A German lawyer would most likely not worry too much about the term 'Hoover' and its 'meaning'.

English law would start, in applying the objective principle,[53] with the wording of the contract rather than the parties' intentions, framing the issue as one of interpreting the term 'Hoover'. However, as one commentator puts it, the 'first and least-controversial source of assistance for the purpose of construing particular contractual words is the remainder of the instrument or the "internal context"'.[54] The attached product description indicates that the

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Court of Justice, Neue Juristische Wochenschrift 3139, no. 13 (2006): the parties' joint understanding prevails over a content of the contract objectively determined; Flume, Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft, § 16.2.a (4th edn., Springer: Berlin, 1992).

[51] Flume, Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft, § 16.2.a (4th edn., Springer: Berlin, 1992).

[52] Flume, Allgemeiner Teil des Bürgerlichen Rechts. Zweiter Band Das Rechtsgeschäft, § 16.3.b (4th edn., Springer: Berlin, 1992).

[53] In the context of interpreting contracts, the 'detached objectivity' or 'fly-on-the-wall objectivity' applies; McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification, 3.04-3.05 (3rd edn., Oxford University Press: Oxford, 2017). The language used is thus interpreted from the 'perspective of a reasonable bystander, or eavesdropper on the parties'.

[54] McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification, 4.01 (3rd edn., Oxford University Press: Oxford, 2017).

parties intended to sell the Siemens model and the term 'Hoover' is only used as a reference to a vacuum cleaner (in order to distinguish the item sold from other household appliances on sale in S's shop).

Thus, in Variant 1, it appears that both under German and English law the parties agreed on a sale of the 'Siemens SuperClean x56'. The legal reasoning differs—or at least the rhetorical packaging of such reasoning. The outcome is the same.

Variant 2: In this scenario, the wording of the contract does not help to determine whether S and B agreed on the Hoover or the Siemens model. The wording of the contract ('Hoover') and the objective circumstances in the shop (a Hoover model being on display for the price indicated) might indicate that the contract needs to be interpreted as referring to the Hoover model.

Yet under German law, other circumstances of the parties' discussions would be taken into account. In particular B's picture of the Siemens model with the price tag (or any other relevant evidence) would render credible that the Siemens was discussed, which would in turn point to a joint actual understanding of the parties that the Siemens model was sold. If one were to understand the reference to 'Hoover' as an incorrect labelling of the product sold, a German lawyer would reason that using a wrong term does not matter in the context of interpretation (*falsa demonstratio non nocet*) if the parties intended to make a certain declaration and had a joint understanding of its content, even though the common (i.e. objective or objectivised) understanding of the term may be different.[55] Under German law, the parties have agreed on a sale of the Siemens model on display, irrespective of how an independent third party would interpret the term 'Hoover'.

Under English law, the reasoning will likely be more complex. Some observers might invoke the principle that no interpretation is warranted if the

[55] Cf. *supra* note 50.

wording is clear[56] and that the parties' negotiations are not relevant or admissible (exclusionary rule) when interpreting an agreement.[57] This could result in the Hoover model being sold. On the other hand, it has been held that the content of the parties' negotiations may be used to establish 'the genesis and object'[58] of a provision—pointing to the Siemens model. In the present case, the fact that the parties only discussed the Siemens model in the window could be used to inform the reading of the term 'Hoover'—as referring to a vacuum cleaner in general, rather than a particular model, in order to distinguish the product sold from the other items discussed by S and B (other household appliances on sale that day).

More generally, one commentator concludes 'that, as a matter of English law, there is no parol evidence rule … to restrict the evidence which is admissible for the purpose of construing a written contract'.[59] That alone would settle the case in favour of the Siemens model.

Yet even if the parol evidence rule were to play any role to restrict the available evidence, or if the correct interpretation of the contract under English law pointed to the Hoover model for other reasons, this would still not be the end of the analysis. English law has developed the safety nets of rectification and estoppel by convention in order to circumvent the rules restricting the evidence that may be adduced for interpretation purposes. Evidence of the parties' negotiations may be used in the context of requesting either of these

[56] On this principle see Grabiner, *The Iterative Process of Contractual Interpretation*, 128 Law Quarterly Review 41, 61 (2012). For the avoidance of doubt, Lord Grabiner does not allege that there is 'no' room for interpretation in this context, and it is not suggested that he would come to any particular conclusion regarding the above Example.

[57] Per Lord Hofmann*, Investors Compensation Scheme Ltd v West Bromwich Building Society* (HL) [1998] 1 WLR, 896 (913A): 'The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.'

[58] Per Sales J, *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch), paras. [75]-[76].

[59] McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification, 5.12 (3rd edn., Oxford University Press: Oxford, 2017).

(equitable) remedies, a tactic that, according to recent case law, appears to continue to be legitimate.[60]

Thus, under English law, the result also in Variant 2 is likely to be the same as under German law, i.e. that the parties agreed on a sale of the Siemens model on display in S's shop.

D. Reflections

This example demonstrates that legal communication between lawyers from different legal backgrounds must work with factual descriptions, as and to the extent these factual descriptions are convertible across 'cultures'.[61] This is not a new insight,[62] and also not an insight limited to legal theory or comparative law.[63] Yet its implications are often forgotten.

Communication on the basis of legal concepts must be avoided, at the very least in practice (due to cost and time constraints). Although such communication appears, at first sight, like a convenient shortcut, it is extremely risky with little chance of controlling the outcome in terms of success of the communication. It is not excluded that the legal communication between lawyers from different legal backgrounds yields a 'correct' outcome even when they 'compare' legal concepts directly, but this, more often than not, is a matter of mere happenstance.

To demonstrate this by reference to the above example: A German lawyer, having solved Variant 2 under his own law on the basis of the German

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[60] McMeel, The Construction of Contracts: Interpretation, Implication, and Rectification, 5.86 (3rd edn., Oxford University Press: Oxford, 2017), referring to *Chartbrook Ltd v Persimmon Homes Ltd* [2008] EWCA Civ 183.

[61] *See* also Wyatt, Intertemporal Linguistics in International Law. Beyond Contemporaneous and Evolutionary Treaty Interpretation (Hart: Oxford, 2019), 8: 'legal issue detached from any doctrines or principles used by any specific systems'.

[62] *See* already Zweigert/Kötz, Einführung in die Rechtsvergleichung, § 3.II. (3rd edn., J.C.B. Mohr: Tübingen, 1996).

[63] Edmund Husserl cautioned, in a similar vein, against reasoning on the basis of philosophical doctrines. He emphasised the need to use problems as the starting point for scientific analyses, see Husserl, Philosophie als strenge Wissenschaft, 72 (Felix Meiner Verlag: Hamburg, 2009).

falsa demonstratio principle, might ask an English colleague whether English law knows of such principle. The English lawyer, searching for a *falsa demonstratio* principle, will find that such 'rule' exists but is apparently used only in the conveyancing context.[64] Her answer might therefore be: no, such principle does not exist in English law generally for contract interpretation purposes. If the German lawyer then simply takes this piece of information and concludes that, in Variant 2 and under English law, the parties had agreed on a sale of the Hoover model (contrary to the German law solution), he might be seriously wrong.

The mistake appears obvious in light of the above very detailed account. Yet it is a mistake that is all too often made in practice. Focusing on a factual framing of issues for the purposes of legal communication between lawyers from different legal backgrounds is thus of prime importance.

We must now turn to the question of how such communication should be structured in order to duly take into account the challenges and needs of legal practice in particular.

IV. LEGAL COMMUNICATION IN FIVE STEPS

In order to tackle the described challenges of legal communication between lawyers from different legal backgrounds, in particular in legal practice,[65] the seeking, receiving and implementing of foreign law input should be structured according to the following Five Steps: full legal analysis of the case by the lawyer requesting foreign law input—under his or her *own* law in order to avoid the 'loaded query problem' (A); detailed *factual* description of the case on the basis of this legal analysis—to be transmitted to the foreign lawyer requested to provide input (foreign law advice) (B); legal analysis under foreign law—together with a *sensitivity analysis* (C); evaluation of the foreign law input

[64] *See* Carter, The Construction of Commercial Contracts, no. 4-50 (Hart Publishing: Oxford, 2012).

[65] These Five Steps can also serve comparative legal research projects, in particular if research is undertaken with regard to factual scenarios as it often is. The legal analysis in one legal order could be the starting point for determining the factual matrix of the research project, a legal analysis of that matrix then be conducted in other legal orders (with feedback loops to determine all the relevant factual issues).

by the lawyer requesting it and, if need be, follow-up discussion between requesting and requested lawyer—installing a *feedback-loop* (D); translating, by the requesting lawyer, the foreign law input into her own terminology (if required) (E).

A. Step 1: Full Legal Analysis by the Lawyer Requesting Advice—Avoiding Heuristics and Biases

The starting point of legal communication between lawyers from different legal backgrounds should be a full legal analysis of the case under the law of the lawyer requesting foreign law input—irrespective of the law ultimately applicable.

Step 1 is designed to counterbalance unconscious convictions[66] at the initial stages of the communication between lawyers from different legal backgrounds. The effect is to avoid jumping to conclusions, to avoid heuristics and biases, and to uncover, if need be, unconscious convictions—on the part of the lawyer requesting information.

Without attempting an exhaustive analysis,[67] the psychology underlying such jumping to conclusions shall briefly be outlined by reference to Daniel Kahneman's 'Thinking, Fast and Slow'.[68] This outline also demonstrates how Step 1, i.e. the full legal analysis of the case under the law of the lawyer requesting advice, can help avoid distortions in the legal communication between lawyers from different legal backgrounds.

Kahneman distinguishes between two modes of thinking. While System 1 'operates automatically and quickly, with little or no effort and no sense of voluntary control',[69] System 2 'allocates attention to the effortful mental activities that demand it'.[70] System 1 is in operation when we think fast,

[66] *Supra* Section III.A.

[67] For details *see* e.g. Gigerenzer/Engel (eds.), Heuristics and the Law (The MIT Press: Cambridge/Mass., 2006).

[68] Kahneman, Thinking, Fast and Slow (Penguin Books: London, 2011).

[69] Kahneman, Thinking, Fast and Slow, 20 (Penguin Books: London, 2011).

[70] Kahneman, Thinking, Fast and Slow, 21 (Penguin Books: London, 2011).

System 2 operates when we think slowly. Usually we do both at the same time. When conducting legal research, System 2 is used to work on the specific (legal) problem. System 1 provides a (trained lawyer) with the underlying assumptions, terminology, thought patterns, legal instincts etc.[71] Efficient thinking, judging and decision-making would not be possible otherwise, but the problem is that System 1 has biases, i.e. 'systematic errors that it is prone to make in specified circumstances'.[72] To avoid those errors, by switching to System 2, effort has to be exercised, attention paid. Yet one of System 2's 'main characteristics is laziness, a reluctance to invest more effort than is strictly necessary'.[73] In order to get System 2 going, a lawyer needs to invest extra effort and care.[74]

The lawyer requesting foreign law input—before formulating her questions to the foreign law expert—should thus switch consciously to System 2 in order to analyse the case from a legal perspective, thereby making sure that she is not tricked by unconscious convictions into wrong conclusions about relevant legal issues. As a solution of legal issues, this analysis is of course only a workaround that may ultimately be irrelevant if the case is to be determined according to a foreign law—it serves as scaffolding for the legal communication between lawyers from different legal backgrounds and will be removed once such communication has been successfully completed. The law of the requesting lawyer is chosen for the purpose of activating System 2 because it requires the least effort, the lawyer requesting input being most familiar with her own law.

Trained lawyers have a strong yet vague feeling about an appropriate solution to a legal problem (*Rechtsgefühl*), as well as an intuitive understanding

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[71] *See* Kahneman, Thinking, Fast and Slow, 22 (Penguin Books: London, 2011): some 'mental activities become fast and automatic through prolonged practice'.

[72] Kahneman, Thinking, Fast and Slow, 25 (Penguin Books: London, 2011).

[73] Kahneman, Thinking, Fast and Slow, 31 (Penguin Books: London, 2011).

[74] Considering the complexity of the field, it is unlikely that any lawyer could ever develop, beyond a very (extremely) limited area, a type of understanding that Kahneman would accept as the type of expertise (has 'seen everything', Kahneman, Thinking, Fast and Slow, 242 (Penguin Books: London, 2011)) that can serve as a valid basis for 'expert intuition'.

of the legal implications of a case. Such intuition is used when determining the appropriate starting point for legal research in one's own law. In the purely domestic context, relying on intuition in this context is unproblematic because it will eventually be checked and corrected by detailed research. But this intuition is also used when communicating with foreign law experts, influencing what a lawyer requesting input asks for and considers relevant. If the intuition, not tempered by thorough research, is wrong or incomplete (under the requesting lawyer's own law!), it potentially distorts legal communication between lawyers from different legal backgrounds already from the outset—as the requesting lawyer might not ask the appropriate questions to begin with.

The purpose of Step 1 is therefore to understand potential legal implications and to determine a possible legal solution to the case (leaving aside, for the moment, whether it is the 'correct' one in view of the applicable law). This step is rarely ever mentioned in the debates about comparative law yet very important, not only in practice but also in comparative law scholarship. The concern is not that this step is not taken—it always is—but that it is taken unconsciously and in a somewhat fleeting manner.

B. Step 2: Detailed Factual Description (Case Scenario)

Following the full legal assessment in her own law, the lawyer requesting foreign law input needs to describe the case in factual terms, i.e. she needs to reduce the case to a factual scenario that can be communicated to the foreign lawyer. She also needs to be aware that some words of the everyday language may have a different (or specific) meaning when used in a legal context—which may render them unusable for the purposes of a factual description.

The lawyer requested to give advice will then analyse this set of facts from the perspective of his (foreign) law. He will return the outcome of this analysis and provide the lawyer requesting input with the result as well as the underlying legal reasoning (under the foreign law).

Yet even if framed on the basis of facts, and even though she has sought, under Step 1, to neutralise her own legal convictions to the largest extent

possible, the requesting lawyer must be aware of the fact that her query will be somewhat loaded (the 'loaded query problem'). Since she uses, under Step 1, her own law to determine the relevance of facts, before communicating those facts to the foreign lawyer, the structure of her own law might distort what facts she considers relevant and thus transmits.[75] She might omit, without knowing it, facts that could turn out to be relevant from the perspective of a particular foreign law. This is where the requested foreign lawyer must now, which is also often overlooked in practice, play an active role under Step 3 and Step 4.

C. Step 3: Legal Analysis Under Foreign Law—with Sensitivity Analysis

There is little additional risk that the foreign lawyer falls into the trap of legal intuitions and convictions when assessing under his own law the factual scenario provided. He will directly activate System 2 in the course of his legal research.[76]

Yet in order to provide input that is as useful as possible to the requesting lawyer, and in order to counterbalance the problem of the 'loaded query' described in the context of Step 2 above, the requested lawyer should transmit not only the bare result of the legal analysis as well as his legal reasoning, but also indicate how the result would change if the fact pattern were slightly different. Mathematicians (and, in practice, economic experts) call this a 'sensitivity analysis', i.e. a re-assessment of the outcome of the (in our case legal) base assessment using different input (factual patterns).
In order to encourage and trigger such additional advice from the requested lawyer, a feedback-loop is provided for under Step 4.

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[75] Determining facts in issue is not a neutral exercise but informed by one's understanding of a legal order. Facts are only in issue because a law makes them so, *see* e.g. McKeown, Evidence, ch. 1.2 (16th edn., Oxford University Press: Oxford, 2012).

[76] Subject to making mistakes, but the possibility of making mistakes, on either side, is not relevant for the *structuring* of the legal communication between lawyers from different legal backgrounds itself—although it affects the *quality* of the result of such communication.

D. Step 4: Evaluation of the Foreign Law Input and Providing Feedback

Once the requesting lawyer has reviewed the advice, she should ask follow-up questions, slightly modifying the fact pattern, and also encourage feedback questions from the requested lawyer (the 'sensitivity analysis' mentioned under Step 3 above). These follow-up questions also serve to double-check both sides' understanding of the factual scenario and its legal implications. The purpose is yet again to activate System 2 on both sides of the legal communication.

For the avoidance of doubt, such sensitivity analysis is not meant to encourage falsification of the evidence or distorting the facts of the case. Rather, those modifications of the fact pattern serve the *analytical* purpose of finding out whether both sides think in appropriate legal categories. They also help identify the need for further factual research and instructions from the client.

In practice, the factual scenario is rarely fully transparent and undisputed. Different facts may be relevant if a different legal strategy is chosen. Some legal arguments will not work simply because the corresponding facts in issue cannot be proven and are thus inexistent for the purposes of the proceedings (although they may be correct from an epistemological point of view).

E. Step 5: Translating the Input into the Requesting Lawyer's Language

Based on the foreign law input provided, a solution will often have to be formulated in the requesting lawyer's own words—ideally double-checked by the requested lawyer. Step 3, Step 4, and Step 5 may go hand in hand.

Usually the lawyer requesting input will need to further build on that input, for instance because a foreign law must be pleaded in front of a court or arbitral tribunal or because a judge applies the foreign law in the context of a case heard by her. The foreign law research is thereby assimilated in the mind of the lawyer requesting input.

In arbitration proceedings, there is sometimes a further layer of complexity that is added by the fact that all the members of the arbitral tribunal do not necessarily have the same legal background.[77] Careful legal communication is even more important in this setting—and carefully translating the received foreign law input in one's own words might help such communication as it, to a certain extent, emulates the steps the arbitrators also need to undertake when explaining their reasoning for instance in an arbitral award.

V. PREPARING FOR APPLIED COMPARATIVE LAW—A TWO-STEP PROCESS

Let us finally turn to the question of how academics and practitioners, given the challenges described above, might prepare for effective and efficient legal communication between lawyers from different legal backgrounds. It is submitted that this should be a two-step process.

(1) As demonstrated, the most important prerequisite for being able to communicate across legal orders, and thus the most important prerequisite for ultimately applying comparative law successfully in many cases, is to fully grasp the legal framework of at least one legal order. It matters little which one that is. Otherwise it is impossible to perform Step 1 and Step 5, and difficult to perform Step 2 and Step 4.

The purpose of mastering one legal order in its entirety is to learn all the legal convictions, instincts, and predispositions that come with being fully versed in one law. This does not require knowing all the details of a country's law (which is impossible to achieve in practice), but it requires a thorough understanding of the methodology used and the most relevant elements of such legal order.

[77] *See supra* Section II.C.

The benefits of studying comparative law have been pointed out for decades.[78] There is no denying those benefits. However, it is submitted that there is no substitute for studying and mastering at least one legal order in its entirety—not for the purposes of legal practice and applied comparative law at the very least (one might still become a good politician or business leader).

There is a reason why examiners at university and bar exam level require the study of certain subjects. It is highly likely that all subjects combined provide not only for a broad but also an integrated understanding of the whole legal order, not just isolated aspects of it. It need not concern us here that some jurisdictions allow the practice of law with only a university (law) degree or with only a professional certification. On the one hand, there are apparently only very few legal orders that do so.[79] On the other hand, if those legal orders consider the respective degree or certification to be enough for an integrated understanding of the whole legal order, we have no reason to second-guess that choice.

This is not to advocate against studying comparative law,[80] transnational law[81] or domestic law from a transnational perspective.[82] It should only be

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[78] *See* e.g. Ault/Glendon, *The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison*, 27(4) Journal of Legal Education 599 (1976).

[79] Cf. Chesterman, *The Evolution of Legal Education. Internationalization, Transnationalization, Globalization* in Comparative Law as Transnational Law. A Decade of the German Law Journal, 41, 41-2 (Miller/Zumbansen (eds.), Oxford University Press: Oxford, 2012).

[80] On which *see* e.g. Brand, *Conceptual comparisons—Towards a coherent methodology of comparative legal studies*, 32 Brooklyn Journal of International Law 405 (2007); Fauvarque-Cosson, The Rise of Comparative Law: A Challenge for Legal Education in Europe (Europa Law Publishing: Leuven, 2007); Gordley, *Comparative Law and Legal Education*, 75 Tul L Rev 1003 (2001); Großfeld, *Sinn und Methode der Rechtsvergleichung* in Festschrift Sandrock, 329 (Verlag Recht und Wirtschaft: Heidelberg, 2000); Hazard*, Comparative Law in Legal Education*, The University of Chicago Law Review 264 (1951); Husa, *Comparative law in legal education—building a legal mind for a transnational world*, The Law Teacher (2017) (DOI: 10.1080/03069400.2017.1340532); Kadner Graziano, *A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal*, 6 European Review of Private Law 927 (2015).

[81] On which *see* e.g. Arjona/Anderson/Meier/Robart, *What law for transnational legal education? A cooperative view of an introductory course to transnational law and governance*, 6(2) Transnational Legal Theory 253 (2015).

[82] *See* e.g. Berger, *Vom praktischen Nutzen der Rechtsvergleichung. Die 'international brauchbare' Auslegung nationalen Rechts* in Festschrift Sandrock, 49 (Verlag Recht und Wirtschaft: Heidelberg, 2000).

remembered that legal education in these areas raises additional challenges.[83] From the perspective of legal practice, including scholarship that wishes to be relevant for legal practice, this is the icing on the cake, not the cake itself.

One could, in theory, study two entire legal orders (subsequently or in parallel, as some double-degrees somehow seem to attempt to do). It would be indeed very valuable, for the purposes of communicating with lawyers from different legal backgrounds as well as for applied comparative law, to have mastered two legal orders in their entirety, to gain an integrated understanding of two entire legal orders. However, the exercise would require studying those two legal orders fully (and would need to include obtaining two bar admissions). It would make the overall legal education more onerous, not easier.

Studying two (or more) legal orders only superficially, on the other hand, provides very limited gains in practice—and is potentially dangerous for applied comparative law. The risk is that scholars and practitioners only confuse methodologies, predispositions, convictions, and concepts, and are thus simply incapable of performing Step 1, Step 2, Step 4, and Step 5 in a controlled fashion. Having Step 3 performed in isolation (the assessment of the case under foreign law), even if done in the highest quality possible, is then of no use whatsoever for applied comparative law. To make matters worse, the respective scholar or practitioner has virtually no way of verifying, for lack of solid 'external reference points'[84]—that he or she would have acquired by

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[83] *See* e.g. Balan, *Meeting the challenges of globalisation in legal education*, 51(3) The Law Teacher 274 (2017); Chesterman*, The Globalisation of Legal Education, Singapore Journal of Legal Studies 58 (2008);* Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 Tul L Rev 949 (2001); O'Sullivan/McNamara, *Creating a global law graduate: The need, benefits and practical approaches to internationalise the curriculum*, 8(2) Special Issue: Legal Education 53 (2015); Smits, *European legal education, or: how to prepare students for global citizenship?*, 45(2) The Law Teacher 163 (2011); Squelch/Bentley, *Preparing law graduates for a globalised world*, 51(1) The Law Teacher 2 (2017); Tamm/Letto-Vanamo, *Innovation and Law* in Liber Amicorum Ole Lando, 369 (DJØF Publishing: Copenhagen, 2012); Winterton, *Comparative Law Teaching*, 23(1) The American Journal of Comparative Law 69 (1975).

[84] I borrow this term from Comey, A Higher Loyalty. Truth, Lies, and Leadership, xi (Flatiron Books: New York, 2018), who highlights the value of such reference points for effective leadership that transcends the situation, the tribe, the ego of the leader. In a similar vein, external reference points are needed to enable communication

studying one legal order in its entirety—, the correctness and usefulness of the advice obtained.

One might argue that students learn legal instincts regardless of whether they study one or more legal orders, and whether they do so thoroughly or superficially. To a certain extent, this is correct. They would still develop convictions and instincts. But those convictions and instincts would be very personal to them—and therefore not a basis for communicating with others or, at the very least, not a basis for facilitating communication with others.

The legal theory background to this argument in favour of studying at least one legal order fully is the contingency of the structures and rules developed in today's legal orders, i.e., to put it colloquially, the fact that all structures and rules could in theory also be different (although, within one legal order, they are not arbitrary and could not be modified all at the same time). All legal orders, and the structures and rules they contain, are possible (else they would not exist), but there is no reason, extraneous to the respective legal order, why they would necessarily be precisely the way they are (*möglich aber nicht-notwendig*).[85] There is no supreme authority, such as God, Nature, Reason, or a Supreme Leader, that would dictate the content of legal orders,[86] or that would dictate that all legal orders must have the same structures or content.

Many legal orders across the world will have developed similar structures, as there is a 'strong "equal-finality" of legal institutions'.[87] However, both the structures and the precise content of the corresponding rules may still differ—which is why comparative law is an endeavour worth undertaking in the first place. For instance, one legal order might address a particular concern with

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that transcends the situation, the small group of like-minded people someone might belong to, the individual mind of one person.

[85] *See* Luhmann, *Rechtstheorie im interdisziplinären Zusammenhang* in Ausdifferenzierung des Rechts, 191, 200 *et seq*. (*idem*, Suhrkamp: Frankfurt am Main, 1981).

[86] Luhmann, Law as a Social System, 215, 431 *et seq*. (Oxford University Press: Oxford, 2004).

[87] Luhmann, Law as a Social System, 481 (Oxford University Press: Oxford, 2004).

private law remedies (private enforcement). Others might prefer administrative law measures (public enforcement).

The important thing for students to learn would be that measures are taken to address a particular problem (whatever they are)—which means that they also learn that a problem or issue exists. If students study no legal order in its entirety, they might miss out on understanding a potentially important aspect of what constitutes a modern-day legal order.

(2) Once they have mastered one legal order fully, practitioners and scholars of comparative law must set out to specifically realise their unconscious convictions that they have thereby acquired—by learning about foreign legal orders and how they can differ, for instance by working through case studies.[88]

At this stage, there is no need to study a foreign legal order in its entirety, as the only purpose is to become aware, and understand, that one indeed has unconscious convictions and (roughly) what they are. This can be done with regard to specific areas of law that are of particular interest to the respective legal scholar or practitioner—which makes the task manageable. A case-based, fact-oriented approach to the study of comparative law, like the approach developed by Kadner Graziano,[89] appears to be particularly valuable in this context—and perfectly calibrated to the practical needs of applied comparative law as well as to the practical constraints of studying law.

VI. CONCLUSION

In a nutshell, the key to effective and efficient legal communication between lawyers from different legal backgrounds, and thus an indispensable

[88] A 'learning-by-doing approach', *see* Kadner Graziano, *A Multilateral and Case-Oriented Approach to the Teaching and Studying of Comparative Law: A Proposal*, 6 European Review of Private Law 927, 943 (2015).

[89] Cf. Kadner Graziano, Comparative Contract Law: Cases, Materials and Exercises (2nd edn., Edward Elgar Publishing: Cheltenham, 2019); Kadner Graziano, Comparative Tort Law: Cases, Materials, and Exercises (Routledge: Abingdon-on-Thames, 2018).

prerequisite for applying comparative law successfully, whether in practice or in academia, is to become an expert in one legal order, acquiring all the legal instincts and all the understanding that come with it—but then to 'unlearn' those instincts[90] when it comes to communicating with foreign lawyers.

In legal communication between lawyers from different legal backgrounds, it is fundamental not to take anything for granted. It is imperative never to jump to conclusions, and certainly not to do so at an early stage in the communication process. The key to this is using factual scenarios to communicate wherever possible, not legal concepts.

[90] *See* Eberle*, The Method and Role of Comparative Law*, 8 Wash U Global Stud L Rev 451, 457 (2009): 'we need to shed our built-in, native bias or "cognitive lock-in" so that we can review the data objectively'.