A. The False Problem of the Aims of Science

If you ask an astronomer about the aims of astronomy, he will probably answer in a way that repeats the question itself. The aim is knowledge of the nature and movements of the stars. That answer is perfectly appropriate. The aim of science is to satisfy a need for knowledge that is characteristic of man himself. Each individual science satisfies the need to acquire knowledge of its particular object. It is true that theoretical knowledge may subsequently find a practical application. Man would never have set foot on the moon without astronomy. Yet astronomy measured the distances that separate the planets long before the first moon landing. In general, then, the use to which scientific ideas are put affects neither the definition of a science nor the validity of its conclusions.

Jurists are generally aware of this truth. They do not think their work is valid only because it can be used to achieve this or that practical end. In the case of comparative law, however, a different standard is applied, or at least it was thirty years ago. Those who compare legal systems are always asked about the purpose of such comparisons. The idea seems to be that the study of foreign legal systems is a legitimate enterprise only if it results in proposals for the reform of domestic law.¹

This demand for a redeeming proof of the legitimacy of comparative law has a number of strange consequences. It rules out some areas of comparison entirely: legal anthropology, for example. It distorts the importance of others. We would have to say that the young Italian scholar has deepened his knowledge if he studies at

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¹ A partial panorama may be seen in Szabó, "Les buts et les méthodes de la comparaison du droit," in Rapports généraux au IX Congrès international de droit comparé 163 (1977).
Yale and discovers institutions the Italians would do well to imitate. On the other hand, if the young American scholar studies Italian law without finding anything he deems worthy of imitation, he has failed to acquire knowledge. The effort to justify comparative law by its practical uses sometimes verges on the ridiculous. According to some sentimentalists, comparison is supposed to increase understanding among peoples and foster the peaceful coexistence of nations. According to that idea, the statesmen who triggered the two world wars would have stopped at the brink of catastrophe had they only attended courses in comparative law. Napoleon himself would have given up his imperialistic dreams had he spent less time over the code that bears his name and more on the *gemeines Recht*, the common law and the *kormchaia pravda*.

Still other people suggest that attaining uniformity among the legal systems of different nations is a breakthrough that comparative law might help to bring about. Uniformity is often described as a patently good thing and hence worthy of encouragement. Actually, both uniformity and particularity among legal systems have their pros and cons. The greater the number of particular legal institutions existing at a given time, the greater may be the probability of certain types of progress.

In any case, history provides no evidence that uniformity is achieved through comparative legal study. In the Middle Ages, Roman law spread throughout Continental Europe because the other systems of rules with which it had to compete lacked its quality and prestige. The jurists who turned to Roman law instead of to local rules did not do so because they had compared the two. In most cases, the Roman rules were the only ones they really knew, and their choice was more the result of ignorance than of comparative study. Similarly, the French *Code Civil* spread throughout Europe, not because of comparative study, but because of the propagation of liberal ideas, the ideal of codification and the prestige of all that was French. Nor was comparative study the reason that German legal ideas spread throughout Europe less than a century later. Roman, French, and German legal ideas could not, of course, have been diffused without some knowledge of them. Yet mere knowledge of

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2. Uniformization of norms is the process whereby legislators adopt a formulated norm in the same way, or a single legislator introduces identically formulated norms into more than one system. It is to be distinguished from unification. The latter consists of the creation of a single norm, enforced by authorities belonging to a single pyramid, illustrated by a unitary body of jurists, and designed to substitute a plurality of divergent autonomous norms.

Hence, for example, the coming into force of the Italian Civil Code of 1865 unified Italian civil law: the Geneva conventions and the uniform law on the international sale of goods made uniform the legal sector which they concerned without abrogating it.
these ideas is not the same as study of comparative law. Indeed, sometimes law makers have borrowed a rule or institution expecting that they would learn how to apply it appropriately later on.

This is not to deny that the study of comparative law can contribute to achieving uniformity among legal systems. It has done so in one type of situation which might seem unreal had it not actually occurred. The situation is one in which law is declared to be uniform before the content of the law has been established. In this situation, the judge, aware of the various legal systems in force before the law was declared to be uniform, draws his rules from them. An instance is the European Economic Community. The law that regulates relations between the community itself and enterprises within the community has been declared to be uniform. Nevertheless, the treaties controlling the duties of these enterprises have not defined what constitutes an enterprise or regulated such matters as the restitution of money paid by mistake by private individuals to the community. The court of justice has created judge-made law drawn from the different legal systems that supposedly the uniform law has replaced. In such a situation a political decision mandates uniformity, and the comparative study of law makes the uniformity possible.\(^3\)

When the comparative study of law does contribute to achieving this uniformity, one of the principal instruments by which it does so is by showing that certain differences among legal systems are merely apparent.\(^4\) That is a genuine contribution and one which is cognitive and critical and in this sense "scientific." The task is performed by recognizing similarities in old laws rather than by enacting new uniform laws.

The comparative study of law can be helpful, not only in achieving uniformity, but whenever foreign legal models are imitated. The imitation of foreign legal models need not take the form of a global reception, the effect of a widespread political movement, such as the reception of French models in Europe following 1806. It can also take the form of a selective adoption of particular legal institutions or rules. In the latter case it is no doubt helpful to understand both

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3. There is now literature about this: Pescatore, "Le recours dans la jurisprudence de la Cour de justice des Communautés européennes à des normes déduites de la comparaison des droits des Etats membres," Rev. intern. dr. comp. 337 (1980).

4. See infra. Of course the disavowal of artificial oppositions might have wide-ranging practical consequences.

In 1977 the theme Nouvelles perspectives d’un droit commun de l’Europe was debated by fifteen jurists, and the proceedings published under the same title (Mauro Cappelletti ed. 1978). Here, in dealing with the theme Droit commun de l’Europe, et composantes du droit, Rodolfo Sacco envisaged the possibility that doing away with a series of artificial oppositions may lead to the creation of a uniform scientific and school models, which would, in turn, introduce uniform operative rules.
the foreign rules and institutions one is borrowing as well as one's own legal system.

We can now answer the question of whether the imitation of foreign legal models must be regarded as the aim of the comparative study of law. Like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use. It remains a science when the jurist does make use of it to borrow the rules or institutions of foreign legal systems. Indeed, it then becomes a science brimming with exciting practical potential. When the legislator borrows from a foreign legal system aided by the sophisticated analysis of a jurist, they earn the respect we accord to enlightened practical activity. Nevertheless, we should not be blind to the splendid results that comparative law conducted as pure research has already achieved: sophisticated analysis of the differences between common law and civil law; detailed reconstructions of ethnic law; profound assessments of the transformation of Afro-Asian law through contact with European law or of the differences between law in capitalist and socialist countries. These breakthroughs have not led to the borrowing of foreign legal models, but they have, nevertheless, increased our knowledge. No one has yet compiled a list of instances in which the borrowing of foreign rules and institutions was made possible by sophisticated comparative research. One fears that if anyone were to do so the result would be simply a blank page. The great receptions—the wheels that keep legal progress rolling—usually occur without prior comparison or on the basis of superficial comparisons for which an elementary knowledge is sufficient. Whatever its potential to assist when such borrowings are made, in the normal course of events, the comparative study of law intervenes at a later stage, analyzing receptions that have already taken place and sometimes have taken place centuries before.

B. The Aims of Comparative Law

Comparative law is like other sciences in that its aim must be the acquisition of knowledge. Like other branches of legal science, it seeks knowledge of law. Comparatives presupposes the exist-

5. An authoritative definition that is completely parallel to the thesis presented in the text is made by Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung, 16-17, I (2nd ed. 1984). "The primary object of comparative law—as in the case of all scientific methods—is knowledge. . . . Comparative law, however, has four more specific practical objectives. . . . comparison provides material for the legislator; it serves as an instrument of interpretation; it plays a role in university instruction; and it is of significance for the supranational unification of law.

6. A group of Italian comparativists—"il circolo di Trento"—begins its manifesto, drawn up in 1987, with the following initial thesis: "Comparative law, understood as a science, necessarily aims at the better understanding of legal data.
ence of a plurality of legal rules and institutions. It studies them in order to establish to what extent they are identical or different.

Because it is concerned with these differences, comparative law is like comparative linguistics or comparative ethnology. In linguistics, comparative methods have proven to be the best means available for highlighting structural regularities that would otherwise pass unobserved. It would be wrong, however, to expect comparative methods to explain the reasons for these regularities. Comparisons do not serve this purpose. Linguistics, for example, has not explained why we say “cow” in English and “boeuf” in French.

Comparative law is like comparative linguistics in another respect as well. Linguistics is independent of political and ethical science and, of course, of sciences that do not deal with linguistic data. The study of linguistics, moreover, has not centered on practical applications. In these respects, comparative law is like cultural anthropology as well.

Those who engage in comparative law should not feel themselves inferior to those who engage in these other comparative sciences and who seem to have garnered everything comparative methods can yield. Nevertheless, those who use comparative methods to study law have yet to realize that comparison must play the same role for them as it does in these other comparative sciences. Comparison follows from a knowledge of the phenomena to be compared. You can only compare what you are acquainted with. What the other comparative sciences realize, and what they can teach us, it that knowledge of these phenomena develops by comparison. Only through comparison do we become aware of certain features of whatever we are studying. Everyone engaged in comparative law knows this from experience. It is precisely when it is speaking of the law of his own country that he must struggle to be understood by his fellow countrymen whose interests are limited to their own system of law and uninfluenced by his more complex experience.

The primary and essential aim of comparative law as a science, then, is better knowledge of legal rules and institutions. That idea,
of course, is neither far fetched nor new. But it is not thought to be an obvious truth anywhere.

The aim of comparative law is to acquire knowledge of the different rules and institutions that are compared. That is, of course, a different aim than to acquire knowledge of a single legal system, be it a foreign system or one's own. Nevertheless, knowledge of single systems can be the fruit of comparative studies and in that respect it is also among the aims of comparative law.

II. THE COMPARABILITY OF DIFFERENT LEGAL SYSTEMS

The Comparability of Socialist and Non-Socialist Legal Systems

When the differences between systems are sufficiently great, can one still compare them? Or does comparison become impossible because there are no suitable yardsticks?  

The answer that comes spontaneously to mind is that legal systems must have a certain amount in common and that this homogeneity makes comparison possible. For half a century, however, jurists have asked whether socialist and non-socialist systems are comparable. Jurists in socialist countries once denied that their law could be compared with bourgeois law. According to them, law is a superstructure arising from the economic base of a society. Since that base is overturned when a capitalist society becomes socialist, law too must be totally overturned and take on a significance opposite to the one it had before the revolution. Indeed, in contrast to the aim of bourgeois law which is the forcible subjection of the exploited classes to the will of the exploiting class, the aim of socialist law is the liberation of workers from all forms of exploitation. Consequently, although sale, inheritance, and compensation for harm may be regulated by identical rules in both socialist and capitalist countries, the antithetical aims of these laws makes the similarities illusory.

Such claims became less insistent after the Second World War. It was recognized that the institutions of both types of society may partially converge. Both may share a public international law and work side by side in the United Nations. Both types of societies have signed international conventions designed to create uniform law which, by definition, must be the same for both. Capitalist countries have introduced measures in their laws to safeguard the interests of the workers. Thus it has been conceded that capitalist and socialist laws can be compared at least as to their surface layer or in

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single areas, even though irreducible differences concerning the end and purpose of law permeate its deepest layer. Consequently, despite their previous diffidence, jurists from socialist countries have been willing to play an active part in international institutes of comparative law such as the I.A.L.S., the International Academy of Comparative Law, and the Faculté Internationale of Strasbourg. In some socialist countries, comparative law is now a subject of research and teaching.

The claim that comparison is impossible has also been questioned by the brothers Trajan and Aurelian Jonașcu and Anita Nascitz in Romania. According to them, certain legal rules can survive a change in the material basis of society because certain legal values such as the disapproval of homicide will outlive such a change. More will be said about this theory when we discuss the borrowing from foreign legal systems.

In fact, however, one can compare the legal systems of countries with different economic bases, not because these systems are more or less similar, but because comparison itself has no fear of differences however large they may be. The very jurists who once denied that capitalist and socialist legal systems were comparable because they are fundamentally diverse were, without realizing it, themselves making a comparison.

Comparison measures the extent of differences be they small or large. It must not concern itself exclusively with the small differences or the large ones. It must not discuss only the common core of different legal systems or only their distinctive elements. Jurists who denied the comparability of capitalist and socialist law were assuming that comparison was impossible simply because these systems appeared dissimilar. Moreover, they underestimated the importance of the so-called "surface layer" of legal systems in the belief that only the infrastructure mattered. In both ways their position lacked scientific detachment.

B. The Comparability of the Legal Systems of Peoples That Have, or Do Not Have, a Written Language

Some people object to including legal anthropology in the comparative study of law. One objection has its source in the positivist conception of law as the creature of the state. Positivists in general see law as the creation of the state because of the way European legal doctrine systematized the reality it was faced with in the nineteenth and twentieth centuries. Marxists see law as the creation of the state because, in their view, law is the tool that the state uses to impose the will of the exploiting class. Rules cannot be law in the same sense when they are found in a stateless, or, indeed, a classless
society. Thus we are either dealing with law and not with anthropology, or with anthropology and not with law.

To deny that people without a written language can have law is the fruit of European ethnocentrism. In Europe, it has been only too convenient to imagine that the law and the state coincide. Yet even if they lack a state, societies without a written language still manage to make their social rules effective. Recently, Marxists themselves have used the idea of a “pre-state” to explain social organization where there are no states or classes (chefries, and so forth). One more step and they will be speaking of “pre-law” and acknowledging that it may be compared with law as such.

Actually, the law of stateless societies has certain basic functional and structural features in common with the law of developed countries. It preserves a certain social order through obedience to rules. Of course, it has its own special features as well. There is no body of jurists to apply the rules; there are close links between operational rules and nonlegal doctrines; there is less a tendency to repetitivity of solutions. In short, the constitutive elements are different from those in, for example, West German or Canadian law. Yet it is still law because it is society’s response to the need for social order. If one prefers to say that the rules of such a society are not law, one must at least admit that such rules belong to a wider category to which law belongs as well. Surely there can be no reason for refusing to compare the rules that belong to these two different subcategories.

Indeed, legal anthropology is an informative experience for one who studies comparative law. It teaches him a whole range of basic truths. To begin with, it will never occur to him that the only point of studying foreign law is to improve domestic law, and that the only point of studying domestic law is to enforce it. Quite the contrary, legal anthropologists once sought to give colonial administrations the information they needed to deculturate colonial peoples and impose European values. Now that the colonial era is a thing of the past, anthropology pretends to be neutral as to the values of societies without written languages. It merely studies rules and institutions, their similarities, differences and influence. The promotion of values is not an essential aim of research and insofar as it implies the deculturation of peoples in the name of European values, it is regarded with suspicion.

Moreover, legal anthropology leads the researcher to make interesting generalizations about the rules of different societies and so shows the importance in comparative law of the similarities and dif-

ferences between legal models. The two keys to the study of these models are evolution and diffusion of rules and institutions, and that is a matter on which any student of comparative law may meditate fruitfully.

Above all, a legal anthropologist is confronted by rules that have not been adequately formulated in the very society that applies them. Consequently, if he wishes to explain his findings, he himself must set about formulating these rules using precise concepts expressed in a suitable terminology. Necessarily, he must use his own categories and expressions which are foreign to those of the societies which he studies. Nevertheless he will draw a picture of a rule as it exists in that society. His experience will effortlessly reveal that human groups regularly abide by certain rules of behavior which they do not formulate in advance. At the same time, he will realize the difference between the pattern of behavior reflected in a rule he can formulate and the mental picture people in the society itself have of the rule. This is the first step to understanding a distinction between an operational rule and the way it is understood. Legal anthropologists take it for granted that the operational rule can deviate from the way it is understood, and yet, in developed countries, such deviations are perceived only by a handful of specialists.

Researchers in developed countries are also accustomed to reducing rules to the pattern: “If all the factual elements of situation A are present, the legal relationship B will arise.” The legal anthropologist will soon realize that identical facts do not always produce identical legal rules, that the results are affected by other elements which may involve magic, social considerations, the respective power of contenders, pedagogical concerns, and so forth.

Finally, most legal anthropology is concerned with formerly colonial countries in which European rules and institutions have been introduced. These rules and institutions are now administered by natives of the countries, and yet the previous legal substrata is still sufficiently alive to impinge upon the enforcement of these rules. It is therefore possible to distinguish and analyze the roles played by the indigenous substratum and the stratum of European origin.

The interest of the jurist should be aroused, in short, wherever he finds rules to study. He may even take an interest in ethology, the study of animal societies. In fact, the study of these societies shows us that a given rule and distribution of power may be imposed coercively upon members of a group without any linguistic formulation.
III. PROBLEMS OF LANGUAGE

A. The Translatability of Legal Terms

Some time ago, Professor Kiralfy of the University of London had the job of writing the entry, "revolving funds," for the International Encyclopedia of Comparative Law. He circulated a questionnaire about the concept to jurists in different countries. It is not mentioned in European codes. While individual rules outside the codes may touch upon the subject, there is no general rule that concerns "revolving funds."

The first seven questions in Kiralfy's questionnaire were:

1. To what extent, if at all, is a revolving fund treated as a thing or other object independently and apart from its component changeable parts?
2. To what extent, if at all, can it be said to be owned?
3. Who owns it—the management or the beneficiaries?
4. Is the ownership regarded as divided between them?
5. Is the notion of ownership discarded and, to use the terminology of the common law, the legal estate vested in the management, whereas the equitable estate or interest is vested in the beneficiaries?
6. If the ownership is exclusively vested in the management, is it full ownership or is its content automatically limited?
7. If the beneficiaries are not owners, is their interest merely personal or does it have the characteristics of property?

Kiralfy thus wants to discover whether the revolving fund is owned, whether the owner is the management or the beneficiaries, whether the legal estate is vested in the management and the equitable estate or interest in beneficiaries, and so forth. These questions presuppose legal institutions that do not exist in Continental Europe. They are formulated by using conceptual opposites, such as law and equity, and hence legal estate and equitable estate, which have no continental European equivalent. For an Italian, the difficulty of Kiralfy's questionnaire is not so much one of adapting the question to Continental European categories. Thus we encounter one of the main problems of comparative law, that of translating the linguistic expressions that denote legal concepts.

It must be admitted that some expressions are untranslatable. The question we must ask, however, is, “Are some expressions translatable?” Unless the answer is a flat denial, we must ask under what conditions an expression is translatable and when any given translation can be regarded as correct.

B. The Aim of Translation

No people invents all of the legal rules and institutions it actually employs, and some principally use rules and institutions developed elsewhere. The reception of these rules and institutions is necessarily accompanied by translation.

In Italy we have seen, in successive waves, translations from French, from German, and most recently, and apart from any immediate reception, from English, from Russian, and from other languages. The reception of rules and institutions first from France and later from Germany has forced Italians to develop legal categories that are supposed to be the same as those developed in these countries. Thus Italian legal vocabulary has twice bent to the need to do so. The word “nullità” once meant “invalidity” because of the parallel with the French “nullité.” More recently it has been used to mean that a transaction is ab initio void because of the parallel with the German “Nichtigkeit.” Delitto civile and fatto illecito translate the French words delite and fait illicite; atto illecito translates the German unerlaubte Handlung. Dazione in pagamento parallels the French dation en paiement and comes directly from the Latin datio in solutum, whereas prestazione in luogo d'adempimento is used for the German Leistung an Erfüllungsstatt. Thus the Italian language combines two different legal languages, although many today consider the Frenchified language improper.

It is not rare for a language to combine more than one legal language. The French language, for example, combines the legal language of France, of Quebec, and of Switzerland. The legal language of Quebec is not identical to that of France, especially in cases in which terms were chosen by the legislator itself. The Quebec legislator decided to call trust fiducie (art. 981 ff. of the Code Civil du Bas Canada; art. 600 ff. of the draft of the Code Civil du Quebec). Consequently fiducie means trust in the legal language of Quebec. The problem is linguistic, not legal.

Possession and possessio are French and Italian expressions used by the French and Italians, respectively, to indicate de facto power over a thing with animus domini. Yet the same French and Italian expressions are used by the Swiss to mean de facto power over a thing with animus domini. The German word Besitz is used by the Germans and Swiss to mean de facto power over the thing generally
but by the Austrians to mean power with animus domini (art. 2228 ff. French Civil Code; ABGB, § 309 §§ 854 ff. German Civil Code; art. 919 Swiss Civil Code; Art. 1140 Italian Civil Code). From a logical point of view, nothing prevents us from concluding that there exists more than one French language (one for France, one for Switzerland, one for Congo, and one for Senegal), more than one Italian language (one Frenchified, one Germanized, one for the Ticino Canton), and more than one German language (one Federal-Imperial, one Democratic).

Not only can two codes in different countries use the same words with different meanings, but two codes in the same country may give different meanings to the same words, as indeed, may two articles of the same code, two authors of doctrinal works, or two judges. Words do not, in fact, have absolute permanent meanings. Every speaker, whenever he uses an expression endows it with an unrepeatable specific meaning.

Because of these considerations, we are continually confronted with problems of translation. When we in Italy speak of Italian law from 1865 to 1942—the period, that is, between our first and second Civil Codes, must we use the terminology of the era, or should we replace it with our modern terminology? What is to be done if a certain terminology was prevalent once, but not exclusive, and today a different terminology is prevalent, but not exclusive? How can we express precisely the similarities and dissimilarities? In large part, we simply learn from practice. We consult Italian works of the last century without translating them into modern Italian. The same can be said of the Parisian jurist who consults the literature of Quebec or the jurist in Stuttgart who consults that of Leipzig.

C. Problems of Translation Arising from Law

UNIDROIT is an international institute based in Rome founded to promote the unification of private law. In 1974, after a successful initiative in the field of international sale of goods, it began editing an international commercial code. The text was to be bilingual, French and English. Three of the most renowned comparativists were chosen to draft the initial chapters: René David, Tudor Popescu and Clive Schmitthoff.

Article 2 of the draft dealt with “contract” and contrat, which are not the same thing. A deed transferring property or creating a

12. It was an initiative of UNIDROIT to reach the agreement, known was LUVI and LUFCVI (uniform law on international sale, and uniform law on the formation of international sales contracts, the Hague, 1964), later revised in the Convention of Vienna in 1980.
mortgage and an agreement for the management of an estate by a nominee are “contrats” in France but are not “contracts” in England or the United States where they are regarded as “conveyances” or “trusts.”

These were problems that could not be resolved by translation alone. The English language has no term for contrat, and the French language has no term for “contract.” To resolve the problem, one needs a generic term to embrace both, a term that means “an agreement the subject matter of which concerns legal relations.” In that event, however, the meaning of the generic term has to be clarified. We have to decide, in other words, whether the proposition “conveyance is not a contract” expresses a linguistic or a legal truth. In the former case, those competent to modify the meaning of words would be the speakers of the language or a legislator who decided to give words a new meaning and made his decision explicit.

Although the difference between “contract” and contrat arises from a difference between concepts, fortunately, the situation is less serious when legal rules differ. “Obligation de donner” and “obligation to transfer property” are interchangeable linguistic expressions, although, in France, the “obligation de donner” produces an automatic transfer of property (Art. 1138 French Civil Code), whereas, in England, an “obligation to transfer property” merely creates an “equitable interest” in favor of the transferee. The legal rules are different, but the categories and the linguistic terms for them correspond.

These examples show that even when terms correspond and are translatable—like the terms death, mort and Tod—there may not be the same operative rules. Strange as it sounds, the opposite may also be true: the operative rules of the two systems may be more similar than the vocabularies in which they are expressed.

Translation, then, requires the work of the jurist. To translate, one must establish the meaning of the phrase to be translated and find the right phrase to express this meaning in the language of the

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13. In the same way, donation and contrats which transfer property are contrats, whereas gift and bailment are not contracts. This distinction is irrelevant when we are dealing with a commercial Code: donation is not a commercial transaction, and bailment entails a commercial act only when it is onerous; in the latter case, it is a “bargain” and may, therefore, be classified in the category of contract.

14. These three terms were certainly more fungible in the past than they are today. Legal death may be made to coincide with the ceasing to function of heart or brain and this possibility of choice might lead to diversifications in the meaning of the terms indicated above.

15. Tom promises to transfer to Harry the ownership of a movable property, and then, despite the nullity of the promise, and albeit aware of such nullity, he delivers it in execution. In England, France and Germany, ownership, in this case, is conveyed. Yet the rule is expressed with highly diverse, and partially untranslatable formulations.
translation. Both the first and the second of these operations are
the work of the jurist, who is the only person competent to decide
whether two ideas taken from different legal systems correspond to
each other and whether a difference in rules is tantamount to a dif-
fERENCE in concepts. The translator, however, must take account of
other problems as well which cannot be reduced to finding correla-
tions between words.

D. Problems of Translation Arising from Language

The legal rule preexists the linguistic formula we use to de-
scribe it. In the case of customary law this truth is evident. The
rule is suitably formulated only after it is studied by a class of pro-
fessional jurists.

The translator, however, appears to be concerned only with the
expression he has to translate. That phrase and the phrase he uses
in his translation must correspond to a common concept.

This correspondence may be either facilitated or hampered by
the characteristic features of the two languages with which the
translator is working. Nineteenth century German legal language
was easy to translate. The Pandectist School had given it a rich set
of well coordinated analytical concepts approaching the ideal in
which each concept corresponds to one word and each word to one
concept. Difficulties arose when the language that it was translated
into lacked corresponding words. How was it—and is it—possible to
translate into French such expressions as rechtswirksames
Verhalten, Rechtshandlung, geschäftsähnliche Handlung, Willen-
geschäft, Willenserklärung, or Rechtsgeschäft? The only expres-
sions the French possess are acte juridique (corresponding to
rechtshandlung) and déclaration de volonté (corresponding to Will-
erklärung). Rechtswirksames Verhalten might be translated
with fait de l'homme, but the other terms, above all Rechtsgeschäft,
have no corresponding term in French. Nevertheless, the problems
are not insoluble. The translator can, for example, work out the
precise meaning of a German term and translate it with a complex
expression formed by more than one word.

The real difficulties of translation arise when the relationship
between word and concept is not identical in different legal lan-
guages. Word and concept may be related in different ways and any
theory of legal translation must consider them.

An important example is the use of synedoeche, a linguistic form
in which the speaker refers to a part to indicate the whole. A
Frenchman may say "touner ses épaules" (literally, "to turn one's
shoulders") when he means "to turn one's body." An Englishman
may translate this expression as "to turn one's back" since English
allows this specific synecdoche. But is the same operation possible whenever we encounter synecdoche?

The problem is especially interesting to jurists because an important legal language, French, uses synecdoche more than any other.\textsuperscript{16} The most characteristic feature of a case is stated instead of all the features that matter. We can see this tendency—of which the French themselves are not particularly aware—in the definitions the French jurists give of important legal terms. For example, contract is defined by mentioning the will without mentioning the need for the will to be declared or the requirement that there be a \textit{cause} (roughly speaking, a good reason for the parties to declare their will and for the law to respect it.) Similarly, tort is defined by mentioning fault and harm, but omitting the requirement that the tortfeasor’s conduct be not only blameworthy but contrary to law. Although such definitions, when initially formulated, are instances of synecdoche, it can then happen that the letter of the definition is followed, that is, an element left out of the definition is treated as irrelevant in resolving an actual case—and so the synecdoche is eliminated. The translator of a French text must be on the lookout for such figures of speech. He must not translate them in a way that suggests their literal meaning is the correct one.

Synecdoche and metonymy are only examples of a more general phenomenon. For a variety of reasons, the way rules are stated may be different than the way they are enforced. Yet when, because of a rhetorical figure, there is a difference between the rule as stated and the idea that the speaker wished to express, an attentive translator cannot ignore it.

E. \textit{Beyond Definition}

In legal language, as in scientific language in general, categories should be defined by all their constituent features, and words should correspond to categories. It may be surprising, then, to find that certain legal terms also have connotations that are favorable or unfavorable, implying like or dislike, or that the choice of a word is influenced by the historical origin of a legal rule, or that the use of a word implies a judgment on an institution.

The fact is that the language of law is also the language of political thought in which value judgments are legitimate. The word “saving” has a favorable connotation, unlike the French word “capitalisation.” It would therefore be wrong to translate \textit{capitalisation} as “saving” even though the extension of the two concepts is the same. Even the terminology of the legislator may reflect emo-

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tion, fashion, phobia or mere theatrical flare. Towards the end of the nineteenth century, adherents of German “legal socialism” attacked the terminology used in the draft of the civil code on the grounds that it was too abstract, too removed from popular language, and hence incomprehensible to the masses. When the East German Civil Code was drafted in 1975,\(^{17}\) the drafters replaced some German legal words with neologisms. They spoke of *Betrieb* instead of *Unternehmen*, *Gemeinschaft* instead of *Gesellschaft*, *Andere* instead of *Dritte*, and so forth. Since the English word “enterprise” and the Russian word *predpriiatie* have always been used to translate *Unternehmen*, one wonders if they can still be used to translate *Betrieb*.

When legal rules or institutions are imitated, sometimes words are borrowed as well. In such cases, the terms convey information about the borrowing that has occurred. An example is the diffusion in socialist countries of words taken from the language of revolutionary Russia: *khozraschet, kokhozl, prezidium*, and so forth.

Again, within a language, certain expressions seem to be connected. “Autonomy of the contracting parties” and “freedom of contract” are synonymous but the second phrase suggests a connection with freedom in its more general sense. French law suggests a relationship between “copyright” and “patent” by terming them *propriété littérale* and *propriété industrielle*.\(^{18}\)

\section*{F. Abstract Notions and Their Concrete Expression}

An abstract idea finds concrete expression in a given legal language much as, in biology, a genotype or distinctive set of genes is expressed in the phenotype or outward form of a plant or animal. The jurist of an individual country studies the phenotype. The comparativist must study the genotype of which it is the expression.

For example, even within the French, German and Italian languages, the words *possession*, *Besitz* and *possesso* express different abstract concepts. Sometimes these words are used to mean a *de facto* power over a thing coupled with *animus domini*. They are then contrasted with the terms *detention*, *Innehabung* and *detenzione* which mean immediate *de facto* power with or without *animus domini*. *Possession*, *Besitz* and *possesso*, nevertheless, are sometimes used to mean *de facto* power with or without *animus domini*. As this shows, within each single language we find a lin-


\(^{18}\) Art. 22 of the Treaty of Rome instituting the European Economic Community is aimed to exclude any effect of the Treaty itself upon the system of ownership. In French, the term, “propriéte,” would be compatible with an extensive interpretation.
guistic divergence. The reason is that the Germans and Swiss broke with Roman law by granting protection to anyone who had *de facto* power regardless of his *animus*. By so doing they have decided a matter of law. When they did so they did not use the words *detention*, *Innehabung* or *detenzione* to describe such a person, for these terms implied a lesser degree of protection than they wished to afford. The person with *possession*, *Besitz* or *possesso* had traditionally been protected even against interferences with his use of a thing that did not oust his possession, for example, against what common lawyers call a nuisance. Therefore they used these terms to indicate a person who is to receive such protection whether or not he has *animus domini*. In 1975, however, a French law on possessory actions called this linguistic usage into question by granting a remedy against nuisance (*complaints*) to the *détenter*. Yet the protection afforded the *détenter* is still not as great as that given the *possesseur* for the former cannot act against someone who has *possession* through his own efforts.

To unravel problems such as these the comparativist must go back to the genotype, to the abstract concept that the language of a legal system expresses. He will encounter similar and even more complex problems from the analysis of such expressions as *contrat*, *contract*, *Vertrag*, and *contratto*, or *propriété* and ownership, or *délit civil* and tort.

**G. Nouns and Categories**

Thus far we have considered nouns that represent abstract categories, such as *contract*, will and damages. Nevertheless, the translator may also encounter words which, although they seem to indicate such categories, have acquired a meaning closely linked to the environment in which they are used. In extreme cases such words become like proper nouns which refer to only one person. Such words cannot be translated. For example, to indicate the King of England, a Frenchman says *roi* and a German says *König*, but to speak of the former sovereigns of Russia both the French and Germans say *tsar* even if they are talking about Russian monarchs who adopted the official title of *imperator*. Honorary titles often use words that cannot be explained by any conceptual distinction: words such as *conte* and *marchese*, *cavaliere* and *commendatore*, *licencé maître*, and *docteur*. Terms such as these have taken root in


20. They may, nonetheless, lead to problems of translation. The French and Italians call the Polish state created in the Napoleonic era the Grand Duchy of War-
many languages because of their origins in medieval Latin or their historical prestige.

In such cases we see a phenomenon one can call legal nominalism: the noun prevails over the meaning. One might say, to speak very loosely, that the noun no longer indicates an idea but rather another noun. There are many examples. No one would translate soviet (in the sense of a political assembly) with the word council, although the meanings of the two words correspond.

In some instances legal nominalism is prescribed by political authority. Such instances are odd because, while the creation of legal rules is the prerogative of those in authority, the definition of concepts is usually the prerogative of scholars. Nevertheless, however much scholars may protest, they cannot ignore the decision that those in authority sometimes make about the use of a word. Indeed, the translator must not ignore the fact that this use results from a political decision. For example, in the Soviet Union a state enterprise possesses means of production which it can use for its own benefit. Western jurists would therefore describe the enterprise as the owner or, in French, the propriétaire of these means of production. Nevertheless, in conformity with the dictates of political authority, the Soviet jurist Venediktov\(^{21}\) declared that the state owns these means of production, a declaration repeated in the civil codes enacted in the USSR since the appearance of his work.\(^{22}\) One who translates the assertion in these codes that the state has sobstvennost' of the means of production cannot use a word that genuinely captures the meaning. He must translate sobstvennost' as "ownership."

**H. Translation and Extralinguistic Data**

Complete permanent correspondence between two expressions belonging to two different languages can be created only artificially. Leaving aside entirely artificial language, the meaning of a word is artificial if those in authority have declared that a word shall have a certain meaning or that two words shall have the same meaning. A similar decision could be made by people who have a purely moral authority: for example, the scholars in a country might decide that such and such an expression will translate some foreign phrase.

Multilingual texts are, of course, one common instance of this phenomenon. If a bilingual legislator in Quebec decides to call a

saw, but the Poles call it Księstwo Warszawskie (or Duchy or Principate of Warsaw), and are clearly upset by the linguistic choice of the Latin tongues.

\(^{21}\) Anatoliı́ Venediktov, Gosudarstvennaja sotsialisticheskaja sobstvennost' (1948).

\(^{22}\) Ogz, art. 21, GK RSFSR, art. 94.
given institution both *fiducie* and trust, then *fiducie* means trust in the language of Quebec. Another common instance occurs with legal reception as when an Arab country borrows the rules of the French Civil Code,23 Germany adopts Roman law, or the Russians adopt the conceptual system developed by German jurists.

In the case of a legal reception, the translator has an advantage. The foreign expression will be translated by a neologism which is taken to correspond to a notion that is well-known to those acquainted with the legal system that is being imitated. There will always be someone ready to explain a phrase the jurists of the country doing the imitating, and hence translation from one language to the other will be easy. For example, when the Italians began to talk about *negozi giuridico*, the definition of this term was clear since everyone knew the term was a translation of the German *Rechtsgesäft*. The case is slightly more complex when those who speak two different languages decide independently on words in their own languages to stand for an idea expressed by a word in a third language. For example, the French use the word *louage* and the Germans use the word *Miet* to represent the idea of the Latin *locatio*.

I. *Homologation*

Translations imposed by the legislator or adopted during a reception are artificial. In contrast, normal translation simply tries to present the ideas expressed in the original language without change in the language of the translation.

When a scholar translates he cannot use a word without questioning every aspect of its definition. If he cannot refer to a definition provided explicitly or implicitly by the legislator or the case law, he must decide how to guarantee that the word he adopts in the translation corresponds to that in the original. He may adopt either of two approaches.

First, he may prefer not to translate. At a macro comparative level, such a preference is common. The anthropologist hardly ever translates. Normally one does not translate *parquet*, trustee, *Dienstbarkeit*, *khozraschet*, *kokholz*, *tsarina*, and so forth. Alternatively he may pick the closest term available to him in the language he is using, identifying the differences between it and the term in the original language, and then taking care that these differences are irrelevant from the standpoint of the problem he is addressing. Although a thriller may translate *procureur de la République* as

23. It may be possible to use a data computerization system to draw up a body of all the Arabic expressions used to express legal concepts with a European matrix. See here Beck Peccoz, “Verso il riordinamento del lessicario giuridico arabo. Il progetto iura islamica informatica,” *Riv. dir. civ.* 77 (1985).
"district attorney" and exécuteur testamentaire as executor, and servitude as legal estate, a legal translation would avoid doing so. Terms such as président de la République, chose mobilière, parlement, lichmaia sobstvennost' may be translated, for example, as president of the republic, moveable property, parliament, and ownership of the citizen. Differences in connotation will be regarded as qualities that do not delimit the concept itself.

Second, he may create a special neologism in his own language. The romance languages and German have done so to have terms corresponding to the Latin. Russian has done the same with the French and, above all, the German legal language.

Whether the comparative legal scholar is translating or not, he faces problems like those of a translator when he tries to get at a notion in a conceptual system extraneous to his own. He needs a standard to measure differences and correspondences to the concepts in his own system, and he must seek them in the operational rules of the two systems. If, for example, a French scholar wishes to study "trespass to land," he must reduce "trespass" to more elementary concepts. Let us suppose that, in doing so, he identifies concepts of intention, immoveable property, entry, violation of the property rights of another without the owner's permission. He may subsequently discover that the idea of intention he identified is different than his own in the sense that it requires something more or less than the French concept. Perhaps he will also find out that acting in opposition to the will of an owner has a different meaning than the one usual in French. The problem thus arises of establishing correspondences among the different categories. This reduction of the categories of one legal system to the categories of another may be termed "homologation."

The complexity of the problems involved in legal translation makes the carelessness with which they are approached seem incredible. The translation of important contracts is often entrusted to people who have a solely literary knowledge of one of the two languages used. Sometimes a choice of law clause refers to a legal system with a language that does not correspond to the one in which the contract is written. Or an arbitration clause may permit an arbitrator to be chosen from a third country, and the same word may therefore have three different meanings for three arbitrators.

24. What if this term is missing? In this case, it is better to explain than translate. The future belongs to dictionaries which explain foreign terms in the language of the reader, without translating them. This is what Francesco De Franchis has done with his Anglo-Italian legal dictionary.

25. For example, the varying degree of power enjoyed by Président and President. The head of state who inherits a title and conserves it for life would, however, represent a different concept.
IV. In Search of "Legal Formants"

A. What is a "Legal Rule"?

To speak of comparison, one must have objects to compare. If one asks what students of comparative law compare, the most obvious answer would be, "the rules of different legal systems." What, then, is meant by a "legal rule"?

It is misleading to speak of the legal rule in force in a given country as though there were only one such rule. To illustrate, consider the regulation of collective bargaining agreements in Italy. Article 39 of the Constitution provides that "duly registered trade unions... may... enter into collective labor agreements which are binding upon all..." The constitutional rule, then, is that the unions can enter into binding agreements once they register. Italian legislation, however, has never provided a way in which the unions can register. The statutory or legislative rule, then, is that registration is not possible and collective bargaining agreements therefore are not binding. Nevertheless, Italian judges have consistently enforced the agreements that unions enter into. Thus the judicial rule or case law provides that such agreements are binding. There is a lack of harmony, then, between the constitutional rule, the statutory rule, and the judicial rule. A common lawyer, accustomed to considering judicial precedent as a main source of law, will therefore find it curious that in Italy judicial decisions are not supposed to be a source of law at all.

If, then, we are to compare the rules of the Italian legal system with those of the English system, which rule are we to compare? The constitutional rule, the statutory rule or the judicial rule? In fact, it is wrong to believe that the first step toward comparison is to identify "the legal rule" of the countries to be compared. That is the typical view of an inexperienced jurist. It is a misleading simplification which the student of comparative law has a duty to criticize.

Instead of speaking of "the legal rule" of a country, we must speak instead of the rules of constitutions, legislatures, courts, and, indeed, of the scholars who formulate legal doctrine. The reason jurists often fail to do so is that their thought is dominated by a fundamental idea: that in a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, have an identical content and are therefore the same.

Within a given legal system, the jurists assume this unity. Their main goal is to discover "the legal rule" of their system.26 For a civil

26. Looking at the matter from a philosophical point of view, a reader might
law jurist, this single rule is supposedly contained in the code. Supposedly, the works of scholars are consulted because they faithfully describe the rule in the code, and decisions of judges are instances in which this rule has been enforced. For a common lawyer, this single rule supposedly is contained in a statute, or when none has been enacted, in the decisions of courts. The works of scholars are consulted because they describe the statute or the judicial decisions.

Nevertheless, civil law and common law jurists all consult statutes and judicial decisions and the opinions of scholars in search of this single rule. Thus, at the outset of their search, they have, not a single rule, but a variety of legal material. The civil lawyer may say that this rule comes, in principle, from the code; the common lawyer may say it comes from a particular statute or from judicial decisions; and yet they both will learn their law initially from the books of legal scholars. Students in civil and common law countries turn to books, manuals, hornbooks or carefully edited casebooks, or at least to the opinions of their professors, to learn, respectively, about the code, and about their case law. Thus, whatever jurists or students supposed to be true as to the ultimate source of a legal rule, they will begin with the work of scholars and pass to a variety of other legal sources. Moreover, empirically, they know that in some cases the case law does not correspond to the opinion of scholars or legislation to the case law. For example, an antiquated or unreasonable statute may have been replaced by a more suitable interpretation developed by judges or by professors. Thus even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges—elements that he keeps separate in his own thinking. In this essay, we will call them, borrowing from phonetics, the "legal formants." The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that there is, in his system, only a single rule. Several interpretations will be possible and logic alone will not show that one is correct and another false.

raise against this distinction an objection that is rather awkward for us: in what sense can we speak of a "meaning of the law, of doctrinal formulas, etc.? If it is true that each interpretation of the law modifies it, it is equally true that it is anterior to every interpretation, and independent from every interpretation. From a more empiric perspective, a suitable answer to this objection does exist: in this case, it is necessary to understand the expression, "meaning of the law," in the sense, "empiric literal meaning in conformity with the thought of the writer of the text." If the literal meaning and the thought of the writer are in conflict, it is better to acknowledge that we have before us two distinct "legal formants."
Within a given legal system with multiple "legal formants" there is no guarantee that they will be in harmony rather than in conflict.

B. Must There Be a Single Rule?

In civil law systems, and in common law systems where there is a relevant statute, there is a tendency to say that the will of the legislature creates a legal rule which scholarship interprets and judges enforce. In common law countries when there is no relevant statute, there is a similar tendency to think that a single rule is implicit in the case law, a rule that scholars discover and judges apply in new cases. Thus, in principle, the various rules that legislators, scholars, and judges propound or apply are supposed to be identical. Lack of identity is the fault of the interpreter.

One who studies comparative law cannot think this way. He cannot reject foreign solutions to legal problems because they arise from "wrong interpretations." At the same time, by comparing several systems, he can see that the "legal formants" within a single system may differ.

Consider, for example, the ways in which Italian, French, and Belgian law deal with a case in which a person who believes himself to be heir disposes of property he has inherited by transaction to a third party in good faith and for a valuable consideration. Is the transaction effective or not? In Italy the transaction is effective according to both the civil code (art. 534, par. 2) and the case law. In Belgium the code says nothing and consequently the question must be decided by the general rules governing property. Since, in general, property can only be transferred by its owner, the transaction is ineffective. In France the texts of the code are the same as in Belgium, but the transaction is considered to be effective because various ideas are invoked to justify a departure from the ordinary rules of property: for example, the idea that the heir has a tacit agency.

Can one say that Belgian law is the same as the Italian? Of course not: it is the exact opposite. Can one say that Belgian law is identical to the French? Of course not: the result in practice is the exact opposite. Thus to identify differences and similarities among legal systems, we must take into account both legislation and case law.

We should not think, however, that we understand a legal system when we know only how courts have actually resolved cases. Knowledge of a legal system entails knowledge of factors present today which determine how cases will be resolved in the near future. We must know not only how courts have acted but consider the influences to which judges are subject. Such influences may have a
variety of origins. For example, they may arise because scholars have given wide support to a doctrinal innovation. They may concern the judge's background. A judge appointed from an academic position will tend to put more stress on scholarly opinion than a judge who has always practiced law. The text of a statute is one of these influences even when previous judicial decisions have disregarded it. There is always the possibility that courts will return to the letter of the law.

C. The Consistency of "Legal Formants"

Suppose we were to study how two different legal systems resolved a problem, for example, the problem of the liability of the manufacturer of defective products for damage caused to someone other than the direct purchaser. Suppose we found that the statutes of the two legal systems were the same. We might then find either that the judges of both systems applied the same rules or that they applied different ones. If they applied the same rules, the reason might be that these rules actually were consequences of the statutes. If, however, they applied different rules, it would be clear that the statutes alone were not responsible for the rules followed by the judges. We could then ask what, if not the statute, might be influencing the judges. A comparative method can thus provide a check on the claim of jurists within a legal system that their method rests purely on logic and deduction. Indeed, the comparative method can show us just how relative is the value of many discussions about the theory of the juridical person, the principle of the autonomy of the will, the nature of ownership, and so forth. The comparative method may thus be a threat to any process of legal reasoning which does not employ comparison. The threat is most direct to those "scientific" methods of legal reasoning that do not measure themselves against practice, but formulate definitions that are supported solely by their consistency with other definitions. In destroying the conclusions reached by these methods, comparison may provide an alternative method that is more solid.

D. Comparison: An Historical Science

Comparison recognizes that the "legal formants" within a system are not always uniform and therefore contradiction is possible. The principle of non-contradiction, the fetish of municipal lawyers, loses all value in an historical perspective, and the comparative perspective is historical par excellence.27 From this perspective, any

27. We have seen that the jurist "of a single system" sets these asymmetries in relation to the possible errors of the interpreter. But the opposition between true interpretation and false interpretation is a luxury which the comparativist cannot af-
model is true if it has actually existed. Any model that is \textit{de facto} true has as much legitimacy as any other model that is \textit{de facto} just as true. If we consider the French Civil Code in historical perspective, we find that the generation of Louis Philippe gave it one interpretation while the generation of Clemenceau gave it another. While every interpreter, of course, will claim that all previous interpretations are wrong, it would be absurd for a student of comparative law to become mixed up in these generational polemics. From his perspective, all the alternative solutions are true and real with the possible exception of that contained in an overly nervous student’s examination answer.

The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories. The dogmatic method offers

\begin{itemize}
\item Forth. The jurist of a single system fills the gap between the idea (a law which entails a single exact interpretation) and the fact (the presence of numerous interpretations) by making the choice that his personal preferences make him consider to be exact. Yet the comparativist, who is never a good judge on foreign ground, refuses to consecrate this or that interpretation as exact, and has no faith in any criterion that is not objective; indeed he is fully aware that any interpretation made by a jurist is a real interpretation. “Verum ipsum factum” is the criterion that inspires the comparativist in his analysis. As he has no preference for one legal system rather than another, so the comparativist has no preference for one or another “legal formants” of a given system, nor for one or another feature which he finds within a given “legal formant.” In the Trento manifesto (see above, to n. 2) figures a thesis (the fourth) which is expressed as follows: “Comparative knowledge of legal systems has the specific merit of checking the coherence of the various elements present in each system after having identified and understood these elements. In particular, it checks whether the unrationalized rules present in each system are compatible with the theoretical propositions elaborated to make the operational rules intelligible.”
\end{itemize}

28. A large number of errors might have been avoided if, in the study of French property law in the nineteenth century, a privileged position had not been allotted to the declamations of writers and the general definition we find in the \textit{Code civil}, and if the importance of the specific rules contained in the code and in special statutes and regulations had been acknowledged. On this see, extensively, Antonio Gambaro, \textit{lus sedificandi e nozione civilistica della propriet\`a} (1975). In the Trento manifesto (see above, 2 to n. 2) two theses (the second and the fifth) are expressed as follows: second thesis:

\begin{itemize}
\item There is no comparative science without measurement of the differences and similarities found among different legal systems. Mere cultural excursions or parallel exposition of fields is not comparative science.
\end{itemize}

fifth thesis:

\begin{itemize}
\item “Understanding a legal system is not a monopoly of the jurists who belong to that system. On the contrary, the jurist belonging to a given system, though, on the one hand, advantaged by an abundance of information, is, on the other hand, disadvantaged more than any other jurist by the assumption that the theoretical formulations present in his system are completely coherent with the operational rules of that system.”
\end{itemize}
abstract definitions.29

V. "LEGAL FORMANTS": THEIR STRUCTURE AND RELATIONSHIP

A. The Significance of Case Law

In civil law countries, the use of the comparative method has gone hand in hand with greater attention to case law. Comparative law is an historical science concerned with what is real. It conforms to the criteria of Gian Battista Vico: verum ipsum factum. It is therefore natural for the comparativist to direct his attention toward judicial decisions. Especially in Italy, use of comparative methods has led to a reassessment of the role of case law. It has lead to the recognition of some operational rules not contained in the Civil Code but nevertheless actually followed by the courts.

This concern with case law, however, is to be found among those who use any non-dogmatic methodology. The exegetical, historical, rational, and sociological methods, as well as legal realism, all look to reality and hence appreciate the importance of judicial decisions. The literature concerning the role of case law has developed, especially in Italy, in a way that would have been unthinkable fifty years ago. It would be unjust to deny that comparative research has favored this phenomenon. It’s senseless to reduce it to the product of comparative research.

Conversely, it would be a mistake to reduce the comparative method to the study of cases. The student of comparative law is perfectly aware that a judicial decision has a different significance in countries where the law is based on precedent than in those where it is based on statute.

An example of what comparative methods may uncover through attention to cases are the results Gino Gorla achieved in his study of contract.30 He compared the role of consideration in English law with that of cause or cause in French and Italian law. Cause means, roughly speaking, a good reason for the parties to enter into a contract and for the law to enforce it. According to both the French and Italian Codes and scholarly doctrine, a contract must have a cause to be enforced. Gorla showed, however, that French and Italian case law does not allow the enforceability of a contract to turn

29. The teaching comes from Gino Gorla.
   The third thesis of the Trento manifesto (see above) states as follows:
   "Comparison turns its attention to various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparison is an historical science.

on the presence or absence of a cause but on the presence or absence of a non-liberal cause. The courts treat the absence of cause and the presence of a liberal cause in the same way. It is interesting that this result is not expressed in this way even by Gorla himself.

The significance of the presence or absence of a liberal cause, which Gorla discovered to be implicit in the French and Italian legal systems, is explicit in the Anglo-American system, a fact that certainly facilitated Gorla's discovery. As is often the case, the model in question is explicit in one system, and present, but implicit in another.

Gorla's work indicates the importance of distinguishing between the rule announced by the court and the rule it actually applied, or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, that is, the facts on which the court arrives at a certain result.

B. The Development of the Factual Approach: The Studies at Cornell

In civil law countries, law is traditionally explained by saying that the legislature enacts a statute, scholars discover its meaning, and judges, assisted by their conclusions, give the statute a precise application through their decisions. We have seen the unrealism of this view. Can we therefore conclude that this view is wholly fallacious? Can we say that a statute or the reasons given by a court are legal flowers without stem or root, irrelevant to the actual law in force? When the question is asked in that way, it is clear that the answer is "no."

The statutes are not the entire law. The definitions of legal doctrines by scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by courts. In order to see the entire law, it is necessary to find a suitable place for statute, definition, reason, holding, and so forth. More precisely, it is necessary to recognize all the "legal formants" of the system and to identify the scope proper to each. One must avoid the optical illusion caused by magnifying the more general statements of law, the large definitions, and neglecting the specific operational rules that courts actually follow. By the same token, one must avoid the error of perspective that makes the more abstract legal conclusions invisible.

The need to recognize the diversity of the "legal formants" and their proper roles is illustrated by the Cornell studies on the formation of contract, a collective comparative research project directed by Rudolf Schlesinger which has left in its wake a monumental
mass of data. The preliminary problem that Schlesinger had to resolve was how to obtain comparable answers to the questions he wished to ask about different legal systems. The answers had to refer to identical questions interpreted identically by all those replying. Moreover, each answer had to be self-sufficient. It was impossible to use answers which needed further interpretation and hence the answer had to be on a par with the most detailed rules.

Professor Schlesinger therefore had to formulate each question to take account of any relevant circumstances in any one of the legal systems analyzed to be sure that this circumstance would be considered in the analysis of every other system compared. Consequently, generic rules, identically formulated but capable of producing different results, were not regarded as the same.

Another and more important objective was also achieved. Often, the circumstances that operate explicitly and officially in one system are officially ignored and considered to be irrelevant in another and yet, in that other system, they operate secretly, slipping silently in between the formulation of the rule and its application by the courts. The special feature of the work done at Cornell was it made jurists think explicitly about the circumstances that matter by forcing them to answer identically formulated questions.

The solution that Schlesinger adopted to these problems constitutes the most significant methodological feature of the whole survey. The problem was to formulate a question in a uniform way for an Indian, a Spaniard, a Pole, a German, a Norwegian, and so forth. In order to do so, one could not use abstract categories that might not be universally applicable: for example, offer, acceptance, and contract. Representatives from each national legal system would


In 1957 a three-day conference planned comparative research on the formation of contracts (offer, acceptance, revocation of the offer: with appendices on *de facto* contracts and conventional forms). In the following three years the legal systems to be analyzed and reporters were carefully chosen: most important, questionnaires were elaborated. The questions were formulated and constructed in such a way as to have a plausible, complete meaning for jurists of different families: later extremely detailed memoranda were composed to which single reporters had to comply in researching the data of the various systems: finally, the single collaborators produced written (national) reports.

The years in which work was most intense were those between 1960 and 1964. Three times reporters spent together at Cornell University periods varying from two to four months. In these stays, the various national reports were the subject of oral discussion, at the end of which each reporter produced a supplement to his previous contribution. General reports were then prepared, designed to give a picture of the agreements. Albeit preceded by the compilation of drafts by single reporters, these general reports are a collective work. Between 1964 and 1968 the national reports were further revised (to make their contents more consistent with the general reports), and an introduction was written. Finally, the records of proceedings were printed. The result was a work of 1,700 pages.
have seen in these abstract terms the ideas of their own system, or worse yet, their own doctrinal school. To obtain consistency, each question was therefore formulated by presenting a case. The cases were taken not only from Anglo-American countries but from Germanic countries as well. French and Italian cases were not used because the reports of these cases are often not sufficiently clear as to the facts.

This factual approach thus asked respondents about the results that would be reached in particular cases, not about a doctrinal system. To the extent the results of these cases were similar, they may have contained an implicit system. Yet the factual approach is the opposite of a method that concentrates on system.

The work at Cornell met not only with approval but with criticism, especially by Dennis Tallon. He charged that because Schlesinger came from a country, the United States, with a legal system based on precedent, he had, in effect, treated civil law systems as systems based on case law. Schlesinger, however, did not ask jurists from civil law countries to forget that their own law is generally guided by more systematic work of scholars. He asked them only to apply their law to certain particular problems. The informant was free to answer the question by consulting an article of the civil code or a statute or the scholarly literature. He could refer to these sources in explaining his answer.32

In our opinion, the work at Cornell was an important step in the history of the comparative method and, perhaps, of the legal method in general. The consistency presumed to exist among the “legal formants” of each system was no longer taken for granted. Once it was recognized that these elements could be inconsistent, it was recognized as well that the national jurist by himself could not judge their consistency. Judging their consistency required work based on a factual method.

At Cornell, the jurist who reported on a given national legal system was, of course, chosen from the nation in question. Yet the method of investigation avoided the risks that usually accompany such parallel collective presentations of information. Usually, in parallel presentations, it is thought that only the jurist of the country in question is initiated in knowledge of his own legal system, and it is thought that this initiation is necessary and sufficient, not only to know codes, scholarly work, and case law in that system, but also to judge the consistency of the code, the conclusions drawn from the code, and the judicial decisions that purport to apply these conclu-

32. In our view, at Cornell some Romanist jurists gave too much emphasis to the “system,” whereas others stressed excessively the latest case law (see Un metodo, cit.).
sions. The studies at Cornell teach us that in order to have complete knowledge of a country's law, we cannot trust what the jurists of that country say, for there may be wide gaps between operative rules and the rules that are commonly stated.

The work at Cornell highlighted a different phenomenon as well. Often a respondent had to answer questions about his own legal system that had never been asked before. As a result, the reports at Cornell gave a highly different picture of the law than the monographs used in the country in question.

C. Features of Some "Legal Formants"

Within each legal system there co-exist different "legal formants" which may or may not be in harmony with each other. That would seem to be a proven fact. Thus far, however, we have not explained what these "legal formants" may be.

Important elements of which we have not yet spoken are the reasons and the conclusions given by judges and scholars. Strange as it may sound, the reasons that judges and scholars give are different "legal formants" than their conclusions. The reasons have a life of their own independent of that of the conclusions they supposedly support.

Consider, for example, the French legal rule that a person who believes himself to be heir and who acts in good faith can make a valid conveyance.33 This conclusion is justified by the jurists who have dealt with it in various ways: (1) by saying there is a collective sasine common to all those inheriting; (2) by saying the true heir has tacitly appointed the transferor his agent; (3) by saying there is "apparent ownership"; (4) by saying that the true heir has created a risk for others through his inertia. The conclusion is a fact about the French legal system that is to a large extent independent of the reasons given for it. Nevertheless, one cannot conclude that the reasons do not matter. They are "legal formants" for French law in their own right. Legal systems where the same conclusion is supported by different justifications cannot be regarded as identical. For example, if the conveyance is deemed to be effective because of a tacit agency, there will be a tendency to treat the conveyance by the rules of tacit agency. New rules governing agency may be applied to the person who believes himself to be heir. Thus one must include the justifications given for rules among the "legal formants" of the French system. Other examples would be the justification French jurists give for the don manuel, the recovery of money paid by mistake, and so forth.

The propositions about law that are put forward as conclusions by scholars, legislators, or judges are another legal formant. The various forms they may take have not yet been widely studied. Sometimes these conclusions seem to explain a legal term. They are supposed to connect the term with its legal effects. For example, the term may be “parents” or “members of Parliament” and the legal effects may be “they have the power to manage the property of their minor children” or “they have the power to make legal rules.” Jurists insert a statement in the middle: for example, “parents represent their minor children,” or “members of Parliament represent the nation.” These statements are not themselves operative rules. They are purported explanations of operative rules. Nevertheless, we should not regard them as superfluous. They can affect the way in which the operational rules they purpose to explain are understood and interpreted. Thus they also rank among the legal formants of a system.

It may be surprising that some explanation of this sort are made by the legislator. His job, after all, is to make rules, not to explain them. Nevertheless, when legislator describes and classifies, he defines terms and sometimes explains their significance. Sometimes, indeed, these definitions or explanations contradict operational rules. Sometimes they are superfluous in the sense that the operational rule alone is sufficient to decide cases. Nevertheless, the explanations of the legislator have an official character and therefore can exert influence. Even if a definition has no direct connection with the decision of cases, it has a hortatory character which may influence other aspects of the legal system.

Declamatory statements often make explicit an ideology, be it the ideology that actually inspired the system in question or the one that a given authority believes to have inspired it or the one this authority wishes people to think inspired it. In civil law and in common law countries, declamatory statements are often made in accordance with the background of jus naturalism. Declamatory statements, for example, may insist that contracts are made by consent, while the operational rule requires not only consent but a reason or cause for the enforcement of the contract (see, for example, art. 1376 of the Italian Civil Code). Or, for example, in common law countries, there are declamatory statements that property is transferred by the will of the parties while the operational rules require an additional element: for example, consideration or delivery or, for the transfer of immovable property, a conveyance. Often the declamatory statement amounts to a synecdoche, a rhetorical figure which, as mentioned earlier, indicates one necessary element without mentioning the others.

Declamatory statements are especially important in socialist
legal systems.\textsuperscript{34} From the beginning, Soviet authority showed a surprising propensity to make such statements, statements that are neutral with respect to operational rules but reveal the ideals and aspirations of those in authority. One of the most fundamental propositions of Soviet law is declamatory: that the means of industrial production belong to the state. From the standpoint of the operational rules, the power of ownership is divided and allocated in various ways between the state and the enterprise.\textsuperscript{35} In non-Socialist countries declamatory statements are most frequent in the more basic laws such as constitutions and codes.

The statements which are "legal formants" of the system, hortatory or not, may not be strictly legal. They may be propositions about philosophy, politics, ideology or religion. It would be as difficult to explain canon law without the notion of God as it would be to explain Soviet law without ideas taken from Marx or Engels or Lenin. It would not only be difficult, but inadequate and unfair. Whether strictly legal or not, the propositions that are one of the legal formants of a system may be true or false. In that respect they differ from operational rules which are simply imperatives. Declamatory propositions carry the particular danger of encouraging a false understanding of what a legal system is doing, even if this understanding is sometimes welcomed by those who make such statements. For example, Article 1321 of the Italian Civil Code says that a contract is an agreement, that is, that a contract consists of two wills. Article 1333 says that, in certain cases, a contract can be formed even when the offeree is silent. Jurists have explained that in such cases silence counts as an expression of will. This explanation is declamatory in the sense that it is tagged on to operational rules which it really does not explain. Far from explaining them, it is contradictory, and, like every other contradiction, false.

D. Consequences of the Disharmony Among "Legal Formants"

The number of legal formants and their comparative importance varies enormously from one system to another. In some areas of English law, statutes are wholly lacking. Peoples without written alphabets may not have rules that are formulated expressly or bodies of case law or scholarly writing. Some areas of constitutional law have no decided cases.

The comparative importance of a legal formant depends upon


\textsuperscript{35} The cited work by Venediktov is fundamental for the entire problem. See also the resumption of the debate during "the Prague spring" in the proceedings of the Conference of Tremezzo in 1968, \textit{Riv. dir. comm.}, I, 19 ff. (1969).
its capacity to influence the others. That capacity differs from one legal system to another. It is a characteristic of a legal system that is hard to verbalize, hard to quantify and patently of enormous importance. For example, scholarly writing was far more important in Germany between 1880 and 1900 than in France. Case law has been more important in France than in Italy. Ideology has affected scholarly writing much more in socialist countries than elsewhere.

Moreover, the disharmony between one legal formant and another in the same legal system may be greater or smaller, or less important. For example, the disharmony between the civil code and its interpretation is very great in France and much less conspicuous in Germany. In a very compact system, the legal formants are close together.

A jurist who deals with a system that is not his own often has problems of perception with legal formants that do not exist in his own system. Anglo-American jurists, for example, dismiss the ideological statements in socialist laws and hence the legal categories that socialist jurists produce on the basis of their ideology. The French jurist, struggling to understand German scholarly writing, sometimes imagines it to be a species of (poor) philosophy devoid of interest for the jurist.

E. Disharmony Among "Legal Formants" and Knowledge of Law

We can now see that it would be far too simple to say that statutes, scholarly writings and judicial decisions are the legal formants of a system. The legal system contains a far greater range of potentially contrary elements.

Statutes, as we have seen, may contain not only operational rules but explanations that in some cases are merely declamatory. The legislator may make a declamatory declaration that sovereignty belongs to the people, and the legislature should be elected by universal suffrage and yet enact an operational rule denying the franchise to some citizens of full age. Similarly, the legislator may announce that a contract is an agreement and all agreements are to be enforced while providing an operational rule that enforces only those contracts that are based on a cause or consideration.

Again, as we have seen, a judicial decision may announce one rule, even though the judge is implicitly following another one. Moreover, the judicial decision may contain the same diverse elements we have seen in statutes such as explanations of rules that may or may not be declamatory.36

Scholarly writing may take several different forms. It may be essayistic: it presents an original idea and seeks to persuade the reader of its validity. Or scholarly writing may be didactic: it provides students with a manual. In either case, the writing will at times be informative, at times persuasive. Scholarship that aims to persuade will regularly be accompanied by arguments which, as we have seen, take on a life of their own and become "legal formants" in their own right. Whether it aims to inform or to persuade scholarly writing will usually supply examples. The examples again can acquire an influence of their own and so become an autonomous "legal formant" because, from the examples, one could infer a rule that is not the one about which the scholar intended to inform or persuade us.

We shall not try to compile a list of all the "legal formants" possible in a legal system. We wish to stress, however, that there is a basic distinction between those legal formants that are themselves rules of conduct and others that are developed in order to provide abstract formulations or justifications of rules and conduct. Both are found in the work of legislators, scholars, and courts.

We also wish to stress that these "legal formants" may diverge from one another. Only experience makes it possible to judge the extent of these divergences. Over time, abstract formulations and justifications may adapt themselves to the rules and so the gap may be narrowed. Yet it is also possible for these elements to co-exist without any narrowing of the gap. Indeed, there are a number of techniques that jurists use to prevent the gap from closing. For example, they create "irrebuttable presumptions." Still more common, as already mentioned, are declamatory statements by which one event is treated as its opposite, as when the silence of an offeree is said to be a declaration of his consent.

(Installment II of II will be published in the next issue)

37. A study on the many "legal formants" involved in the stare decisis rule in American law is Ugo Mattei, Stare Decisis (1988).