



BRILL

Comparative Sociology 7 (2008) 286–310

Comparative
Sociology
CompSoc
www.brill.nl/coso

Creating Comparability Differently: Disassembling Ethnographic Comparison in Law-in-Action

Thomas Scheffer

*Emmy-Noether Group, Free University,
Altensteinstr. 2–4, 14195 Berlin, Germany
scheffer@law-in-action.org*

Abstract

Ethnographic comparison identifies and analyses core mechanisms which integrate and drive various ethnographic fields. This is exemplified here by what we term, following Luhmann, “the binding mechanism” – which we identify in criminal cases from England, the United States and Germany. By choosing criminal cases as the dynamic frames of “their” (participants’) activity and “our” (observers’) analysis, thick comparison questions the sources of stability found in structural comparisons of legal doctrines, namely fixed items, definite meaning, and detached contexts. This paper discusses how these features of structural comparison are replaced by more dynamic components, such as becomings, involvements, and formations.

Keywords

ethnography of discourse, legal procedure, binding and unbinding, comparative law, law-in-action

How can one conduct an ethnographic study and still compare? How can one compare without betraying the call for specificity, locality, and thickness that ethnography entails? In the following, I give some answers in the light of a comparative ethnographic study of US, German, and UK criminal pre-trial and trial procedures which I completed with Alex Kozin and Kati Hannken-Illjes two years ago. Our comparison contributes to a sociological understanding of legal procedure in terms of communication,

© Koninklijke Brill NV, Leiden, 2008

DOI: 10.1163/156913308X306636

knowledge production, and decision making, which together create “a separated sphere of meaning” (Luhmann 1969:45, my translation). In effect, the English Crown Court procedure or the German District Court procedure processes, funnels, and resolves criminal cases quite differently. In essence, procedures do so by involving participants over a period of time. They make actors commit themselves to one case (out of our two adversarial case systems) or to a single version (of our one inquisitorial case system) throughout the “promising” and “demanding,” that is, an undetermined proceeding.

In the specific comparative ethnography of legal procedures discussed here, my research group¹ focused on relationships surrounding what we called “a first defence,” its availability and usability for later purposes (for example, the witness statement in court) and its effects for the participants that are held accountable for it (for example, the defendant needing to address what she or he stated earlier).² The specific study serves as an illustration for the potentials and limitations of thick comparison³ in light of another method of comparing, namely those in comparative law. The latter operates, generally speaking, on the basis of legal doctrines.

The main argument runs as follows: while legal comparison presumes a level of comparability, by stabilising main ingredients of comparison – namely, lexical items, their general meaning, and the separated contexts of interpretation – thick comparison operates differently. It creates (limited) comparability by relating indexical items, meaning production, and ongoing contextualisation. These three components are not stable and separated, but instead shifting, overlapping, and responsive. They thereby

¹ The project is funded by the German Research Foundation. You find a detailed description of it at www.law-in-action.de.

² For the comparison see Scheffer, Hannken-Illjes and Kozin (2007). I thank Jan Schank, Jörg Niewöhner, Estrid Sørensen, and Alex Kozin for helpful comments.

³ For qualitative researchers, thick comparison is a contradiction in terms: “Thick description of a music program, for example, would include conflicting perceptions of the staffing, recent program changes, the charisma of the choral director, (. . .). In these particularities lie the vitality, trauma, and uniqueness of the case. Comparison might be made on any of these characteristics, but it tends to be made on more general variables (. . .). With concentration on the bases for comparison, uniqueness and complexities will be glossed over.” (Stake 2000: 444).

create some kind of incomparability. As a result, even the *tertium comparationis* may be affected by explorative nature of thick comparison. Thick comparison, then, may be the equivalent in qualitative methodology to generating hypotheses.

Creating Comparability of the “Binding Effect”

Reflecting on our exploration of the “binding effect” in three different procedures yields insights into the ethnographic creation of comparability. Binding signifies a discursive mechanism, one which links present to past, an utterance to its memorised original.

Consider a case of battery: in the midst of a jury trial, a young defendant is invited by his own barrister (trial attorney) to talk about some incriminating “slips” he happened to have uttered (drunk as he was) months ago, during his interrogation at the police station. These premature “slips” are not forgotten or rendered irrelevant. Rather, they are re-examined by the defendant and his barrister during the final stages of the procedure, namely in open court before judge and jury:

- Q. And then you were asked, “Did you feel remorse for what you had done, or anything?”, and you say, “No, I wasn’t finished.” What did you mean by that?
- A. I don’t know. I was still very angry. I just – I don’t know.
- Q. And, when you struck with the glass, what did you intend to do?
- A. I don’t know.
- Q. Did you think about the fact that you had the glass in your hand?
- A. No.
- Q. Did you want to cause him really serious injury?
- A. Not really serious injury, no.

Binding statements appear in many ways. The friendly examination conducted by the barrister in the English jury trial recalls “inconvenient” portions of, what Luhmann calls, “the procedural past” in order to allow his client to repair some of the “evidence against him.” This defence strategy realises the potentially damaging effects of the (legally careless expression) “No, I wasn’t finished.” Certainly, the prosecution would remind the defendant of “what he was up to,” according to police records.

How can one turn such moments of “repetition and difference” (Deleuze 1990) into systematic features of criminal cases? How can one compare these features across criminal procedures and their respective processing of cases?

We have chosen binding as an analytical *and* ethnographic-comparative point of departure. First, as an *analytical object*, binding raises awareness of the problem of how procedures are integrated, as more or less self-referential spheres of meaning with their series of speech and writing events, knowledge processes, and funnelled decisions. Second, as a *mundane object*, binding gives expression to participants’ experiences and practical concerns, which evolve in the course of “their” criminal cases. Third, ethnographers make extensive use of binding artefacts, such as legal files (Kozin 2007, Scheffer 2007a), documents (Lynch and Bogen 1996, Scheffer 2005), and hand-written notes (Scheffer 2006), in order to reconstruct the successive making of cases.

In this threefold perspective, “binding” appears simultaneously as a powerful effect of legal discourses *and* as a practical accomplishment of competent participants. Competent insiders, it seems, are not simply absorbed by the “here and now” of speech events; they also simultaneously contribute to the “there and then” of their case (Scheffer 2007b). They conduct a conversation *while*, at the same time, conducting a procedure.⁴

Competent participants take this double stance by moving back and forth in time: they link the present state to the memorized past while enacting possible futures. Participants return to the procedural past in that they repeat, quote, criticise, or correct filed versions. For instance, barrister questions as well as witness answers act upon and address those (binding) statements that were put in circulation prior to a hearing.

The comparison of the binding mechanism contributes to a better understanding of the diachronic and synchronic formation of criminal cases in different procedures. Moreover, we conceive binding as a major force of legal procedures. Binding mediates the role-taking of defendants

⁴ We followed what I call a “trans-sequential analysis,” in order to trace and link up the turn-by-turn sequence of actually doing. This includes, as examples, plea bargaining, cross-examination, or a client-lawyer conference as well as the stage-by-stage processes of, as examples, drafting a defence statement, keeping a file, or putting together a closing speech (Scheffer 2007b).

and witnesses. Binding introduces intrinsic norms for the presentation and assessment of legal accounts. Being bound means that an audience quite likely receives claims which either diverge from or converge with an “original version.” In this way, binding dramatises legal performances. The actor may fail in light of his or her “binding past” (Luhmann 1969).

A similar observation made earlier by Luhmann regards the procedural drive in general: “Every contribution enters the case and can be reinterpreted but not neglected” (Luhmann 1989:44, my translation). Once we identified the phenomenon of binding in our three criminal procedures, we started to measure them up to Luhmann’s general theoretical explanation of the participant’s involvement, his or her learning, and the self-legitimation of procedures. In light of our ethnographic specifications, we not only revealed different versions of binding but also found opposing forces such as “unbinding” and specified the conditions of binding for each procedure. It is, thus, Luhmann’s early work on “procedural systems” which provided our thick comparison with a shared analytical problematic: a *tertium comparationis*.

Creating Comparability versus Postulating Comparability

One can put this methodical construction in a broader context. At times, social theories or concepts happen to be either too abstract or too specific to serve as a basis for comparison. This is how Joachim Matthes (1992), a sociologist of religion, explains why some disciplines abstain from the “operation called ‘*Vergleichen*’”⁵ while other disciplines define themselves as comparative by nature. Matthes depicts medium-range theories – common in organisation studies, political studies, or social psychological studies – as comparison-friendly. He finds a correlation between the “degree of abstraction” and an “affinity to comparison” (1992:78, my translation).⁶

For instance, rich details of thick description employed for comparative purposes lead to inflating contrasts in the name of cultural holism. Something is seen not as a variation but rather as a unique, intrinsic component of a totality. By contrast, “iron laws” of grand theories, employed for the

⁵ The German *Vergleichen* translates into comparing, matching, or contrasting.

⁶ Accordingly, “structuralists or ethnographers do not talk much about comparison” (Matthes 1992:78, my translation).

same purposes, lead to deflating differences in the name of universalism. One or another phenomenon (“profit maximization,” “will to power” or “primacy of proximity”) is elevated to the status of universal truth.

Does thick description of what actually takes place in a law firm or in criminal court hamper comparability? Are situated activities so intrinsically self-referential that they forbid any comparative reformulation? The ethnographic predicaments created by too much involvement, too many details, and too narrow framings seem daunting. This is only exacerbated, one may add, when a fascination for “local knowledge” (Geertz 1993) overrides the general and durable definitions of comparative law.

In contrast to the situatedness of microanalysis, comparability seems an inbuilt feature of legal doctrines. The latter exhibit similarities and differences on various levels: between legal systems (English vs. German), procedural regimes (inquisitorial vs. adversarial), or legal traditions (civil law vs. common law). In the following, I contrast our comparative ethnographic efforts with examples of legal-doctrinal comparison, thereby “comparing comparison” (Chodosh 1999).

Comparative law is highly efficient, and there is an increasing and intensifying interest in this field of study (for an overview, see Zumbansen 2005). Specialised journals publish articles covering a broad range of tricky legal, political, and constitutional issues. For the growing community of legal comparativists, comparability and “translatability” (Aoki 1992) are considered generally undisputed features of law. For them, “obstacles to comparison” are readily overcome.⁷ As a result, legal comparison seemingly can serve as an evaluative source, a learning tool, a praiseworthy “best practice,” as well as a stimulus to reform.⁸

The omnipresence of legal comparison forms an integral part of tightening integration on the European and global levels. Globalisation compels nation-states to engage in a constant weighing of their policy agendas, administrative programmes, or legal regulations. Nation states are competing, and observe each other as competitors for investments of all sorts. They are objects of meticulous, ongoing assessment. They find themselves

⁷ Almost sixty years ago, Gutteridge (1949) discussed obstacles to comparison, including identifying objects of comparison, and proposed various approaches to overcome these obstacles.

⁸ The same is true for Political Sciences. Comparing political systems is seen as an unproblematic exercise. See, for example, von Beyme (1988) or Caporaso (2000).

placed in rankings used by global players such as private firms, transnational public agencies, or social elites.

Moreover, a refusal to compare, including oneself to others, equals a refusal to learn, from others. Indeed, any kind of “incomparable” and “incompatible” state is today considered unthinkable and suspicious, a potential threat to the “international community.” Incomparability runs counter to neo-liberal ideals of transparency, accountability, and commodification.

Ethnographic comparison, in contrast to comparative law, went through several crises amidst a series of turns in the Social and Cultural Sciences (performative, cultural, linguistic, praxis, and others), all of which helped formulate bases for reservation. Comparison is a violent act; it betrays critical foundations of social or cultural theory; it is not desirable in political terms, meaning in light of feminist, post-colonial, and post-modern criticism.⁹

For critics, comparability is not considered a natural property of the social or the cultural dimension. It is instead considered an effect of powerful interventions and hegemonic appropriations. The reasons given for rejecting comparison are fundamental: cultural phenomena are intrinsically contingent, situated, and unstable. They are inseparable from the sites of their emergence and thus also from their ethnographic acquisition. They elude the rigid methods and categories of social science. According to critical theorists (Habermas 1981), the phenomenological thickness and richness of “life worlds” is not just ignored but wiped out by “functional rationality.” Social-system logics “colonize” local knowledge, regional dialect, cultural anomaly, or traditional idiosyncrasy.

Our own efforts to compare law-in-action (see Travers and Manzo 1997) underwent similar complications. Items which at first sight seemed directly comparable – such as the defence file, pre-trial preparation, or cross-examination in court – turned out to be unique features of one procedure only. When suggested as items for comparison by one field researcher, they would provoke qualifying responses by other field researchers: “This does not exist in my field!” (German comment on the extended

⁹ Legal anthropology witnessed a long-standing debate between different concepts of translation. Bohannan (1969) criticised Gluckman for his asymmetrical and colonial comparison of “primitive legal systems” with the “elaborated English jurisdiction” (1954). See also Swartz (1969), Collier (1975), Moore (1978), or Dwyer (1979).

“preparation” in the English context) or “This is not relevant in mine!” (English comment on the defendant’s “last words” in the German context).

Aside from problems which emerged in the effort to identify specific items of comparability, the analytical framing of observed activities was demanding, too. The question, “Where and when is the field?” (Scheffer 2007b), became more than a methodological concern. Ironically, one answer to this concern was to approach procedure as a self-referential, self-supporting and relatively autonomous sphere of meaning. That is, we found received analytical frames – such as criminal court, legal system, or legal culture – to be either too specific or too general for purposes of comparing law-in-action. In the following, I recall the conceptual efforts which helped us to create some degree of comparability between criminal cases, as they were processed in Eastern Germany, Northern England and the US-American state of South Dakota.

From the perspective of comparative law, thick comparison displaces the four-part order of comparison: the *tertium comparationis* as a sample of *items* readily named and defined (as “rape,” for examples), the items as *meaningful variations and specifications* of a shared category (such as “standards of proof”), and the *explanatory contexts* for the resulting differences (as English Criminal Law, for example). By contrast, thick or ethnographic comparison interweaves these components in order to adapt to the intrinsically dynamic and self-reflexive character of law-in-action.

Now the *tertium comparationis* is an unnamed mechanism of the legal discourse. The *items* do not explicate, but only mediate the compared procedural mechanism (here, “binding”). The meaning is not pre-defined, but is itself accomplished in interaction. The *explanatory contexts* (here, “procedures and their proceedings”) resonate with the compared legal activities. In the conclusion of this paper, I portray our study of binding as both generating some comparability of law-in-action and at the same time restricting the results of comparison.

Indexical versus Lexical Starting Points

How is “binding” rendered observable in the first place and how is it turned into a *tertium comparationis*? In our analysis of documents, transcripts, field notes, and legal files, we identified those pieces of data that can articulate the binding effect, namely later statements (in criminal court, for example) seen in the light of earlier statements (in the police interview, for

example). In order to work a statement into an articulation of binding – a statement which binds *and* is bound – we traced it through its discursive career. Viewed “from the side,” statements (such as “I have been somewhere else!”) turned out to be indexical. Here “indexical” refers to the fact that without grasping *when* exactly they are used and *what* exactly they refer to, one would not be able to identify them as “meaningful units” in the first place. The meaning of certain speech acts or writing acts is embedded in the social situations of their emergence. The acts are meaningful due to the multiple references to the time (“now”) and place (“here”) of their application.

The items with which to start are not just local, dynamic, and relational for they are also processed as being constant and durable. Statements are fed into an ongoing proceeding by being transformed: into documents (away from fleeting utterances), into monologues (away from their dialogical manner of emergence), and into case representations (away from their originally expressed morality and sociality). This “absorption of uncertainty” (Cyert and March 1963) does not just provide lawyers with reusable “facts of the case.” It also provides the ethnographer with data, for example on the early defence and its competing and supporting others.

All of these transformations are precisely what make statements a useful starting point for our “ethnography of legal discourses” (Conley/O’Barr 1990). The items “in transformation” feed into and propel criminal cases; they relate to and are related to other statements; their exchanges and circulations integrate and delimit legal discourse; and they underscore the varying spatiotemporal extensions of “what goes on.”

The indexical foundation of thick comparison differs profoundly from the lexical starting point of legal comparison, according to which selected items (legal rules) are stable and discrete. That is, indexical items seem unsuitable to the sorts of controlled juxtapositions of terms and definitions in comparative law. One example of how comparative law operates can be seen in a “General Course on comparative law” presented by Gert Steenhoff. The course suggests “the following elements and subsequent steps” (Steenhoff 1998:1.3):

The preliminary stage: the question of the *tertium comparationis* or the comparability of the items of comparison; is comparison possible?

The selection of the items for comparison. What should be compared?

The selection of the legal systems for comparison: First stage of research: determining similarities and differences; comparative synthesis. Second stage: explanation of similarities and differences. Third stage: evaluation of the results.

The items of comparative law seem to resemble terms in a lexicon, or rather various lexica. This prescription allows the comparativist to control and to distribute doubts and certainties in a sequential order.¹⁰ Doubts are placed exclusively at the preliminary stage, before the actual comparison is carried out. Once the *tertium comparationis* is identified and significant items are selected, comparison can proceed on a stable foundation. Doubts are removed from the actual process of comparing. That is, problems of comparability are dealt with at the outset. Finally, and as a consequence, the course can expand the third stage, the “evaluation of the results” (Steenhoff 1998:1.3)

Legal comparison thereby derives far-reaching and instructive conclusions. I quote from US-American studies of “abortion rights” and “criminal procedures.” The first study concludes:

In summary, U.S. and Taiwan abortion laws differ markedly. In Taiwan, a woman does not have a constitutional right and must receive the consent of her husband. A minor must obtain parental consent. Whereas, in the U.S., a woman need not obtain the consent of her spouse or even notify him. A state also must have a judicial bypass if an under-aged girl in the U.S. chooses not to notify her parents (Hung 2004:26).

As for criminal procedures:

A right against self-incrimination at trial, and against involuntary confessions, is now generally enforced, and the use of an exclusionary rule to force police to obey rules governing searches (sometimes) and interrogations (usually) is increasingly being used in most of the countries discussed in this book. Miranda-type warnings are also widely required. In short, defendants are entitled to more “rights” than they used to be, including the right to an advocate whose job it is to vindicate those rights (Bradley 2007:xxi).

¹⁰ Bennett and Edelman declare (1985:3) that “the process of comparison represents the most complicated aspect of comparative law and that it is deemed rather problematic to establish any rigid rules regulating this process.”

Hung (2004) inquires into the “legal rights of abortion” in the U.S. and Taiwan. He chooses the *tertium comparationis* or shared problematic, “abortion,” which resonates with a selection of legal regulations. Hung then juxtaposes different responses to the same problematic. By this operation, he delimits both the scope of the legal problem and the scope of the data, namely by translating abortion from a US-American setting to a Taiwanese one¹¹ and by referring to written doctrines only.

Bradley and colleagues (2007) start from similar grounds. They observe similarities and differences in criminal procedures on the grounds of written doctrines, and they find orientation by using US-American law as the standard. On these grounds, they identify a trend towards “more rights” as “a trend towards adversarialism.” The trend towards rights is itself a result of extralegal processes, namely of social transformations towards “diverse societies.” The diagnosis is based on comparing a wide range of countries in a “worldwide study” which includes Argentina, Canada, China, Egypt, England and Wales, France, and others. Each case study follows the same order: from police procedures (arrest, identification procedures, interrogation) to courtroom procedures (pre-trial, trial, appeals).

In a “note on the theory,” the authors excuse this streamlined and repetitive structure:

All of the chapters use the same numbering system at least through the first Arabic number. Thus, for example, §11 A1, ‘Stops’ will be the same in each chapter. . . . This form will make comparison easier. It will also create some awkwardness since the outline is based on the American system and may have terms and concepts that cannot readily be applied to all of the other countries discussed. Even though both terminology and practices will vary from country to country, the basic aspects of bringing a criminal case from investigation through prosecution are the same (Bradley 2007: xxvi).

Legal anthropologists have criticised the “imperial” mode of comparison, which measures certain variations in light of one hegemonic and putatively exemplary system.

¹¹ Frankenberg (1985:433) criticises hidden hierarchies in legal comparison: “The implied adequacy of *law* to solve what appear to be universal and perennial problems of life in society betrays and underscores not only how the comparativist’s own country’s approach is supposed and privileged, but more particularly with respect to the United States, British, German, and French studies [...] how their notion of law is itself privileged.”

But local performances, whether they take place in South Dakota, Eastern Germany, or Northern England, should not be analysed and evaluated in terms of extraneous (even if putatively preferential) concepts. In point of fact, my pre-study's very terms, such as "competing cases" or "pre-trial preparation," turned out to be *English* concepts, lacking equivalents, for instance, in the German context. Likewise, the standard legal process in Bradley's "world-wide perspective" or the regulations and definitions of Hung's "abortion" study borrow from the US-American paradigm. But how can one find items upon which to ground comparison that do not favour one system?

Another line of ethnographic critique of lexical comparison focuses on the primacy of one data type: the written body of laws. This pragmatic foundation has far-reaching consequences for the analytical and theoretical understanding of law. Not only does it exclude other legally relevant standards and norms (such as binding). It also ignores the ways by which a legal matter or a case is subjected to a legal decision.¹² Moreover, can we presuppose that legal doctrines have the same weight, cultural meaning, and force across legal systems or cultures?¹³

Legal Pluralists criticized the institutional bias of legal studies (Ewick and Silbey 1998). Geertz called for "cultural translation" (1993) and for an emphasis on local interpretations of doctrines in the midst of "animated" disputes. Such emphases on extralegal processes, of interpretation, translation, communication, and others, are not just a matter of cultural folklore. These phenomena – whether documented or spoken, whether internal or external to the legal courts – "must be taken into account for comparative law to realize its aspirations of actually explaining what the law is elsewhere" (Zumbansen 2005:1084).

In our thick comparison, it was not until the later stages of our inquiry that binding emerged as a shared (analytical) problematic with some empirically identifiable contours. Paradoxically enough, our ethnographic studies brought this *tertium comparationis* into view only in the course of

¹² By tracing processes of juridifying "the comparativist contributes to a deeper understanding of how societal conflict gets translated into law and ultimately isolated, detached and 'alienated' from its social context" (Zumbansen 2005: 1080).

¹³ See Luhmann on "legal comparison" (1993), which has to operate on the basis of presuppositions regarding the equal relevance of laws.

observing “something else,” that is, in the course of tracing the career of statements on their way to court.¹⁴

There are other peculiarities pertaining to the selection of an item capable of grounding thick comparison. First, we were never able to examine the binding-effect directly in our ethnographic fieldwork. Binding-effect is instead sandwiched between earlier and later (indexical) versions of the “same” legal statement, and it is locally performed by practitioners who are aiming either for repetition or for alteration. Binding demonstrates the “spatializing and temporalizing capacities of discourse” (Anton 2002: 190). As such, it requires some methodical adjustments of what is generally referred to as “participant observation.” That is, it exceeds the ethnographic bias for proximity between participant performance and observer description.

What is more, binding is accessible because participants orient their current contributions towards binding statements: they discuss the restrictions deriving from these statements, and they attempt to play down or to talk round these restrictions. In short, binding is made observable by the local activities of competent and interested participants. Binding is not a “dark force” working behind participants’ backs (at least not behind all of them). The binding effect of an “early defence” is known to and taken into account by lawyers, who in turn work with early and late versions of their clients.

Binding, in short, hinges on various types of data that, taken together, demonstrate both the fleeting (as ideas or suggestions) and durable (as filed and disclosed documents) character of legal discourse. But binding appears only indirectly, by way of the ethnographers’ and the members’ synopsis of protocols, file notes, written statements, or court testimonies. Both sets of contributors – analysts and protagonists – crisscross an “intertextual field” (Lynch and Bogen 1996) and they do so by way of retrospection (something is bound to the past) and prospection (something is binding for the future).

In light of the binding effect, legal activities appear neither as individual choices nor as legal determinations. The binding force is rather operated by the defence and the prosecution, or the judge in the German context. It

¹⁴ In line with the “reversals” typical of scientific presentation (see Knorr 1981), the introduction to our 2007 article reads as if the binding-theme was readily available to us right from the start. It was not.

comes into operation in communication events (conferences, interviews, etc.) and processes (drafting, filing, circulating, etc) which are tied to expectable occasions (announced dates) and granted periods (marked by deadlines) in different procedural courses.

The main empirical challenge of our ethnography is actually to track down various stages and appearances of legal objects (here, “statements”). Thus, the comparative ethnography of discourse hinges on access to various types of empirical data: not just files or expert interviews but also insiders’ knowledge of “how to play the game” (Bourdieu and Wacquant 1992) and the institutional infrastructures of memorising (the archives and files). This access is what permits ethnographers actually to follow statements from one occasion to the next, despite the indexical nature, modifications and adjustments of these statements. The same is actually true for the protagonists themselves. Without “know how,” full access, and institutional resources, they would not be able to realise the binding forces.

Meaning – As Practical Involvement

In order for a item of comparison to fit the *tertium comparationis*, it requires some context or frame in which it obtains a meaningful and relevant position. In comparative law, a system of relevance (such as criminal law) resembles constantly reworked and renewed definitions (“murder” versus “manslaughter”), which are systematised in monographs (the Roman law tradition) or in collections of hierarchical decisions (the common law tradition). By contrast, in ethnographic comparison, an item (such as an alibi statement) is defined by its manifold involvements in certain moments and stages of a proceeding. An item’s full meaning, or better, its various meanings have not yet been realised.

Ethnographic discourse analysis reconstructs the production of meaning from moment to moment and from stage to stage. Meaning and relevance change due to the formation of the case, that is, to shifting references and cross-references in a changing nexus of statements. In terms of our comparison, the ways and degrees by which an alibi, for instance, has been developed, supported, repeated, attacked, circulated, and so on determine whether it can be and will be rather bound to or binding for other accounts (for example by an alibi witness). The meaning of a binding/bound statement is identical with its impact at a particular time on other statements and on the case.

A brief extract from a first defence, uttered by the client in a police interview and recorded by her solicitor, may demonstrate this emergence of meaning and relevance:

She [the suspect, client, and not yet defendant] was interviewed at X-village Police Station in the presence of X from instructing Solicitors. She confirmed that she had been in X-village and met her friend Kim and that they had been to Kim's house and they then went out with her little sister to buy cigarettes ... (Scheffer, et al. 2007:18)

In the lawyer-client meetings which follow, this alibi story is systematically thickened with details. When exactly, with whom, and for how long did she go to "Kim's house"? The details and particularly the potentially supporting further statement (by Kim) will be recounted in upcoming meetings and hearings. The early defence binds its "author" and her defence team at subsequent stages, as she is invited to repeat her account, to provide some evidence, or finally to answer critical questions on the witness stand.

In the English context, the "first defence" is used and reused as a general information for the defence lawyer, as a model for the lawyers' drafting and reformulating, as an official "defence statement" of "what our case is about," as a resource for the plea bargaining session ("This is what we have!"), as a stimulus for cross-examination by the prosecutor in open court ("And you claim that in fact...!"), or as a resource or warning for the defence barrister's case presentation ("And my client made clear at the earliest opportunity that she...").

In the different national procedures, the binding effect is realised differently, if at all. It is realised by different protagonists (defence lawyer, client, judge, etc.), by different means (documents, personal memory, self-made notes, etc.), and in different successions (as examples, from one pre-trial hearing to the next or only in judge-centred trial hearings). Likewise, requests for "follow-up versions" – based on a first defence – are placed at specific moments and sites in these procedures: in England by the barrister (as the in-court lawyer for the defence) on the basis of the solicitor's instructions, in the US by the prosecutor in early plea bargaining sessions based on what he or she is told by the defence attorney, or in the German context by the judge in open court on the basis of the shared dossier.

“Early defences” and their authors, mostly suspects or accused in police custody, only partially overview and realise the possible meaning and relevance of their contribution for the proceeding to follow. The final reception is open, which means that current contributions take risks; they require some (legally informed) guesswork on what may happen at later procedural stages. A seemingly “good account” may turn against its author simply because it is used again (differently) or referred to by others (inconsistently).

Binding creates a powerful link between single response and the emergent statement, as the measure or norm for any subsequent accounting “of what the case is.” Meaning, thus, is ascribed not just to the account as such, but to *this* account in line with *other* accounts that, in the procedural course, were already turned into norms for “more of the same.” Binding suggests what should follow (repetition) or what should be avoided (difference). The binding force is itself a meaning-producing device.

Interpreting an account “of what happened” is profoundly different from reading laws on “abortion” or “freedom of speech” (in light of some model cases). This difference derives from the open-ended, contingent character of discursive items. It also derives, moreover, from the temporal character of the context of meaning production. Thick comparison takes a sequential stance towards its texts: they are, by definition, in flux and not completed. By contrast, comparative law treats its texts as consistent systems of meaning, which can be inventoried, juxtaposed to other systems, and evaluated.

In this line, where our ethnography of legal discourse reconstructs how statements are rendered meaningful and relevant “on the way,” legal comparativists presume a general relevance of legal doctrines. They ascribe a constant status and force to the law. Laws are featured as hefty due to the authority of the state and its legislative procedures. This idea of general relevance goes along with assumptions about the function of legal rules for societies. Comparativists use general purposes as “the starting point and basis of all comparative law and [assume] that different legal systems can be compared only if they solve the same actual problem, satisfying the requirement in adequate legal regulation” (Kieckbaev 2003: 3). Comparison then shows that legal systems provide different solutions to similar problems. What is of central importance here is that the force or status of

law is treated as an independent variable, in order to allow for comparison to proceed in the first place.

The premise of general relevance and the premise of shared problems have attracted critique by interpretative legal scholars. Frankenberg, for instance, argues that comparative law ignores the local uses and interpretations of laws which, ultimately, put law into effect.¹⁵ Only through processes of sense making is law rendered relevant. In reverse, laws obtain no meaning outside their local use. Comparative law, Frankenberg insists, lacks a sense of law's cultural context, its everyday applications, and its productivities (for example, producing not only decisions but the cases to be decided). In line with legal ethnography, Frankenberg demands that legal comparison should stick to cultural specifics, for example by reconstructing "a particular legal discourse."

However, even "interpretative" comparativists do not study the making of statements and cases in a single proceeding. They instead interpret legal differences in the light of cultural patterns, political hegemonies, or judicial paradigms (see Saban 2002). Meaning for them does not derive from law-in-action but instead derives from references towards "culture as text." Thick comparison, by contrast, follows the production of meaning in still open cases.

Contexts – As Productive Formations

Legal comparativists compare countries (Germany or England) and their legal systems (Civil or Criminal Law), and they do so in innumerable respects. Scholars of legal culture criticize how this contextualization introduces wrong generalizations, and how compared legal contexts exhibit more diversity than is generally implied. This line of critique seems even more justified where legal comparison relates to more abstract categories, such as legal families (adversarial vs. inquisitorial) or legal traditions (Roman Law vs. Case Law).

¹⁵ "By stressing the production of 'solutions' through legal regulations, functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life which shape people's ways of organizing social experience, giving it meaning, qualifying it as normal and just or as deviant or unjust" (Frankenberg 1985:438).

However, the urge for generalization may be less problematic than the implied idea of context. Context seems under-theorized: it is referred to as a container with only loose bearings on the analysed items.

In his “archaeology of knowledge,” Foucault conceptualises contexts in a different manner. Context to him is in constant spatio-temporal “formation.” This formation does not follow a single logic or one temporal order. A discourse, according to Foucault, is not kept together by “one and the same object” (1972:35); it is not defined by “permanent and coherent concepts involved;” it is not kept together by the “identity and persistence of themes” (1972:38–39). A discourse is rather qualified by the ability to create (changing) objects, concepts, and themes:

The unity of discourses on madness would not be based upon the existence of the object “madness,” or the constitution of a single horizon of objectivity; it would be the interplay of the rules that make possible the appearance of objects during a given period of time . . . Moreover, the unity of discourses on madness would be the interplay of the rules that define the transformations of these different objects, their non-identity through time, the break produced in them, the internal discontinuity that suspends their permanence. (1972:36)

Does this understanding of discourse by Foucault provide us with a useful concept of context to create comparability? Can one demarcate context in this manner as a productive formation that creates its own reasons, resources, selections, and limitations?

Such an understanding of context, as a multi-temporal ordering, can borrow from recent work in the sociology of law by Niklas Luhmann and his theory of “operationally closed systems.” A system, in this understanding, performs its own boundaries and selections. Therefore, a case-processing procedure in law, for Luhmann, is a system in so far it creates and sustains an autonomous sphere of meaning. It operates by means of communications which mark out: what belongs and does not belong to the debated case, what is agreed upon and what is debated, what counts and does not count as relevant for decision making – when the procedure starts and when it will finish. This system dynamic involves internal roles (of defendant or witness, for example) which are detached from external social roles (such as gender or class). It also binds participants to their cases by intrinsic norms (“But you said earlier that . . .!”), not by general obligations (“Everybody is bound to . . .”).

A legal procedure, therefore, is not a container or nexus of fixed rules. It is not a pre-given pathway to be followed or conditional program to be completed. It is, in this view, a rather self-programming “decision machine” (Nassehi 2005). It arrives at conclusions through the very communicative events and processes which bring about its components, such as participant roles, binding statements, and decidable cases.

We compared our three national procedures by asking how exactly statements are invited, processed, assembled, and assessed. Procedures bring about binding statements by:

- encouraging participation through undetermined decision making,
- turning momentary responses into fully available statements,
- interpreting late versions in the light of memorised early versions, and
- enacting points of no return in terms of accountability, factuality, and decision making.

This chain of operations presents the procedure as a discourse formation. The context for contributions shifts from moment to moment, depending on the statements that are (still) available and that serve as (binding) norms and measures. Context, moreover, is multi-temporal. It comprises chains of speech events and ongoing writing processes, moments of competitive tension and routine practices, waiting times and times for action.

In this regard, binding is a core mechanism, for it confronts the present with its past, the descriptive elements (“You did say that . . .!”) with normative (“You better stick to what you said!”) and evaluative elements (“He had better said that . . .!”). Power and truth merge, as Foucault insisted, and they do so on the very micro-level of sequential case-formations.

This dynamic character of context contrasts with rather distant concepts of context in comparative law: countries, legal culture (Nelken 2004:7), legal systems, or legal traditions (Koppen et al. 2003). Comparative law performs contexts as being “out of touch” with the compared variation of law. They are stable units or containers that provide the comparison with some explanatory resources. The context, overall, remains abstract and ambiguous. Here ambiguity and abstraction are productive, in so far as they allow the legal comparativist to link specific items of comparison, such as “free speech doctrine,” to general explanations, such as countries’

“socio-political conditions.”¹⁶ In particular, nation-states supply comparativists with points of reference which are at once vague but also conventional and associative.

Thick comparison, in contrast, tries to close the gap between item, meaning, and context. Otherwise distinct and distant levels are placed in organised successions of distributed case work. Thus, our article on binding integrates and brings into interaction levels as diverse as observed moments in courtrooms or law firms, identifiable processes of “witness recruitment” or “file work,” and underlying standards and resources of verdicts – all as legitimate, that is, as themselves binding decisions.

How is all this integrated and contextualised? Not by grand regulations, we propose, but rather by the “smallest units” circulating on procedural front and back stages as well as back and forth between procedural past and present. Statements such as “I was not there!” serve as the smallest common denominator of legal cases with which participants work, the units of analysis they note, change, rehearse, analyse, contrast, assemble and reassemble, and so on.

The contexts in comparison entail both the formation of an individual case and the regularities for the formation of any and all cases. The comparison of binding engages both facets: the procedures and their cases. It follows statements, such as an alibi, by which participants engage *binding others* (the defence team, the judges, or the opposing party), *binding devices* (such as instructions or protocols), and *binding effects* (such as for the upcoming trial hearing). The practicalities of binding suggest some distinct regularities of binding, in terms of: a sequential and ritual order (for example, who is asked to enter a statement first, who second, etc.), a standardising apparatus (such as the requirement for written statements), and conditions of possibility (such as the availability and admissibility of documents).

¹⁶ In the “criminal law” study of Bradley and colleagues, they account for the trend toward “more rights” with a general explanation: “As societies become more diverse, the notion that government can be trusted to do right by minority groups is being considered increasingly anachronistic by reformers in civil law countries. The more informal approach of the continental system may be well suited to a society in which everyone is of the same or similar background. But it is not suitable where minority groups are mistrusted by, and mistrust, the majority and its police forces” (Bradley 2007: xxiii).

Conclusion: Creating Comparability

The dynamic nexus of items, meaning, and context does not render comparison unproblematic. Quite the opposite is true. Still, or even more so after we demarcated the field of thick comparison, we do not claim a secure place from which to start the comparative endeavour, as in Hung's study of "the law of abortion." We do not claim an unproblematic grid or structure to which to refer, as do Bradley and his colleagues with "the phases of criminal procedure."

Everything instead seems entangled and set in motion. Could we turn this weakness into strength? Could we produce comparability?

In our article of 2007 I reconstructed the ethnographic creation of comparability by reflecting on the role of items, meaning, and context in light of legal comparison. First, I explicated how the *tertium comparationis* can be observed only indirectly and how these observations mobilise various sources of empirical data in a continuum. Second, I distinguished our concept of indexical meaning-production from the rather lexical concept of meaning in legal comparison. Third, I presented procedure and its case as a self-referential context for legal statements, whereby the context is propelled by the actual processing of these statements.

After all, our thick comparison of binding can show to what degree and to what effect binding is realised empirically in criminal cases. The results are surprising when cast in terms of Luhmann's "homogenous" procedural systems. I quote from our article:

[T]he proceedings are fragmented due to a range of disruptions: front and back regions, formal and informal negotiations, disclosed and undisclosed documents, admissible and inadmissible information. These disruptions obstruct a determinist and accumulative procedural past. The procedural course, thus, is far from being linear. Rather, it meanders through a number of temporal relations, among which binding covers only one variety (Scheffer et al. 2007:36).

Even "binding," as the *tertium comparationis*, is destabilized in the course of ethnographic comparison. Not even the "shared" analytical reference point survives our comparison safe and sound. In our ethnographic data, we found a phenomenon that is largely ignored by Luhmann and that can hardly count as binding, but rather appears as the opposite. The moment

resembles what Turner (1969) called “anti-structure” in his theory of rituals (also see Deflem 1991) and what we grasped pragmatically as “unbinding.”

All three national procedures apparently reserve (different) times and spaces for “liminality” and “surprise,” meaning for moments that suspend “traditions,” “the facts in this case,” or “prejudice” – and thereby allow participants a “fresh start.” Unbinding, that is, is not something which happens at random; it is part of the procedural processing of cases. It keeps procedures open:

A range of regulations works as protections against the binding past. Defendants are protected against their own words. They are protected against being trapped by good investigators at the preliminary stage. They are protected by the right to legal representation and the right to silence. The procedures include mechanisms to reopen the “funnel” (Luhmann) and to unbind the author from his/her past (Scheffer et al. 2007: 37).

The comparison of (un-)binding extended the phenomenal range of comparison, while abstaining from propositions such as: “the US system creates more binding than the German system;” “the German system binds later compared to the English one;” or “the English system is more unbinding than the other two systems.” Our comparison implies only modest hypotheses, such as: the English Crown Court may create rather implicit binding for witnesses in the trial hearing; the US State Court may create rather explicit binding prior to the trial hearing; the German District Court may create rather explicit binding for the defendant in court. Moreover, what we deliver remains in the run-up of comparison, which is the price to pay for choosing thick comparison over comparative law.

If thick comparison does not generate much more than hypotheses and limited comparability can this nonetheless be of any use for others besides ethnographers? Could comparative law, for instance, use our insights into how cases are processed (differently) in terms of communication, knowledge, and decisions? Could comparative law link up to the performative account of cases and the reconstruction of their formation?

There is, I believe, no principled reason why legal scholars should not inquire into the legal conditions of binding and unbinding, or into the best possible legal regulations of these effects in various legal procedures. In this way, legal ethnography could provide legal comparativists with a problematic which they may in turn translate into a variation of legal responses.

However, and this is a good thing, such a division of labour may yield some disturbing revelations for both sides. Comparativists may find that significant legal differences do not matter in practical terms. Legal ethnographers may realise that some of their findings are better explained by legal doctrines.

References

- Amodio, Ennio. 2004. "The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy." *The American Journal of comparative law* 52:489–500.
- Aoki, Tamotsu. 1992. "Zur Übersetzbarkeit von Kultur." Pp. 49–73 in *Zwischen den Kulturen. Die Sozialwissenschaften vor dem Problem des Kulturvergleichs* (Soziale Welt, special issue 8), edited by Joachim Matthes. Göttingen: Schwartz.
- Beyme, Klaus von. 1988. *Der Vergleich in der Politikwissenschaft*. München: Piper.
- Bohannon, Paul. 1969. "Ethnography and Comparison in Legal Anthropology." Pp. 401–418 in *Law in Culture and Society*, edited by Laura Nader. London: University of California Press.
- Bradley, Craig M. 2007. *Criminal Procedure. A Worldwide Study*. Durham, NC: Carolina Academic Press.
- Bourdieu, Pierre and Loic J. D. Wacquant. 1992. *Réponses pour une anthropologie réflexive*. Paris: Éditions du Seuil.
- Caporaso, James A. 2000. "Comparative Politics: Diversity and Coherence." *Comparative Political Studies* 33(6–7):699–702.
- Chodosh, Hiram. 1999. "Comparing Comparisons: In Search of Methodology." *Iowa Law Review* 84:1046–1052.
- Collier, John. 1975. "Legal Processes." *Annual Review of Anthropology*, 4:121–144.
- Conley, John M. and William M. O'Barr. 1990. *Rules versus Relationships. The Ethnography of Legal Discourse*. Chicago and London: The University of Chicago Press.
- Deflem, Mathieu. 1991. "Ritual, Anti-Structure, and Religion: A Discussion of Victor Turner's Processual Symbolic Analysis." *Journal for the Scientific Study of Religion* 30(1):1–25.
- Deleuze, Gilles. 1990. *The Logic of Sense*. New York: University Press.
- Dwyer, Daisy H. 1979. "Substance and Process: Reappearing the Premises of the Anthropology of Law." *Dialectical Anthropology* 4:309–320.
- Ewick, Patricia and Susan Silbey. 1998. *The Common Place of Law. Stories from Everyday Life*. Chicago and London: The University of Chicago Press.
- Foucault, Michel. 1972. *The Archaeology of Knowledge and the Discourse of Language*. London: Tavistock.
- Frankenberg, Günter. 1985. "Critical Comparisons: Re-thinking comparative law." *Harvard International Law Journal*, 26:411–455.
- Friedman, Lawrence. 1997. "The Concept of Legal Culture: A Reply." Pp. 33–40 in *Comparing Legal Cultures*, edited by David Nelken. Hants, UK: Dartmouth Publishers.

- Geertz, Clifford. 1993. *Local Knowledge*. London: Fontana Press.
- Gluckman, Max. 1954. *The Judicial Process Among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press.
- Gutteridge, Harold. 1949. *comparative law: An Introduction to the Comparative Method of Legal Study and Research*. Cambridge: Cambridge University Press.
- Habermas, Jürgen. 1981. *Theorie des Kommunikativen Handelns. Band 2. Zur Kritik der funktionalistischen Vernunft*. Frankfurt am Main: Suhrkamp.
- Hannken-Illjes, Kati, Alex Kozin, Alex and Thomss Scheffer. 2007. "Trial and Error." *International Journal for the Semiotics of Law* 20(2):159–190.
- Hung, David. 2004. "Abortion Rights in the United States and Taiwan." *Chicago-Kent Journal of International and comparative law*, 4: 1–37.
- Knorr, Karin. 1981. *The Manufacture of Knowledge: An Essay on the Constructivist and Contextual Nature of Science*. Oxford: Pergamon Press.
- Koppen, Peter J. van, Steven D. Penrod. 2003. *Adversarial versus Inquisitorial Justice. Psychological Perspectives on Criminal Justice Systems*. New York: Kluwer Academic/Plenum Publishers.
- Kozin, Alex. 2007. "The Legal File. Folding Law: Folded Law." *International Journal for the Semiotics of Law* 20(2):191–216.
- Luhmann, Niklas. 1993. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp.
- Lynch, Michael, and David Bogen. 1996. *The spectacle of history. Speech, text, and memory at the Iran-contra hearings*. Durham: Duke University Press.
- Matthes, Joachim. 1992. "The Operation Called 'Vergleichen.'" Pp. 75–99 in *Zwischen den Kulturen. Die Sozialwissenschaften vor dem Problem des Kulturvergleichs* (Soziale Welt, special issue 8), edited by Joachim Matthes.
- Moore, Sally Falk. 1978. *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul.
- . 2005. "Comparisons: Possible and Impossible." *Annual Review of Anthropology* 34(1):1–11.
- Nassehi, Armin. 2005. "Organizations as decision machines: Niklas Luhmann's theory of organized social systems." *Sociological Review* 53:178–191.
- Nelken, David. 2004. "Using the Concept of Legal Culture." *Australian Journal of Legal Philosophy* 29.
- Saban, Ilan. 2002. "Offensiveness Analyzed: Lessons for Comparative Analysis of Free Speech Doctrines." *The Journal of International and comparative law at Chicago-Kent* 2:60–81.
- Scheffer, Thomas. 1998a. „Übergänge von Wort und Schrift: Zur Genese und Gestaltung von Anhörungsprotokollen im Asylverfahren.“ *Zeitschrift für Rechtssoziologie* 20:230–265.
- . 2005. "Courses of Mobilisation: Writing Systematic Micro-Histories on Legal Discourse." Pp 75–89 in *Theory and Method in Socio-Legal Research*, edited by M. Travers and R. Banakar. Oxford and Portland Oregon: Hart Publishing.
- . 2006. "The Microformation of Criminal Defence: On the Lawyer's Notes, Speech Production, and the Field of Presence." *Research on Language and Social Interaction (ROLSI)* 39(3):303–342.

- . 2007a. “File work, legal care, and professional habitus – An ethnographic reflection on different styles of advocacy.” *International Journal of the Legal Profession* 14(1): 57–81.
- . 2007b. “Event and Process. An Exercise in Analytical Ethnography.” *Human Studies* 30(3):167–197.
- Scheffer, Thomas; Kati Hannken-Illjes and Alex Kozin. 2007. “Bound to procedural History? Early Accounts in English, US-American, and German Criminal Cases.” *Law and Social Inquiry* 32(1):5–39.
- Stake, Robert E. 2000. “Case Studies.” Pp. 435–454 in *Handbook of Qualitative Research*, edited by N. Denzin and Y. Lincoln. Thousand Oaks, London, New Delhi: Sage Publications.
- Steenhoff, Gert. 1998. *Teaching comparative law*. Bristol: Universiteit Utrecht.
- Swartz, Marc. 1969. “Processual and Structural Approaches in Political Anthropology: A Commentary.” *Canadian Journal of African Studies* 3(1):53–59.
- Travers, Max and John F. Manzo. 1997. *Law in Action: Ethnomethodological and Conversation Analytical Approaches to Law*. Aldershot: Ashgate.
- Turner, Victor. 1969. *The Ritual Process: Structure and Anti-Structure*. Chicago: Aldine.
- Zumbansen, Peer. 2005. “comparative law’s Coming of Age? Twenty Years after Critical Comparisons.” *German Law Journal* 6.