3.1 General Remarks

A basic precondition for any meaningful comparison between different legal systems is that it is possible to obtain current and accurate information on the legal rules and the legal institutions one is seeking to compare. This of course applies equally to the comparative jurist's own legal system, if it is included in the legal systems being compared, but it is as a rule, because of obvious reasons, much more difficult to learn the details of foreign law. The same difficulties can of course also arise when one is studying foreign law for other than comparative purposes.

The simplest and often also the most efficient manner of obtaining information on a foreign legal system is to take direct contact with knowledgeable colleagues in the foreign country whose law is being studied. This is one of the reasons why bigger law firms often participate in international networks. If one is not fluent in the language and legal terminology of the foreign country in question, it is essential to rely upon a colleague who is able to "translate" the foreign law to the legal concepts which one is familiar with. The greatest advantage of direct contacts is that a dialogue can take place, so that specific and detailed questions can be raised, which focus on the points which are difficult to comprehend, thus making sure that the two lawyers understand one another. The risk of misunderstandings increases when two jurists are compelled by necessity to exchange information in a third language, for example when a Swedish and an Italian lawyer discuss and compare their legal systems in English and thereby use terminology that is foreign to both of their countries.

A comparatist must often, however, obtain the necessary knowledge exclusively by means of his own study of foreign legal materials, such as statutes, judicial decisions, preparatory legislative materials, books and legal periodicals. This requires, of course, that one be somewhat fluent in the language and have a certain basic knowledge of the legal system of the country being studied, particularly its sources of law, fundamental legal concepts, and the legal terminology used. Despite such background knowledge, anyone who attempts to study foreign law will be faced with a number of pitfalls. It is impossible to list all these traps and unfortunately also to avoid them completely.[1]

The greatest danger facing a student of foreign law is that he consciously or instinctively starts with the assumption that the legal concepts, legal institutions and methods of working with the law that he is familiar with in his own legal system also exist in the foreign legal system being studied. Such assumptions can often conform with reality, but it is just as often that they are wrong. An English jurist studying French law might tend to give more weight to judicial decisions than they have in the French legal system, whereas a French jurist studying English law might commit the opposite error. It is therefore necessary to study foreign law without such assumptions or presumptions.[2] In other

[1] See e.g. Zweigert, *Mélanges Maury*, vol. 1, p. 588.

[2] See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, p. 154.

words, it is essential to remove oneself from one's own legal system and its way of thinking (one is almost inclined to speak of the removal of the "handcuffs" of one's own law). This is, however, easier said than done. The legal education a jurist obtained in his own country influences to a large extent his basic attitudes as well as his way of thinking and approaching a legal problem. It is therefore not an exaggeration to suggest that an educated foreign lawyer runs a greater risk of *certain* types of mistakes and misunderstandings than a student who has just begun his legal studies. One need not, however, subscribe to the words of the German-American comparatist Max Rheinstein, who gave the following words of warning when welcoming young European jurists to the University of Chicago for their postgraduate studies:[3]

> Try to forget that you have ever studied law. Never approach a problem in the way in which you would approach it at home. You are likely to go astray.

There can be no doubt that good knowledge of one's own legal system substantially facilitates the study of foreign law. This applies not only when one is looking at a legal system that is related to one's own, but also when studying a legal system which is very different from what one is used to. Without the knowledge of at least one legal system it may be difficult to comprehend the issue under scrutiny. Imagine that the question concerning the protection of the purchaser's title to property against the creditors of the seller is resolved in the foreign legal system in an entirely different manner than what one is accustomed to at home. But would the problem be noticed and raised at all if it had not already been encountered in one's own legal system?

Incorrect factual knowledge concerning foreign law leads naturally to qualitatively poor and factually incorrect legal comparisons, and these can at times be worse than no comparison at all. These potential difficulties should however not discourage one from studying foreign law and making comparison between legal systems. As it has been expressed by two very respected German legal writers,[4]

> the cleverest comparatists sometimes fall into error; when this happens the good custom among workers in the field is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right.

3.2 Availability and Reliability of the Sources of Information

It goes without saying that a fundamental precondition of every study of foreign law is the ability to obtain accurate and up-to-date knowledge about that law, which means that one should have access to reliable sources of

[3] Rheinstein in Rotondi, ed., *Inchieste*, p. 553.

[4] Zweigert & Kötz, *Introduction*, p. 36.

information. It is often considered best to study the primary sources, i.e. the official sources of law (the texts of statutes, judicial precedents, etc.) from the country whose legal system is being studied.[5] This however cannot be regarded as an absolute necessity. To begin with, it presupposes a good knowledge of the language of the country, which may be a serious obstacle, especially for the studies of more exotic legal systems.[6] Foreign statutes and judicial decisions are also often difficult to obtain, even if much reliable information is these days available on the Internet. Of course much depends on the level of ambition, which is related to the purposes of the study. A foreign comparatist who has written a monograph, such as a doctoral dissertation, on French criminal law using merely secondary sources can hardly be forgiven with the excuse that he does not read French or that the law library's only copy of the French Penal Code has disappeared; in the first case he has chosen an unsuitable subject, in the second case it could not have been too difficult for him to procure a copy of the Code from another source. The same demands however cannot be placed on a law student writing a comparative paper on how a particular detail is treated by the criminal law of the EU Member States without focusing on French law; in this case the reliance on secondary sources concerning certain countries can be tolerated, as it would be excessive to demand working knowledge of all the official languages of the EU.

In fact, there are at times clear advantages in using secondary sources of law, such as textbooks, manuals, articles in periodicals, etc. To begin with, judges and practicing lawyers in the foreign country itself read and allow themselves to be influenced by well-regarded works of these types. Additionally, it may be difficult to understand the primary sources and make full use of them without having a substantial amount of background knowledge. It is more rational to first read an overview of the legal issues in a recent article or reference book than to delve directly into the text of statutes and judicial decisions. The article or book shows the entire issue in perspective and will normally contain references to other sources where one can acquire a deeper understanding of the state of the law in the country in question. This is true, in particular, if the author is aware of the fact that the text will be read by foreign readers and adds, therefore, information and explanations normally not included in texts addressed to domestic readers.

It can at times be advantageous to use books written by jurists from outside the legal system they are writing about, although this is an exception. For a German jurist studying English law, an introductory book or article about English law written by a German comparatist can be an excellent means of assistance, as it may be especially adapted to German readers, with the focus on the similarities and the differences between German and English law and their legal terminology.

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[5] See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 156-159.

[6] See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 164-172; Reitz, 46 *A.J.C.L.* 631-633 (1998).

It is an elementary and self-evident requirement that the legal materials being studied must be current. Legal literature in the developed countries has a tendency to become out of date very quickly. Outdated sources lose their value and can even be dangerous: the reader is invited to make the experiment of imagining the picture of his own legal system a foreign colleague would obtain by studying today the course literature that was used at the law schools in, say, 2000. On the other hand, books and legal periodicals are expensive and financial and space constraints make it often impossible, even for law libraries, to procure the latest editions of foreign standard works and subscribe to all leading legal journals and collections of statutes and case law, especially regarding other than the most important legal systems. These days it is often possible to obtain much valuable and current information electronically by means of various computer databases, but not everything on the Internet can be trusted.

Much depends naturally upon what one is interested in. Certain fundamental features of a legal system change very infrequently. This applies for instance to the hierarchy of the sources of law and how they are used. A foreign jurist who wishes to know the methods of interpreting judicial precedents in English law can perhaps rely on the assumption that these methods have not changed dramatically in the last few years. Of course even such fundamental principles can and do change over time. They may even change abruptly and even very recent books may lose their value when a country has undergone a drastic change in the society, such as has occurred with the fall of the communist regimes in Eastern Europe. In the majority of situations where there is a sudden change in the regime, including situations where the change is accomplished by force, almost the entire legal system remains substantially unchanged, especially if there has not been a deeper change in the society. The once frequent military coups in Latin America are a good example of this.

The requirement of up-to-date sources can be relaxed somewhat when foreign law is being studied merely as an exercise just for obtaining the experience of studying foreign law, for instance when a student writes a paper within the framework of a university course on comparative law. Since the availability of current foreign legal sources in the law libraries is often limited, the student may be allowed to get by without the latest legal books, decisions or legislative changes, provided it is the purpose of the paper to train the student rather than to investigate and present the most recent developments of the law in the foreign country in question.

3.3 Interpretation and Use of Foreign Sources of Law

Foreign legislation, judicial decisions, legislative preparatory materials (*travaux préparatoires*), legal writings and other sources of law must be used in precisely the same manner as they are used in the country where they originate from, if one desires to obtain an accurate picture of the foreign legal

system. It is a fundamental principle that when studying foreign law one must respect the system and the hierarchy of sources that exist in the foreign country in question.[7] It often occurs, however, that one unconsciously violates this self-evident principle. It is, for instance, common that Anglo-American jurists, when studying Continental European law, approach even clear and unambiguous statutory text with suspicion if its interpretation has not become settled and confirmed by higher courts, while Continental jurists when studying an Anglo-American legal system tend to place too much emphasis on the statutes.[8] An English jurist might, when studying Swedish law, risk underrating the significance of legislative preparatory materials, just as a Swedish student of English law might risk making a mistake in the opposite direction.[9]

This problem is further complicated by the fact that it is difficult to obtain accurate knowledge about the importance of the various sources of law in the daily practice of law without observing, over a substantial period of time, how they function in reality. The role of precedents or of legislative preparatory materials in a particular legal system is usually not so simple that one can explain it in a few sentences, without constantly using reservations such as "most likely", "as a rule", "usually", etc. The foreign jurist consequently receives no clear instructions and it may easily happen that he in his uncertainty becomes inclined to rely more on the types of sources of law that he is accustomed to working with in his own country.

No less dangerous is, however, to attempt to avoid this risk by means of exaggerating to the opposite extreme, for instance if a Continental jurist would believe that when studying Anglo-American law he should rely exclusively on precedents, or if an English jurist would think that in the Continental legal systems one only needs to be concerned with the text of the statutes without the need to consider judicial decisions. The truth is that both on the European Continent and in the Anglo-American legal systems statutory texts as well as judicial decisions are taken into consideration, even if the weight accorded to them varies.[10] In both systems one can arrive at very similar conclusions even if one starts out from different points of view; it has for instance been said that a Continental jurist pays attention to precedents because the legislation allows it, while a common law jurist pays attention to statutes because the courts do the same.[11]

An important thing to keep in mind is that the real importance of the various sources of law is by no means always officially recognized in the country's

7 See Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 179-188 and 203-205; David, *Traité*, pp. 9-12; Göranson, *Festskrift Agell*, pp. 203-204; Lando, *TfR* 1998, pp. 398-401; Zweigert, *Mélanges Maury*, vol. 1, p. 587.

8 See Ehrenzweig, *Mélanges Malmström*, pp. 77-78.

9 Cf. Gutteridge, *Comparative Law*, p. 116.

10 On prejudices concerning differences between common law and Continental European law, see Mayda, *Rev.int.dr.comp.* 1970, pp. 72-74; Sweeney, *Rev.int.dr.comp.* 1960, pp. 685-700; Zweigert & Kötz, *Introduction*, pp. 256-275.

11 See Ehrenzweig, *Mélanges Malmström*, p. 76.

judicial decisions and described in the country's legal literature. The case law and legal writing in Latin America is often extremely theoretical and entirely neglects to refer to and discuss previous cases. A European jurist visiting his Latin American colleagues has therefore frequently become astonished when he observed that the practising lawyers and judges regularly consult their comprehensive collections of judicial decisions.[12]

Foreign sources of law should be interpreted as they are interpreted in the country where they originate. If one desires accurately to understand the meaning of a foreign statute or of a foreign judicial decision, one cannot interpret them in the same manner as if they had originated in one's own legal system.[13] Anglo-American courts, for instance, tend to interpret legislative rules restrictively in accordance with the exact literal meaning of the words, while Continental judges are normally inclined to interpret the wording more flexibly, taking into consideration the purposes of the statute. This has influenced the wording of statutes in e.g. England and the USA. Where a Continental European legislature would be satisfied to say that the act concerns "banks", the text of an Anglo-American statute might prefer to speak of "a bank, banking corporation or other organization or association for banking purposes"; nor would it be satisfied to refer to "foreign laws" without more comprehensibly stating, for instance, "all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power", etc.[14]

Even among countries which in theory accord a certain source of law approximately the same value, there may be substantial differences. For example, even if the role of precedents in general terms is the same in two countries, they may have different approaches concerning the weight of *obiter dicta* or the importance of concurring or dissenting opinions.

Not even when interpreting a foreign legal rule resulting from international legislative cooperation, or taken over from another country, one can be certain that it is interpreted in the same manner in all of the countries concerned. For example, the Belgian Civil Code originates from the French Civil Code and the rules are, to a great extent, still identical in both countries. However, if one seeks to learn the provisions of Belgian law one cannot mechanically rely upon French authors and French judicial practice; one must rather determine, independently, the interpretation that is prevailing in Belgium itself.

3·4 The Foreign Legal System Must be Studied in its Entirety

Often when studying foreign law one is interested only in a specific issue, for example the financial support the government provides to families with children or the statute of limitation for monetary claims. It occurs

[12] See David & Brierley, *Major Legal Systems*, p. 149.

[13] See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 216-220.

[14] See sec. 204-a(3) (a) in New York Banking Law, as quoted in 61 *A.J.I.L.* 611 (1967).

that an inexperienced student of foreign law, and even at times an experienced comparatist, obtains the impression that the foreign legal system completely lacks rules on the issue under scrutiny. But this can be due to – and in the majority of cases most probably is due to – that one has looked in "the wrong place" within the foreign legal system, most often because one only has looked in the place where the same issue is dealt with within one's own legal system.[15] This is a dangerous mistake.

To begin with, it may be that the foreign legal system's systematic divisions differ to a significant degree from those which one is accustomed to in one's own legal system. Thus Soviet law, and not so long ago also English law to a certain extent, lacked the – for a Continental jurist fundamental – division of the law into public and private. On the other hand, the Continental legal systems lack the division within English law into "common law" and "equity" (see section 9.3 below). But even those divisions, which on their face are the same, can be defined in various ways in various countries. If one wishes, in an Anglo-American legal system, to find the rules concerning the statute of limitations for monetary claims, one must, surprisingly for a Continental European jurist, normally look into books and collections of judgments concerning procedural law.

Another fact that must not be disregarded is that a foreign lawmaker, even in a country with similar divisions in the legal system as in one's own, may have chosen another method to attain the same or similar objective, and that this perhaps means that the relevant legal rules are found in another part of the legal system. A Swedish jurist interested in the legal regulation in a foreign country on the public financial support to families with many children should not limit his research to welfare-law instruments such as those used in Sweden (child and housing allowances), since a substantial share of the public support in the foreign country is perhaps not paid out in the form of welfare subsidies but rather via the tax law in the form of a tax reduction (a form of support not used in Sweden). In a similar manner, the right of the surviving spouse to share in the division of the property of the deceased spouse is in certain countries primarily based on inheritance law, while in other legal systems the same matter is regulated by matrimonial law. A student of foreign law consequently cannot assume that a particular problem in other legal systems is regulated within the same part of the legal system as in his own law.[16]

The significance of the above is that one must have a look at the foreign legal system in its entirety even when one is only interested in a specific issue. It is not sufficient to investigate only the particular legal field which according to its designation corresponds to the relevant field in one's own legal system. In addi-

[15] See Strömholm, *SvJT* 1971, pp. 261-262; Zweigert, 7 *Israel L.R.* 467 (1972), in *Mélanges Maury*, vol. 1, p. 589 and in Rotondi, ed., *Inchieste*, p. 739; Zweigert & Kötz, *Introduction*, p. 35.

[16] See Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 240-247; David, *Traité*, pp. 12-15; Schwarz-Liebermann von Wahlendorf, *Droit*, p. 187. Strömholm, *SvJT* 1971, pp. 261-262 speaks in this connection about "the problem of congruence".

tion, the small part of the foreign legal system being studied is equally influenced by those principles which influence the foreign legal system as a whole, for instance the hierarchy of the sources of law and the principles of interpretation.[17] This confirms that one should not "clip out" a detail from the foreign law and study only that, without keeping in mind its interaction with the remaining parts of the legal system. A different matter is that time and other restraints make this ambition often difficult or even impossible to fulfill.

3.5 Translation Problems

A jurist involved in the study of foreign law in a foreign language will at times need the assistance of a dictionary. Ordinary bilingual dictionaries attempt to translate each word by looking for the directly corresponding word in another language. Many foreign legal terms and phrases, however, lack in fact a directly corresponding translation. For example the English legal term "trust" has no counterpart in most Continental European languages. Furthermore, even when there ostensibly is a direct translation, one should not assume that the meanings are exactly the same.

Legal terms often have the disadvantage that they also exist in everyday language and frequently with a somewhat different – often less precise – meaning than they have in the legal context. For example, the word "attempt" in ordinary English usage does not mean exactly the same as it does in English criminal law. Nor does the word "attempt" in English criminal law necessarily mean the same as the literal translation of "attempt" in another legal system.

One may question if it is at all possible to translate with just one word even relatively common legal terms, such as "marriage". For example, marriage in English law has legal effects which in some respects differ from the legal effects of marriage in accordance with French law, the conditions for entering into and dissolving differ, etc.[18] The English "marriage" and the French "*mariage*" can be said to mean the same as long as they refer to marriage more as a sociological, biological and/or religious institution than as a legal one. To arrive at an internationally accepted *legal* definition of marriage is however much more difficult. Defining marriage as a "relationship between one man and one woman, established in a prescribed manner, to which the law accords particular legal effects varying between different legal systems" is so vague and general that the meaning of the definition is quite insipid. It can also rightly be accused of being too narrow, as it excludes polygamous and same-sex marriages existing in

[17] See Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 247-249.

[18] See Kisch in Rotondi, ed., *Inchieste*, p. 411. On legal translation problems in general see de Cruz, *Comparative Law*, pp. 220-222; de Groot in Smits, ed., *Elgar Encyclopedia*, pp. 423-433; Jamieson, 44 *A.J.C.L.* 121-129 (1996); Grossfeld, *Kernfragen*, pp. 118-122; Kjær, *Retfærd* 1998, no. 83, pp. 4-14 and in Van Hoecke, ed., *Epistemology*, pp. 377-398; Legrand, *Rev.int.dr.comp.* 1996, pp. 310-313; Pfersmann, *Rev. int.dr.comp.* 2001, pp. 283-286; Sacco, *ZEuP* 2002, pp. 734-735; Vogel, *Juridiska översättningar.*

many countries; on the other hand it is too broad as it also includes heterosexual registered partnerships (existing in e.g. Dutch law) and legally recognized *de facto* cohabitation.

Translation problems can occur even concerning typical legal terms which are not even used in non-legal contexts. An American notary public is, for example, not at all the same figure as a Swedish *notarius publicus* or a German *Notar.*[19] Or similarly, the French *"détention préventive"* does not have the same meaning as preventive detention in England.[20] It occurs that legal terms have different meaning even in countries which have the same official (legal) language. The concept of *"Auftrag"* (roughly translated into English as commission or mandate) in Swiss law does not mean the same as *"Auftrag"* in German law. The Swiss concept includes both remunerated and unremunerated commissions, while the German concept is much narrower and includes only the latter type. Remunerated commissions are denoted in German law in another manner, usually as *"Dienstvertrag"* or *"Werkvertrag"*.[21]

Attempts to create a special borderless comparative legal terminology remain utopian.[22] The best advice one can give the student of foreign law is to make use of specialist bilingual dictionaries for legal terms[23] or law dictionaries where legal terms and concepts are explained in their own language, provided of course that such dictionaries are available. The last-mentioned dictionaries are particularly valuable, as they make it easier to understand the meaning behind the foreign legal terminology, assuming of course that one has sufficient knowledge of the language.

The problems with translation are especially troublesome when one is elaborating a multi-language legal text, for example an instrument of EU law or an international treaty with authentic versions in several different languages.[24]

3.6 Obsolete and Living Law

When one studies foreign law it is of the greatest importance to determine which rules of conduct in the foreign country have the status of a legal rule.[25] The answer naturally depends on how one defines "valid law" and it is therefore important that the comparative jurist begins with defining this for himself. It may often be the case that the definition in the comparatist's own country differs somewhat from the definition used in the foreign country whose law is being studied. For instance, the borderline between moral rules and legal

[19] See e.g. Kahn-Freund, 82 *L.Q.R.* 52-53 (1966); Schlesinger, *Comparative Law*, pp. 622-623.

[20] See Backe, *TSA* 1968, p. 386.

[21] See Bogdan, *Travel Agency*, pp. 40-42.

[22] See Gerber, 46 *A.J.C.L.* 719-737 (1998).

[23] See Backe, *TSA* 1976, pp. 189-191 and in 1977, pp. 311-312.

[24] See Gutteridge, *Comparative Law*, pp. 121-122.

[25] See e.g. Constantinesco, *ZvglRW* 1981, pp. 177-198; Husa, *FJFT* 1997, pp. 412-421.

rules in certain foreign legal cultures can be more vague or be different from what one is accustomed to.

Previously (see section 1.3 above) I have defined legal rules as those norms for human conduct that are maintained by the authority and power of the state. If one accepts this definition, the question arises whether formal declarations of the citizen's political and civil rights in the constitutions of some countries belong at all to these countries' legal systems, since there is no possibility to have them enforced. In some countries, the courts and other authorities do not have the right to invalidate or refuse to apply laws and regulations that are in violation of the formally valid constitution, and the legislation passes laws without any real control of their constitutionality. In the best case, it can be said that in such countries the constitutional provisions constitute a political declaration of intentions but do not fulfil the criteria according to this book's definition of valid law. On the other hand, in some one-party states the ruling political party issues instructions and decrees that are followed by i.a. courts and the police; in spite of the fact that the party is on paper separate from the state, its rules are in reality part of the law there.

In most legal systems it will occur that certain legal rules become obsolete, i.e. despite that they may formally continue to be valid they are no longer applied in practice. At a certain point such legal rules may simply cease to be a part of the "living" legal system. This may be confusing for foreign jurists. For example, a jurist from a country where "life imprisonment" really means imprisonment for the rest of the natural life of the criminal may become somewhat preplexed when he reads that an alien found guilty by a Swedish court has been sentenced to "life imprisonment and to be deported after the sentence has been served". It is often difficult to discover that a rule in a foreign legal system has become obsolete. The fact that a statutory rule is no longer applied in practice is of course not apparent in the text of the statute itself. The lack of recent published judgments applying the rule may be due to other reasons than that it has become obsolete and lost its significance. Because of various reasons, authors in the foreign country may have chosen to refrain from pointing out certain rules as obsolete. For instance, legal scholars living in a totalitarian country seldom dare to explicitly describe how formally applicable guarantees of the rule of law are disregarded by the government.[26]

As the above-mentioned example regarding Swedish life imprisonment shows, when investigating if certain formally valid statutory rules are still living law one should not limit oneself to judicial decisions. It can for instance be that the foreign statute provides for capital punishment (death penalty) for certain crimes, and that the country's courts in practice also issue such verdicts, but that subsequently the sentence is always commuted by the head of state to life imprisonment. The question then arises whether the commuting of the punishment occurs after considering the circumstances in each individual case or because the head of state regards himself compelled to pardon the person

[26] Cf. Lando, *Mélanges Tallon*, pp. 143-144; Zweigert, *Mélanges Maury*, vol. 1, p. 588, note 25.

sentenced to death on the basis of an unwritten customary legal rule, which has transformed the death penalty into an obsolete institution.

It is important when studying foreign law to keep in mind the various rules of conduct that have been developed *praeter legem* but function as legal rules.[27] Included here is also the practice of the police and the prosecutors: it can for instance be imagined that a statute requires even private babysitters to declare and pay tax on their income, but in practice that almost never occurs, perhaps due to the fact that is is generally known that according to an unwritten rule this statute is never enforced.

3.7 Social Context and Purpose of the Legal Rules

The legal system is a social phenomenon and expresses only one aspect of the society. It therefore cannot be seen isolated from the same society's other aspects. To be able to understand the legal rules of a foreign country, one should, as far as possible, attempt to understand their "non-legal" (such as the economic, political, ethical, religious and cultural) environment and their social purpose.[28] Only in this way is it possible to understand what role the legal rule in question really has in the society and how it functions in reality. The same problem is well-known among legal historians, since one can hardly correctly understand, for example, the law of the fifteenth century without knowing the economic and political system, and the cultural, religious and ethical values, of that time. Naturally one must distinguish between legal rules whose background and purpose are obvious or easy to understand (for instance traffic rules) and rules whose understanding requires a deeper study of the foreign society.

What has just been said is of special importance when one studies legal rules originating in a different type of society than that which exists in one's own country.[29] One must keep in mind that the same or similar legal rules and legal institutes can play different roles in different societies. The former communist-governed countries of Eastern Europe thus had relatively developed and detailed legislation on, for example, the protection of trademarks, even if this did not fulfil any significant practical purpose as there was no functioning market with competition. They were, however, forced by international conventions, to which they have acceded in order to protect their own trademarks in the world market, to have trademark legislation. Without knowledge of the planned-economy system that existed in these countries, one could easily misunderstand their

[27] Cf. Neumeyer in Rotondi, ed., *Inchieste*, pp. 512-515; Reitz, 46 *A.J.C.L.* 629-630 (1998).

[28] See e.g. Ancel, *Utilité*, p. 93; Blagojević in Rotondi, ed., *Inchieste*, p. 39; Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 201-203 and 252-276; David, *Traité*, pp. 15-25; Glendon, Gordon & Carozza, *Comparative Legal Traditions*, pp. 9-13; Kamba, 23 *I.C.L.Q.* 513-515 (1974); Müller-Römer, *Recht in Ost und West* 1969, p. 6; Rodière, *Introduction*, pp. 139-141; Savatier, *Problèmes contemporains*, vol. 2, pp. 377-378; Strömholm, *SvJT* 1971, p. 262; Winizky, *Problèmes contemporains*, vol. 2, p. 531.

[29] See e.g. Loeber, *RabelsZ* 1961, p. 218; Szabó, *Act.Jur.Hung.* 1971, pp. 131-141.

trademark legislation's meaning and function. Similar difficulties naturally could also arise in the opposite direction: a jurist from a country with a planned economy, where all industrial and commercial activity was managed in detail by the state, could only with difficulty understand Western competition law without first having obtained a certain basic knowledge on how a market economy works.

But knowledge of economic and social factors beyond the basic social system may too be necessary for the understanding of foreign law. Imagine that a state enacts legislation obligating employers to absorb the costs for language training for newly employed immigrant manpower. It may appear on the surface that this legislation is for the advantage of immigrants, but in reality the intention and the effect of the rule may be to limit immigration by discouraging employers from employing immigrants and thus to reduce the unemployment rate among nationals. A foreign jurist, who is not familiar with the situation in the country (the state of the economy, level of unemployment, immigration policy), can easily gain a wrong picture of the real purpose of the legal rule and its practical effects.

It is also important to know the attitude towards the legal system that prevails among the inhabitants of the foreign country. Thus, Japan, Taiwan and South Korea have taken over a number of important legal rules from for example Germany, but these rules play another role in countries where one traditionally is inclined to resolve disputes by means of mediation and compromise and where it is regarded to be almost shameful to turn to the courts.[30] Important cultural differences in attitudes towards law may exist even among Western countries, for example between the Continental European countries and the countries of common law.[31]

Knowledge concerning the non-legal aspects of the society whose legal system one is studying is of value not only when one wishes to learn how certain legal rules function, but even when one wants to understand how the foreign society manages problems on which legal rules, surprisingly enough, are lacking. It occurred that a foreign labour law specialist became surprised and had some difficulty to comprehend that Sweden does not have any legal rules concerning minimum wages; the understanding of the Swedish situation on that point requires namely knowledge of the high degree of unionization of the Swedish labour force, the strength of the trade unions and the role of collective bargaining agreements. It may also occur that some legal relationships, which in certain countries are the object of detailed regulation by means of legislation, are regulated in other countries by legally recognized customary rules or by standard contract clauses. A task, which in one country is regarded as belonging to national or local government, may in certain other countries be regarded as a private concern and as such not requiring detailed regulation by law. Thus some countries have a national social insurance system regulated in detail by admin-

[30] See Noda, *Livre du Centenaire de la Société de législation comparée*, vol. 2, Paris 1971, pp. 161-164.

[31] See e.g. Legrand, 45 *I.C.L.Q.* 52-81 (1996); Kjær, *TfR* 2001, pp. 870-905, with further references.

istrative law, while the same tasks in other countries are taken care of by private insurance companies relying on contracts. Some such contracts may have a special status due to the fact that the state was involved in their formation.[32] This used to be the case in Sweden, where the general contract terms in some consumer contracts were formulated by the organizations of businessmen in cooperation with the Consumer Ombudsman (a state instrumentality protecting the interests of the consumers).

[32] See e.g. Kahn-Freund, 82 *L.Q.R.* 87 (1966); Zweigert, 7 *Israel L.R.* 467-468 (1972).