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# WHAT'S WRONG WITH INTERNATIONAL LAW SCHOLARSHIP?: GAPS IN INTERNATIONAL LEGAL LITERATURE\*

Lyonette Louis-Jacques\*\*

## I. INTRODUCTION

Once upon a time in Minnesota, a student approached a neophyte foreign and international law librarian, and asked for legal resources on the rights of gays in the military in Europe. After much searching, the librarian found hardly any publications written on the topic in any language. That challenging (yet wondrous) quest for resources taught the librarian a very important lesson. When little is published on an area of law, it is very difficult to research that area. And if you do find literature to fill such a gap, make a note of it. And then tell the world!

I was that young librarian, and this article is my attempt to tell the world about some of the gaps in the foreign and international law literature that I have observed throughout the years. These observations are derived not only from reference questions, but also from my review of research tools, publishers' catalogs, bibliographies, footnote references, and other materials that have crossed my desk. While I have scanned the literature in selecting materials to build foreign, comparative, and international law collections at two institutions (Minnesota and Chicago), I have done no systematic search. Still, I think those who read the literature on a regular basis would confirm most of my impressions.

Part II of this article addresses the problem of finding translations of primary legal sources. Part III details the gaps in, and inadequacies of, international legal research resources. And in Part IV, I bemoan the dearth of literature on certain topics and the underrepresentation of particular viewpoints in the scholarship on foreign, comparative, and international law.

## II. TRANSLATIONS OF FOREIGN AND INTERNATIONAL LAW

“As the world, in effect, grows smaller and as international trade and social, commercial and cultural exchange increases almost exponentially, lawyers and scholars in one jurisdiction or of one legal system must seek

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\*\* Foreign and International Law Librarian, D'Angelo Law Library, University of Chicago Law School. The author would like to thank Michael Edwalds for his helpful and constructive comments on this article.

information from, or about, another.”<sup>1</sup> For monolingual researchers in the United States, finding foreign legal information in English can be extremely difficult:

The day comes when one must search for bankruptcy laws in Greece or banking laws of the Cayman Islands or initiate an interlibrary loan request for the Bolivian civil code. At this point, one begins to appreciate the difficulty of foreign legal research and, at the same time, there dawns an apprehension of the enormous, diverse and casually controlled range of foreign legal materials. In all likelihood, once this first awkward prospect is negotiated, the researcher will be troubled with a sequence of other serious questions. These queries stem from our fairly insular background as “North Americans”: is this material easily available; is it in English or, failing that, in what we might consider an “accessible” language (such as French or German); is the dusty version of the Argentine penal code we’ve located still current and reliable?<sup>2</sup>

The needs of a transnational lawyer might differ from those of a law professor or student in that the latter may have a choice as to which foreign laws to read. Because of the general awkwardness in conducting foreign legal research, the choice of what country’s law to compare with that of the U.S. may depend on which languages the researcher can read or which translations he or she can readily access. Academic researchers need translations of non-English primary and secondary legal materials to expand the range of their comparisons beyond English-speaking common law countries to studying countries with civil, religious, or mixed legal systems. Comparative legal studies have more limited value when the systems compared come from closely similar cultures. Improved access to English translations of foreign and international legal materials will facilitate greater exploration of different legal systems to energize the field of comparative law.

At present the most indispensable resource for finding translations of primary legal materials is *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World* (“*Foreign Law*”). This annually-updated set is currently available in loose-leaf and full-text-searchable CD-ROM formats. It includes subject listings for accessible English-language translations of standard codes, as well as major legislative enactments as published in commercial loose-leaf services, multi-volume monographic sets, and periodicals that regularly include translations.

The problem with *Foreign Law* as a research tool is that it provides access mainly to the most commonly available translations of major

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<sup>1</sup>Thomas H. Reynolds and Arturo A. Flores, eds, *1 Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World 1* (Rothman 1997).

<sup>2</sup>*Id.* at 1.

legislation. It indexes neither compilations of “lesser legislation,”<sup>3</sup> nor translations in electronic format. The editors intentionally omit translations that are occasionally published in law review articles or as appendices to the odd foreign law monograph or textbook. *Foreign Law* also generally does not cover translations of foreign court decisions or bilateral treaties, nor does it include all subject matters.

*Foreign Law* has the major benefit of providing one central, well-organized source for major English-language translations. If a search in the *Foreign Law* set is unsuccessful, what is a researcher to do? She has before her a world of possible sources of translations but with widely scattered, disorganized points of access. Translations of laws directly related to doing business abroad are easier to find than others. But sometimes researchers need translations of health, family, criminal, and other laws of foreign countries in order to compare legal approaches to contemporary social issues and investigate possibilities for reform.

To facilitate the search for translations, we need alternative, up-to-date indices to translations of foreign law that are available not only in print, but also in electronic format on the Internet, LEXIS, WESTLAW, and other databases. We need indices that include subject access to legislation that is not solely related to doing business abroad. And, we need tools for finding bilateral treaties and significant case law in translation (such as the abortion decisions of the German Constitutional Court). We also need access to all publicly available translations.

Rich sources for English translations of laws include foreign embassies, United Nations bodies, human rights organizations, international law firms, research institutes, English-language foreign law journals, comparative law scholars, and ministries of justice, commerce, and foreign affairs. A publisher with vision and initiative can track down existing translations or commission needed translations and then make these translations available in searchable, logically organized subject compilations (in whatever formats are optimal for particular research purposes). Key articles from even the most respected foreign law journals or major legal scholars are generally unavailable in translation. American law journals could solicit translations of such articles and publish them to make more comparative law literature in English available to researchers here in the United States.

### III. GAPS IN INTERNATIONAL LEGAL INFORMATION SOURCES

Traditional international legal research tools are inadequate to meet fully the needs of today’s researcher. This is largely due to the format and content gaps in international legal literature. In addition, inadequacies

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<sup>3</sup>*Id.* at 10.

exist in international legal reference tools, statistical sources, and citation analyses.

### A. Format Gaps

Most researchers prefer to access legal information in electronic format, but key tools, such as the *World Treaty Index*, *International Law Reports*, the *Encyclopedia of Public International Law*, the *International Encyclopedia of Comparative Law*, and *Szladits' Bibliography on Foreign and Comparative Law: Books and Articles in English*, exist only in print format. Other tools are only partially available in electronic format: though it began publication in 1962, *International Legal Materials* is accessible only from 1975 to the present on LEXIS; the *Index to Foreign Legal Periodicals* ("IFLP"), begun in 1960, can be accessed online via WESTLAW only from 1985 onward; and most full-text law journals are online only since about the mid-1980s.

The *Digest of United States Practice in International Law* (1973–1988) ("*Digest*") presents special problems. It is updated by a column in each quarterly issue of the *American Journal of International Law* ("AJIL"). The AJIL is accessible online on LEXIS and WESTLAW, but the *Digest* and its predecessors are only in hardcopy format.<sup>4</sup> There was a paper consolidation of the 1981-1988 volumes of the *Digest* called *Cumulative Digest of United States Practice in International Law*. The *Digest* needs a comprehensive subject index, as well as a new hardcopy compilation to cover 1989 through 1999.

Making the *Digest* available in electronic format would facilitate international legal research by making it easier and more efficient to use. Digitizing journal articles written before 1980 and the classic international law works would make them more accessible, facilitate their use, and ensure that we do not forget the international law scholarship of the past.

### B. Content Gaps

Even when publishers have made research tools available in electronic format, researchers still confront gaps in the content of these research tools. For instance, the IFLP is available electronically beginning in 1985. This does not mean, however, that the coverage for all the journals it indexes starts in 1985. The IFLP has added and removed journals since 1985. The most notable decision in the past decade was to omit coverage of Japanese legal periodicals from the IFLP. Therefore,

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<sup>4</sup>The *Digest*'s predecessors are: Francis Wharton, *Digest of International Law of the United States* (US Dept of State 1896); John Bassett Moore, *A Digest of International Law* (US Dept of State 1906); Green Haywood Hackworth, *Digest of International Law* (US Dept of State 1940–44); Marjorie M. Whiteman, *Digest of International Law* (US Dept of State 1963–73).

the researcher cannot rely on the IFLP as a complete and comprehensive source for identifying articles in foreign legal periodicals. The same caveat applies to online full text databases for journal articles (such as the ones on LEXIS and WESTLAW). Such online versions generally do not include complete runs of the journals. One should never assume that an index or a full text database covers the full run of a journal, or covers the journal at all.

The LEXIS and WESTLAW databases are relatively content-poor compared to the wealth of foreign and international legal resources outside their electronic borders. They contain very little by way of foreign law (WESTLAW covers a handful of countries; LEXIS about two dozen). There is also no guarantee that what is in these two databases today will be there tomorrow or that the files are kept up-to-date. For instance, over the years, WESTLAW has dropped the CHINALAW, POLISHLAW, and CELEX European Union legislation and case law databases. Recently, LEXIS dropped all French law files from its databases. And, the file on LEXIS containing European Court of Human Rights decisions is at least one year out-of-date. Electronic resources seem to mimic the poverty of print resources when it comes to topics and countries covered—the focus is on major countries and major topics, especially anything related to business law.

### C. Gaps in International Legal Reference Tools

Basic reference tools, such as the *Parry and Grant Encyclopaedic Dictionary of International Law*, the *Encyclopedia of Public International Law* (12-volume and 4-volume cumulative print editions) and the *International Encyclopedia of Comparative Law* (30+ volumes), exist only in print format. The latter two are multi-volume sets which, if consolidated in an online database such as LEXIS or WESTLAW or on CD-ROM, would be easier to search.

Another useful reference tool is the Online Public Access Catalog (“OPAC”). The OPAC enables researchers to verify citations of books and journals owned by a particular library (or multiple libraries if they are union catalogs). Several different union catalogs exist worldwide. Ideally, one OPAC could include the combined union, national, and individual library catalogs, enabling a researcher to use a single search to find all books and journals owned by libraries throughout the world on foreign, comparative, and international law topics.

In recent years, some major research tools, such as the International Labour Office’s *Labour Law Documents*, have ceased publication. Some have lagged in publication and become outdated. Some have been converted from print to electronic-only publications (especially newsletters) often with no assurances of permanent electronic archives.

These changes create lacunae in the literature that can make international legal research very difficult.

#### *D. Gaps in Citation Analyses and Studies of Authorities*

While citation analyses exist for American legal materials, there are none for foreign and international law. Studies that show which journal articles, books, and authors are most often cited in the international legal literature would help determine the leading scholars, major works, and predominant topics of international law scholarship. Such studies would also highlight the need for a more complete exploration of some areas of international law in the literature and the need for different voices in the scholarship on international law. A ranking of international and comparative law journals published in the *International Lawyer*,<sup>5</sup> for instance, while not without its faults, did help highlight the most authoritative, widely respected journals in the field.

Directories and biographical information for professors, lawyers, judges, and others working in the international law field throughout the world can also add to the general awareness of international law expertise. Publishers in the United States can encourage the writing of more *Festschriften* and other compilations of essays to recognize lifetime contributions to international legal scholarship. Assessments of the literature, such as recommended foreign and international law books or bibliographies of key literature for different legal topics, would also help comparativists and researchers generally.

#### *E. Other Gaps*

Comparative legal statistics are hard to find. Researchers face an uphill battle if they are looking for information on the number of lawyers and judges in the world, criminal case statistics, and general information on numbers of cases filed, disposed of, at what level, and on what areas of law for foreign countries. Statistics on cases resolved outside of the legal system, for example, would enable scholars to explore the effects and uses of alternative dispute resolution techniques.

Finally, new technologies such as online legal databases (LEXIS and WESTLAW), CD-ROMs, and the Internet, are generally affecting how international legal research is done and what sources of international law are used. The new technologies may also obscure some important sources for international law. We need more research on the impact of electronic access to international legal information on the research process and substantive international law generally. Also, research is

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<sup>5</sup>Gregory Scott Crespi, *Ranking International and Comparative Law Journals: A Survey of Expert Opinion*, 31 INT'L LAW 869 (1997).

needed on the impact of the ABA's Central and East European Law Initiative<sup>6</sup> and other law reform projects on the legal systems of the states involved.

#### IV. UNDER-REPRESENTED TOPICS, APPROACHES, AND VIEWPOINTS

We are losing much of the moral human perspective by concentrating our literature on business-related aspects of foreign, international and comparative law. There are many areas outside the mainstream which need legal analysis. Comparing laws worldwide can inform us about different perspectives for handling legal issues and provide additional options for legal reform.

##### *A. Health Law*

With increased travel worldwide, the chances of cross-border transfers of infectious diseases have increased. Tuberculosis and other diseases previously thought to have been eradicated or controlled have reemerged. Although health problems have international scope, few legal scholars have directed attention to the related legal issues. The rights of patients, medical insurance, HIV/AIDS law, reproductive technologies, and abortion laws generally have not been frequent subjects of international legal scholarship.

##### *B. Travel Law*

Governments worldwide are struggling with border-control issues. The inter-national legal community needs to scrutinize the measures governments take to control illegal immigration, transnational organized crime and smuggling of drugs, arms, and humans. I note especially the relatively few mainstream publications concerning the treatment of immigrants, their housing, their rights to welfare benefits, health care, and work, and their problems with discrimination, crime, and reunification with their families.

Also, the intersection of race and migration is an area of current concern. Security measures at airports regularly involve detention and searching of dark-skinned people who fit profiles of "terrorists" or "drug smugglers." Others are stopped or prevented from entering a country because of fear that they carry the AIDS virus or contagious diseases. These types of procedures are insidious because they can be invisible to fellow travelers. There is great potential here for discrimination and interference with the international right to travel, and, therefore, the literature should cover and expose these issues.

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<sup>6</sup>See <http://www.abanet.org/ceeli> (visited on Mar. 4, 2000).



*C. Human Rights*

Most countries afford fewer rights to the mentally disabled and to prisoners. The literature lacks comparisons of how they are handled in various legal systems. Even where constitutional and statutory law formally protects the rights of prisoners and the mentally disabled, enforcement of those rights is inconsistent. Yet scholars have done precious little work on the practical realities of these human rights.

The human rights of some ethnic and religious minorities are rarely explored on a global level. The Roma (or "Gypsies") and other nomadic people are in serious danger of being planned out of existence. Palestinians in Jerusalem are constantly dealing with the destruction of their homes and property. Jehovah's Witnesses face religious discrimination regularly. There are also legal problems faced by Christian Scientists, Jews, the Church of Scientology, and other religious minorities. Anti-semitism has not disappeared.

Cults or other non-traditional or unrecognized religious groups create special problems. Some religious groups advocate overthrow of secular government in favor of a theocracy. How do various countries deal with ethnic groups which do not share the dominant culture's views on property? What have authorities done about neo-Nazis and various other antihuman/antisocial peoples? What effect has hate crime legislation had? How do countries around the world treat growing xenophobia, especially in areas with illegal immigration and massive population migrations? The literature of international law provides few discussions, let alone answers.

*D. Different Perspectives*

Critiques of international human rights law and its bases are rare. Since the fall of the Berlin Wall, most writers seem to assume that capitalism and democracy are the only possible social systems, or that other systems have no advantages worthy of mention. Few legal scholars study existing socialist and communist systems and aspects of them that work, such as society-wide public health, welfare, and employment. While much is written on international criminal law, the literature largely lacks representation of the viewpoints of the countries accused of violating international law. The literature generally omits discussion of crimes committed by countries that are sufficiently powerful to assure silence on such issues.

Where are the critical legal studies of international law issues? Third World perspectives? Who cites the Indian international law scholars? Eastern European? Asian? African? Latin American? What about conservative or feminist viewpoints on international law? If all

scholarship is from a Western, capitalist, democratic, liberal viewpoint, how are we challenged? Does it not both exclude and preclude recruitment, collaboration, and involvement by “others”? I challenge international law scholars to write about the unpopular, the weird, the old, the outside, the unexpected, the obscurities buried in ancient tomes, and the unsafe topics that do not make headline news.

U.S. writers tend to the provincial, living in a monolingual world, seeing that world through a narrow tunnel. They should expand their minds and look abroad at the work of other international law scholars worldwide. I would like to see references to more foreign scholars and non-English resources in the international legal literature. I would like to read more scholarly writings on international legal issues from diverse perspectives.

#### V. CONCLUSION

Global networks have improved access to international legal information. Projects are underway to translate and digitize core materials necessary for foreign, comparative, and international legal research. And some academic institutions have actively encouraged scholarship in underrepresented areas of international legal literature.

But much work remains to be done to plug the gaps. For international law scholarship in the United States to break from its provincial perspective, researchers need better access to translations of significant legal materials, better electronic access to basic research tools, and exposure to a wide array of works on diverse topics written from widely varying perspectives. “Denn nur durch Vergleichung unterscheidet man sich und erfährt, was man ist, um ganz zu werden, was man sein soll.”<sup>7</sup>

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<sup>7</sup>THOMAS MANN, 3 JOSEPH IN AGYPTEN 589 (Berman-Fischer Verlag CIS 1936). (For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be.)

