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## Comparative Law and Jurisprudence

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# COMPARATIVE LAW AND JURISPRUDENCE

JEROME HALL\*

## INTRODUCTION

ARTHUR Lenhoff was a master of two great legal systems—the civil law and the common law. No less remarkable was the fact that, despite his training and long experience in the practice of Continental law, he brought an open mind to his study of the common law. Never a mere critic of that law, he was intent on the thorough exploration of legal problems. The breadth of his perspective is evident in his book of materials on legislation,<sup>1</sup> in his jurisprudential analysis of statutory interpretation,<sup>2</sup> in a score of thoughtful articles on various aspects of comparative law and in many other publications.<sup>3</sup> His memorial deserves a larger wreath than this necessarily short paper, which is nonetheless a token of affection and of high regard for Arthur Lenhoff's scholarship.

We were fortunate, in this country, in having had available the services of able European lawyers, some of whom, like Arthur Lenhoff, acquired an American legal education and were superbly equipped to teach courses in comparative law, legislation, conflicts, family law, international law and other subjects. The launching of comparative law programs in many law schools, which would otherwise have been difficult, if not impossible, was easily accomplished. Businessmen and others who had to cope with a vast array of legal problems arising from the increased involvement of this country in international trade, investment and industry, especially after the last war, found us well prepared as regards the primary purpose of the law schools—to train lawyers to advise their clients and to collaborate effectively with foreign lawyers in the representation of American interests.

It is not my present purpose to consider these important practical problems. I shall instead be concerned with the study of comparative law by scholars and students who do not plan to practice the law of international trade and the like. There is, however, one important phase of this question which I shall omit; namely, the reasons for thinking that any lawyer will understand his law better if he studies and compares another legal system with it. I share that view: for many years I have introduced various aspects of European criminal law and theory into my course on the common law of crimes, including *nulla poena sine lege*, general and special parts of the European criminal codes, their requirement of negligence (in Germany for example) where we impose strict liability, differences between the two systems regarding the criminal responsibility of grossly intoxicated persons, the concept of criminal attempt, and so on.

The establishment of comparative law in the curricula of many law schools

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1. Lenhoff, *Comments, Cases and Other Materials on Legislation* (1949).

2. Lenhoff, *On Interpretative Theories—A Comparative Study in Legislation*, 27 *Texas L. Rev.* 312 (1949).

3. See Halévy, *Bibliography of the Writings of Arthur Lenhoff*, *infra*. p. 267.

is no small achievement. While much remains to be done to improve current programs, the first crucial battle has been won—few, if any, legal scholars would now question the acceptance of comparative law as a proper subject in the law school curriculum. It is possible, therefore, to raise some pertinent and sometimes critical questions about comparative law. It is even more important to plan the next stage—the expansion of comparative studies in ways which will benefit the large class of scholars and students, referred to above, by developing comparative law as a social and cultural discipline.

The principal need is for theoretical studies of comparative law, *i.e.*, discussions of the discipline suggested by “comparative law” when that term is employed in ways which have sociological, cultural or philosophical significance. It is, therefore, necessary that we ask and try to answer such questions as: What are the important problems involved in the cultural study of comparative law? What are the objectives of cultural comparative legal studies? What are the criteria of evaluation of these studies? What method or methods of research are available?

I have recently given some thought to these questions<sup>4</sup> and shall summarize what have seemed to me to be the salient features of the principal problems. But before doing that I should like to make it quite clear that in what follows no criticism is intended of scholars who are interested only in conceptual analysis and comparison. One who has spent many years in the study of the concepts of criminal law is hardly an apt critic of that sort of arduous work which, indeed, is an essential precondition and component of the cultural study of law. Besides, just as a great painter may be wholly innocent of any knowledge of aesthetics, so may a legal comparatist contribute greatly in his chosen field despite his lack of interest in philosophical interpretations of his work.

On the other hand, it is certainly proper and it may be interesting and useful to consider aspects of what may be called “cultural comparative study” from a jurisprudential point of view. This may include the challenging task of constructing a pattern of the entire enterprise, a model or system of ideas in which there is an important place for legal as well as non-legal scholarship. It seems to me that the most significant construct or over-all conception to serve this purpose is a humanistic sociology of law. Having given this indication of the underlying premise of this discussion, I turn to the current uncertain situation in comparative law in order to raise some pertinent questions.

## I. COMPARATIVE METHODOLOGY

First is the question of “method,” especially Gutteridge’s view that “comparative law is merely a convenient label attached to a particular method of study and research,” that it is *only* “the method of comparison,” lacking any “subject matter.”<sup>5</sup> Legal comparatists continue to repeat Gutteridge’s thesis as though it

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4. Hall, *Comparative Law and Social Theory* (1963).

5. *Id.* at 8.

were the expression of an eternal truth. After repeating that formula, a writer, sometimes on the same page, will say that comparative study helps one to understand his law better, that it contributes to the sociology of law, to its history and so on. But unlike Aristotle, who viewed method in relation to subject matter, many legal comparatists seem to regard "the method of comparison" as *sui generis*. However, once attention shifts to subject matter and to the results of comparative study, it is plain that several methods of research are being employed. It is equally clear that it is a gross simplicism as well as a barrier to the progress of comparative law to speak only of "the method of comparison."

But, of course, there are reasons for the perdurance of Gutteridge's thesis—which was, in fact, stated as early as 1900 by Frederick Pollock at the First Congress of Comparative Law.<sup>6</sup> The survival of that thesis for sixty-five years can be accounted for only on the hypothesis of the indifference of many legal comparatists to the philosophical and sociological aspects of comparative studies. They are interested in the comparison of the legal concepts of a branch of the law of two or three legal systems. This, of course, involves difficult problems about comparison, which cannot be explored here, but some unfortunate consequences of ignoring them must be noted.

It is not necessary to solve the mystery of "the concept"<sup>7</sup> to acquire some insight into the meaning of "common concept"<sup>8</sup> or to appreciate the fallacy of the literal translation of terms from one system to another. What is suggested is the need for intensive study of a particular branch of law and, by limiting oneself to that branch of one or two foreign systems, exploration of the relation of the concepts to one another as they function in their respective systems. For the difficulty of discovering the meaning of common concepts and thus enlarging the knowledge of similar laws will often reside in the scholar's incomplete mastery of his own system of law. What, for example, can one learn from a book comparing an entire foreign legal system and the American legal system? When one turns to the chapter on a branch of the law with which one is familiar, he may discover such a lack of understanding of the American law that doubts are raised regarding the report of the foreign law and, indeed, regarding the significance or validity of the entire enterprise.

Despite the evident difficulties, there are innumerable assertions of similarity among so-called "legal systems" or selected rules of two or more systems; but in light of the lack of knowledge (or agreement) of what is meant by "similarity," "common concept" (and "legal system"! ) and of what criteria are employed to guide decision in that respect, one can only hazard a vague guess about the validity and precision of this large body of literature. Because of these limitations, it has been said that there is no such discipline as that suggested by "comparative law" and that this term is used merely to refer to a serial discussion

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6. Held in Paris; see Gutteridge, *Comparative Law* 18 (2d ed. 1949).

7. *I.e.*, defining an abstract legal archetype.

8. *Viz.*, an abstract identified in more than one legal context.

of the laws of different countries. If that criticism is apt, it would be more accurate to call much of the current teaching "introduction to foreign law" rather than "comparative law." In any case, there is a great need to reduce the puzzlement about the "common concept" or the "*rapprochement*" Lambert never tired of advocating, which is the ultimate concern of many legal comparatists. Some progress in the elucidation of that basic notion has been achieved by reliance on social problem-solving and on social context, as the frames of reference and the basis for explanation of the meaning of common terms. But this implies that there is no such thing as an independent conceptualist comparative law—except, perhaps, for professional needs only. For once the above techniques have been utilized it is plain that the deeper or fuller meaning of common concepts depends on references to empirical and valuational data and that, in short, we must confront the problem of the sociology of law.

## II. THE SOCIOLOGY OF LAW

The sociology of law had its origin in Plato's "master political science," but "sociology" was coined by Comte and the modern sociology of law is usually dated from the work of Montesquieu, Feuerbach or Henry Maine. Whichever of these one prefers to regard as the father of that discipline, the interesting fact is that, for many comparatists, he will also be designating the father of modern comparative law. But while Lambert and a majority of the other participants in the 1900 Congress of Comparative Law thought primarily of comparative law as the sociology of law (and secondarily as a logical or conceptualist discipline), the major hopes of those days have not been realized. Although many contributions have been made which may be referred to "the sociology of law," the status of a recognized, clearly delineated discipline, like economics, remains largely an aspiration, a program for future accomplishment. It is little wonder that Gutteridge was skeptical about claims made in terms of a "sociology of law" and that present-day comparatists continue to repeat the slogan that comparative law is only the method of comparison. This skepticism is also reflected in the cavalier assignment of the results of comparative study to the "sociology of law," for the legal comparatists who make that allocation promptly drop the question; they apparently are content to leave the analysis and organization of the products of their work to others.

But again, when one considers the enormous difficulties confronting the construction of a sociology of law, he can readily understand this attitude, even if he cannot sympathize with it. For, apart from the intrinsic complexities, a deeply rooted pervasive difficulty which besets the construction of a sociology of law is the fact that the interested social theorists are either humanists who stress motivation, goals and values or they are scientists who take physical science as the model of what the sociology of law should be. I have tried to resolve some of the differences by suggesting that instead of continuing the polemic on the abstract level of methodology and epistemology, discussion should center on

specific contributions,<sup>9</sup> by submitting that there is need for all of the methods and types of social knowledge—history, genetic explanation, middle-range generalization, such as sociological case histories, description of problem-solving, and in other ways.

But in a rigorously scientific climate of opinion, any use of values that is contrasted with fact and any emphasis on problem-solving or goal-seeking which cannot be reduced to factual functions are strictly *verboten*. The consequence is particularly unfortunate for the sociology of law because, by definition, norms comprise a central part of its subject matter, and purpose is recognized as an essential concept by both legal positivists and natural law philosophers. So, too, it is obvious, at least to most legal scholars, that mental states exist and must be relied upon to make sense of legal rules; for example, the only way to distinguish the innocent placing of a spoonful of sugar in another person's cup of tea from an attempt to kill him is to show that in the latter case the actor *thought* he was placing a deadly poison in the cup. But such facts as these do not seem to affect proponents of behaviorism; at least, that is the premise which must be accepted if we are to face the current problems which raise difficult obstacles to the construction of a cultural discipline of comparative law.

In these circumstances, we can allow matters to drift or we can seek methods of direction. For example, ways can be discovered and employed to encourage discussion among scholars of divergent views. Certainly aloof communication via polemics published months apart is inadequate; there should be daily contact and conversation in a hospitable environment. In addition, the formation of small groups of collaborating scholars,<sup>10</sup> regardless of the theoretical bent of the participating social scientists and philosophers, would be helpful. It would bring professional legal comparatists who recognize the importance of social context and function into contact with scholars particularly interested in following those leads to their final implication—a sociology of law.

### III. THE SOCIAL REALITY OF LAW

The next questions, which concern the social reality of law, social structure and function, are within the scope of the sociology of law; but they have other connotations as well and, in any case, their importance merits particular attention. Most of the published work of professional comparatists is necessarily concerned with codes and statutes and the case-law which interprets them. Although, as stated, there are many references to function, social context, institutions and culture, there has been relatively little sustained study of these sociological subjects in their relations to legal systems. But if professional work is to attain enlarged significance by being brought within the bounds of a sociology of law, it is necessary to study not only social contexts and functions but also, and especially, the conduct or social processes which have been called "customary

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9. Hall, *Introduction to Theft, Law and Society* (2d ed. 1952).

10. From three to six would be my preference.

law," "law in action," "living law" or, as I have preferred, the "social reality of law." The need for this is implied in the subject matter of any social discipline devoted to the study of law, *i.e.*, its factual, as well as its qualitative and ideational character.

The social reality of law is "social conduct expressing norms that imply values, deviation from which, implying a judicial process, causes harms that are and must be met by the imposition of sanctions."<sup>11</sup> The positive law which legal comparatists study is, in the first instance, abstracted from the social reality of law; and that is regularly supplemented by legislation and judicial decision. The officials, including the ministerial corps which applies the sanctions, also exhibit patterns of action. By reference to the above indicated social action, the common concepts of professional comparatists take on a fuller meaning than that which suffices for legal practice. That there are important interrelationships between positive law, common legal concepts and the social reality of law seems undeniable. The relevant problems concern a division of labor among interested scholars.

For the above indicated reasons, the social theorists who collaborate with legal comparatists must be prepared to assist in the formulation of problems and methods of research and to suggest other ways in which professional legal studies and their conceptual products can be employed in the construction of a sociology of law. This does not imply that there are no divergent interests between the legal comparatist and the legal sociologist. In addition to that noted above (concerning the analysis of concepts), the former is apt to evaluate the relevant policies, while the latter is concerned to describe and explain their operation in fact. But there is no incompatibility between these interests.

If we view the "panorama of the world's legal systems," as Wigmore called it, we cannot help recognizing the rich fare laid out for us. Never before have legal scholars, social scientists and philosophers had such possibilities opened to their research and speculation. European law and various combinations such as Roman-Dutch law have, of course, long been subjects of careful study. But these legal systems as well as ours have gained special significance in the emerging law of many new nations in Africa and in recent developments in South America and Asia. Similarly, the mines of Islamic law, long dormant, now promise easy access. In Russia and China there are also enormous reservoirs of unexamined records. The Hindu law of the subcontinent of India has long attracted attention, but despite Sir Henry Maine's imaginative contributions, most of the succeeding legal scholarship has been traditional and the larger potentialities of the study of that law have only been touched. Enough has been said, it is hoped, to give some indication of how these vast stores of legal data can be used to construct cultural histories of legal experience as well as a sociology of law to which legal comparatists contribute, at least, the structure of legal ideas.

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11. Hall, *op. cit.* *supra* note 4, at 78.