

Week 1: Introduction to Comparative Law

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Key Concepts



Defining the Term 'Law'

- Ethical sense eg. 'laws of morality' or 'law of nature'
- Idea of uniformity of cause and effect eg. 'laws of trade', 'laws of political economy', or 'laws of health or history'
- In physical science, law is referred to as 'laws of gravitation or of motion'

Origin of the Term 'Law'

The word 'law' is used to describe properties, relations or conditions existing everywhere in the physical, mental and moral world; in the exact sciences as well as in the mental and moral.

Function of the Law

- (1) keep the peace
- (2) maintain the status quo
- (3) preserve individual rights
- (4) protect minorities against majorities
- (5) promote social justice
- (6) provide for orderly social change

What is Comparative Law?

According to Merriam-Webster dictionary 'comparative law' is **the study of the differences, similarities, and interrelationships of different systems of law**

d'être which is misguided.¹² Comparative law, they note, has long been recognized as a valuable tool for interpreting and reforming domestic law internally,¹³ harmonizing and unifying law trans-nationally,¹⁴ and interpreting and constructing international law.¹⁵ It has also provided a bottomless supply of data with which to test philosophical, economic, sociological, and anthropological theories about law, to name only a few.¹⁶ It is therefore hardly surprising, these scholars maintain, that comparative law has failed to congeal into a single academic discipline: comparative law is not one, it is many.

To Compare Need:

1. Know → Collect data and information
2. Understand → Avoid translations, analyze, and reflect
3. Compare → national vs. international, country vs. another country, particular law in region vs. same law in another region

History of Comparative Law: Antiquity

- Aristotle with his school compared large numbers of Greek city-states and casual comparison with other Greek speaking parts of the world
- Comparative legal work was limited to public law, little interest in private law

History of Comparative Law: Antiquity

- Roman work of Gaius, called *Institutes* (160 A.D.) contains a few comparative elements on private law
 - Compared Roman Law to other greek speaking nations through *ius gentium* (“The law that natural reason establishes among all mankind [and] is followed by all people alike” (p. 5)) and *ius civil*
 - ius gentium* = law of the Roman people, nation
 - ius civil* = civil law, institutions

History of Comparative Law: Antiquity

- Gaius' work acted as a basis for Justinian's *Institutes*, textbook on Roman Law in the name of emperor Justinian (529 A.D.)
- Divides *ius gentium* from *ius naturale* ("what nature has taught all animals"), in contrast, Gaius referred to them interchangeably
→ Borrowed ideas from the Roman jurist Ulpian

Contentions with these Works

- “The law that **natural reason** establishes among **all mankind** [and] is followed by all people alike”?
- *Ius gentium* being referred to “natural reason”?

History of Comparative Law: Antiquity

- Late antiquity produced the work of *Lex Dei quam praecipit Dominus ad Moysen* ('The Law of God which the Lord Commanded unto Moses')
- From early 4th century with more additions following the original text
- Provides evidence of classical jurist texts and classical Roman Law
- Compares Roman Law to Mosaic Law
- Demonstrates that Roman Law was consistently similar in principle to Mosaic Law

Concerning [the fact that] the testimony of members of a family is not to be admitted.

[I.] Again Moses [says]: ‘Thou shalt not bear false witness against thy neighbour’.

[II.] Ulpian in the 8th book ‘Concerning the office of the proconsul’ [under the title] ‘On the *lex Julia* concerning public and private force’: [1.] By the same law, in chapters 87 and 88, certain people are entirely interdicted from testimony and certain from testimony if they are unwilling. [2.] [In chapter 88] in these words for these men: ‘By this law let there not be permitted to speak testimony against the defendant anyone who was freed [*se liberaverit ab*] by him, his parent, the freedman of either of them or of his freedman, or by a freedwoman [sc. of them], or who is under the age of puberty, or who [has been condemned in a public judgment and who] has not been reinstated [*qui eorum in integrum restitutus non est*], or who is in chains and public custody, or who has pledged himself for fighting, or who has hired or hires himself out for fighting with beasts, except someone who has been or is sent to the city to fight with javelins, or who has publicly made or makes gain with his body, or who has been

History of Comparative Law: Early and High Middle Ages

1. Germanic people's presence in the Roman Empire sparked some comparisons in legal systems
 - Compared and created two codes: law for the Burgundian inhabitants and one for the Roman
2. Revival of legal study in North Italy, Bologna, focusing on Roman Law and canon law (laws of the Roman Catholic church)
 - When lecturer read texts on Roman and canon law, the lecturer then commented on the passages are recorded them in manuscripts as glosses → compared these glosses over time

History of Comparative Law: Early and High Middle Ages

- This period established the Romano-canonical procedure where civilians and canonists participated in
- This acted as a direct ancestor of Continental Europe today

History of Comparative Law: The Later Middle Ages

- Policy and comparative analysis of conflicting laws in Italy in the *repetitio* by Bartolus, a commentator on Italian city-states, especially around marriage and inheritance
- Sir John Fortescue from England demonstrated how English law is much more superior than French

History of Comparative Law: 17th and 18th Century

- The school of natural law prevailed during this time period (based on a universal moral order)

Eg. Selden, Grotius, and Pufendorf
- Resembles a little more of modern comparative law, but is there a problem with 'universality'?

Current Situation

- Comparative Law really developed during the 19th century
- Historical event propelled it, such as the Faciscism in Europe, the creation of the European Union, political and economic developments, and globalisation
- Comparative law feels pressure as an intellectual exercise and as a practical subject
- No common core, this field is up to the ‘teacher’
- Debate between if Comparative Law should be taught as a course or comparative skills be applied in every course as part of a curriculum

Legal Tradition

- Legal traditions help position cultural and historical factors of a legal system, which are crucial to help understand a particular legal system
- When comparing legal systems, a grey area exists when determining which is 'better' or 'worse'

→ depends on religious, political, economical, historical, and cultural factors

Definition of Legal Tradition:

a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught.

Comparative Law vs. Foreign Law

- Foreign law may get confused with comparative law, the key distinction is that comparative law goes further by being critical and conscience of potential hindrances
- Avoid judging the country or legal system of study with the bias of your native country
- Treat sources in Comparative Law with caution
 - Certain laws may appear one way on paper, but in reality, conduct themselves in another eg. corruption

Comparative Law Key Terms

Legal systems: “A procedure or process for interpreting and enforcing the law

The Legal Family: “The set of laws of a country and the ways in which they are interpreted and enforced”

There are 5 Types of Legal Families

1. Civil law systems have their origin in the Roman legal tradition. Civil systems vary widely, both in procedure and substantive law, so conducting research on a particular nation's civil law system should include looking at that nation's specific system of law, but they do have some trademark characteristics. Nations with civil law systems have comprehensive, frequently updated legal codes. Most importantly, case law is a secondary source in these jurisdictions. France and Germany are two examples of countries with a civil law system.

There are 5 Types of Legal Families

2. Common law systems, while they often have statutes, rely more on precedent, judicial decisions that have already been made. Common law systems are adversarial, rather than investigatory, with the judge moderating between two opposing parties. The legal system in the United States is a common law system (with the exception of Louisiana, which has a mix of civil and common law).

There are 5 Types of Legal Families

3. Customary law systems are based on patterns of behavior (or customs) that have come to be accepted as legal requirements or rules of conduct within a particular country. The laws of customary legal systems are usually unwritten and are often dispensed by elders, passed down through generations. As such, customary law research depends greatly on the use of secondary sources. Oftentimes, customary law practices can be found in mixed legal system jurisdictions, where they've combined with civil or common law.

There are 5 Types of Legal Families

4. Religious legal systems are systems where the law emanates from texts or traditions within a given religious tradition. Many Islamic nations have legal systems based in whole or in part on the Quran.

There are 5 Types of Legal Families

5. Mixed legal systems refer to legal systems where two or more of the above legal systems work together.

Comparative Law can be Divided into 2 Categories

1. **Macro-level** → comparison is done between legal systems or legal cultures
2. **Micro-level** → the objects of research are normally individual legal rules, judgments, or individual legal institutions

*Distinction is not always clear cut

Next week: Methodology & will be receiving readings for that week