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Comparative Law: a Very Short Introduction

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Chapter 1

What is comparative law?

At the dawning of the 20th century, universalism, openness to other cultures, and faith in progress were the driving visions of society. The Paris World Exhibition held in 1900 (Figure 1), one of the major world's fairs in history, hosted more than fifty million visitors. Dozens of countries around the globe gathered to share their culture and accomplishments, and to celebrate the achievements of the previous century while preparing for the future. Artistic innovations (Art Nouveau), new means of transportation (the first line of the Paris metro), and architectural masterpieces (Petit and Grand Palais) were either reserved or built for this exhibition. From electricity to the new cinematograph, invented by the Lumière brothers, several technological innovations of major importance were displayed for the first time. An important world chess tournament was played involving the best players from the United States, the United Kingdom, the Russian Empire, Austria-Hungary, the German Empire, France, and Cuba. The second modern Summer Olympic Games were also held in Paris in 1900. Twenty-eight nations, 1,000 athletes, and, for the first time ever, twenty-two women took part in the event. The Swiss sailor Hélène de Pourtalès was awarded the first gold medal as a crewmember of the winning team in the 1–2 ton sailing event, and the English tennis player Charlotte Cooper was the first woman to obtain the individua! title of Olympic champion.

l. The 1900 Paris World Exhibition's main entrance (Porte Monumentale).

A comparable Zeitgeist affected law. The same year, Paris was also the venue of the First International Congress of Comparative Law, the event that is widely considered to be the conventional establishment of comparative law as a discipline. A similar spirit ofuniversalisrn, inclusiveness, and openness towards foreign cultures and traditions inspired the Congress. Experts gathered to discuss the nature, targets, and methodology oflegal comparison and, no less important, to investigate how to achieve a set of universal, unifYing principles. By translating the foreign into the familiar, comparative law promised to make these universal principles apparent by helping to delineate a 'common law for the civilized world', as state d by Raymond Saleilles, the main organizer ofthe Congress and one ofthe founding figures ofthose jurists inquiets' who played a pivotal role in the critique of what represented the epitome of strict national positivism, the École de l'Exégèse. If the Congress of Paris set the theoretical foundations of comparative scholarship, the practical vocation of comparative law was especially emphasized at the Universal Congress of Lawyers and Jurists held four years later in St Louis, Missouri, the founding act of comparative law in the United States. The Congress was soon followed by the establishment of the Comparative Law Bureau within the American Bar Association, which founded the Annual Bulletin, the first comparative law journal in the United States, with the aim of providing legal data and scholarship from several countries, ranging from Belgium, Germany, Spain, and Switzerland to Japan and Latin America. These initiatives were particularly aimed at practitioners (rather than academics) interested in legal activities with a transnational dimension.

Openness involved legal professions as well, in a similar way as happened with sports. In December 1900, Olga Petit and Jeanne Chauvin (Figure 2) were the first women in France to take their oath as lawyers, a few decades after the US had taken the same step. Still, as Chapter 2 will address, laws used to be (and mainly are) adopted and implemented at the national level. Therefore, the second dimension in the development of legal comparison, alongside openness and universalism, was the attention paid to domestic norms. In fact, comparing national laws was considered for a long time to be the core business of comparative studies.

A relatively young comparative discipline

In principle, comparative law encompasses the following operations: the comparative assessment of entire legal systems or specific laws, regulations, judgements and customs in order to

2. Jeanne Chauvin, the first French female lawyer.

unveil similarities and differences; the study of how legal solutions are imitated, transplanted, accepted, and rejected in other countries or social groups; and the methodological issues arising from the study of different legal systems, families, and traditions (see Chapters 2 and 3). In this respect, according to methodologists like

Rodolfo Sacco, the mere study of foreign law does not amount to proper comparison, but instead it becomes a phase within the realization of a comparative study. Nonetheless, there are authors who do include pieces on foreign law under the umbrella of legal comparison, as they would require the scholar to employ a distinct methodological toolkit in order to understand the norms of another system or tradition. To a certain extent, comparative law has existed in a broader sense since Montesquieu's contributions in the 18th century and even since Aristotle's Politics classifying numerous real and imaginary 'constitutions' of city-states. Nevertheless, as an academic discipline, it was a latecomer with respect to other legal fields with an international dimension, such as public international law (the norms governing the relationships between sovereign states and international organizations), and private international law (the norms used to solve disputes or govern situations, such as contracts or marriages, involving citizens or corporations of various states). In contrast to international (public and private) law, this new field was not intended to designate a positive body of rules but rather an approach to norms, institutions, or entire legal systems belonging to different social and geographical contexts, with the aim of grasping similarities and differences. Comparative law was also a latecomer with respect to other comparative disciplines. As a scientific method, comparison is nothing new, as explained by Dirk Berg-Schlosser. In the 15th century, Cardinal Cusanus claimed that all research was pursued by establishing comparative relations, and in subsequent centuries as well, comparison was considered a universal method. From natural sciences like comparative biology to sciences that explore similarities and dissimilarities of cultural and social phenomena, such as philology, anthropology, or politics, comparison became an established method of study. In the 19th century, the fields of linguistics, religion, and folklore represented the paradigm of comparative studies. In particular, comparative linguistics gained momentum when European linguists started to investigate a new language family, the 'Indo-European' (as named by Sir Thomas Young), after they discovered that Sanskrit presented similarities with Greek, Latin, Persian, and ancient German. The application of this methodology favoured the elaboration of classifications based on family trees, explaining the genetic interconnections between languages and proto-languages. The establishment of philology as a historical and comparative science showed how to extrapolate a model by taking into account different languages, their origin and their cultural transmission. The hermeneutics behind the logical operation of comparing words and roots from distinct languages is similar to that used in comparative legal scholarship. Drawing inspiration from his background of comparative linguistics, Friedrich Max Müller, who taught in Oxford during the second half of the century, determined the institution of comparative religion. This academic discipline also aimed to study religions from a comparative perspective to shed light on the roots, diffusion, and migration of doctrines and beliefs. Therefore, the 19th century shaped the concepts of classic and primitive, and then exotic and modern, somehow drawing borders which separated the West from the rest of the world as well as the other way around. The political implications of this approach are significant and can be seen in phenomena such as legal and cultural imperialism, with colonizers imposing their law on the conquered territories, or more recently, with Western countries aiming to export their democratic standards. Not unlike the archetypical comparative sciences, comparative politics and other comparative social sciences seek to provide general theories on the forces leading to change and evolutionary trends in political and social systems depending on economic, social, and historical factors. Inductively, they elaborate on tendencies, causality, and path dependence, and use comparison as a sort of 'experiment' for the testing of these theories.

Between theory and practice The previously mentioned two-fold dimension, combining purely theoretical purposes and practical targets aimed at international integration and conflict resolution, among others, is at the core of comparative law as a discipline (see Chapter 6). The theoretical dimension, emphasized by comparativists of all generations, underlines the role of legal comparison in the better understanding of legal data, their explanation and classification for purposes of knowledge. The practical dimension encompasses the use by founding fathers and legislators in drafting constitutions and laws, the inclusion of foreign law within judicial reasoning, the achievement of common norms in international or supranational realms, as well as the realization of proper legal translations. Comparative law enhances cultural and critical skills. Many of the masters of comparative law were prominent figures in the fight against legal positivism and formalism that were at the centre of all debates in both the United States and Europe at the time. This is why legal comparison is relevant not only for scholars interested in foreign law but also for domestic academics and practitioners.

The study of legal institutions and traditions of other countries helps us to develop a more critical take on our own legal system. At the same time, comparative law has always aimed at being useful for the achievement of practical, programmatic targets as well. This was already the case at the beginning of the 20th century, as the experience of Ernst Rabel for instance proves: he was the co-founder of the first University Institute for Comparative Law in Germany in Munich, but he also served as a judge on several international judicial bodies and was a member of the International Institute for the Unification of Private Law (UNIDROIT), fostering the unification of rules for international sales transactions. It is certainly true in times of globalization and integration among states. Solving, instead of simply analysing, the problems of managing difference has become a task for modern lawyers seeking to understand foreign legal institutions and tackle them effectively. In fact, in its short history, comparative law has served different missions. Countless projects of unification and harmonization of law have been pursued with the help of comparative analysis, deserving of both praise and criticism (see Chapter 5), with the objective of introducing identical norms or principles in different countries through international and supranational legislation. Primarily aimed at favouring trade and commercial relations through the creation of an international 'common law', these projects have pursued the most diverse purposes, such as maintaining peace, assisting international institution building, improving legal drafting, fighting the Cold War, aiding decolonization, or providing guidance to foster modernization (whatever that may mean). The achievement of legal convergence to aid trade and commercial purposes proves the point. For instance, the European Economic Community, founded by the Treaty of Rome in 1957 for the achievement of economic integration, required the adoption of common and harmonized rules among the member states for the realization of a common market and a customs union. A shared set of rules was needed to eliminate internal borders and regulatory obstacles for the free movement of goods and services. These foundations easily explain the use of comparative law in the development of what is now European Union law and the jurisprudence of the Court of Justice of the EU. On a global scale, the World Trade Organization promotes free multilateral trade, reinforcing principles such as transparency and fairness. Bilateral and multilateral trade agreements are equally based on the achievement of uniform standards to favour mutual investments and contractual relations.

A relativistic and humble approach to the law

More than any other legal field, comparative law, pursuing the innovative ambition of challenging the national boundaries of legal analysis, needed to elaborate both theoretical and methodological aspects of the discipline. In particular, it had to focus on definitions, categories, and methods in order to find an appropriate vocabulary to identify this new approach to the study of law. It also had to challenge the legal mindset of domestic scholars who were accustomed to thinking about the law as it was in their own countries. The first, foundational issue of comparative analysis concerns the identification of what 'law' is in different legal systems and traditions. An elected parliament may perform the law-making function that in another system is assigned to the judiciary, or to the community. This diversity may constitute a primary difficulty for comparative analyses. Not only do legal systems recognize different sources of law, but they also give them a different weight and value. Understanding what kinds of sources a jurisdiction acknowledges and how it handles them is of the utmost importance for any comparative inquiry. It can also bring major difficulties. For instance, understanding legal traditions based on the oral transmission of rules can be complex for Western scholars. Similarly, experts in religious traditions struggle to embrace the secular conception of the law, which is enforced in other systems. Therefore, comparativists must get rid of their previously acquired legal mindset and make the effort to enter into that of the 'others'. They have to appreciate what domestic jurists of another country would consider as sources of law, applying that country's domestic criteria to interpret and systematize them. This strategy is not as easy as it may seem at first glance. Comparativists embrace a relativistic approach, entering into the logic of the other studied systems without prejudices or preconceptions. Additionally, in a sense they need to become legally 'agnostic' and accept that there is no proper, perfect legal solution, but that there are appropriate solutions depending on time, space, and context. For example, most societies punish murder with imprisonment, whereas some indigenous groups interpret this offence as a challenge to the group's harmony

and punish the guilty parties by laying on them the obligation to serve the family of the victim and their community. Such punishments reflect the worldview of the interested social groups, and no hierarchy among legal solutions is possible for comparativists.

European continental scholars may have been the least suitable for addressing other traditions since they were raised with the positivistic belief in the existence of complete, comprehensive, and internally consistent legal systems in the wake of codifications. This ideology defended a conception of legal sources according to which the law is created through codes and legislation, forming a gapless system of legal propositions. While decisive in understanding a legal system, cases and scholarly writings are not deemed to be sources of law. From a positivistic viewpoint, judicial decisions are the mere application of an abstract legal rule to a factual situation through means of legal logic. In other words, judges apply the rules, and legal scholarship comments upon and clarifies their meaning. Of course, divergences in interpretation cannot be excluded. However, when identical statutory rules bring two courts to different judicial decisions, one decision may be considered erroneous and therefore shall be overruled by a higher judge who is entitled to provide a more correct interpretation of the norm. This reconstruction becomes untenable in a comparative analysis. If a Portuguese statute contains the same phrasing as a Spanish statute, but the corresponding judges interpret them differently, it would not make sense to say that Portuguese judges are right and the Spanish wrong, without taking into account the context that led to the respective interpretations. France, Italy, and many other Western systems share a similar view of the sources of law. Comparable similarities equate Common Law systems that allot significant law-making power to judges, making it easier for a US scholar to study Canadian or Australian law. More substantial difficulties, and very interesting challenges, arise when the foreign law responds to a different logic in which legal norms cannot be separated from ethics, morals, and religion.

Originally comparative law was mainly based on Western standards, labelling the rest of the world's canons as exotic or less developed. Of course, perceptions change dramatically over time. In medieval times, when 'Asia was the world' (in the words of Stewart Gordon), European customs, scientific achievements, and commercial habits seemed much less developed to Asian observers and travellers. The rhetoric of liberation used by Napoleon when invading Egypt was deemed fake and self-serving by local scholars, criticizing the imposition of alien rules and heavy burdens on their society. Even today, when observing Western laws in practice, 'the rest' notice their inconsistencies, hypocrisies, and cracking legitimacy, as Laura Nader has explained. The progressive inclusion and understanding of legal traditions further away from the West have led comparativists to take into due consideration not only statutes but also judgements and scholarship. Therefore, comparative analyses adopt a realistic, bottom-up perspective, investigating which actors, institutions, or events produce legal norms in each system. Elements like oral traditions, religious interpretations, trade usages, contractual standard terms, social mechanisms, and customs, which would not amount to official legal sources according to Western orthodoxy, should be included in the picture as long as they determine the meaning and scope of the legal norms under consideration.

Even more impalpable aspects, including underlying theories and conceptions, tacit assumptions, legal culture, and the language of a foreign legal system, are crucial. For instance, according to conventional accounts, anyone wishing to establish a business relationship should remember to greet the oldest person first when dealing with Chinese partners, or to hold and deliver important documents with both hands if the company is Japanese. In order to grasp those extra-legal factors that affect the law, comparative studies have to assess and understand structural aspects, such as political power, economic hegemony, cultural legitimacy, rhetorical elements, shared beliefs, and ways of thinking. From this perspective, law is seen as a social, contextual phenomenon that evolves and changes over time, and thus is subject to constant amendments. As a consequence, comparative law embraces a humble approach which does not rely exclusively on legal assumptions and knowledge. Such a comprehensive approach to legal sources and the consequent appraisal of legal systems in their entirety require a truly interdisciplinary approach. History, sociology, anthropology, political science, economics (to name a few) cannot be underestimated when trying to identify the roots and targets of a foreign norm. One cannot study a parliamentary system without understanding equilibria among political parties; or grasp the meaning of a norm on gender equality without consulting statistical data on women's representation. Therefore, comparative law makes use of different disciplines which provide

insightful knowledge on the legal systems analysed. Of course, the level of interdisciplinarity and the choice of the other sciences to include depend on the specific topic examined. Language and linguistics are paramount for the study and understanding of foreign norms, while history provides the essential reconstruction of facts and events for the comparativist to appreciate the origin and development of any legal institution. Political science can complement the traditionally prevalent object of legal studies, i.e., the 'law in books', offering explanations of the 'law in action', such as when the comparativist approaches political systems, presidential powers, political parties, and so on. Sociology as well can offer insights into the relationship between a society and its corresponding legal system. Let's just imagine the study of the recognition of indigenous groups within a given legal system. From this perspective, anthropology has turned increasingly important as comparative legal studies have become more inclusive, frequently now addressing non-Western forms of producing norms and organizing societies. Necessarily, depending on the topic, further disciplines may be relevant, from legal theory to philosophy, economics, statistics, geography, and even psychology or medicine. Consequently, comparative law is characterized by methodological openness to other fields to achieve a greater understanding and contextualization of foreign rules.

Foreign law as a subject of study

Studying foreign law requires a comprehensive, open-minded approach. The mindset is similar to that of travellers, as Günter Frankenberg remarked: 'The traveller and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown.' The comparative endeavour entails three basic phases: study, understanding, and comparison of the norms being analysed. The first and second phases acquire particular relevance when approaching foreign law. One cannot take for granted a foreign rule, as one might if it belonged to one's own system. Foreign law must be addressed in its entirety, not focusing exclusively on the specific issue at stake. Otherwise, comparativists run the risk of searching in the wrong legal field or in the wrong source. For instance, they may look for the regulation of a certain right in the country's constitution when it is actually located in its statutes or regulations. Also, interpretations given to rules in practice have to be assessed, and the authority in charge may vary according to the system analysed. Ideally, one should take into account the social, political, historical, and economic contexts in order to fully understand the rationale and targets of each foreign rule. In this respect, language plays a paramount role as an element of facilitation or complication. Specialist bilingual dictionaries or dictionaries giving an explanation based on one's own system would be particularly useful for comparative endeavours.

Translations as well could be extremely beneficial in legal comparisons, but they are not always available and reliable. In fact, as also addressed in Chapter 4, the name of a specific institution may be different or misleading in other systems. Provinces are local entities in Spain and Italy, while they are member states of federal countries in Canada or Argentina.

Comparing them would simply restate the obvious and would imply methodological flaws in the selection of the cases. The Northern European ombudsman corresponds to the so-called defensor del pueblo in other parts of the world. In other cases, foreign legal terms do not have an exact translation into other languages, such as the Anglo-Saxon contract of 'trust'. Even when different legal systems make use of similar words or concepts, their actual meaning can be and often is significantly divergent. For example, an institution like marriage, whose denomination can be common to many countries, may be applicable to distinct sets of situations, spanning from opposite- sex and/or same-sex relationships, polygamy, child marriages, and forced marriages. This is true today, and even more so if one analyses the regulation of marriage from a comparative historical perspective. Another example of the importance of a comprehensive approach is the potential comparative study of the scope of free speech in the US and in Europe. Theoretical reconstructions prove that, over time, the First Amendment of the US constitution has provided extensive protection for free speech, including cases that from the European viewpoint would amount to discriminatory manifestations. The 'marketplace of ideas' metaphor, often attributed to John Stuart Mill's essay On Liberty (1859), justifies these limitations of censorship and restraints and encourages the free flow of ideas. It relies on a market-based conception and

claims that the truthfulness or acceptance of opinions rests on the outcome of their mutual competition, exempt from the control of any authority. It was first invoked by Justice Oliver Wendell

Holmes in 1919 and then applied by the Supreme Court copious times, setting a very high bar for any prohibition or sanction of thought and expression. This bar seems (formally) much lower in most European countries. Nevertheless, although legal texts apparently allow for a wider scope of freedom of speech in the US than in the Old Continent, this merely doctrinal approach to the law would lead us to obviate or underestimate numerous social and contextual elements which actually constrain public speech, thus reducing the scope of what is considered 'socially acceptable' in America.

Major difficulties and precautions

Comparative law used to be subject to criticism with respect to its lack of geographical comprehensiveness, since an assessment of all areas of law, in all jurisdictions, would be unattainable and was not even attempted at first. Nevertheless, phenomena like globalization, Europeanization, and the spread of international legal instruments involving different countries have revived the theoretical and practical discussions on the selection of case studies. This field has defended its value as an autonomous academic discipline. Engaging in comparative endeavours involves the same search for knowledge and cultural enrichment as that of any other legal field, providing a validation to legal comparison without a distinctive need for justification. It contributes to the understanding of how legal solutions are elaborated and copied, succeed or fail, and how legal families and traditions coexist, clash, or influence each other. Comparative law has had to become less 'Western oriented' and more inclusive, giving wider space to areas of the world often neglected by traditional scholars. The 'Global South critique' to comparative studies exemplifies the matter, as it requires the opening of comparative legal scholarship beyond the so-called Global North. For decades, mainstream scholarship dealt with only a few countries, like the United States, the United Kingdom, France, or Germany, supposedly covering all (relevant) legal reality. The cases to include in comparative inquiries would be a few prosperous, stable democracies of the Global North—the 'usual suspects', as Ran Hirschl names them—as if they were representative of the world's diversity. Of course, depending on the topic, the set of country cases will vary. Not all comparative assessment needs to include the entire world, but it cannot be blind to non-Western traditions. The selection of relevant case studies, in fact, is pivotal in legitimizing and giving substance to each comparison. The accusation of strategic 'cherry-picking' will always be there, and it can be moved against all judges or legislators who only quote norms consistent with their own particular desiderata, and even more so against scholars who are seen to choose countries that fit with their previous knowledge, expertise, or even career prospects. Therefore, the justifications used in the choice of cases become vital, along with the explanation of the target pursued by the individual inquiry. Theoretical assessments of models, imitations, or transplants do not require the same skills or the same methodological approaches.

Scholars, judges, legislators, and lawyers interested in other legal systems should be able to obtain reliable information. Ideally, they should use primary sources, i.e., original documents written in that country's language. However, in some cases they can also rely on secondary sources, such as official translations or studies on that system. Comprehensive studies covering numerous countries, for instance, will necessarily lead the comparativist to use secondary sources as one may not be fluent in all the languages involved, nor have direct access to all the relevant data. The increasing availability of official information helps in this. With the evolution of methodology the need has been reinforced for comparativists to enter into the mentality of other systems, avoiding judgemental attitudes and prejudices.

In spite of the difficulties, through the proper methodology, legal comparison can fulfil rigorous standards, becoming a powerful educational tool and a practical aid in law-making. One of the major analytical aims of comparative law has been, and is, to group legal data into different categories, providing a systematic ordering of legal knowledge through classifications which are useful for teaching, studying, and comparing. This is why classification is one of the keywords of the field.