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David S. Clark

Willamette University College of Law

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Comparative Law Methods in the United States

David S. Clark**

Comparative law is the science or practice of identifying, explaining, or using the similarities and differences between two or more legal systems or their constituent parts. Comparative law's objectives and aims include those that are practical, professional, scientific, and cultural. Its scientific aspirations can be more relaxed than traditional scientific inquiry, in the sense of accumulating or applying systematic knowledge (*Wissenschaft*), or more constrained, such as empirically testing general explanatory propositions, or there may be some intermediate endeavor. These activities involve many distinct methods. Legal systems can be international, national, or subnational and contain a complex mixture of distinctive legal norms, institutions, processes, actors, and culture.¹

A comparatist confronts many challenges in carrying out her objectives. First, she must select a legal element for study. Possibilities include a contract rule, the standard of proof in criminal procedure, the expected or actual role for prosecutors, civil discovery, legal education, the relationship among

* © 2009 David S. Clark. Maynard & Bertha Wilson Professor of Law, Willamette University. Past President, American Society of Comparative Law.

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1. These issues in comparative law are treated extensively in JOHN HENRY MERRYMAN, DAVID S. CLARK, & JOHN O. HALEY, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA* ch. 1 (2009).

government structures, and people's attitudes toward mediation as a form of dispute resolution. Second, a comparatist must identify the aim of her inquiry — whether practical, professional, scientific, or cultural. Third, a comparatist must choose at least two legal systems, typically her home system and that of a foreign nation. One often does this implicitly. The investigator may state that she is only interested in a foreign example, such as the rule of law present in Indonesia, but she has to begin somewhere in her conceptual organization. That somewhere is usually the relevant element in the investigator's own legal system. The two systems need not be contemporary; one may be historical or idealized. It is here that one can see overlap with legal history or legal philosophy. Fourth, a comparatist must select a method or methods to use in making her comparison. These methods may have developed within other disciplines, which can make the activity interdisciplinary.²

There is further discretion in determining the nature and extent of the similarities or differences the investigator will emphasize. Some comparatists prefer identifying similarities, while others accentuate differences. This will often vary depending on the comparatist's use or objective.

Some comparative law utilizes a level of generality above the nation state. The classification of the world's national and subnational legal systems into families or traditions is an effort to simplify the universe. Simplification occurs by focusing on the similarities of selected components within a legal tradition and pointing out the differences between that tradition and others. For instance, legal scholars commonly speak of the civil law tradition or the Islamic law tradition. Further analysis may lead to the recognition of mixed jurisdictions that reflect legal pluralism within a single legal system, such as Louisiana or Scotland.

From this portrayal, one can see that comparative law is not a discipline with fixed boundaries, either by subject or by method, and it is certainly not doctrinal. Over the course of American history, many legal scholars and lawyers who worked on issues

2. The many other disciplines and their methods that analyze law and legal systems, with examples, are detailed in *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* (David S. Clark ed., 2007).

related to law that involved a foreign element did not think of themselves as comparatists. This was certainly true during the colonial period and at the beginning of the American republic. The term “comparative law” first appeared in an American law journal in 1839.³ Prior to that time, common reference to foreign law other than that of Great Britain was to the civil law or Roman law, or more generally to natural law. Comparative law did not emerge as a discipline with journals and organizations in Europe until the middle to late nineteenth century. In the United States, scholars and lawyers only organized themselves to promote comparative law aims in the early twentieth century.⁴

In discussing comparative law methods—and I hope here only to mention ten distinct methods that comparatists have used over the course of American history—it might help to first list again the three principal categories of objectives and uses. These are (1) practical or professional, (2) scientific, and (3) cultural or humanistic.

The most common use that lawyers, judges, and scholars make of comparative law is one that is practical or professional. This involves transnational litigation, contract drafting, law reform, law and development activities, or legal harmonization, to mention a few.

A scientific use of comparative law, however, including one relying on economics or sociology, is normally the domain of scholars. The systemic study and elaboration of principles based on legal rules and doctrine, as in German legal science, tends to be nation specific, reflecting its roots in the nineteenth century historical school of jurisprudence. An approach more congenial to comparison could use sociology to test general explanatory propositions about law and legal institutions or economics to assess efficiency or distribution issues across nations. Those who work with this objective, such as law and society or law and economics scholars, consider law and its elements as integral parts of society. Since societies today divide along political boundaries, although cultural or economic lines also may

3. I summarize this history in DAVID S. CLARK, DEVELOPMENT OF COMPARATIVE LAW IN THE UNITED STATES, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 175-213 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

4. *Id.*

subdivide them, the aim is to understand national or subnational legal systems and particular rules or institutions in social context. Much of this activity is interdisciplinary involving colleagues in anthropology, economics, political science, psychology, or sociology.

The third use, which is cultural or humanistic, has no immediate utilitarian motive. The objective ranges from a person's desire for international understanding or the simple pleasure of learning about others. Some legal history of foreign cultures or literature about foreign legal systems serves this use. This is a challenging idea to teach in American law schools, where students are career oriented in a legal culture that is already highly pragmatic and generally intolerant of efforts to emphasize (or even understand) philosophy, history, or culture.

The accepted methods of American comparative law have multiplied from the eighteenth century until the present. I do not have time now to elaborate on ten of those methods, which I list roughly in historical order.⁵ I hope that during our proceedings today we can discuss some of these. It is important to note that a comparatist may use a particular method for more than one objective, so objectives and methods do not line up in a descending hierarchy.

The ten methods are:

- (1) Natural law;
- (2) Legal transplants: import and export;
- (3) Examination of a nation's *Volksgeist*: emphasizing differences;
- (4) Legal harmonization and unification;
- (5) Legal traditions, legal systems, and pluralism;
- (6) Functionalism: emphasizing similarities;
- (7) Ideal types;

5. I am examining in historical context all ten of these methods in David S. Clark, *AMERICAN COMPARATIVE LAW: HISTORY AND METHODS* (forthcoming 2010).

(8) Nation building: law and development initiatives;

(9) Law, rhetoric, and culture: critical studies; and

(10) Economic analysis of the law.

Most of these ten methods will be self-evident to you. Comparatists treated all but natural law, *Volksgeist*, and ideal types in the very useful *Oxford Handbook of Comparative Law* that Mathias Reimann and Reinhard Zimmermann edited in 2006,⁶ which suggest that these methods have wider applicability in Europe and elsewhere. I do not suggest that any of these methods is the best one. Historically, each has had its supporters and critics, all have their limitations in particular contexts, and most appear to ebb and flow in popularity.

6. See CLARK, *supra* note 3.