

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1938

Teaching Comparative Law

Max Rheinstein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Max Rheinstein, "Teaching Comparative Law," 5 University of Chicago Law Review 615 (1938).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

gained by amending the bankruptcy law to provide that a discharge in bankruptcy shall not operate to discharge an adjudicated claim for wages.

Progress has unquestionably been made in reaching an adequate solution of the problem. Of course, as has been said many times, a vigorous, daring administrative officer can accomplish results even with a poor law. But how much more successful will he be with a good law. Good laws will be enacted but in the writer's opinion they will not be completely effective until we work out devices to overcome the hazard of the penniless employer. This will necessitate more legislative experimentation but only by such experimentation can we hope to obtain complete security for the wage-earner.

TEACHING COMPARATIVE LAW*

MAX RHEINSTEIN†

THIS article constitutes the first report submitted in pursuance of the terms of the Max Pam Professorship to the trustees of the Max Pam estate by the present holder of the chair. It constitutes an attempt to define on the basis of experiences had during the first two years of the author's incumbency various aspects of the term Comparative Law, in order to determine the teaching methods best suited to American legal education.

I

At its 1937 convention, the Round Table of Comparative Law of the Association of American Law Schools discussed "Methods of Teaching Comparative Law." This discussion revealed that American teachers of comparative law were experimenting with various methods of teaching their subject. The existent methodological uncertainty appears to be due, in part at least, to a lack of clarity with respect to the nature of the subject-matter itself. What is needed, therefore, is a clearer conception of the "province of comparative law."

1. As the term is used most frequently perhaps, it refers, in a vague sense, to any juristic activity which pays some attention to one or more laws other than that of the observer's own country. Such *attention* paid to *foreign law* may be *occasional* and haphazard, or it may be *systematic*. Systematic observation of foreign law may be *monographic*, when it is

* Report of the Holder of the Max Pam Professorship of Comparative Law.

† Max Pam Associate Professor of Comparative Law, University of Chicago Law School.

focused upon one particular foreign law (Canadian, French, Islamic) or *synoptic*, when it is directed to more than one foreign law (German and French law; Latin-American laws; laws of the British Commonwealth of Nations).

Both monographic and *synoptic* observations of foreign laws may have as their object either the law of one or several foreign countries in its entirety (e.g., Soviet law, or the laws of the Scandinavian countries); or some special topic (e.g., the measure of contractual damages in French law; the family in Japanese law; liability for harmful consequences of tortious acts in French, Italian, and German law; delegation of powers in modern democracies). Such observation, haphazard or systematic, monographic or *synoptic*, should not be called comparative law, as long as it remains purely descriptive. Such description may be interesting and useful, but it is not a comparison. It furnishes indispensable material for the science of comparative law, since no one can engage in "comparing" laws unless he has a solid knowledge of other legal systems as well as the one under which he happens to live. But a German lawyer who describes the structure of the contractual relationship in American law is not engaged in comparative law but only in preliminary study.

2. The term comparative law has been used for denominating the descriptive-analytical observation of a special field of positive law, the law of international trade, especially of those of its rules which are sometimes called the "autonomous law of international trade."

International trade and shipping have developed peculiar transactions, such as the charterparty, the c.i.f. contract, the bill of lading, the letter of credit. Although formally governed by as many different laws as there are countries engaged in international commerce, these transactions show a degree of uniformity to such an extent that international traders are often unaware of the differences of national legal rules lurking in the background. The lawyer of the 16th and 17th centuries had no difficulty conceiving a Law Merchant independent of the sanctions of a particular sovereign state. Today, such a notion clashes with the modern state's pretended monopoly over law making. In litigation before a national tribunal, international business transactions are pressed into the pattern of a particular system of national law, into which they may or may not fit.

Businessmen try to avoid such difficulties by resorting to arbitration. Although no statistics are available, it can be said that a large, perhaps the major, portion of litigation arising out of transactions of international trade, is handled by arbitrators and arbitration boards who apply no par-

ticular national law but the general and common rules of international trade. However, arbitration is not entirely independent of national laws, at least not in those cases in which the losing party does not comply with the award without compulsion, and intricate legal problems may arise out of such situations.

The customs and rules of the modern "Law Merchant" and their relation to the various national systems of law are a fascinating field for the observing and the creative legal scholar, but, although there are points of contact with "comparative law," it would seem preferable not to apply the name, "comparative law," to this field.

3. The term comparative law has been applied to the observation and description of "foreign" law which are made for the non-juristic purpose of acquiring general knowledge about a foreign people. Like literature or art, law is an emanation of the peculiar genius of a particular people. An American who wishes to understand the national spirit of the Italian or the German people, the New Mexican Indians, or the classical Greeks, may just as well study their law as their poetry, pottery, philosophy, or religion. But preferably, he ought to study it in addition to all the other aspects of national or tribal life. Since law is less easily accessible than literature or art, such studies are less frequently made, or when made, are carried on by anthropologists, historians, or ethnologists of insufficient legal training. If pursued in a competent manner, the results of such studies furnish important material for the science of comparative law. But the term comparative law should not be used to denominate the studies of foreign law carried on by juristic lay people.

II

What then *is* comparative law? It is suggested that the term should be reserved to denominate those kinds of scientific treatment of law which go beyond the taxonomic or analytical description or technical application of one or more systems of positive law.

1. The statement that law is a means of social control and organization has almost become a commonplace. Not all of the implications of this proposition have been fully realized, however. For legal science, it implies the task of inquiring into the social function of every legal rule and institution. It means that nothing in the realm of law can be taken for granted, that every rule and institution has to justify its existence under two inquiries: First: What function does it serve in present society? Second: Does it serve this function well or would another rule serve

better?¹ It is obvious that the second question cannot be answered except upon the basis of a comparison with other legal systems. In spite of many national differences, modern civilization creates essentially the same problems everywhere. The appropriateness of the devices developed to meet a certain social need in one country cannot be judged without a knowledge of foreign attempts to meet the same situation.²

It may also be that the first question can be answered with greater ease and certainty when we know what functions were or are served by a similar rule or institution in another legal system of the present or the past. Legal institutions have a tendency to go their own ways. The lawyers by whom they are tended are less concerned with the discovery of their true and proper social function than they are with the use to which a certain rule can be put in the interest of a client. Especially in a system where the principle of *stare decisis* is coupled with a reverence for formalities handed down from remote centuries, rules and institutions (whose functions are long forgotten) have a fair chance of surviving by the sheer force of tradition.³

The difference between this "functional comparison of legal rules and institutions" and what has been styled "synoptic description of legal rules and institutions," will become clear through an illustration. One may, for instance,

- 1) survey marriage ceremonies in countries A-Z
- or 2) inquire into the functions of those rules of law which prescribe formalities as conditions to the creation of the complex legal

¹ It need hardly be said that a negative answer to these questions does not necessarily imply propaganda for change. Apart from the fact that objective research and inquiry as such never implies propaganda either for change or conservatism, even the activist may find that the preservation of an existing state of affairs may be socially more useful than the change or abolition of a particular rule or institution even though that rule or institution may have outlived its function or serve it badly. Science may point out the results which are likely to follow if an existing legal rule or institution is preserved, changed, or abolished, but the decision as to whether or not it shall be preserved will be made by the legal statesman (legislator or, under some circumstances, judge or administrative official). True it is, of course, that the scientist's statement that a certain rule or institution has outlived its usefulness may sometimes move the legal statesman in the direction of change.

² Another caveat may not be out of place here: The discovery that the social function X is well served by institution A in country I, while the apparently equal function X' is badly served by institution B in country II, is far from impliedly advocating the abolition of B and adoption of A in country II. Apart from the fact that the similarity of X and X' may be superficial, there may be numerous reasons rendering A unsuited and making the preservation of B desirable for country II.

³ The mere enumeration of a few terms will suffice to illustrate the proposition of the text: Consideration, domicile, parol evidence rule, hearsay, contributory negligence, plea of infancy, husband's duty to support wife, etc.

situation called marriage, and, thereupon, review the formalities prescribed in countries A to Z from the point of view of how well or how badly they fulfill these functions.

If he engages in the first activity, he moves in the field of "synoptic description"; in the second, he makes a "functional comparison."

A functional comparison may be carried on either:

- a) for the general purpose of any science: the search for truth;
- or b) for definite legislative purposes: country A, not as yet having attacked a particular social problem (*e.g.*, of mitigating the fear of old age by providing an income for destitute aged people, by legislative or other legal means) may undertake a study of the devices developed for that purpose in other countries;
- or c) for the purpose of better understanding the functions fulfilled by the rules and institutions of one's own law by looking at them through the mirror of corresponding foreign institutions. Employed this way, comparative law becomes a tool of the practicing attorney whom it may provide with insights, ideas and arguments which he is unlikely to obtain merely by looking at the structure of his own law from within.

2. The second objective of comparative law, used in the proper sense of the word, is to determine the social function of law in general. In this sense, comparative law is synonymous with Sociology of Law. Emphasizing an inductive method and starting with the data of factual research extending over the laws of all times and peoples, it tries to formulate general statements about the conditions under which "law" appears as one of the means of social control and regulation. Hence, it considers the relation between the development of law and such factors as climate, race, geography, religion, philosophy, economic conditions, political organization, etc.

As a science, sociology of law is but a part of the general field of sociology and therefore falls within the broad scope of the social sciences. But it is essentially different from the legal science, used by lawyers, which has the twofold task of:

- (a) classifying and arranging the unwieldy mass of existing rules of law into such a form as to make it possible for the human mind to find the rule governing a given case without wasteful loss of time and effort;
- (b) developing a technique of judicially deciding cases, in accordance with the spirit of a given legal system, for which no ready-made rule exists so far.

In its first sense, the science of the lawyer is a taxonomic science, in its second, a practical art. It is obvious that there are as many "legal sciences" as there are "legal systems." Not only are different materials to be classified in Germany and in France, but different techniques for deciding "new cases" have also been developed in these two countries.

There is, on the other hand, but one science of sociology of law. Its subject-matter is the social phenomenon "law" in all of its historical manifestations. It seeks to discover general "laws" (*i.e.*, statistical regularities) about the origin, growth, decay, functions, forms and appearances of this phenomenon. It takes its materials from the whole range of history and from over the whole world. It cannot be carried on by any method other than the comparative one. It is related to the various national sciences of law in the same way as Sociology of Religion (Comparative Religion) is to Baptist, Lutheran, Catholic, Jewish, Mohammedan, or Hindu theologies.

Today, such a science of sociology of law hardly exists. There are occasional discussions of scattered problems, but there are no more than a few promising beginnings of systematic research. The problems of the science of sociology of law have not even been adequately stated. It would be strange, indeed, if it were different. Sociology as such is among the youngest of all sciences and is still engaged in an effort to develop its categories and methods. He, who proposes to work in the field of sociology of law, must be familiar not only with the latest achievements, methods, and terms of social science, but also with the laws of as many countries, peoples, and periods as possible. He must be a sociologist, a legal historian, a lawyer thoroughly trained in several heterogeneous modern systems of law, and, in addition, he ought to be deeply founded in the culture of his time and of the past. The mere enumeration of the qualifications demonstrates that the appearance of such a scholar would be a rare historical accident. However, what may not be found in one man, can often be combined in a group of collaborators.

3. Third and finally, comparative law may have another task which may best be explained by referring to an analogy in another field of science. The various national sciences of law may be compared to the various philologies of particular languages in the field of linguistics. Just as a French lawyer collects and systematically arranges the rules of French positive law, so the philologist of the French language collects and systematically arranges the words and investigates the regularities of the French language in the study of French grammar and syntax. Other philologists perform an analogous task in other languages. Above and

beyond the philologies of particular languages, a separate science of "Comparative Linguistics" has been developed, which tries to discover the general "laws" of all languages, to establish a general morphology of "language" over and above the morphologies of French, English, Hindustani, Eskimo, Hittite, etc. Such a science has no "practical" purpose; its only aim is to search for the truth for the truth's sake.

An analogous science seems possible in the field of law. Every national legal science must of necessity pay some attention to the structure of the rules with which it is concerned. It must inevitably establish some formal categories such as right in *rem* and right in *personam*; property, tort, contract; right, power, privilege, immunity, duty, liability; it must use such concepts as jurisdiction, *res judicata*, estoppel; substantive law, procedural law, etc. The same categories are found with astonishing regularity in various systems of law. Are they inherent categories of law? Is it possible to develop a formal morphology of law? Such attempts have indeed been made. They were in vogue especially during the latter part of the 19th century, when they became known as Analytical Jurisprudence in English speaking countries, and as *Allgemeine Rechtslehre* in German speaking ones. Similar attempts have recently been resumed by the Vienna School as an aspect of the so-called Pure Theory of Law. Hardly ever were they based on a universal knowledge of diverse systems of law, however. Most of their proponents took as the object of their analysis the so-called Civil Law, taking it for granted that its categories had universal validity. In no other way, however, than upon the basis of a structural, formalistic comparison of the legal systems of all times and countries, can a general morphology of law be developed.

III

In determining the place of comparative law in the curriculum of an American law school, it is well to keep in mind:

- (1) that the aim of the average American law school is a practical one, viz., the training of candidates for the bar;
- (2) that this aim must be achieved within the limited time of three, or, under the Minnesota-Chicago plan, four years.

Although the vocational aim resulted, for a long time, in confining legal education to the limits of strictly vocational training, more recently greater insight has shown that better vocational results are likely to be achieved when the rules of law are taught, not as self-sufficient entities, but as means of social control. In addition, a consciousness of the great political power of the bar and its social responsibility has awakened Ameri-

can law schools to the necessity of preparing the future members of the legal profession for their social task. In a curriculum thus conceived, comparative law can play an important role. It is indispensable, however, to consider carefully in which of its various aspects it is likely to serve this task best. That comparative law, taken to mean the giving of information on foreign law as such, has no place in the undergraduate curriculum of an American law school, is obvious. Although the widespread opinion that the law of a country cannot be learned except "on the spot" is no more than a prejudice, neither the spirit of the students nor the organization of American law schools is such as to justify courses on a particular foreign law.

Comparative law, in the sense of systematic observation of the customs and usages of international trade is a topic of sufficient practical and theoretical interest to justify its inclusion in the curriculum of a law school interested in training "international lawyers," but it hardly seems to have such an importance as to make it a part of the general legal education of the average American lawyer. That comparative law, as a method of studying the spirit of foreign nations, interesting and important though it may be, has no place as such in a professional law school, is needless to emphasize. However, comparative law, meaning "sociology of law," ought to be part of the general study not only of sociologists and political scientists, but of every "educated man" desirous of understanding our civilization. Quite particularly, however, ought it to play an essential role in the education of lawyers. Unfortunately, it is so little developed at present, that a long period of special research will be necessary before the science of sociology of law is in a "teachable" form.

Therefore, it is only in the sense of "functional comparison of legal rules and institutions" that comparative law has a place in undergraduate legal education. That place is broad enough, indeed. Functional comparison has a place in every course in the curriculum of ordinary common law subjects, provided such courses are taught by the so-called "functional approach." That approach, as it has been developed in modern American legal education, means that every legal rule and institution is presented to law students from the point of view that it fulfills a function in the machinery of organized society. As pointed out above, that function can hardly be recognized and never be critically evaluated without comparison. In teaching "common law," the only limits to making functional comparisons are those imposed upon the individual teacher by the limits of his time and knowledge. To overcome the

limits of the law teachers' knowledge of foreign laws is a task of graduate legal education. An instructor who has sufficient knowledge of foreign materials may easily overcome the limits of time by selecting those problems of his field in which a functional comparison will contribute most to the clarification and understanding of the rules and institutions of American law. There are wide stretches in every field of the law which are easily understandable without foreign law comparison. There are others in which a functional comparison will show familiar institutions of American law in a new light and will give insight that one-sided treatment of common law rules leaves unrevealed.⁴

This general utilization of functional comparison of legal rules and institutions, to which *all* students ought to be exposed *all* the time in *all* courses, can and should be supplemented by special, elective courses where special problems may be treated in a more thoroughgoing comparison. In the ordinary common law course, foreign institutions can be mentioned as background material in order to give the proper relief to the American rules, and as illustrations of political solutions of a given problem differing from those adopted in American law. In these special courses, the limited number of students admitted thereto ought to have an opportunity to study a few narrow but vital social problems, and their solutions in different legal systems from the original sources,⁵ and to delve into the causes of differences and similarities. Thus, such a course should not only give a student the actual experience in making functional comparisons, but also afford him the opportunity to glance at the vast field of sociology of law. Finally, through a series of collected readings, students can be familiarized with the main trends in the historical de-

⁴ From his own experience in teaching the common law courses on Wills and Family Relations, the author suggests that a functional comparison may be used profitably in the following fields:

Wills: Problem of freedom of testation and its limits (forced heirs); function of testamentary formalities; technique of interpreting wills; redress against disinheritance; line of demarcation between transactions *inter vivos* and transactions testamentary; transactions to restrain defeasance of expectations (esp. contracts to devise and bequeath); machinery for the protection of creditors of a decedent; function of public authorities (probate courts) in winding-up a decedent's estate.

Family Relations: Restrictions upon the freedom to marry; machinery to enforce such restrictions; function of the restriction of freedom to escape from a disagreeable marriage union; machinery to enforce duties to furnish support; protection of family unit against outsiders; safeguards against abuses of membership in a family unit to defraud creditors; protection of minors and other "incompetent" persons against abuse of their business inexperience and instability of character; attempts to find the proper compromise between unity of family and individual independence.

⁵ Translated, of course.

velopment of that other great system of law, which, together with the common law of England, has conquered the world: the Civil law of Rome, the Church, and the Modern Codes.⁶

⁶ The author has taught such special courses on selected problems of comparative law of torts, contracts, and conflict of laws, respectively. The following problems seem to be most appropriate for detailed functional comparison in these fields:

Torts: Technique of determining interests to be protected against invasions; protection of certain interests, e.g., of the interest of not being disturbed in one's sphere of privacy or in the legitimate conduct of one's business; determining the standard of care required in the conduct of one's affairs (problem of negligence); determining the extent of liability for consequences of tortious acts; liability in possessing and using dangerous instrumentalities (esp. automobiles).

Contracts: Demarcation of promises meant to be given as legally binding, from mere social undertakings (problem of consideration); divergency of the declaration of a promisor and his intentions (problems of interpretation and mistake); functions of the so-called requirement of privity (third party beneficiary contracts); techniques of enforcement of legally binding promises; limits on the protection of expectancies based on promises (esp. problems of impossibility); protection against exploitation of economic inferiority (undue influence, economic duress, usury); social limits of the freedom of contract (contracts against public policy and against *bonos mores*).

Conflict of Laws: Theoretical possibilities of dealing with cases involving foreign elements (decision according to rules of *lex fori*; negation of jurisdiction under doctrine of *forum non conveniens*; decisions according to rules of "ius gentium" or an internationally uniform "law merchant"; decision according to rules of some foreign law); varieties of choice of law rules: rules for intertemporal, international, interstate, interterritorial, interracial, interreligious conflicts of laws; nature of choice of law rules, esp. the relation between rules for international conflicts of laws and international law; relation between choice of law rules for interstate conflicts of laws and constitutional law under various constitutional systems; technique of formulating conflict of law rules, esp. with respect to conflicts between heterogeneous systems of substantive law (problem of characterization, "qualification"); content of choice of law rules: reference to another country's substantive law or to another country's conflict of laws (doctrine of *renvoi*); policies determining choice of law rules for selected topics, esp. torts, contracts, marriage; theory of "points of contact" and determination of such points of contact as domicile, nationality, place of contracting, place of wrong, etc.; methods for deciding choice-of-law problems under different legal systems; historical development of conflict of laws in theory and practice of principal countries.