CHAPTER I

What is Comparative Law

Introduction

It is self-evident that comparative law is not a subject but a method. With a preliminary remark that legal definitions are notoriously unsatisfactory, H.C. Gutteridge, the doyen of the discipline, dismisses the question of definition thus: since the subject-matter is non-existent it defies definition.[1] The phrase is employed to describe a *process* or a *method* by which two or more legal systems, or parts thereof, are compared with a definite aim. This statement—we refrain from calling it a definition—raises further questions. How does one pick up the fields for comparative study? What does one, in other words, compare? Doctrines? Customs? Practices? Structures? Systems? Rules? The answer depends upon two things: first, on one's conception of comparative law; and second, on what one aims to achieve.

Conception of Comparative Law

In a penetrating article written in 1936 Roscoe Pound answered the ticklish problem as to what we may expect from comparative law by narrating an interesting anectode: When Thomas Hood was asked, we are told, whether life was worth living, he is said to have replied: "that depends upon the liver".[2] Clarifying Pound's thoughts on comparative law von Mehren stated that comparative study, like legal history and jurisprudence, took its areas for investigation where it found them.[3] The range of choice, as to both topics and methods, thus, is without effective limits.

Since the areas for investigation are limitless the choice of the field for comparison will necessarily depend upon the aims one has in view. Though there is some divergence of opinion as to the advisability of pitching one's sights very high there is general agreement amongst comparatists that comparative law serves a large number of purposes. But before we come to that a clarification seems to be warranted as to what comparative law is and what it is not in order that we may avoid confusion about its goals. Let us begin with what it is not.

Comparative law involves comparison not of mere rules of law though this would be essential and inevitable. For, as Pound rightly pointed out, law is something more than an aggregate of laws. "Laws are rules," argued Pound, "but law is far more than a body of rules. Laws are but raw

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1. H.C. Gutteridge, *Comparative Law, An Introduction to the Comparative Method of Legal Study & Research*, Cambridge, 1946, p. 2.
2. R. Pound, "What May We Expect from Comparative Law?", 22 *A.B.A.J.* 56 (1936).
3. A.T. von Mehren, "Roscoe Pound and Comparative Law", 13 *Am. J. of Comp. L.* 507 (1964).

materials of law. Law is needed to make laws instruments of justice...A true comparative law calls for very much more than a comparison of the rules of law on this or that point in the Roman Law, the modern Roman law, the several modern codes, and the Anglo-American common law."[4]

A fruitful comparison, according to Pound, was something more than a paste-and-pot-and-scissors affair. It involved more than a comparison of legal precepts, important as that is. There should be comparison of systems, not merely precept by precept, said Pound at another place.[5] A comparatist's task was not similar to that of Robin Hood or that of Lord Bramwell's pickpocket, who, according to Pound, went to the charity sermon and was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate.[6] The comparatist's task consisted in avoiding the pitfalls of sterile logicism and excessive concern with methodology. His task consisted in the development and formulation of a practical theory, a fruitful philosophy of law.[7]

To use another famous legal philosopher's words, true comparison must take into account the totality, the physiognomy of the legal systems to which the study extends.[8] Citing Jeremy Bentham, Kahn-Freund pointed out that a comparative lawyer was a comparative physiologist rather than a comparative anatomist.[9] Lepaulle had put it rather clinically: "a comparison restricted to one legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole."[10] Lepaulle maintained that even the unity of one legal system was more apparent than real. Moral, economic, religious and many other forces, in different proportions, come into play in the composition of a legal system. And all those forces, according to Lepaulle, must be taken into account and weighted in the process of comparison.[11]

Scholarship in comparative law, again, does not consist in informational presentation, but must always seek insight at one level or another—practice, procedure, juridical and governmental structure, substance—into the operation of the legal systems under investigation. The comparatist's concern with structure and detail is with a view to understanding the processes of growth and development and habits of thought.[12] The guiding factor for the comparatist in his investigations should not be a "what" but a "why". He should concern himself with the why of the existence of divergencies of jurisprudence and the reason for the doctrinal divergencies if he wants his labour to assume the dignity of a science.[13]

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4. R. Pound, "What May We Expect from Comparative Law?" 22 *A.B.A.J.* 56 (1936).
5. R. Pound, "Philosophy of Law and Comparative Law," 100 *U. of Pa. L. Rev.* 1 (1951).
6. *Ibid.*, 14.
7. *Ibid.*, 17, 16.
8. See Lee's words to this effect cited in M. Schmithoff, 7 *Camb. L.J.* 98 (1939).
9. O. Kahn-Freund, "Comparative Law as an Academic Subject", 82 *L.Q. Rev.* 45 (1966).
10. Lepaulle, "The Functions of Comparative Law", 35 *Harv. L. Rev.* 853 (1922).
11. *Ibid.*, 853.
12. A.T. von Mehren, "Roscoe Pound and Comparative Law", 13 *Am. J. of Comp. L.* 515 (1964).
13. G. Escarra, "The Aims of Comparative Law," 7 *Temp. L.Q.* 299 (1933).

Viewed in this light comparative law is "neither a professional tool nor an academic toy",[14] it has a higher purpose of providing an insight into the social purposes of law, and of evolving a better science of law. And, as Ihering remarked long ago, legal science without comparison could scarcely rise above the level of provincial causistry and empirical craft.[15] Comparison, therefore, is central to the study of law.

Types of Comparison

If one agrees that comparative law is not an amusing puzzle providing an opportunity to satisfy idle curiosity, and that it does not consist in the comparison of one rule with another rule, or precept by precept, but that it consists in going deep into the doctrinal rationales behind divergent legal systems, what then is the positive content of it. Confessing at the outset a sense of confusion, M. Rheinstein, one of the leading professors of comparative law in the United States, says : "The term comparative law has been used for denominating the descriptive analytical observation of a special field of positive law."[16]

The province of comparative law, according to Rheinstein, includes any juristic analysis which pays some attention to one or more laws other than that of the observer's own country. Such attention paid to foreign law might be occasional and haphazard, or it may be systematic. Systematic observation of foreign law may be *monographic*, when it was focussed upon one particular foreign legal system (Canadian, French, Islamic) or *synoptic*, when it was directed to more than one foreign law (German and French Law; Latin-American laws; laws of the British Commonwealth of Nations).[17]

Rheinstein made the further point that such observation, haphazard or systematic, monographic or synoptic, should not be called comparative law, as long as it remained purely descriptive. Descriptive material might be indispensable as the tool for research in comparative law but it could not by itself be called comparative law. To illustrate the point further, an Indian lawyer who describes the structure of family law in Outer Mongolia is not a comparatist, and *vice versa*. His results might provide very useful material for a future comparatist who chances to take interest in a comparison of family law in India and Outer Mongolia.

Again a scholar who dedicates himself in the study and observation of the legal system of a particular country alone might be doing a great service to the promotion of better understanding of that country—along with people doing similar work on the country's art, poetry, philosophy, or pottery. But that is not comparative law. What then is comparative law. Rheinstein answered this question thus :

> The term should be reserved to demonstrate those kinds of scientific treatment of law which go beyond the taxonomic or analytical description of technical application of one or more systems of positive law.[18]

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14. O. Kahn-Freund, *op. cit.*, 61.
15. See E. Rabel, "Institutes for Comparative Law"; 47 *Col. L. Rev.* 227 (1947).
16. M. Rheinstein, "Teaching Comparative Law", 5 *U. of Ch. L. Rev.* 616 (1938).
17. *Ibid.*, 615-16.
18. *Ibid.*, 617.

The problem of definition has been circumvented by subdivision of comparative law into various types. Wigmore, for instance, distinguishes between *Comparative Nomoscopy, i.e.*, the description of other systems of law; *Comparative Nomothetics, i.e.*, the assessment of the relative merits of the rules under comparison; and *Comparative Nomogenetics, i.e.*, the study of the development of systems of law in relation to one another.[19] Rabel divides comparative law into Ethnological Jurisprudence, Historical Comparison and Systematic-Dogmatic Comparative Law.[20] Bryce distinguishes the purely scientific aspect of the subject from its more practical side. The first aspect he describes as "the comparative science of jurisprudence", and the second aspect, according to him, has the practical aim of ascertaining and examining the rules actually in force in modern civilized countries, with a view to projecting the similarities.[21] And for Pollock "it makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence or, as the Germans seem inclined to say, of the general history of law".[22]

Surveying the above and numerous other opinions Gutteridge makes the point that the classifications varied according to what the authorities considered were the aims one set about to achieve by the comparative method. The essential problem, according to Gutteridge, therefore, is not —What is comparative law? The question of real importance is—What is its purpose? For, "a *method* of study does not lend itself to definition otherwise than by an indication of the purposes for which it may be employed."[23] Gutteridge doubts whether much is gained by classification of comparative law. Connecting such an exercise with the purposes of the study, he nonetheless makes a broad distinction between *Descriptive Comparative Law* and *Applied Comparative Law*.[24] Gutteridge makes this classification avowedly to bring into relief the fact that comparative law includes a great deal more than a mere description of the laws of a foreign country. The first type has no other aim than that of furnishing information, and it is no concern of the person undertaking it to ascertain what use will be made of the result of his investigations. As an example of this, Gutteridge cites the inquiry instituted in 1937 by the League of Nations into the laws which regulate the civil status of women.[25]

By *Applied Comparative Law* Gutteridge means the use of the comparative method with a definite aim in view, other than that of obtaining information as to foreign law. Under this category the investigator probes deeper into the rules to ascertain the essential from the accidental, the causes from the differences, and examines their operation in the context of the social environment in which the legal system operates. The purpose of comparison may be purely scientific as, for instance, comparison of the evolution of a rule or institution in two different legal systems; or practical,

19. Wigmore, "A New Way of Teaching Comparative Law", *Journal of the Society of Public Teachers of Law* 6 (1926).
20. For a discussion of Rabel's conception see M. Rheinstein "Comparative Law and Conflict of Laws in Germany", 2 *Chicago L.R.* 232 (1935).
21. Bryce, *Studies in History and Jurisprudence*, vol. 2, 188. (1901).
22. Pollock, "The History of Comparative Jurisprudence" 5 *Journal of Comparative Legislation and International Law* 74 (1903).
23. Gutteridge, *op. cit.*, 5, Italics ours.
24. *Ibid.*, 7, *et. seq.*
25. *Ibid.*, 8.

such as law reform or the unification of divergent laws.[26]

Rheinstein classifies comparative study into "functional" and "synoptic" comparison.[27] He brings out the difference between the two through an illustration. One may, for instance,

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

Rheinstein visualizes the evolution under the second type of study of a formal morphology of law and recommends that "*all* students ought to be exposed *all* the time in *all* courses" to functional comparison.[28]

Whatever the categorization the essence of classification is a separation of the descriptive from the utilitarian side of comparative law. Wigmore's comparative "nomoscopy", Gutteridge's "descriptive" comparative law, Rheinstein's "synoptic" method, etc. could be subsumed under the first category, and their "nomothetics", "applied" and "functional" comparisons, respectively, could be distinguished with their purpose-orientation. The latter category could be again pigeon-holed into jurisprudential purposes and practical purposes. Thus we come down to the second feature of comparative study.

Aims and Purposes

With what aims can one pursue different legal systems comparatively ? It goes without saying that one must discourage amteurish dilettantism and caution against irrelevant interests. What then, to borrow McDougal's terminology, should be the "the central over-riding purpose."[29] Let us examine the prescriptions of some authors. In the context of an affluent America the central over-riding purpose, according to McDougal, "is... the clarification for all our communities—from local through regional to global—of the perspectives, the conditions and the alternatives that are today necessary for securing. maintaining, and enhancing, basic democratic values in a peaceful world."[30] This McDougal thinks can be achieved on the international level by a comparative study as to how the foreign affairs is structured and operates in different states. What, in detail, is the constitutional competence to negotiate and conclude international agreements, how are such agreements made internally binding within the nation-state. Where is the war power located?

On the national level, McDougal recommends comparative studies indicating what powers are granted to what officials, over whom, with respect to what values, and subject to what conditions or limitations. He draws further divisions between "the delusively functional institutions—

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26. *Ibid.*, 9. M. Ancel adopts the same classifiacation and throws his authority in favour of applied study. See 4 *Am. J. Comp. L.* 258 (1955).
27. Rheinstein, *op. cit.*, 619.
28. Rheinstein, *op. cit.*, 623.
29. Myres S. McDougal, "The Comparative Study of Law for Policy Purposes", 1 *Am. J. Comp. L.* 34 (1952).
30. *Ibid.*

legislative, executive, administrative, judicial—or geographically (with varying degrees of centralization or federalism) between national and provincial or local authorities".[31]

Others suggest comparative studies in traditional fields like public law, labour law, the law of property and succession, administrative law, law of obligation, in money and banking, in the laws of bills of exchange, carriage of goods, insurance, guarantee and suretyship, sale of goods, patents and copyrights, and so on.[32] A few with a philosophical bent of mind, (*e.g.*, von Mehren), believe that "illumination can be cast by comparative work on pervasive questions underlying the entire legal order: How specific or universal is the Western idea of law? What premises are basic to Western thinking about the manner in which disputes are to be resolved and about the proper content of norms regulating conduct? How universally are these premises shared? What moral assumptions, cultural traditions, historic experience and economic considerations are reflected in a given society's attitude toward problems of social control? Finally, what can be said about the various forms that generalized social control—which we in the West have entrusted so largely to the legal order—takes in different societies and culture?"[33]

By way of reference to Ombudsman, Campbell makes the point that a comparative method is not confined to strictly legal matters.[34] And, indeed, Professor McDougal's recommendation in this regard is remarkable. He urges pooling experience and the best contemporary wisdom about such functions as the control of the community design, the regulation of land use, the provision of public services, securing improvements and developments, policing, quality standards in construction and maintenance, protecting consumers against price gouging and the administration of public controls. Comparative studies in these fields, according to McDougal might lead to improvements everywhere in the performance of such functions.[35]

The Academy of Comparative Law opened up a "splendid vista"[36] when its director, Lambert, proposed cooperation between societies of comparative legislation, societies for the study of legislation, etc. The subjects suggested for future research were, *inter alia*, general theory of law; legal sociology, philosophy of law; comparative legal history; legal ethnology; conflicts of laws; comparative commercial law; comparative legal procedure and arbitral procedure; criminology; criminal procedure, and criminal law; public international law; constitutional law; administrative law; transportation and communication law; copyright and patent law; and occupational law (workmen's compensation), etc.[37]

Of more immediate interest to the practicing attorney is the suggestion of Schlesinger relating to rules of pleading and evidence in transnational litigation. These rules, says Schlesinger, are the daily bread of practitioners and judges. But no answer has ever been given, or even essayed, to the

31. *Ibid.*, 43.
32. F.C. Auld, "Methods of Comparative Jurisprudence", 8 *U. of Toronto L.J.* 83-92 (1949).
33. A.T. von Mehren, *op. cit.*, 514.
34. Campbell, "Comparative Law: its Current Definition", *Jurid. Rev.* 161 (1966).
35. McDougal, *op. cit.*, 45.
36. Edouard Lambert and John H. Wigmore, "An International Congress of Comparative Law in 1931", 23 *Ill. L. Rev.* 665 (1930).
37. Lamberts' report is translated and reproduced in, *ibid.*

threshold question: which principles are so fundamental, so generally recognized by civilized nations that their world-wide acceptance may be presumed. Deploring the fashion of the Courts in giving pragmatic answers on the basis of what Schlesinger calls "judicial hunches", he urges comparative lawyers, to provide the necessary information on the basis of which the courts could decide whether a given rule or principle of law is in fact "recognized by civilized nations."[38]

The prescriptions thus vary according to the personal predilictions of individual scholars, the nature and needs of the societies in which they are made, and the general orientations of institutions concerned. What can we suggest that will conform to the traditions and needs of India? We will come to this after examining as to how—and for what purposes—comparative law could be employed. The recognized purposes of comparative law are: (1) promotion of understanding of one's own legal system with a view to produce better lawyers and laws; and (2) promotion of understanding between nations with a view to reduce world tensions. We will examine these two aims in the following two chapters.

38. R.B. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", 51 *Am. J. Int'l L.* 749 (1957).