COMPARATIVE PRIVATE LAW

DEFINITION OF COMPARATIVE LAW

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"The greatest confusion continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques"

- McDougal, *The Comparative Study of Law for Policy Purpose*, 1Am.J.Comp.L. 24, 28f. (1952)
WHAT IS NOT COMPARATIVE LAW

• Description of a foreign law
• Parallel descriptions of different laws
• Comparison of rules
DEFINITION OF COMPARATIVE LAW

• Elements of a definition:
  – Essence
  – Scope
  – Method
  – Purpose
Traditional definition of comparative law

• Comparative law’s purpose:
  – Improve domestic law
  – Construct domestic law
  – Teaching instrument
  – Tool of harmonisation
  – Tool to achieve a common European law
Definition replaced by proof of legitimacy

- Study of law is traditionally "municipal"
  - Why should foreign law interest me?
  - How can foreign law be properly understood?
Comparative law as a science

• Rodolfo Sacco
• 1987: The Trento Manifesto
  – Francesco Castro
  – Paolo Cendon
  – Aldo Frignani
  – Antonio Gambaro
  – Marco Guadagni
  – Attilio Guarnieri
  – Piergiuseppe Monateri
  – Rodolfo Sacco
  – Gianmaria Ajani
  – Ugo Mattei
The first Trento thesis

"Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Further tasks such as the improvement of law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research."
The aim of comparative law is knowledge

- Not all sciences are applied sciences
  - Astronomy
  - Linguistic
- Knowledge needs not be centered on practical application
  - Physics
- Comparative law highlights similarities, differences, structures
  - Common law, civil law, but also early peoples’
"Comparative law studies various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparative law is an historical science."
Legal data as historical facts

• What is a "legal rule"?
  – Various levels: constitutional, statutory, judicial, doctrinal

• What rule is to be compared?
  – Different legal rules are main sources of law in different systems
  – Is there harmony within one single system?
Not "the legal rule", but legal formants

• Living law contains many different elements
• Must there be a single rule?
  – Interpreter seeks unity
  – Interpreter is subject to ideology
  – Interpreter is subject to legal tradition
• Comparatist observes all legal formants and does not attempt to create conceptual consistency
The third Trento thesis

"There is no comparative science without measurement of the differences and similarities found among different legal systems. Mer cultural excursions or parallel exposition of fields is not comparative science."
The factual approach - I

• Dogmatic analysis of one system attempts to achieve consistency and disguises legal formants

• Use of "official" conceptual categories prevents comparison
The factual approach - II

• Cornell studies, Common core studies:
  – Questionnaires on factual situations
  – Answers must be self-sufficient
  – Joint work on general reports
The fourth Trento thesis

"Comparative knowledge of legal systems has the specific merit of checking the coherence of the various elements present in each system after having identified and understood these elements. In particular, it checks whether the unrationalized rules present in each system are compatible with the theoretical propositions elaborated to make the operational rules intelligible."
Observation of legal formants’ plurality

• Asymmetries in a system are not deemed the result of a wrong interpretation
• Comparative method is actual observation of the elements at work in a system
"Understanding a legal system is not a monopoly of the jurists who belong to that system. On the contrary, the jurist belonging to a given system, though, on the one hand, advantaged by an abundance of information, is, on the other hand, disadvantaged more than any other jurist by the assumption that the theoretical formulations present in his system are completely coherent with the operational rules of that system."
The advantage of comparing

• Comparative method as historical method
  – Does not offer abstract definitions (as the dogmatic method)
  – Is not subject to myth of unitary system
Comparative law: Evolution during the past 15 years?

• 2001: Reevaluation of the Trento manifesto

• Antonio Gambaro:
  – III, IV [and II]: Now undisputed
  – I,V: Need still emphasis