

THE COMPARATIVE STUDY OF LAW

Arthur T. von Mehren*

I. Introduction**

A desire to understand and to explain perceived patterns of similarity and divergence in the juristic ordering of aspects of life shaped by cultural, economic, and social circumstances drew Ferd Stone to comparative law. Because Ferd Stone was a true comparatist, comparative-law study was for him rich in challenge as well as in opportunity. The general reflections upon the comparative enterprise and the illustrations of the comparative method at work that follow are published here in memory of a distinguished colleague and a dear friend whose work has contributed so much to our comparative understanding of the law.

Basic to all comparative work are knowledge and understanding of discrete areas of human and social experience that have enough in common to permit a meaningful comparison. For legal studies, the criterion of comparability is convergence at the functional level. Facially disparate institutions, principles, rules, and theories that serve similar purposes can be meaningfully compared. Where social, political, or economic values are shared in significant measure, the arrangements and intellectual structures through which societies seek to advance these values are comparable.

A wide range of choice is open to the legal comparatist in the spectrum that runs from specificity to generality, from nuts and bolts to theoretical constructs. The vast topic of law's role in different cultures can be explored and such questions asked as whether a traditional society--China or Japan, for example--addresses dispute resolution and the eliciting and carrying-out of production and distribution decisions through mechanisms and concepts comparable to those utilized by contemporary Western societies? And, if not, why not? Do societies that stand outside the Western legal tradition have a legal profession

* Story Professor of Law, Harvard University; Fellow, 1990-91, Institute for Advanced Studies, Berlin.

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The discussion draws in particular upon A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* (ed. 2 1977); A. VON MEHREN, chapter 1 -- *A General View of Contract*, Vol. VII -- *Contracts in General*, (ed. A von Mehren, 1980), *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*; and A. VON MEHREN, chapter 9 -- *The Formation of Contracts*, *id.* (to appear in 1992).

and, if so, what are its characteristics? In such societies are disputes resolved in terms of abstract conceptions of right, or is justice seen as highly particularized and individualized? In exploring such topics the jurist has much to learn from the cultural anthropologist, the sociologist, and the political scientist.

For a variety of reasons, most comparative legal study does not cast its net so widely. To explore the nature and role of law in two or more basically different cultural and legal traditions requires vast knowledge. Furthermore, most jurists look upon law as a professional discipline and accordingly prefer to work at a lower level of generalization and to seek more particularized connections to what can be called "law in action."

A great deal of comparative work consequently addresses problems that arise in legal orders whose basic assumptions and values are taken to be fundamentally similar. For comparative work to be challenging and professionally useful, however, meaningful differences must exist at some level between the systems whose positions are to be compared.

These considerations among others have resulted in most comparative work exploring the handling of legal problems in so-called civil-law and common-law systems. The term "civil-law" system is a convenient shorthand for those modern Western legal orders that arose out of the legal culture that began to develop in 1095 with Irnerius's lectures at Bologna on the newly rediscovered *Corpus Iuris Civilis* of Justinian. On the basis of Roman law materials, generations of professors developed and refined a distinct legal culture--the civil-law system of continental Europe. The inevitable result was a legal culture profoundly influenced by the fondness for generalization and system that characterizes the work of university scholars.

The other great Western legal system is, of course, that of the common law. Although these two systems share a common cultural heritage, they exhibit significant differences in their habits of thought and modes of analysis. The common law emerged in England in the course of the twelfth and thirteenth centuries. Its intellectual tradition rests on the political fact that an effective, centralized administration of justice was established in England long before Western societies had come to look upon law as a rational system of rules and principles that a politically organized society consciously generates to regulate social and economic life. In the twelfth and thirteenth centuries, governmental authority was largely undifferentiated. The King's court--that is to say, his advisors and representatives--declared law for his realm. Disputes were resolved essentially on the basis of community practices and traditions which came to be seen as authoritatively revealed in the course of deciding comparable disputes.

Thus, in England a system of private law was established and developed in the process of administering the King's justice. By the end of the twelfth century, a strong and cohesive legal profession had arisen. Aided by the rather occult nature of the practice of law, the practicing profession took over legal education; English lawyers were not to receive a university training in law until the twentieth century. Instead, in the Inns of Court, aspiring lawyers were trained by the practicing profession. Inevitably, the common law's habits of thought and methods of analysis became those congenial to adjudicators and practitioners. Systems and broad generalizations did not attract; jurists thought in concrete terms and reasoned inductively from precedents rather than deductively from general concepts.

For various reasons, the contrast just drawn between the methodologies in the civil and the common laws is less stark today than in the past; nevertheless, the civil-law and common-law styles of legal writing and analysis still exhibit significant differences. A concern of comparative scholarship is to assess the significance of these differences for the administration of justice in contemporary societies.

A further reason why so much of comparative-law scholarship is concerned with problems situated within the civil- and common-law traditions is that, in the course of the nineteenth and twentieth centuries, political, economic, and cultural forces have--for better or for worse--resulted in the two Western traditions replacing, especially for commercial matters, indigenous legal traditions in non-Western societies. There is little reason to believe that this picture will change dramatically in the decades to come. On the contrary, some command of both Western traditions is likely to become increasingly important in the contemporary practice of law.

The methods of research and the raw materials for comparative work in law depend upon the problem to be investigated and the characteristics of the legal systems for which the investigation is to be undertaken. For example, field work is required to study dispute resolution in traditional societies and to investigate how black-letter rules of law affect the way in which commercial activities are carried on in contemporary Western societies. Most comparative work limited to common- and civil-law systems relies, however, not on field work but on materials generated by those agencies of society that discharge legislative, administrative, or dispute-resolving functions.

There are several reasons why legislative and administrative materials along with judicial decisions are grist for the comparatist's mill. First, jurists are accustomed to work with these sources; they provide the authoritative starting points for legal reasoning. In most developed legal systems, materials of this nature are relatively easy to

obtain and are produced in the course of the system's operations for many--though not all--subjects that lend themselves to comparative study. Investigation of certain questions--for example, how lay judges, such as jurors, decide cases--is difficult because here the system's operations do not generate a paper trail. Unless the needed materials have been gathered by jurists working on the subject in particular legal systems, in order to explore such matters the comparatists must themselves undertake empirical research.

The fact that a great deal of comparative work rests on materials generated in the course of the normal operations of the system under consideration raises the question whether these materials can be relied upon. The comparatist who studies doctrinal writings and judicial decisions assumes that they throw a strong light on the way in which disputes are decided. One posits that rules and principles control in significant measure the administration of justice. If the truth is otherwise--if rules, principles, and doctrines are mere superstructure concealing the interplay of economic, political, or social power from which decisions actually result--comparative work based on doctrinal writings and judicial decisions can hardly deepen our understanding of law and the legal order.

Of course, the issue thus raised is present not for comparative study alone but for legal scholarship generally. Various schools of jurisprudential thought--legal realism, the *Freie Rechtsschule*, and (more recently) the critical legal studies movement--have argued that the reality of the legal process cannot be captured in rules, principles, and doctrines.

Without seeking to explore this problem here, I venture the observation that, as is so often true when one seeks to understand the working of human society, the matter is more complicated than jurisprudential generalizations may suggest. Much depends on the view that not only the legal profession but also society in general hold respecting the force and determinacy of authoritative starting points for legal reasoning. Are rules, principles, and doctrines seen to advance objectivity, to ensure evenhanded justice, and to make it possible for individuals to calculate in advance the legal consequences of their behavior?

Views held on these matters are, to a significant degree, self-fulfilling; our beliefs decisively shape our conduct. Accordingly, it is of great historical and sociological importance that, in Western society, at most periods and by most individuals law has been seen as principled in nature and as administered in an essentially even-handed manner. If it could be demonstrated that the reality were otherwise, much comparative-law scholarship would be irrelevant.

A great deal of comparative analysis is concerned with the interplay and tension between intellectual structures--legal rules, principles, and doctrines--and social, economic, and political needs and realities. Do a given legal system's intellectual structures produce solutions that, when considered in functional terms, are defective or could be considerably improved? When legal systems with significantly different intellectual structures address what is, functionally considered, the same problem, do differences at the level of legal rules and principles reflect different political, social, or economic views as to how the problem should be handled? Or do they result from differences in the methodology and doctrinal ordering with which each system works? And how should a legal system adapt or modify its intellectual structures when the results that flow from those structures are in severe tension with perceived functional requirements?

The comparative study of law, as the preceding discussion suggests, can serve a variety of purposes. One may seek deeper insight into law as a social phenomenon and into the capacity of concepts and abstractions to direct and discipline the taking of decisions and the resolution of disputes. Comparative study in this and other ways thus helps us to see our legal system's forest; providing perspective, comparative study helps jurists to understand better law's constraints and law's potentials. Insight into how other legal systems have dealt with particular problems not only stimulates the jurist's imagination but reveals the strengths and weaknesses of particular solutions. Comparative study thus assists legal reform as well as lawyers' efforts to find creative solutions for problems that arise in legal practice. This second function is of particular importance in transactions involving two or more different legal orders. The comparatist serves here as a translator whose knowledge makes possible communication between persons speaking different languages.

The comparative study of law thus has many applications, ranging from the philosophical and speculative to the practical and concrete. Comparatists seek insight and truth at many levels and for various purposes.

II. Comparative Analysis of Aspects of Contract Law

My purpose is to give a sense of some of the forms that comparative-law scholarship can take. The examples used can only sample the possibilities. Although I have done some relevant work, I do not present an example of cross-cultural comparative-law scholarship but limit myself to work dealing with problems within the civil- and common-law branches of the Western cultural tradition.

My endeavor will be to give you an understanding of the comparative enterprise as one comparatist has pursued it in one field, that of contract law. Because it is impractical to analyze particular factual problems or situations in detail, I concentrate on the generalizations and conclusions respecting various aspects of contract law that are informed, supported, and tested by comparative study.

In the contemporary world, the economic and commercial coordination and cooperation for common purposes that every society requires take two basic forms: plan and contract. Of course, status and various manifestations of social pressure, ethical principle, commercial morality, and religious feeling have considerable importance for areas of life that fall within the purview of contract and plan. For example, contemporary contract law in both common- and civil-law systems gives weight to good faith and to commercial morality. The "ordre public" sets limits to the use and enforceability of contractual arrangements.

The dominant methods of ordering, especially insofar as production and distribution decisions are concerned, are today clearly contract and plan. Nowhere are these two forms regarded as mutually exclusive. Quite the contrary is true; in the contemporary world, the emphasis is on achieving an optimal balance in practice between the two principles.

Views respecting what constitutes an optimal balance vary and have shifted in the course of the century. The institution of contract has come under pressure in societies that have come to attach a reduced importance to free choice as a source of legal rights and liabilities. The result has been a decline in contract's effectiveness as an instrument for the allocation of calculable risks. By contrast, many societies that earlier in this century were very heavily committed to the planning principle, have turned from plan towards contract.

When reflecting on the role of contract and plan, it should be remembered that their importance is not to be measured simply by the extent to which one or the other explicitly controls a given situation. Where parties rely on nonlegal sanctions to enforce an agreement, contract or plan may have played a role in shaping the underlying transaction. Thus, in societies that rely heavily on contract for economic coordination and cooperation, contract law influences subtly and importantly expectations and notions of proper conduct even where the parties do not seek to attach legal sanctions to their transactions.

Contract, by giving decisionmakers a direct stake in the outcome, is thought to stimulate initiative and prudence. Furthermore, because decisions are made by those who will be principally affected

by them, decisions will likely correspond to the desires of those whom they are intended to benefit.

But the institution of contract is not a simple reflex of the proposition that production and distribution decisions should be autonomous and decentralized. Even if contract law were constructed entirely on the basis of private autonomy, it would contain mandatory rules designed to ensure that the contracting process was responsive to the autonomous, substantive decisions of both the parties. Contractual ordering must be done by parties who act with a degree of awareness, independence, and responsibility. Only so long as the integrity of the contracting process is assured can we assume that its results will be socially acceptable. The concern for process explains the importance of rules respecting the legal consequences that follow when mistake, undue influence, or fraud was present during the course of the contract's formulation. Formal requirements also ensure the integrity of the contracting process by inhibiting hasty, unreflective action.

Procedural justice is thus a fundamental concern of every system of contract law. This is not to say that the solutions are the same for all systems. Differences may reflect divergent judgments respecting how such considerations as administrability and legal security are best taken into account. Another source of difference lies in varying theories respecting how contract's binding effects are explained. For example, many nineteenth century jurists, arguing that the binding effects of contract flowed from the creative force of the individual will, accorded what is now considered excessive protection to the mistaken party. Significantly less protection for mistaken parties is indicated when contract's legal enforceability is seen to rest on social, economic, and institutional considerations. Explanations along these latter lines operate to reduce the tension between doctrinal and instrumental considerations and thus to increase the social and economic usefulness of contract as an institution.

Procedural justice is a fundamental concern of contract law, although different views are held as to what is contractually just in various situations. The views traditionally held respecting the requirements of contractual justice were developed for two-sided contractual ordering. With the increasing importance in the twentieth century of such forms of one-sided contractual ordering as standard-form contracts and consumer contracts, new standards of procedural justice have emerged and contract law has become less unitary than it formerly was.

Contract law's approach to issues of substantive justice differs markedly from its approach to procedural justice. As has already been remarked, the classical assumption was that ensuring procedural justice warranted in principle the contract's substantive justice. For onerous--

as distinguished from donative--transactions, a contract is typically considered substantively just if each party receives, in terms of his own evaluation, a value at least equivalent to the value he gives up. For many goods and services, the market usually renders unimportant the distinction between subjective and objective value. The question remains whether, where the terms of the exchange were not fixed by an operating market, the parties' subjective evaluations should always be decisive. In these cases, the legal order could be concerned that certain parties, individually or as a class, are such poor traders that the other party to the transaction will almost always obtain the best deal possible within the range of terms upon which the contract could be concluded. The argument for interference in the name of substantive justice is strongest where--as in one-sided transactions--dickering over terms does not occur.

The history of concern for substantive justice in contract law is long and complex. In the Western legal tradition, the requirement of a "just price" can be traced back to Roman law. In the Middle Ages, influenced in part by the revived study of Aristotelian philosophy, the doctrine was expanded into a fundamental principle of contract law. There is considerable controversy, however, as to what constituted the just price. Whatever was meant, the "just" price's significance for contract law declined as market economies arose. The French Code Civil of 1804 maintained the doctrine of *laesio enormis* for the specific case of a seller of an immovable who had received a price that was less than seven-twelfths of the property's value. The German BGB of 1900 rejected the *laesio* doctrine outright.

The *laesio enormis* theory did not become obsolete because of an emergent view that the principle of equivalence was not basic to contractual justice. Rather value was increasingly seen not as intrinsic but as based upon individual decisions and preferences. To the extent that these decisions are generalized and coordinated by the market, the contract price and the market or just price are identical unless the contracting process was defective because of error, fraud, or the like; in these circumstances, the just price doctrine no longer has independent significance. Where individual preferences and decisions are too particularized or too diverse to be generalized and coordinated by the market, the proposition that value is not intrinsic but rests on individual preferences and decisions again leaves no place for the just price theory. In all these situations, the satisfaction of an appropriate standard of procedural justice was--and continues to be--taken to warrant the justness of the transaction.

But contract law never succeeded in exorcising all concerns for substantive justice. In some situations, perceived gross disproportion in the parties' respective obligations alone or in combination with other improprieties can prevent formation of the contract; the same effect can

follow where one party has essentially arbitrary control over the dimensions of his obligation or of the obligation owed him. Finally, a contract may be formed but with its potential for substantive injustice reduced or removed either through invocation of a rule of law or through interpretation.

For the most part, these results are reached through rules and principles that do not directly express concerns for substantive justice. As a consequence, the area is one in which ambiguity and uncertainty are predictably encountered and the results reached vary considerably from system to system. Here again difficulties in understanding and administering the law arise from a tension between doctrinal and functional considerations.

Solutions to many specific problems that arise in contract law are shaped by doctrines respecting the basic requirements that must be satisfied to conclude a contract. Consistently with contract's social and economic function, contemporary civil- and common-law systems here emphasize party intention. French and German law view contractual obligation as, in principle, arising simply through party agreement. Common-law systems traditionally require as well a "sufficient consideration" and thus add an element of bargain to the requirement of agreement.

These doctrinal propositions work well for the great mass of transactions. In some situations, however, to insist upon agreement plus consideration--or even agreement alone--denies legal effects to transactions that, instrumentally considered, deserve a better fate. To deal with these cases, various alternative or supplementary theories have been proposed. In German law, some urge that one party's intention--the unilateral act theory--should suffice to establish contractual obligation. In American law, the doctrine of promissory estoppel has achieved wide acceptance: a promise that induces reasonable reliance on the part of the other party is binding to the extent necessary to avoid injustice even though that party has not given anything that constitutes consideration.

Other theories advanced to supplement traditional doctrines respecting formation are more radical in that contractual obligation is divorced from party intention. The factual context or *faktische Vertragsverhältnisse* theory argues that contractual obligation can arise directly from factual circumstances quite regardless of party intention. It is also urged that contractual obligation should attach when one party's conduct in the course of contractual negotiation can be characterized as faulty: *culpa in contrahendo*. And in American law one can perhaps discern a tendency to find contractual liability where one party has relied on assurances by the other that are too indefinite to be considered operative promises and hence are outside the scope of

promissory estoppel. Each of these theories seeks to reduce the tension between doctrinal and instrumental considerations. Such efforts, however, run the risk of producing the contrary effect. In the effort to reach satisfactory results in particular situations, the doctrine in question may lead to unsatisfactory results in others. Legal doctrines have an internal logic and dynamic; once launched, they tend to take on a life of their own and may lead to results that are unforeseen and undesired.

Comparative study makes clear not only the centrality of propositions respecting will and intention to much doctrinal theory respecting contract formation but also that, when contract is closely associated with party intention, tension arises between, on the one hand, the doctrinal emphasis on intention and, on the other, instrumental concerns to protect party reliance and to ensure administrability.

This tension is seen in discussion of such issues as the following: How is intention to be expressed; for example, can silence constitute assent? Is a contract formed when the parties have reached agreement on many, but not all material terms? When issues arise respecting the conclusion of legal transactions or the interpretation of underlying declarations of intention, are manifestations to be given effect in terms of the manifesting party's personal understanding--the subjective theory--or of the normal, objective meaning that the other party--or, in some situations, an observer--would, in the given context, reasonably attribute to the manifestation?

The subjective theory, an entailment of the will theory of contract, is more productive than is the objective theory of tensions between doctrinal and instrumental considerations. This is so because the latter theory does not have scruples against giving weight to party expectations and social, economic, and institutional values. The objective theory thus accommodates more easily and fully than does the subjective theory concern for reliance and administrability.

The difficulty for the subjective theory is not that it precludes taking reliance concerns into account but rather that it can only do this in a way that puts administrability at risk. The subjective theory recognizes that one who makes a manifestation of intention should realize that others will ordinarily act on the basis of objective meaning; accordingly, although for purposes of contractual liability the manifesting party is given the benefit of his subjective intention, he is liable on a fault--or abuse of rights--theory for harm resulting to the other party from reliance on the manifesting party's objective meaning. This approach resolves the tension between respect for one party's subjective intention and the other party's reliance but in a manner that gives rise to practical difficulties. The aggrieved party may find it

difficult, or even impossible, to establish the fact of--or the precise harm caused by--his reliance on the objective meaning of the other party's manifestation. Moreover, permitting a party to invoke his subjective intention to overcome the objective meaning of his manifestation generates litigation that would not otherwise occur and thus places a greater burden on the courts. Finally, at least in commercial and economic affairs, considerations of stability and the need of others to know where they stand require that, in principle, one be held to what he is reasonably understood to say or do.

Comparative study indicates that, in the course of the twentieth century, systems that began with a subjective approach have increasingly moved closer to systems using an objective approach. The driving force for this development lies primarily in the practical difficulty of giving sufficient weight to concerns for party reliance and for administrability in a system that adheres strictly to the subjective theory.

The degree of completeness and clarity that party intention must achieve in order to form a contract turns on another aspect of the interaction between intention, on the one hand, and reliance and administrability, on the other. Requiring a reasonable degree of completeness and clarity finds strong support in contract's social and economic function. Contract as an institution can hardly elicit and discipline the myriad of discrete decisions required to allocate and to distribute resources if the essentials of the matter are left open for resolution by courts or other official institutions. Nor would it do to enforce, in principle, only those transactions whose details are contained in entirely complete and absolutely clear party manifestations. Legal security would be undermined if a party who wished later to change his mind could, regardless of degree or centrality, seize upon any ambiguity or incompleteness whatsoever. Moreover, once a party has relied on an incomplete or ambiguous agreement, a greater degree of unclarity is appropriately tolerated than would, in the absence of reliance, be acceptable.

The problem of completeness and clarity would be excruciatingly difficult and burdensome were every situation to be understood and evaluated in completely individual and subjective terms. In practice, conventions and patterns embodied in commercial usages are frequently called upon. The legal order itself provides many rules--so-called *jus dispositivum*--to fill in concrete details when the parties fail to address significant points. Contractual paradigms--for example, the contract of sale or of lease--are found in all contemporary legal systems; these contractual types supplement and fill in manifestations of party intention.