
Winter 1964

Comparative Law and Social Theory, by Jerome Hall

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Recommended Citation

Hazard, John N. (1964) "Comparative Law and Social Theory, by Jerome Hall," *Indiana Law Journal*: Vol. 39 : Iss. 2 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ilj/vol39/iss2/8>

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BOOK REVIEWS

COMPARATIVE LAW AND SOCIAL THEORY. By Jerome Hall. Baton Rouge: Louisiana State University Press. 1963. Pp. vi, 167. \$5.00.

Rejection of the concept of comparative law as method and espousal of a goal of humanistic legal sociology provide the thesis of Jerome Hall's important book. He writes at a time when comparatists the world around are searching for purpose. None of them can ignore this thoughtful effort to restate goals. But not only has Hall written for comparatists. His thesis would bring the comparative study of law back into the stream of social science as an important dimension. For this reason he ends his book with a chapter berating the behaviorists for abandoning law as an element of their study in reaction to the formalism of the nineteenth century.

At the risk of oversimplification of a closely reasoned book of learned dimension, the thesis is this: Gutteridge of Cambridge oriented comparative law research on method, saying that comparative law was not a branch of law but a method of study and research.¹ Hamson and David as his most noted students have spread this approach around the world.² The appeal of this group has been so great as to overshadow, or nearly so, those comparatists such as Rheinstein and Yntema who find comparative law to be synonymous with sociology of law or legal science.³ Hall has suggested that he is with the sociological group, but not entirely. He asks why comparative law should be utilized as a term if it is but another name for legal science or legal sociology. He would innovate for comparative law and use the term to apply to something *between* method, as Gutteridge would have desired, and sociology of law (legal science).

Developing his position, Hall establishes a preliminary thesis that comparative law is a halfway house, an intermediate point "between the knowledge of particular laws and legal institutions, on the one side, and the universal knowledge of them at the other extreme."⁴ The latter is scientific legal sociology of legal science. Hall would stop short of that

1. GUTTERIDGE, *COMPARATIVE LAW* (2d ed. 1949), cited pp. 7-8.

2. HAMSON, *THE LAW: ITS STUDY AND COMPARISON* (1955), cited pp. 7-10. DAVID, *TRAITE ELEMENTAIRE DE DROIT CIVIL COMPARE* (1950), cited pp. 7-10.

3. Rheinstein, *Teaching Tools in Comparative Law*, 1 *AM. J. COMP. L.* 98 (1952), cited pp. 11-12. Yntema, *Comparative Legal Research*, 54 *MICH. L. REV.* 899 (1956), cited p. 12.

extreme at a stage in the search for broad universal generalizations, and that stage he would call " 'humanistic legal sociology.' "5

To accept his goal, Hall declares that there cannot be a reduction of currently available knowledge to a set of common terms which would be systematized, but humanistic legal sociology should strive to create a single rationale and compatibility in relation of these types of knowledge to a common subject matter, the positive law.⁶

In Hall's view research was based on a wrong premise when it was initiated in 1900.⁷ This was the belief that every society must pass through stages of evolution, from which all would emerge at some common point. The movement for unification that grew from this premise has now been criticized as utopian, although Marc Ancel has sought to salvage something by arguing for at least a common language, a common meeting ground, an increased understanding of the common good, if a new *ius gentium* is out of the question.⁸

Comparatists have also erred because they search for common concepts, but few appreciate that what people accept as the concept of law depends upon the philosophy they hold, and personal preference governs choice. There is no common definition of law, and comparatists must, therefore, content themselves with construction of a concept of law which is not definitive but which has the more limited aim of facilitating the acquisition of social knowledge of law. Neither the ordinary, nor the positivist concepts of law suffice for that purpose. Comparatists must, however, work with positive law, *i.e.*, with authoritative materials like statutes and judicial decisions, and they must also work with the sociology of law as knowledge of the positive law. But they must limit themselves to high level abstraction based upon not more than a few legal systems; they should not continue to search for universalism—for the ultimate jurisprudential notion, the concept of law.

With this relatively limited vision of comparative law as a discipline, not a method, and concerned with generalizing from several but not all legal systems, and avoiding the ultimate abstractions of jurisprudence (in the common law sense), Hall attacks details. Humanistic legal sociology, as he chooses to call his discipline, must work with facts, but not only in the form of statutes, judicial decisions and issuances from the sovereign. It must examine the laws of sub-groups, that is, law as con-

4. P. 33.

5. P. 42.

6. P. 43.

7. Pp. 44-45.

8. Ancel, *La doctrine universaliste dans l'oeuvre de Levy-Ullmann*, 1948 *L'Oeuvre juridique de Levy-Ullmann* 181, 195, 201, cited pp. 44-46.

duct or what happens in society. This involves study of the fact of feeling and tendencies to act, and since conduct is not always preceded by thought, but is spontaneous, the starting point for the comparatist must be action, rather than thinking. To this reader Hall is here making a plea for behavioristic studies. He is thinking of customary law as being social reality.

Hall expects to be challenged. He says it is not easy to break away from the tradition that positive law is a rule or concept, for this has been hardly challenged from Plato to modern times, but for him the social reality of law is not solely the norms but the whole conduct which includes and expresses those norms. One must place legal norms, therefore, in the social context, and this means not merely the immediate surroundings that all can see, but everything that law as conduct has produced and everything that has influenced and determined that conduct. This calls for a coalescence of legal ideas, values and facts.⁹

How can such multi-sided research be conducted? At this point Hall makes his argument that norms be the core. He notes agreement in sociology, anthropology and comparative politics that the components of social structure are norms, status and role.¹⁰ "Norms render social actions intelligible, and supply the basis for expectations regarding the conduct of persons in a known culture."¹¹ He speaks not only of legal norms but also of the non-legal norms. He proposes that the norms of various societies be compared against models or types, as suggested by Max Weber's ideal types,¹² and if this is done, he expects to find legal systems ranged in a series between polar extremes. No current systems are adequate, and he explores some of them, notably those based on "adherence to rule of law" or "ideology."¹³ The problem confronting comparatists becomes, therefore, how to improve current typologies and how to adapt them to needs of socio-legal research.

As an example, Hall notes that one cannot meaningfully compare the English judiciary with the Soviet judiciary where judges are expected to implement the party's program because they are instruments in quite different cultures.¹⁴ He admits that in some cases there will be incomparability, and so he suggests limitation in comparative study to carefully selected segments of a legal system, and rejection of comparison of entire legal systems in broad scope. There may also be comparison on the basis

9. Pp. 81, 88.

10. P. 90.

11. *Ibid.*

12. WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (1949), cited pp. 98-99.

13. P. 101.

14. *Ibid.*

of function, although this method has recently been called into question by the sociologists. There may be utilization of solutions to common problems in different systems. From this could emerge a body of knowledge which "would make present comparative disciplines branches of a well-established humanistic sociology of law."¹⁵

If this book has been read aright, and a reviewer may well tremble in approaching such a volume to which years of thought and erudition have contributed, it is telling comparatists just what they must do with the "method" popularized by Gutteridge, rather than leaving them, as Gutteridge is said to do, to utilize the method for whatever purpose they wish. Hall would have comparatists bring to social scientists insight on human behavior gained from the study of norms so that we may all understand more fully what mankind is doing. As in research in pure science, as opposed to applied science, this would not be done with any purpose in mind. Hall decries purposeful research, that is, research designed solely to meet a specific problem of the legal draftsman, although he makes the assumption of scientists that, if pure science is conducted, it will not be without its ultimate reward.

This is all very well, although as one who knew Gutteridge I am not sure that he has not been set up as a straw man to make a point. He was thoroughly English and, consequently, oriented on facts, but he would not have been adverse to use of the comparative method to study social behavior, nor are Hamson and David. Gutteridge was plagued by uninformed individuals who thought that comparative law was another discipline like contracts, torts or criminal law, and they wanted to know what it was. He was meeting their question by saying that he only advocated a method by which they could work toward a common commercial law for much of the world, a goal which was dear to his heart. He can be read only in the light of his times, which Hall correctly defines as those of expectation that world-wide unification of law, at least of commercial law, was sure to ensue if the statutes and judicial decisions were examined, compared and made the basis of round tables designed to find the reasons for the differences and then, perhaps, a compromise which would satisfy the parties present.

The American comparatists have sought to avoid the problem of questions as to what is comparative law by speaking of the "comparative study of law," and most of them, as Hall indicates, have utilized comparative study for the purpose of understanding the role of law in society.¹⁶ Some have met very concrete problems by comparative research

15. P. 110.

16. Pp. 113-16.

as to what is desirable and practicable in social legislation, using the experience of Germany and Scandinavia for the study. Some have utilized the method to help American lawyers communicate with a minimum of misunderstanding with corresponding lawyers practicing in other legal systems. But generally, Rheinstein and Yntema have set the pace, which is to utilize the comparative method to understand societies.

Generally also American research has been in limited areas, perhaps for the reason that Hall suggests, namely, that the knowledge of its participants has been limited. Few have tried to generalize on the basis of all systems because Americans tend not to attempt to be encyclopedic in their knowledge or to make sweeping generalizations. But this is not to say that an encyclopedist, if one there be, could not be more stimulating if he attempted generalizations on the broad basis that his knowledge makes possible.

If a quarrel is to be picked, it is with the stricture against attempting to compare all of one legal system with all of another. Hall says "the assumption that the whole of any nation's laws, or even of a branch of that law, can in its totality be made the basis of comparative study clouds the problem of comparability."¹⁷ In my own experience I have thought it fruitful to confront American students with the contrast offered by enough of the whole of the Soviet system and enough of the whole of the American system to show how the law of a community-oriented society compares with the law of an individually-oriented society. If anything less than the whole is taken for comparison, the systems look poles apart at some points and close together at others, depending upon the segment or branch of the law that is compared. It is only when the whole sweep of one system of social control is compared with the whole sweep of the other, and in utilization not only of statutes, judicial decisions and other materials emanating from the sovereign, but in consideration also of non-legal controls as Hall advocates,¹⁸ that the highly complicated pattern of contrast is disclosed. Then it is that one sees the interplay of ideas upon patterns of social control emerging in societies in process of subjection to the imperatives of industrialization. Some features begin to look common to both systems, but others represent tenaciously held positions stemming from beliefs founded upon "ideologies," each of which has been constructed by men trying to find a means of satisfying mankind's craving for recognition of human dignity, in the confines of an industrial society.

Enough has been said to show that comparatists owe a debt of grati-

17. P. 94.

18. P. 90.

tude to Professor Hall for the review he has made of what has been done to date and for his proposals as to what should be the goal for comparatists in the future. We can share with him his final admonition that a scholar's work increases as he comes more fully to understand his role in a large enterprise of importance, although the creative tasks of scholarship remain individual ones.¹⁹ If the individual can come to believe that his attention to detail is but a part of an effort of multitudes to understand the behavior of mankind, and thereby to provide in some presently unforeseeable way for man's triumph over forces of destruction, he will face his inevitable moments of exhaustion and discouragement with composure, or what the public used to call, "philosophically."

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MISTAKE AND UNJUST ENRICHMENT. By George E. Palmer. Columbus: Ohio State University Press. 1962. Pp. 114. \$3.75.

One should not expect this book to be a best seller. Except for what I think is a modernistic jacket design, *Mistake and Unjust Enrichment* is a decidedly old-fashioned book. Nothing has happened in recent years to cause any new anxiety about the subject matter; interdisciplinary significance is lacking; and the author has not availed himself of symbolic logic or electro-magnetic assistance. Instead, he has done the rather tedious job of analyzing, synthesizing and criticizing appellate case material in a private law area distinguished by a long history of classificatory chaos.

The mess which one finds in the general area of Restitution has been documented by others. In his Restitution casebook, Dean Wade reports that the General Digest user is without a "rubric" and must consult over 25 key numbers to get at the relevant cases.¹ But there is some hope according to two authors who, in remarkably similar passages, suggest that something or someone is beginning to bring order out of chaos.² Cer-

19. P. 124.

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1. WADE, CASES AND MATERIALS ON RESTITUTION 37 (1958).

2. "The remedies aimed at restitution of unjust enrichment have grown like Topsy. They could be better described as a diversified litter of Topsies, with a common parentage that was only recently discovered." Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

"The subject of Restitution never really grew or developed. Rather, it has been like dim fragments moving amongst the bright stars of the curricular firmament, sweeping up cosmic dust and the shattered pieces of other bodies as they disintegrated,