CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW

THOMAS LUNDMARK

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INTRODUCTION

This book offers an in-depth comparison of the actors (lawyers, judges, and lay judges and jurors) and of certain linguistic, philosophical, and methodological features of four jurisdictions: Germany, Sweden, England and Wales, and the United States. The approach taken is to compare these jurisdictions on the basis of their languages, their conceptions of law, their primary actors, and their methods of dealing with legal rules.

Much of the material presented here consists of groundbreaking original research. However, the book is primarily intended for use as a classroom text. Consequently, the first chapter provides an overview of the discipline of comparative law. Due to its relatively recent recognition, few academic disciplines are plagued with as much self-doubt as comparative law. These "growing pains" are presented here in the context of the historical role and recognition of comparative law as an independent discipline. While 19th century academics looked for common roots, the generation that followed saw the field of comparative law more as an experimental laboratory in which to search for the "best" law. More recently, the post-World War I enthusiasm for international cooperation and common solutions was replaced after World War II by a more sober goal: the comparative study of legal traditions and cultures. That is the primary goal of this book. A secondary goal is to make predictions about what developments might be expected in the future.

The four jurisdictions were chosen primarily because of the author's familiarity with them. Nevertheless, they are important for other reasons. Many lawyers feel the need to familiarize themselves with the American and English (and Welsh) legal systems because of the role that American and English law play in today's world, especially in the world of business. How similar are the two legal systems? Germany, which boasts the third strongest economy on earth, is also significant because of its geographic and political position in Europe, including in Eastern Europe. In addition, Germany, with its *Bürgerliches Gesetzbuch* or Civil Code, constitutes one of the classic exemplars of jurisdictions in the "civilian" tradition of continental European law.

Standard texts on comparative law often place both Germany and Sweden in the civilian tradition,[1] although some Nordic scholars insist that Sweden belongs

[1] *E.g.*, PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 266 (3d ed. 2007).

to a separate, Nordic tradition.[2] Standard texts invariably lump England and Wales and the United States together as belonging to the common law tradition.

Are these labels of any use?

The second chapter is devoted to the topic of comparative legal linguistics. Reviewing the most recent literature in the field, the chapter also explores the question of whether there is anything peculiar to the German language, such as its relative preference for nouns over verbs, that can account for the popularity of conceptualism (*Begriffsjurisprudenz*) in Germany and the question of whether there is anything peculiar to the English language which can account for the length of many English language contracts. The chapter ends with an original study by the author on the effect of language on legal predictability.

A number of authors have recently expressed concern about the dearth of scholarship on comparative legal philosophy or jurisprudence. To begin addressing this concern, the third chapter of this book presents the preliminary results of the author's rudimentary research on how lawyers in these four jurisdictions conceive of the law. Is it true, as some have hypothesized, that common lawyers see themselves in the natural law tradition while continental European lawyers are legal positivists? In researching this question by the use of surveys, the author uncovered important differences in the way lawyers in these four jurisdictions perceive of certain aspects of their legal system, particularly the extent to which they view their law as being autonomous from other fields of human endeavor.

The middle three chapters of the book contain side-by-side comparisons among certain key legal actors: lawyers, judges, and lay judges and jurors. Each of these three chapters begins with a historical overview before turning its attention to the lawyers' profession, judges and judiciaries, and the institutional use of lay judges and jurors. Is the legal training given lawyers in these jurisdictions basically the same? How do the roles of lawyers compare? Are the judiciaries in the four jurisdictions roughly comparable? If so, by what measures? Are juries used in Germany and Sweden, or is their use restricted to common law jurisdictions? Do any of the jurisdictions employ lay judges, such as justices of the peace? If so, what justifications are cited in these jurisdictions for including lay people, including jurors, in judicial decision making?

The final three chapters of the book closely examine the methodologies employed in all four jurisdictions in conjunction with legal rules. Beginning with Chapter 7 on legal reasoning, the author examines the commonly held belief that civilian jurists reason by deduction whereas their common law counterparts rely on analogy. By using concrete examples from the four jurisdictions, the author is able to present a unique and authoritative exposition of this profoundly important topic. Chapter 8 treats statutes and statutory construction. Here again, it is the historical background that inspires most of the insights into understanding of the role of statutory law in each of the four jurisdictions. After determining that all

[2] Michael Bogdan, Komparativ rättskunskap 81–82 (2d ed. 2007).

four jurisdictions basically recognize three methods of statutory construction, the author presents the results of his research which suggests that each of the three European jurisdictions has a preference for a different method of statutory construction. Once again, the author compares the practices in the four jurisdictions in order to shed light on the validity of the civil law–common law division.

The final chapter—on judicial precedents—also begins with a historical introduction before presenting the most important statutes regarding precedential effect. Two jurisdictions—Germany and the United Kingdom—have statutes which require inferior courts to adhere to the precedents of an appellate court, so-called vertical precedential effect. Further, there are statutes in Germany and Sweden which prohibit chambers of appellate courts from departing from the precedents of the other chambers. These are examples of a statutorily mandated horizontal precedential effect. Chapter 9 ends by presenting the results of another original study—this one of the case decisions of the German Federal Constitutional Court and of the United States Supreme Court—to determine how respectful the two courts are of their own precedents, and how political the two courts are in overruling their precedents.

Finally, this book ends with a conclusion in which the strands of subjects which are examined in the various chapters are pulled together, and in which the author returns to the question of the usefulness of separating these four jurisdictions into two or more traditions or families.

CONTENTS

Introduction xiii

PART ONE: **General Topics**

1. The Discipline of Comparative Law 3
A. The Uses (Misuses, and Abuses) of Comparative Law 5
B. The Purposes of Comparative Law 10
C. Some Approaches to Comparative Legal Studies 15
1. Micro- or Rule-based Comparisons 18
a. Comparison of Legal Terms 19
b. Comparison of Legal Concepts 20
c. Comparison of Norms 21
d. Comparison of Sources of Rules 22
e. Comparison of Legal Institutions 23
f. Comparison of Bodies of Norms 23
2. Macro-Comparisons 24
a. Comparison of Legal Organizations 25
b. Comparison of Legal Systems 25
c. Comparison of Mentalités 26
d. Comparison of Juristic Styles 26
e. Comparison of Legal Philosophies 27
f. Comparison of Legal Traditions 29
g. Comparison of Legal Cultures 30
D. Classifications in Comparative Law 30
1. Language as a Model for Classifications in Law 31
2. Legal Families 33
3. Some Suggestions for Possible Taxonomic Studies 38
a. Bottom-up Approach 38
b. Top-down Approach 40
c. Comparison at the Middle, including Legal Transplants 42
4. On Using Language as a Tool for Classification 44
Summary 46

2. Comparative Legal Linguistics 51
A. Legal Linguistics 52
1. The History of Legal German 53
2. The History of Legal English 54

3. Characteristics of Legal German 57
4. Characteristics of Legal English 65
B. Language and Legal Predictability 74
Summary 86

3. Comparative Jurisprudence 89
A. Three Conceptions of Law 91
1. Legal Positivism 91
2. Natural Law 93
3. Legal Realism 95
B. Evaluating the Jurisdictions 96
1. Is Law Autonomous or Interdisciplinary? 101
a. Germany 103
b. The United States of America 105
c. Sweden 108
d. England and Wales 109
2. Is Law Complete or Incomplete? 110
a. Germany 112
b. The United States of America 113
c. Sweden 114
d. England and Wales 114
3. Determinable Versus Indeterminable 115
a. Germany 116
b. The United States of America 118
c. England and Wales 120
d. Sweden 122
4. Predictability of the Law Versus Individual Justice 122
a. Germany 124
b. The United States of America 124
c. England and Wales 125
d. Sweden 125
5. Formality Versus Morality 126
a. Germany 128
b. The United States of America 129
c. England and Wales 129
d. Sweden 130
Summary 130

PART TWO: **Legal Actors**

4. Lawyers 141
A. Historical Development 141
1. Germany 141

2. England and Wales 145
3. Sweden 147
4. The United States of America 148
B. Modern Legal Education 150
1. Germany 150
2. England And Wales 157
3. Sweden 159
4. The United States of America 159
C. The Legal Profession 163
1. Germany 163
2. England and Wales 166
3. Sweden 168
4. The United States of America 170
Summary 172

5. Judges and Judiciaries 176
A. Historical Development 176
1. Germany 176
2. England and Wales 180
a. Common Law Courts 180
b. Chancery 181
3. Sweden 182
4. The United States of America 183
B. Court Structure 185
1. Germany 185
a. Ordinary Jurisdiction 185
b. Specialist Jurisdiction 187
I. LABOR MATTERS 187
II. SOCIAL MATTERS 187
III. TAX MATTERS 187
IV. ADMINISTRATIVE MATTERS 188
2. England and Wales 188
a. Tribunals 188
b. Magistrates' Court 189
c. County Court 190
d. Crown Court 191
e. High Court of Justice 192
f. Court of Appeal of England and Wales 193
g. Supreme Court of the United Kingdom 193
3. Sweden 194
a. Special Courts 194
b. Ordinary Jurisdiction 195
c. Administrative Jurisdiction 197

4. The United States of America 198
a. The Federal Court System 199
b. The California State Courts 201
C. The Selection, Training, and Tasks of Judges 202
1. Germany 202
a. Training and Selection 202
b. Tasks 203
2. England and Wales 204
a. Selection 204
b. Education 206
3. Sweden 206
4. The United States of America 207
a. Federal Courts 207
b. The California State Courts 208
Summary 209

6. Lay Judges and Juries 214
A. Historical Development 214
1. Germany 214
2. England and Wales 218
a. Justices of the Peace 219
b. Juries 220
3. Sweden 221
4. The United States of America 224
a. Justices of the Peace 224
b. Juries 225
B. Selection and Training 227
1. Germany 227
2. England and Wales 232
a. Justices of the Peace 232
b. Juries 236
3. Sweden 237
4. The United States of America 239
a. Justices of the Peace 239
b. Juries 240
C. Justifications for Lay Judges and Juries 241
1. Germany 241
2. England and Wales 245
3. Sweden 248
4. The United States of America 249
a. Justices of the Peace 249
b. The Institution of the Jury 250

c. Civil Juries 252
d. Criminal Juries 253
Summary 255

PART THREE: **Legal Rules**

7. Legal Reasoning 261
A. Law, Rules, Norms, Making Law, and Finding Law 261
1. Finding the Law: the Normsuche 262
2. Systematization and the Normsuche 263
3. Putting a Judicial Gloss on a Statute 268
4. Making Law 269
B. Four Steps in Making and Applying the Law 273
C. The Thinking Processes in Making Law 277
D. Logic and Legal Reasoning 280
1. Logical 280
2. Reasoning by Deduction 281
3. Reasoning by Induction 281
4. Reasoning by Analogy 281
5. The Logical Syllogism 283
6. The Legal Syllogism or "Subsumption" (Applying the Law to the Facts) 284
E. Mischaracterizations of Common Law Reasoning 287
Summary 292

8. Statutes and their Construction 294
A. Historical development 294
1. Germany 295
2. England and Wales 303
3. Sweden 306
4. The United States of America 308
B. Legal Sources and Hierarchies 310
1. Germany 313
a. Constitutional Law 313
b. European Law 314
c. International Law 314
d. Statutory Law 315
e. Legal Regulations 315
f. Ordinances (by-laws) 315
g. Collective Bargaining Agreements 316
h. Administrative Rules 316
i. Customary Law 316

j. Case Law (Richterrecht) 316
k. Expert Opinion Law (Juristenrecht)? 317
2. England and Wales 317
3. Sweden 320
4. The United States of America 321
C. Statutory Interpretation 324
1. Germany 324
a. Linguistic Interpretation 325
b. Historical Interpretation 327
c. Teleological Interpretation 330
2. England and Wales 332
3. Sweden 335
a. Grammatical Interpretation (logisk-grammatisk tolkning) 335
b. Systematic Interpretation (systematisk tolkning) 336
c. The Teleological Methods of Interpretation (subjektiv och objektiv lagtolkning) 336
4. The United States of America 337
Summary 339

9. Judicial Precedents 343
A. Historical Development 344
1. Germany 344
2. England and Wales 347
3. Sweden 350
4. The United States of America 352
B. Statutes Regarding Precedential Effect 354
1. Germany 354
a. The Vertical Effect of Precedents 354
b. The Horizontal Effect of Precedents 356
2. England and Wales 358
3. Sweden 359
a. The Vertical Effect of Precedents 359
b. The Horizontal Effect of Precedents 360
4. The United States of America 361
C. The Modern Use of Precedents 362
1. Germany 362
2. England and Wales 371
3. Sweden 374
4. The United States of America 375
D. Precedents and Politics in the German Federal Constitutional Court 377
1. The FCC as Institution 379
a. Organization of the FCC 379

b. Appointment of Judges to the FCC 380
c. Jurisdiction of the FCC 381
d. Normative Force of the FCC's Judgments 381
2. Departures from Precedent by the FCC 386
a. Style of FCC Judgments 386
b. Kinds of Departures 386
c. Departures by the First Senates of the FCC 387
d. Departures by the Second Senate of the FCC 392
3. Short Comparison with the U.S. Supreme Court 395
4. Explaining the Small Number of Departures from Precedent by the FCC, and the Large Percentage of Political Departures 396
Summary 402

CONCLUSION 411
BIBLIOGRAPHY 437
INDEX 455

PART ONE

General Topics

1

The Discipline of Comparative Law

This book represents an exercise in comparative law. What is comparative law? Konrad Zweigert and Hein Kötz, the authors of a classic textbook on comparative law, describe comparative law simply as "an intellectual activity with law as its object and comparison as its process."[3] They observe that comparative legal study helps to deepen our belief in the existence of a unitary sense of justice, and points to the universality of legal science and the transcendent values of law. Basil Markesinis sounds a similar note when he argues that we must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so.[4] Jerome Hall concurred with these observers when he stated that comparative analysis of law is concerned with the delineation of differences against a background of similarities.[5]

These and other authors mention three interconnected elements when defining the discipline of comparative law: law, comparison, and purpose. Summarizing what these authors have written, one might say that comparative law entails a purposeful analysis of different laws or legal systems (defined below) by the use of one or more approaches. In other words, the discipline of comparative law requires at least one purpose or goal of study (the Why), it requires at least one approach to the study (the How), and it requires at least two subjects or fields of study (laws and legal systems, the What).

The term *legal system* deserves definition, particularly because it is found in the title of this book. It also needs definition because, though it is often employed by others, it is seldom defined, leaving readers to guess at the authors' meanings. In this book the term legal system, when employed by the author, means (1) all behavioral legal rules in force in a jurisdiction, (2) all institutional rules that provide for the establishment and administration of legal institutions (including their methodologies, such as their methods of interpretation and their respect

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[3] KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 2 (Tony Weir, trans., 3d ed. 1998).

[4] Basil S. Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 443 (1993).

[5] JEROME HALL, COMPARATIVE LAW AND SOCIAL THEORY 48–49 (1963).

for administrative practice and precedents), plus (3) all of the people involved in making, interpreting, and applying the legal rules, including lawyers. Behavioral and institutional legal rules are often referred to as norms.[6] The people involved in making, interpreting, and applying the norms are sometimes referred to as officials.

Perhaps this is also an appropriate place to mention that the author does not distinguish in this book between the *methods* of comparative legal study and its *approaches*. Both are referred to by the author as *approaches*. Most authors seem to use the terms interchangeably to refer exclusively to the means (the How) of comparative legal studies. However, the two terms might be better understood as constituting the means merely to determine the subject of study (the What), nothing more. Thus, as elaborated below, some comparative lawyers might choose to study the legal institution of adoption in two jurisdictions. This type of analysis is a kind of rule-based method of comparison. Comparative lawyers who choose broad fields of study, like legal traditions and cultures, might refer to their approaches as the traditional method or the cultural method, for example. Yet what this means is that they have chosen historical or cultural aspects, rather than, for example, normative and institutional aspects, for their comparisons.

Many students are disappointed to learn that the field of comparative law does not possess a collection of methods, practices, procedures, and rules on how to conduct comparative legal studies. The author, who has a university degree in comparative literature, can sympathize with them. These students were obviously expecting a more sophisticated methodology than can actually be delivered by the discipline of comparative legal analysis. In part to forestall this disappointment, but also in the interest of consistency and clarity of presentation, the author prefers the humbler word *approach* over *method*.

The three elements of comparative study—the purpose (the Why), the approach (the How), and the subject (the What)—are also interconnected in the sense that they are self-referential: the purpose of any particular study will influence the subject of the study, which will in turn influence the approach or approaches to be employed. The three elements—purpose, subject, and approach—are therefore impossible to separate in practice. Consequently, the discussion which follows will try to separate the elements for ease of analysis, but will necessarily mix them to some extent so as not to conceal their interconnectedness. After discussing these elements separately, the discussion will turn to one active field of study in comparative law: the classification of jurisdictions into families and other groups. Finally, the author will suggest a number of approaches for possible future taxonomic studies.

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[6] The term *norm* employed in this book is a legal rule which prescribes or permits certain human behavior. As such, it includes the (1) behavioral rules and the (2) institutional rules referred to in the definition of legal system.