

Department of Law - Macerata

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COMPARATIVE LEGAL SYSTEMS

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First Unit

Law, history and comparison

1_Law as a general /local phenomenon



- Different meanings of law
- Where there is society, there is **law** (**ubi societas ibi ius**).
- Where there is law there is society (**ubi ius ibi societas**)
- the concept of **law** as a general **phenomenon** of the human world
- the concept of **law** as a **local phenomenon**

2_Law and its relationship with religion

- Religious law

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- 1. Divine origin of the law;
 - 2. Principle of personality rather than territoriality
 - 3. Power of governance for both the external and the internal forum
 - 4. Confessional State

- Laic law

- 1. Juridical subject as the owner of rights
- 2. Principle of territoriality
- 3. Rule of law
- 4. The presence of professional lawyers

- Customary law

- Law and jus
- Law as social order and harmony

3_The idea of law in the western legal tradition



- Two main ways of thinking law in the western legal tradition
 - Law as science
 - Law as practice
- What is law?
 - not only statutes
 - not only law given by the State

4_What is not comparison?



- It is difficult to define comparative law
 - Comparative law ≠ foreign law
 - Comparative law ≠ international law
 - Comparative law ≠ private international law

5_The origins of comparative law



- Only in the latter part of the nineteenth century the desirability and later the necessity of comparing national European laws emerged.
- First International Congress of Comparative Law in Paris in 1900
 - The main aims of the congress were :
 - ✦ The function of comparative law
 - ✦ The method of teaching
 - ✦ The aim was to find the “droit commun législatif” in the positive legislation of the Continental Europe.
- In the XX century: comparative studies include the common law along with the civil law. The basis for comparison is simiilarity of function.

6_Comparative law: science or method?



- *“Comparative Law is not a body of rules and principles. Primarily, it is a method, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country. Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of “law” in the sense in which we speak of “the law” of Torts or “the law” of Decedents’ Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems”. (Rudolph B. Schlesinger).*

7_Methods of comparison



- Comparative legal science will depend on the context.
- Comparison involves History.
 - ✦ Our interest in history of law is not an archaeological interest
 - ✦ It lies on the conviction that it is impossible to understand who we are as jurists without an historical perception of law
 - ✦ History of law is an essential tool for comparative law

8_Methods of comparison 2



- The methods of comparison is imposed by the object
 - ✦ Case method
 - ✦ Functional method
 - ✦ Law in action and law in the books

What we learned today



- Law has different meanings depending on context.
- Comparative law is a science which has law as object and comparison as a method of knowledge.
- Comparative law depends on different contexts.
- Law does not correspond to a set of rules, but it is influenced by other elements. Each legal system is shaped by its own ***styles***.