

Lunchtime Talk: A Personal Roadmap to Comparative Law by Professor Birke Häcker*

A seminar delivered by Professor Birke Häcker, Professor of Comparative Law and Director of the Institute of European and Comparative Law, University of Oxford (22 August 2019, SMU School of Law)

Introduction

On 22 August 2019, SMU School of Law welcomed Professor Birke Häcker (Professor of Comparative Law and Director of the Institute of European and Comparative Law at the University of Oxford), for a discussion on comparative law. She provided ‘a personal roadmap to comparative law’, touching on the history and origins of the field, as well as some basic comparative methodologies. She also shared her views on the future of comparative law in Singapore.

The development of comparative law

Professor Häcker first observed that the modern field of comparative law, whose ‘birth’ is usually dated to the year 1900, had been much narrower in the beginning than it is now as it was limited to the comparison of the different legal systems (mainly private law systems) of various (mainly continental European) countries. For instance, during much of the 20th century, the study was focused on comparison of the various civil codes within Western Europe.

Since the latter part of the 20th century, however, comparative law has become a much more diverse phenomenon. Comparative law is no longer just the mere comparison of core private law systems. It now involves the study of comparative human rights, constitutional law and public law generally, corporate law, criminal law and even the different social practices of countries. Indeed, it is now necessary to study and compare law as it is practiced (and not merely the formal system in which it exists).

Professor Häcker also emphasised the potential importance of comparative law in national legal studies. For example, comparative law is used when a foreign case is cited to support an argument in a local case. The study of comparative law also helps legal scholars understand the varying importance of legal doctrines in different jurisdictions, and the difference in interpretative approaches. Finally, comparative law can have an immediate social impact, by allowing policy makers to observe the effect of certain laws on other countries and consider whether and how those laws should be “transplanted”¹ to their country.

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¹ Ed. note: See Alan Watson, *Legal Transplants* (University of Georgia Press, 1974) for further explanations of this metaphor.

Comparative law and functionalism

Professor Häcker then discussed one of the core methodologies in comparative law: functionalism.² This approach considers the purpose that the law is trying to achieve, recognising the value of law as a tool for social engineering. In this regard, comparative law can be used as a means to resolve emerging issues in society, and to find the best solution to such issues.

However, Prof Häcker cautioned that functionalism – as a methodology – also has its downsides. The attempt to look for a universal “function” for the law may neutralise the uniqueness of systems. There is a danger in “presuming” that different systems will tend to resolve similar social problems broadly in similar ways. Though functionalism tries to caution against using preconceived concepts, what is often not understood is that people look at social issues through the lenses of their own legal system, and then make comparisons with the influence of their own social norms.³ Functionalism may also push comparatists to discover the (supposedly) “best” legal system – but the concept of what is “best” is subjective, and depends on the purpose of the comparison and the perspective of the comparatist. Thus, it is important to recognise that the laws in a particular country should be suited to a country’s society and culture.

The benefits and limitations of comparative law

Professor Häcker then identified the benefits that comparative law can provide. Comparative law is known to enhance knowledge and understanding of different fields of law. When comparing legal systems, the comparatist shatters his/her own perceptions by adopting another perspective to identify why one’s system is so peculiar. In short, comparatists participate in a marketplace of ideas.

Professor Häcker also highlighted some issues prevalent in practicing comparative law today. Scholars have to be cautious of language barriers (both in the linguistic and conceptual sense), particularly when dealing with an unfamiliar foreign legal culture. Furthermore, due to the complexities of legal systems, there may be either a lack of data, or alternatively too much data to address effectively. This may result in uncertainty or controversies. As comparatists, it was therefore imperative to adopt a broader perspective and consider the interaction between various legal rules by researching different sources of data.

² Ed note: Functionalism allows us to examine how other countries have tackled similar social issues using legislation. This can help us decide whether to pass legislation to tackle certain social issues and what form such legislation would take. For the classic exposition of comparative law ‘functionalism’, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd edn (translated by Tony Weir, Oxford University Press, 1998), especially chapters 1-3.

³ Ed. note: See Teemu Ruskola, *Legal Orientalism* (Harvard University Press, 2013). Ruskola argues that because the Western powers looked at China through the lens of their own legal systems, they concluded that China was essentially a lawless State. However, China already had a form of company law similar to that in the West, albeit in the guise of family law.

Final thoughts

Professor Häcker shared her thoughts about Singapore's unique opportunities for comparative engagement with East Asian civilian jurisdictions, as well as common law systems around the world. As a multi-lingual and multi-cultural jurisdiction, with plans to develop into a hub for international commerce litigation and arbitration, Singapore was peculiarly suited as a comparative law hub. It was well placed to engage others across borders and across different legal systems.

Finally, as the world becomes increasingly interconnected, one needs to bear in mind the challenges and limitations that comparative law presents. The field of comparative law is a reminder of how there is a convergence and divergence of legal systems and rules to suit society at large.

In conclusion, it was a pleasure having Professor Häcker at SMU to share her insights, and to give the audience an introduction to comparative law.