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978-0-521-89570-5 - The Cambridge Companion to Comparative Law

Edited by Mauro Bussani and Ugo Mattei

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## Preface

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## Diapositives versus movies – the inner dynamics of the law and its comparative account

Comparative law means different things to different people, and each of these meanings can, in and of itself, be scientifically acceptable. Comparative law may be seen as the macro-comparison of the world's legal systems; as the study of legal transplants – that is, of the borrowing of ideas between legal cultures and/or systems; as the most fruitful way of exploring the relationship between law and society, and the underlying perceptions of law; as well as the magnifying glass through which one best observes how state law lives side by side with other (supranational and domestic) sources of law and, thereby, how relative the notion of state power (as spread by mainstream political analysis) can be. This *Companion* goes through these and other possible meanings of comparative law, trying to show how the diverse working methods entailed by each of them can all be useful tools for the understanding of legal phenomena, as long as they stay close to what the law is and to how the law lives in the different settings – regardless of what one might like (and regardless of what any kind of personal and cultural bias may expect) the law to be.

This very approach also helps one realize how our discipline should, and this *Companion* does, take up the challenge launched by the fast evolving fields of international law and 'global' law. The latter areas are crowded – with some prominent exceptions – with experts whose cultural toolkits make the analysis focus largely on positive, or would-be positive (as is the case for most soft-law initiatives), legal rules. Comparative law, by contrast, looks at the law taking into consideration all the possible interactions between the primary sources, be they official or unofficial, dictating the rules and the activities necessary to apply the rules. Therefore, for any comparatist, there is no serious chance of leaving aside any unofficial factor, including those of a geopolitical nature, able to affect the convictions and the legal culture of the rule-setters, the decision-makers, and the law-users.

Nowadays, much literature is produced by scholars who take a quick look at non-domestic legal systems, and thereby present their studies as

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comparative, while their analysis remains embedded in the positive law paradigm. This scholarship – it is a point the present editors want to emphasize – betrays both the cognitive and the critical vocations of our discipline.

Starting with the latter vocation, it is very hard to believe that a field of study can be of any value, not to mention of any use, when its working method simply aims to pile up notions and details that are available to any law school student provided with a decent access to social sciences databases. Further, one should be aware that this method makes the legal scholar look like someone who can extend at will the scope of her research, being a neutral investigator for whom the crucial questions invariably come out of the data she finds and never vice versa. As is well known, this is often the case in comparative law scholarship too. But this does not come for free. In reality, such a neutrality claim serves to cover up a hidden agenda and/or to make the ‘neutral’ scholar plainly side with the mainstream narrative affecting a given area of the law.

In this *Companion* the reader finds some contributions that directly point to this risk. To begin with, Duncan Kennedy’s chapter (Ch. 2) sets out with candour what the overall critical function of our discipline could be, and analyses the covert ideology underpinning the historically dominant rhetoric of the Western jurist. The self-congratulatory tone of most Western constitutional law scholarship (even when self-portrayed as critical), and its often parochial co-ordinates are challenged by the insightful analysis of Günter Frankenberg (Ch. 8). In the same vein, a sort of counter-test is offered by the brilliant contribution of Nuno Garoupa and Tom Ginsburg (Ch. 3) on comparative law and economics. The reader can realize therein how even the most advanced scholarship in this field may choose to keep itself away from the inextricable connection of comparative law with history and society. But the intertwining between history, law, and economics are worth a further remark.

While the need for historical awareness has not been seriously challenged by anyone in the field of comparative law for quite a long time, in the last decades many economics departments have churned out a large amount of literature using stylized comparative data (we might say comparative caricatures) from a very large number of countries (almost one hundred in certain papers). The most famous of these studies, dubbed ‘legal origins’, have been sponsored by the World Bank and their uncritical goal was to prove, after having drawn a few regressions, the superiority of Western ‘developed’ legal systems, mostly

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belonging to the common law tradition, in producing ‘market-friendly environments’. One should perhaps not devote too much attention to these ideological fabrications, if it were not that this kind of study has been quite influential in advising on legal reforms in many countries, and has attracted a degree of attention in the international policy-making community unprecedented for anything claiming to be a comparative law study. While the scholarly credibility of these analyses has been easily challenged and undermined, their policy impact seems to have resisted even the crisis of 2008 – to nobody’s surprise, as the still dominant rhetoric is pushing for global and national reforms to be nothing but market-friendly and financial-markets-prone. This phenomenon, however, does nothing but harm to the reputation of such an old and very serious domain of research as comparative law. Across the broad spectrum of social sciences, comparison is one of the few historically tested scientific instruments for developing reliable theories, and in our discipline no one would have dared (perhaps since Wigmore’s *Panorama*) to venture a comparison of so many legal systems in so little space knowing so little about any one of them. The very fact that studies of this kind were able, in some prestigious quarters, to claim representation of our field, shows a serious shortcoming in the way in which the comparative law community is able to communicate beyond its professional members.<sup>1</sup> This is one of the shortcomings that the present *Companion* tries to address.

Outside the relatively small number of insiders, there is indeed a sense that comparison is not a professional endeavour per se but just a method or an ‘approach’ that, no matter how superficially, any legal scholar can introduce as a footnote to her work. Years ago, Mathias Reimann lamented that the comparative law scholarly community had been unable to agree on a canon, and that this lack of a standard, and of a minimum core of agreement on what is the subject matter of comparative law, has produced the sense that an academically acceptable comparison can be performed by anybody, sometimes not even a lawyer, just because, one might say, ‘it is better than nothing’.<sup>2</sup>

<sup>1</sup> A noteworthy exception may be the passionate lecture, ‘Civil and Religious Law in England: A Religious Perspective’, given by the archbishop of Canterbury, Dr Rowan Williams, at the Royal Courts of Justice on 7 February 2008, in which, among many other insightful remarks, the archbishop stressed that ‘if the reality of society is plural . . . this means that we have to think a little harder about the role and rule of law in a plural society of overlapping identities’. The whole text is available at [archbishopofcanterbury.org](http://archbishopofcanterbury.org).

<sup>2</sup> M. Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’, (2002) 50 *American Journal of Comparative Law* 671, 689.

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This 'better than nothing' attitude betrays the above-mentioned cognitive vocation of our discipline. This orientation is scientifically noxious and culturally naive, if not dangerous, and it may be all the more so when mixed with the usual degree of arrogance that is typical of leading academic environments. Is it 'better than nothing' that some highly intelligent and well-recognized law professors, who know nothing of the history and social traditions of a given country, might dare to spend time in an academic conference preaching on what that country 'should have done' in order to be more successful in its transition towards capitalism? Is the current dismissive or condescending attitude of many Western constitutional law experts towards the Ecuadorian or Bolivian constitutions that, with an innovation of high theoretical and political significance, have endowed Mother Nature with inalienable rights 'better than nothing'? Is the widespread inclination of many European private law scholars (as pointed out by Franz Werro, in Ch. 6) to venture into harmonization debates without any serious analytical background other than a black-letter rules comparison of three or four 'paradigmatic' legal systems 'better than nothing'? Unfortunately, as Diego López-Medina points out in Chapter 16, superficial analyses only feed stereotypes. In public debates, however, these stereotypes become powerful drivers of meaning that, while useful to some, neglect the reality to which they should apply. This is one of the reasons why the 'better than nothing' scholarship had better pay due respect to the concluding canon of Wittgenstein's *Tractatus Logico-Philosophicus*.

To be sure, we cannot expect each and every scholar to be a fully fledged comparatist in order to venture into some comparison, given the language and cultural barriers that make good comparative law a highly demanding endeavour. However, the least demand that comparative law should be able to make is to be treated by mainstream positivistic scholars like any other discipline endowed with its own canons (perhaps reaching just one canon is not even advisable), its own subject matter, and its own recurrent debates, and that anyone embarking on using it should at least familiarize herself with this basic landscape.

No one should pretend to be a legal anthropologist without having patiently gone through the 'homework' necessary to become one (which includes perhaps a long period of fieldwork), or to be a legal economist without having become familiar with basic micro-economics and with the body of literature that since the 1960s has been produced in the shadow of

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Ronald Coase, Guido Calabresi, or Richard Posner. Similarly, no one should claim to be a comparatist without having gone through the painstaking effort of actual in-depth comparison (which includes long periods of exposure to different legal settings) and having spent or spending most of his or her intellectual energy asking questions as to how to do it better, hopefully continuing to dig in the mine of data and problems that have to be understood in order to make relevant and significant comparative statements about the law of two or more systems. The lack of such a scientific approach straightforwardly entails the risk of amateurism (and of being academically marginalized as an amateur) in any domain, from sociology to anthropology to economics. By contrast, no such risks are perceived when a lawyer (or even a non-lawyer!) ventures to write about comparative law. Blatant ignorance of the tradition of our discipline seems completely accepted. To give but one example, the issue of exporting law has been discussed by comparative law scholars for more than forty years. Yet no traces of this debate, and of the critical knowledge it has produced, can be found in the very abundant scholarship focused on the comparative efficiency of legal systems, as currently benchmarked by the above-mentioned 'legal origins' literature, or in the equally lavish literature devoted to the exportation of democracy (see, instead, Ch. 18 of this *Companion*).

Like any other *Companion*, this one had to square size constraints with the need for as comprehensive a survey as possible. We have attempted a selection of fundamental comparative law contributions according to two criteria.

To begin with, we consider this *Companion* to be a 'third generation' contribution. We do not present entries such as 'legal transplants', or on the Western classical 'common law/civil law' divide, simply because these are lenses through which one is currently bound to look at any legal experience, (i) 'legal transplants' being a dimension that is ineradicable anywhere from the dynamism of the law; and (ii) the Western 'divide' being the usual yardstick (too often the only one) for any comparative debate. By contrast, we have included contributions by some of the scholars best equipped to show that in-depth comparative knowledge of how the Western legal traditions work and the legal transplants are discussed, can actually improve our understanding of a variety of subject matters. Beyond Chapter 18, authored by one of the present editors, an example would be the criminal justice chapter (Ch. 9), which we have assigned to a scholar (Elisabetta Grande) whose work on legal transplants in this domain has been

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seminal and much imitated. In the same vein, the chapter on the East Asian legal tradition (Ch. 12) is authored by Teemu Ruskola, a scholar whose work on 'legal orientalism' is becoming a landmark of our discipline, while the chapter on comparative private law (Ch. 6) is written by a *juriste-savant*, Franz Werro, whose analysis is evidence of the fertility of the 'common core' approach,<sup>3</sup> within and beyond the boundaries of the Euro-academic private law debate.

The second criterion has been that of seeking scholars capable of building on the foundational toolkits of comparative law either because they are among those whose names are closely related to a classic topic of our discipline (Vernon Palmer's chapter on mixed legal systems, Ch. 17, is an example) or because their in-depth knowledge of comparative law can shed a bright light on a particular area. Paradigmatic in this respect are Rodolfo Sacco's chapter on African law (Ch. 15), as well as the chapters by Barbara Pozzo on language (Ch. 5), by George Bermann on international organizations (Ch. 11), and by Francesca Bignami on administrative law (Ch. 7). Further, we have selected leading international experts who over the years have consistently contributed to, and broadened, the core business of comparative law. An example is the entry on comparative civil justice by Oscar Chase and Vincenzo Varano (Ch. 10), which not only is the joint product of a common lawyer and a civilian, but is enlightened by the awareness of both these renowned scholars that the law never is merely a professional business. The same awareness underpins the chapters on the Jewish and the Islamic legal traditions, written by Arthur Jacobson and David Bleich, and Khaled Abou El Fadl, respectively (Chs. 13 and 14). These entries not only are masterful explanations of legal dimensions beyond the stereotypes to which we are used, but show once more the necessity of making Western ethnocentrism that pervades our discipline a cognitive tool the better to understand the poor quality of most of our historical analysis, rather than an excuse for cultural blindness. Also, this *Companion* could not but acknowledge the tremendous strain that economic globalization has produced on the structures of the modern sovereign state. This is a tension that makes it increasingly difficult to stick to the tradition of positivism that has determined the traditional distinctions between comparative law, foreign law, and international law. Chapter 1, the entry by Mathias

<sup>3</sup> See, e.g., R. B. Schlesinger, 'The Past and Future of Comparative Law', (1995) 43 *American Journal of Comparative Law* 477.



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Reimann, and the aforementioned ones by Bermann and Bignami, witness and highlight how today one should be equipped to compare an array of law-producing entities – among themselves or with the structures of domestic law – that often defy being squeezed into the mainstream positivistic account of the sources of law, both because of the supra-national nature of these entities, and because they produce thriving legality at levels different from those controlled by the state.

No scholarly discipline ever transforms its intellectual posture in a short time. We believe that, since the fall of the Berlin Wall, comparative law, by going through a genuine phase of foundational critique, has been successful in this necessary endeavour. This is why our aim here was to overcome the traditional way of shooting diapositives of the different fields, and to provide the reader with an account showing the inner dynamics of the law. We are confident that, thanks to the efforts and the patience of our authors, we are offering an honest, and hopefully a challenging, (motion) picture of our discipline in this age of transformation.

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