Comparative Law

H. C. Gutteridge

CAMBRIDGE

COMPARATIVE LAW

An Introduction to the Comparative Method of Legal Study & Research

BY

H. C. GUTTERIDGE

One of His Majesty's Counsel; Bencher of the Hon. Society of the Middle Temple; Emeritus Professor of Comparative Law and Fellow of Trinity Hall in the University of Cambridge; LL.D. Cambridge and London; Doctor (Honoris Causa) *of the Universities of Paris, Lyon and Grenoble; Associate of the Institute of International Law*

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I
COMPARATIVE LAW

IN PIAM MEMORIAM

HENRICI SUMNER MAINE
CUSTODIS SIVE MAGISTRI
AULAE SANCTAE TRINITATIS
IN UNIVERSITATE CANTABRIGIAE

General Introduction

THIS series has been designed to fill certain gaps that are to be found in that part of English legal literature which is concerned with international relations. Three separate branches of the law are involved and we desire to say a few words about each of them.

In the field of Public International Law there is a growing need, at a time when the foundations of the new international order are being laid, for a fuller treatment of questions of International Law and Organisation than is possible within the limits of text-books devoted to the subject as a whole. It is hoped that the task of progressive codification of International Law, which suffered a temporary set-back in the decade preceding the second world war, may be assisted by research and studies such as are contemplated in this series. We are, further, of opinion that it may, perhaps, be possible to give a generous interpretation to the phrase 'International Law' so as to permit of the inclusion in the series of volumes dealing with certain aspects of diplomacy and international relations in general.

Private International Law, or the Conflict of Laws, is a subject which is of growing importance, both practically and academically, owing to the rapid development of means of transport and communication and to the increasing contact between the citizens and commercial organisations of different countries. Until recently it has, no doubt, been possible to deal adequately with this subject in a single volume, such as Dicey's magisterial treatise, in the same way as two hundred years ago it was feasible to write a book on the Law of England as a whole. But Private International Law has now reached a stage at which a certain measure of disintegration of its content has become necessary, because in no other way can proper provision be made for the needs of those, other than students, who are interested in the subject. Certain topics such as the law of contracts, marriage, jurisdiction and the like can, in our view, be dealt with more advantageously in a series of monographs than in a text-book covering the whole of the area of conflicts of law and jurisdiction.

Comparative Law is an unfortunate but generally accepted label for the comparative method of legal study and research which has come to be recognised as the best means of promoting a community of thought and interests between the lawyers of different nations and as an invaluable

auxiliary to the development and reform of our own and other systems of law. In particular, a very important part is played by Comparative Law in the movement for the unification of private law—a movement which seems destined to gain strength as the nations are increasingly brought into contact with one another and the world tends more and more to become an entity in an economic as opposed to a social or political sense. At present the literature of Comparative Law is scattered, fragmentary and often difficult of access. It is our hope that this series may hereafter be of some service in helping to provide materials for those desiring to avail themselves of the comparative method of legal study or research.

H. C. G.
H. L.
A. D. McN.

CAMBRIDGE
April, 1946

Preface

THIS book is not intended to be a treatise on foreign law. It represents an attempt to meet the need for an English book which deals with Comparative Law in a systematic manner.

My task has been of a threefold character. I have tried, first of all, to explain the origin and meaning of the somewhat curious phrase 'Comparative Law'. In the second place, I have endeavoured to describe the various purposes for which the comparative method of legal study and research can be utilised and the manner in which it functions. Finally I have attempted to arrive at an estimate of the value of Comparative Law as an instrument for the growth and development of the law. Some explanation may, perhaps, be required of the fact that, when dealing with the functional aspects of Comparative Law, I have confined the discussion of this question, for the most part, to the problems which arise if comparison is made between the rules of the Common Law and those of the Civil Law. I may seem, therefore, to have ignored or belittled the importance of comparison between the laws of the different English-speaking nations, but the apparent omission is due to other reasons. I felt it necessary, in the case of a book such as this, written primarily for English readers, to stress the fundamental differences which divide the Common from the Civil Law rather than to call attention to the questions which may arise when the comparison is concerned with the kindred systems based on the principles of the Common Law. No special form of technique seems to be called for if the comparison is, for instance, between Australian and Canadian law or between English law and the law of the United States. It has been necessary to deal—though only in outline—with certain features of foreign law such as the authority of precedents and the interpretation of statutes in systems of law governed by codes. In so doing, I have been mindful of the grave risks incurred by anyone who writes about any law other than his own. But I have embarked on this somewhat perilous adventure because I feel that the nature of the obstacles to be surmounted by English lawyers who may wish to adopt the comparative method of legal study can best be described and explained to them by one of themselves. If I have fallen into error I hope for leniency, having regard to the difficulty of the task.

I am grateful to the many friends, here and abroad, who have encouraged and helped me in various ways. I am specially indebted to Professor Édouard Lambert, Sir Arnold McNair, K.C., Professor Lauterpacht,

Professor René David, and Dr K. Lipstein. Mr C. J. Staines of the Squire Law Library at Cambridge has rendered me much valued assistance. I also wish to thank the members of the staff of the Cambridge University Press for their unfailing courtesy and readiness to help in the difficult and distracting conditions of the present time.

I have, in all humility, ventured to dedicate this volume to the memory of a former Master of my College who has more profoundly influenced the development of comparative legal study than any other English lawyer.

The materials for certain chapters of this book have been taken from articles appearing in the *Tulane Law Review*, in the *Journal of Comparative Legislation*, in the *British Year Book of International Law* and in the *Transactions of the Grotius Society*. I am under a special obligation to the Editors of these publications for permission to make use of those materials.

H. C. G.

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Abbreviations

British Year Book of I.L. = *British Year Book of International Law.*
Cambridge L.J. = *Cambridge Law Journal.*
C.L.J. = *Cape Law Journal Reports.*
Chicago L.R. = *Chicago Law Review.*
Clunet = *Journal de Droit International Privé.*
Columbia L.R. = *Columbia Law Review.*
Fordham L.R. = *Fordham Law Review.*
Harvard L.R. = *Harvard Law Review.*
Illinois L.R. = *Illinois Law Review.*
Journal of C.L. = *Journal of Comparative Legislation and International Law.*
Journal of the S.P.T.L. = *Journal of the Society of Public Teachers of Law.*
L.Q.R. = *Law Quarterly Review.*
Recueil des Cours de l'Académie de D.I. = *Recueil des Cours de l'Académie de Droit International.*
Recueil Lambert = *Introduction à l'Étude du Droit Comparé.* (*Recueil d'Études en l'Honneur d'Édouard Lambert.*)
Tulane L.R. = *Tulane Law Review.*
Yale L.R. = *Yale Law Review.*

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Chapter I

THE PROVINCE OF COMPARATIVE LAW

A DISTINGUISHED comparative lawyer[1] has said that the phrase 'Comparative Law' is a strange one. How strange it is becomes manifest when attempts are made to define it or to ascertain its relation to other forms of learning. Much of the atmosphere of doubt and suspicion which envelops comparative legal study and has proved, in the past, to be so hostile to its development, would disappear if it were generally recognised that the phrase 'Comparative Law' denotes a method of study and research and not a distinct branch or department of the law. If by 'law' we mean a body of rules, it is obvious that there can be no such thing as 'comparative' law. The process of comparing rules of law taken from different systems does not result in the formulation of any independent rules for the regulation of human relationships or transactions. Not only are there no 'comparative' rules of law but there are no transactions or relationships which can be described as comparative. When we speak, for instance, of the comparative law of marriage this does not mean that comparative lawyers have devised a new set of rules to govern the relations between husband and wife; it merely indicates that the marriage laws of several countries have been subjected to a process of comparison in order to ascertain how far, and in what respects, they may differ one from another. There is no 'comparative' branch or department of the law in the sense in which a lawyer speaks of 'Family Law' or 'Maritime Law' or the other departments into which law is conventionally divided for the purpose of indicating the particular type of subject-matter with which each department deals.

The emptiness of the phrase has been realised by German-speaking lawyers who use the term *Rechtsvergleichung*, which connotes a process of comparison and is free from any implication of the existence of a body of rules forming a separate branch or department of the law. But in England, and in most other countries, the term 'Comparative Law' has become so firmly established that it must be accepted, even if it is misleading, and tends, as we shall see hereafter, to obscure the real nature of the functions which the comparative method of study is called on to discharge, and the purposes for which it exists.

1 Lee, 'Comparative Law and Comparative Lawyers', *Journal of the S.P.T.L.* (1936), p. 1. Cf. Randall, *Journal of C.L.* (3rd Ser.), vol. XII (1930), at p. 189.

The unfortunate use of the word 'law' in this connection is reflected in the various attempts which have been made to solve the problem of definition by re-christening the subject. It is sometimes referred to as 'Comparative Jurisprudence',[1] and sometimes as 'Comparative Legislation'. Both these terms are open to the charge of obscurity, but they escape the criticism arising from the confusion created by the use of the word 'law' in this context. The use of the phrase 'Comparative Jurisprudence' is an expression of the belief that the main purpose of the comparative method of study is to aid the historian or the analytical jurist in tracing the origin and development of concepts common to all systems of law. The term 'Comparative Legislation', which, as a learned writer has observed, is in the nature of a 'subterfuge',[2] seems to have been devised in order to emphasise the practical as opposed to the academic aspects of comparative legal research, and stresses two features of the results which may be obtained by the use of the comparative method. The first of these is the collection and distribution of information as to foreign law; the second is the utilisation of the experience gained in other systems of law for the purpose of law reform. The purpose underlying the reference to 'legislation' rather than to 'law' or 'jurisprudence' seems to have been to conciliate the large and influential body of legal opinion which, in all countries, shows its dislike of a purely theoretical approach to the law. It has a 'useful and practical sound', and it was thought that it might serve to disarm hostility.[3] Although we may discard both these terms, in view of the fact that they have not succeeded in displacing the term 'Comparative Law', they cannot be ignored. The Corpus Professor at Oxford holds a Chair of Historical and Comparative Jurisprudence, and the French and English Societies which were founded for the promotion of comparative studies are both styled 'Societies of Comparative Legislation'. These variations in nomenclature are, however, of no great importance save in so far as they illustrate the tendency to define comparative law in the light of the functions which it may be called on to discharge.

Legal definitions are notoriously unsatisfactory and apt to lead to controversies which are often barren of result. This, in particular, is the case when any attempt is made to define 'Comparative Law' as law, since the subject-matter, being non-existent, is one which defies definition. The consequence is that the definitions which have been framed do not deal

1 E.g. Maine, *Village Communities* (3rd ed.), p. 3; Pollock, 'The History of Comparative Jurisprudence', *Journal of C.L.* (N.S.), vol. v (1903), p. 74.

2 Randall, 'Sir John Macdonnell and the Study of Comparative Law', *Journal of C.L.* (3rd Ser.), vol. XII (1930), p. 189.

3 Randall, *loc. cit.* Lambert also uses the term 'comparative legislation' but in a somewhat special sense. See *post*, p. 6.

with the nature of comparative law but only with its objects. The author of the definition has, in each case, focused his attention on the particular function which, from his standpoint, characterises the employment of the method of comparison. The *Vocabulaire Juridique*, for instance, defines comparative law as a branch of legal science whose object it is to bring about systematically the establishment of closer relations between the legal institutions of the different countries.[1] In this definition we hear the voice of the unificationist who regards comparative research as of little importance except in so far as it operates to promote the movement in favour of international uniformity of law. The earlier comparative lawyers identified comparative law with comparative legal history, or treated it as ancillary to analytical jurisprudence. Kohler regarded *Universale Rechtsgeschichte* and *Vergleichende Rechtswissenschaft* as interchangeable terms,[2] whilst Pollock observed that 'it makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence or, as the Germans seem inclined to say, of the general history of law'.[3] Holland puts the matter in this way: 'Comparative Law collects and tabulates the legal institutions of various countries, and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems.'[4] Maine's attitude is different; he states that 'the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law'.[5]

These restricted views of the nature of comparative law began to widen as the many-sided character of comparative law gained recognition. Bryce, writing in 1901, distinguished between the purely scientific aspect of the subject and its more practical side. The first aspect he describes as 'the comparative science of jurisprudence', which, like Pollock, he identifies with the 'historical study of law in general'. The second aspect has a 'palpably practical aim'. It sets out by ascertaining and examining the rules actually in force in modern civilised countries, and proceeds to show

1 'Branche de la science du Droit ayant pour objet le rapprochement systématique des institutions juridiques des divers pays' (*Vocabulaire Juridique*, sub tit. 'Droit Comparé'). Cf. Lévy-Ullmann's definition: 'Branche spéciale de la science juridique qui a pour objet le rapprochement systématique des pays civilisés' (*Droit Mondial du XX^e Siècle*).

2 *Encyklopädie der Rechtswissenschaft* (6th ed.), p. 1.

3 'The History of Comparative Jurisprudence', *Journal of C.L.* (N.S.), vol. v (1903), p. 74.

4 *Jurisprudence* (9th ed.), at p. 8. This view is also held by Allen, who identifies comparative jurisprudence with 'the study of racial origins and early social institutions' as an aid to analytical jurisprudence (*Law in the Making* (3rd ed.), pp. 21 and 22).

5 *Village Communities* (3rd ed.), p. 3.