Edited by Pierre Legrand and Roderick Munday

Comparative Legal Studies: Traditions and Transitions

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PIERRE LEGRAND AND RODERICK MUNDAY

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COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS

This book features fourteen original essays written by some of the world's most distinguished comparatists who bring sophisticated theoretical and interdisciplinary perspectives to bear on comparative legal studies. Arguably the most ambitious intellectual project to date within the field, this collection brings together representatives of many approaches to the practice of comparison of laws and offers a uniquely comprehensive response to the fundamental challenges raised by comparative interventions. Topics covered include universalism, nationalism, colonialism and functionalism. Disciplines addressed include anthropology, history, sociology, philosophy, politics and literary criticism. Problems discussed include contextualization, differentiation, cognition, translation and transferability. Throughout, the contributors present their respective vision of the nature of comparative legal studies and the assumptions that inform their work. This book will engage all lawyers wishing to operate beyond their national law and will be required for everyone taking a specific interest in the comparison of laws.

PIERRE LEGRAND teaches law at the Sorbonne.

RODERICK MUNDAY teaches law at the University of Cambridge.

CONTRIBUTORS

Upendra Baxi is Professor of Law, University of Warwick, and a former Vice-Chancellor, University of Delhi and South Gujarat.

Roger Cotterrell is Professor of Legal Theory, Queen Mary and Westfield College, University of London.

H. Patrick Glenn is Peter M. Laing Professor of Law, Faculty of Law and Institute of Comparative Law, McGill University.

Michele Graziadei is Professor of Law, Facoltà di Giurisprudenza, Università del Piemonte Orientale 'A. Avogadro'.

James Gordley is Shannon Cecil Turner Professor of Jurisprudence, School of Law, University of California at Berkeley.

Bernhard Großfeld is Professor of Law, Universität Münster.

David Kennedy is Henry Shattuck Professor of Law, Harvard University.

Mitchel de S.-O.-l'E. Lasser is Samuel D. Thurman Professor of Law, University of Utah S. J. Quinney College of Law, and Visiting Professor, Cornell Law School.

Pierre Legrand is Professor of Law, Université Panthéon-Sorbonne.

Roderick Munday is a Fellow of Peterhouse and University Lecturer in Law, University of Cambridge.

David Nelken is Distinguished Professor of Legal Institutions and Social Change, University of Macerata; Distinguished Research Professor of Law, University of Wales, Cardiff; and Honorary Professor of Law, London School of Economics and Political Science.

Esin Örücü is Professor of Comparative Law, University of Glasgow and Erasmus University Rotterdam.

Lawrence Rosen is Professor of Anthropology, Princeton University, and Adjunct Professor of Law, Columbia Law School.

James Q. Whitman is Ford Foundation Professor of Comparative and Foreign Law, Yale University.

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Accounting for an encounter

RODERICK MUNDAY

'*[L]'on peut comparer sans craindre d'être injuste.*'[1] Safe in that knowledge, the contributors to this book met in a closed seminar in Downing College, Cambridge between 26 and 30 July 2000 to debate comparative legal studies, almost exactly a century to the day after the *Société française de législation comparée* had held its landmark Congress in Paris. The Cambridge Conference was, of course, intended to mark the centenary of the Paris Congress. To this end, fifteen scholars from around the globe, representing widely diverse strands of comparative scholarship, were invited to speak to comparative legal studies at the millennium within their specialist fields and then, drawing freely upon their research, to reflect upon fruitful lines of inquiry for the future. The present volume comprises papers presented and discussed on that occasion in Cambridge. The Cambridge Conference may not have reaped the incidental benefit of a universal exhibition which, in 1900, coincided with the Paris Congress. But like its Paris predecessor, finding itself poised on the threshold of a new century inevitably lent a symbolic edge to the enterprise. In broad imitation of its Parisian forebear, the Cambridge Conference was intended to provide a *tour d'horizon* of the current state of the comparative endeavour in the specific context of legal studies.

The impact exerted by the Paris Congress on the subsequent development of the subject is underscored by Konrad Zweigert and Hein Kötz on the opening page of their well-known textbook:

> Comparative law as we know it started in Paris in 1900 [...]. [...] The science of comparative law, or at any rate its method, was greatly advanced by the

[1] Charles Perrault, 'Le siècle de Louis le Grand', in *Parallèle des Anciens et des Modernes*, vol. I (Paris: Coignard, 1688), p. 1. An English version might read: 'One may compare without fear of being unjust.'

occurrence of this Congress, and the views expressed at it have led to a wealth of productive research in this branch of legal study, young though it is.[2]

The proclaimed objectives of the Paris Congress, which took place between 31 July and 4 August 1900, had been 'not only to bring together and to foster contacts between scholars and jurists from all parts of the world, but particularly to seek to provide the science of comparative law with the precise model and the settled direction it requires if it is to develop'.[3] Clearly, a century on, the need to foster contact between scholars within different jurisdictions and even different legally related fields of research remains undiminished. However, the notion of imposing a model on a discipline which is now both fully recognized in its own right and which has already developed a number of disparate but settled directions of its own was not on the Cambridge agenda.

The Parisian organizers' summons issued to all jurisdictions where 'legal science' was well established. Their circular declared that not only would their Congress produce scientific work of the first order, but that it might also indirectly contribute to fostering peace and understanding between nations. It would, of course, be gratifying to imagine that the Cambridge Conference might make some contribution to international peace and understanding, but for obvious reasons this was not a stated objective. Our aim was simply to assemble a dozen or so colleagues, in the context of a challenging round table, to wrangle over the current condition of comparative legal studies within their personal fields of speciality and thereafter to speculate on the future routes the discipline might take.

Depending upon how one chooses to portray the Paris Congress, its programme could variously be described as ambitious, comprehensive or simply diffuse. The proceedings were split into six separate sections, deliberately taking in both theoretical and practical questions. The first, and the most intellectually durable, section was devoted to general comparative theory and method. This was intended by Raymond Saleilles, who designed the programme, to be 'the focal point of the entire

[2] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3d ed. transl. by Tony Weir (Oxford: Oxford University Press, 1998), p. 2.

[3] Georges Picot and Fernand Daguin, 'Circulaire', in Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol. I (Paris: L.G.D.J., 1905), pp. 7–8 [hereinafter *Procès-verbaux et documents*]. Interestingly, it is reported that 127 congresses took place in Paris between 24 May and 13 October 1900. See *Anon.*, 'The Paris Copyright Congress', *The Nation*, 20 September 1900, p. 226.

Congress'.[4] The remaining five sections addressed specific practical themes within the diverse realms of private international law, commercial law, civil law, public law and criminology. The topics prescribed by the organizing committee in the latter five sections reflected preoccupations of the day. Thus, public-law lawyers were to address the theme of 'proportional representation: its progress, its consequences in different countries', private international law specialists were to debate 'means of reaching agreement between states, either by international union or by individual treaties, on jurisdiction and the enforcement of judgements', while the commercial section was to consider 'means of achieving uniformity of law and custom in the context of negotiable instruments'.[5]

Saleilles's report to the organizing committee proclaimed that four aims needed to be kept clearly in mind. First, as art and part of the very notion of a 'science' of comparative law, it was necessary to define the appropriate methods whereby the three activities that together constitute the proper task of comparative law might be carried out, namely, establishing the law, comparing law and then adapting the law. Secondly, from a doctrinal point of view, it was important to clarify comparative law's role as an educational tool. Thirdly, from a practical point of view, the Congress had to consider to what extent legal solutions derived from comparative analysis might be implemented. Finally, means of discovering and exchanging information about foreign law had to be developed.[6] As Saleilles put it, 'being a science whose formulation is far from defined, these matters demand elaboration'.[7] A century later, the objectives of comparative legal studies have become too eclectic to permit of such intellectual dirigism.

Moreover, when one examines more closely what Saleilles designated 'the focal point of the entire Congress', one seems to detect a pronouncedly domestic as well as an international agenda. To be sure, the purposes of the Paris Congress were framed in terms of an objective, international 'legal science' which, if properly applied, was to reveal the deepest secrets of legal existence and ultimately lead to ever-greater uniformity among legal systems. Indeed, Saleilles, in his general report to the Congress, berates would-be comparatists for having hitherto simply juxtaposed institutions

[4] Raymond Saleilles, 'Rapport présenté à la commission d'organisation sur l'utilité, le but et le programme du Congrès', in *Procès-verbaux et documents*, *supra*, note 3, p. 15.

[5] 'Programme et rapporteurs du Congrès international de droit comparé de 1900', in *Procès-verbaux et documents*, *supra*, note 3, pp. 18–20.

[6] Saleilles, *supra*, note 4, p. 14. [7] *Id.*, p. 15.

without design and 'without having made the slightest attempt to present any analysis of the scientific laws which must inform comparison'.[8] However, there was a prominently French dimension to the 1900 Congress. Christophe Jamin brought this aspect out to great effect in an elegantly crafted paper presented to the Cambridge Conference one evening under the title 'Lambert and Saleilles's Noble Dream Revisited'.[9] The turn of the century, it was contended, marked an indelible intellectual watershed in French legal thinking. Before 1900, French civil law in particular was dominated by the outlook of an exegetical movement whose faith lay in the ability of the legislative texts, when properly construed, to provide jurists with comprehensive answers to all legal questions. After 1900, however, it is noticeable that another philosophy, another mood took hold. As Jamin shows, the thought of both Saleilles and Edouard Lambert heralds a very different approach that would view legal rules in the context of their historical development rather than in isolation. Hence, Saleilles's famous slogan, 'beyond the Civil Code, but via the Civil Code'.[10] Saleilles's quest for harmony and balance was later to emerge in the form of what he termed 'a national science of comparative law',[11] in which the study of foreign systems was dictated by, and thus subservient to, requirements of national law. If national law was defective, other systems could be ransacked for alternative national models. Comparative law, then, had a practical role to play.

Although Lambert set off from a slightly different point of departure, he too shared this idea that the study of foreign legal systems was meant to serve the interests of national law. Additionally, there was the belief in an international legislative common law – this idea being that universal principles and tendencies could be discerned at work within the various systems and that when these uniformities were absent other disciplines could be prayed in aid to demonstrate statistically, economically or in whichever way the formulation to be preferred. The consequence, as Jamin makes clear, was

[8] *Id.*, p. 13. See also *id.*, 'Conception et objet de la science du droit comparé', in *Procès-verbaux et documents*, *supra*, note 3, p. 167.

[9] This paper, which was delivered after dinner in Christ's College on 27 July, has since been published under the title 'Le vieux rêve de Saleilles et Lambert revisité: à propos du centenaire du Congrès international de droit comparé de Paris', Rev. int. dr. comp., 2000, p. 733. It has been reprinted in Mireille Delmas-Marty (ed.), *Variations autour d'un droit commun* (Paris: Société de législation comparée, 2001), pp. 31–48.

[10] Raymond Saleilles, 'Préface', in François Gény, *Méthode d'interprétation et sources en droit privé positif*, 2d ed., vol. I (Paris: L.G.D.J., 1919), p. xxv ['*Au-delà du Code civil, mais par le Code civil!*'].

[11] *Id.*, 'Droit civil et droit comparé', Rev. int. enseignement, 1911, p. 30.

to accentuate the importance of French doctrinal writing in systematizing the diverse materials and pointing the way to be taken by the courts:

> Saleilles and Lambert essentially employ comparative law as a means of renewing French legal thinking by imposing on French civilian *doctrine* an approach to which it would adhere throughout the following century. Comparative law serves to fill the void left [when French lawyers] abandoned that literal method of reading the texts for which the nineteenth-century writers had been reproached. It provides a broader base for the legal structures founded on the search for the principles that have to replace analytical textual examination, while at the same time conferring on them a much sought-after scientific objectivity. [...] It was inevitable that this very particular role given to comparative law would to a great extent determine the principal directions it would subsequently take.[12]

The search for inspiration from other systems was not necessarily to be unrestricted. For Lambert, it was apparent that certain laws – notably, the English common law – were simply too far removed and lacking in coherent structure to provide the material for valid comparisons.[13] Fruitful comparison might be made only within groups of legal systems with broadly shared attributes.

The scientism of the Paris Congress now looks decidedly antiquated. Similarly, it need scarcely be said that contemporary comparative legal studies no longer particularly seeks after that Grail of universal legal principles which once were assumed to inform the laws of all civilized nations.[14] Nor did participants in 2000 expect to see repeated that renewal within the host country's legal thinking which in 1900 was to coincide with and, to an inevitable degree, become confounded with the birth of modern

[12] Jamin, *supra*, note 9, pp. 743–4 and 40–1, respectively.

[13] See Edouard Lambert, 'Une réforme nécessaire des études de droit civil', Rev. int. enseignement, 1900, p. 421. Lack of structure would seem to be an enduring property of the common law. No comparatist will be unaware of Bernard Rudden's penetrating jest in his 'Torticles', (1991–2) 6/7 Tulane Civ. L. Forum 105, p. 110: 'The alphabet is virtually the only instrument of intellectual order of which the common law makes use.'

[14] This sort of view was widely held at that time. Coincidentally, Lord Haldane, speaking extrajudicially in the very year of the Paris Congress, declared that '[t]he jurisprudence of all countries is much the same in its fundamental principles. Strip it of its technical terminology, and the differences in great measure disappear': Richard B. Haldane, 'The Appellate Courts of the Empire', in *Education and Empire: Addresses on Certain Topics of the Day* (London: John Murray, 1902), p. 141. From this, he deduced that '[t]he master of legal principle who has a mind large enough to be free from provincialism is, therefore, in all cases the best kind of judge': *id.*, pp. 141–2.

comparative legal studies. Rather than restrict the territory of comparative law with fancied incompatibilities or predicate any methodological orthodoxy, the Cambridge Conference deliberately sought to be inclusive and consciously all-encompassing. To this end, it attempted to identify and give expression to all leading strands of comparative thinking. This openness is reflected, for instance, in the fact that the fourth and final session of the Cambridge Conference was specifically devoted to 'Comparative Legal Studies and its Futures'.

The two papers in this session set out to explore where the outer bounds of the subject may eventually come to lie. First, against a background of today's tendencies toward the Europeanization and the globalization of law, David Nelken (chapter 12) considers the increasingly prevalent phenomenon of legal transfers. This obviously invokes a series of questions. Can we ever aspire to a full understanding of another system's law and does it greatly matter if we cannot?[15] Are legal transplants largely a product of serendipity and chance, as Alan Watson has argued?[16] Alternatively, are transfers better viewed as deliberate and do we have means at our disposal that enable us to foretell whether particular institutions or rules are likely to prove especially appropriate subjects for transplantation? This, in turn, leads on to the question of how we might measure 'appropriateness' – what counts for success and what counts for failure in this domain? Beyond this, there lies the equally pertinent question, whether law has a social context or, more perplexingly, whether law also simultaneously or independently makes its own context.[17] The harder one looks at all these conceptual puzzles, the more elusive they prove. Then, finally, there is the issue as to what contribution, if any, sociology can make alongside comparative legal studies – two disciplines that are often at odds with one another – in explaining the effects that broader political, economic and social factors can have on the process of legal transfer. Nelken sounds an important word of caution, namely, that the comparatist surveying this phenomenon must not lose from sight

[15] The issue of understanding the other recalls a passage in Umberto Eco's introduction to the English translation of his *Diario minimo*, in *Misreadings*, transl. by William Weaver (London: Jonathan Cape, 1993), p. 4, where he recounts the following anecdote: 'Some time ago, a group of anthropologists invited African researchers to France so that they could observe the French way of life. The Africans were amazed to find, for example, that the French were in the habit of walking their dogs.'

[16] For example, see Alan Watson, *Legal Transplants*, 2d ed. (Athens, Georgia: University of Georgia Press, 1993).

[17] For example, see Gunther Teubner, *Autopoietic Law* (Oxford: Blackwell, 1993).

'how different metaphors mobilize and favour different ideas about how law fits society' and, indeed, how the very notion of 'transplant' may be ambiguous and quite inapposite in certain contexts.[18] He also argues that there has been a failure fully to engage in empirical research into these fraught questions. Clearly, in a globalizing world, where there appears to be a strong movement favouring increasing uniformity in many areas of law, these are issues of considerable magnitude and potential import.

This diversity of metaphor to which Nelken alludes – the metaphors are variously musical, culinary, biological, marital, medical – is much in evidence in Esin Örücü's examination of 'Comparatists and Extraordinary Places' (chapter 13). It is the case that places can prove 'extraordinary' in a multitude of different ways. However, Örücü's underpinning argument is that in a world where legal implants, transplants, or whatever one chooses to call them now, frequently take place across jurisdictions that share few legal, social or religious attributes, the focus of the comparatist must shift. Henceforth, comparison between systems which conventional orthodoxy would probably once have dismissed as simply too remote from one another to merit meaningful inquiry are entitled at least to equal attention. Without underestimating the importance of understanding transfers of institutions and rules within, say, the European Union, an activity that currently dominates the comparative agenda, it is argued that 'transpositions from the western legal traditions to the eastern and central European legal systems are of equal, if not greater, importance'. Among the formidable challenges that await tomorrow's comparatist, therefore, are the tasks of tracing the sometimes improbable paths taken by migrating laws, of investigating the ways in which they come to be assimilated, rejected or refashioned within the host system, of analysing the consequences that flow from this process of transplantation and adaptation and, finally, of assessing the inevitable conceptual implications inherent in these phenomena.[19] In the course of time, it may be that globalization will put paid even to the notion of an 'extraordinary place'. The 'extraordinary' may simply wither away as global convergence gathers pace. The comparatist's world in consequence may shrink back to a more familiar size and shape. But for the time being, these fresh vistas offer themselves.

[18] For example, see *id.*, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 Modern L.R. 1.

[19] See Esin Örücü, 'A Theoretical Framework for Transfrontier Mobility of Law', in R. Jagtenberg, *id.* and A. de Roo (eds.), *Transfrontier Mobility of Law* (The Hague: Kluwer, 1995), pp. 5–18.

To this day, comparative legal studies, as a subject, remains to a surprising degree problematical and is still perhaps regarded by some as the 'Cinderella of the Legal Sciences'.[20] Indeed, the very term 'comparative law' has always invited the *boutade* that it is not really a category of law at all – although, from the time of Harold Gutteridge and beyond, it had been recognized that not all languages by any means encounter this perplexity.[21] Because 'comparative law' is in a sense a subject without a constituency, a clear appreciation of its objectives is especially vital. Indeed, the issue can be stated in a more menacing way, it having even been suggested lately that unless the subject does discover a meaningful sense of purpose, it will find itself altogether without an audience.[22] This reflection, of course, invites the allied question regarding comparative law's proper place within the academic curriculum – a question that sparks into life from time to time.[23] The enduring quality of these foundational doubts is a constant reminder to those engaged in comparative legal studies that, in the eyes of many, its intellectual *raison d'être* may be somewhat precarious. Although these issues inevitably form part of the backdrop to the papers assembled in this book, the editors' and the contributors' posture was anything but one of defensive hand-wringing. Without ignoring the problematic nature of the enterprise, as its title suggests, the purpose behind *Traditions and Transitions* was to demonstrate both continuity and development within the subject, that is, to explore both those habitudes of thinking that have now become established methodologies within comparative legal studies and to tap into the intellectual vigour and generosity of vision with which the comparative approach can now endow the researcher.

It seemed fitting that the proceedings on the first day of the Cambridge Conference should be devoted to consideration of four great intellectual strands that, it appeared to us, have left their enduring mark on comparative scholarship. First, there is what could be broadly termed 'The Universalist

[20] H. C. Gutteridge, *Comparative Law*, 2d ed. (Cambridge: Cambridge University Press, 1946), p. 23.

[21] *Id.*, pp. 1–2. The title given to the Cambridge Conference deliberately avoids this academic quagmire.

[22] See Basil Markesinis, 'Comparative Law – A Subject in Search of an Audience', (1990) 53 Modern L.R. 1. Markesinis would further maintain that fresh life can be suffused into comparative legal studies in England only by its judges. For example, see *id.*, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* (Oxford: Hart, 2001), p. 1.

[23] For example, see Geoffrey Samuel, 'Comparative Law as a Core Subject', (2001) 21 Leg. Stud. 444, who provocatively argues that comparative law ought to be a core subject in each of the years of a law student's university curriculum.