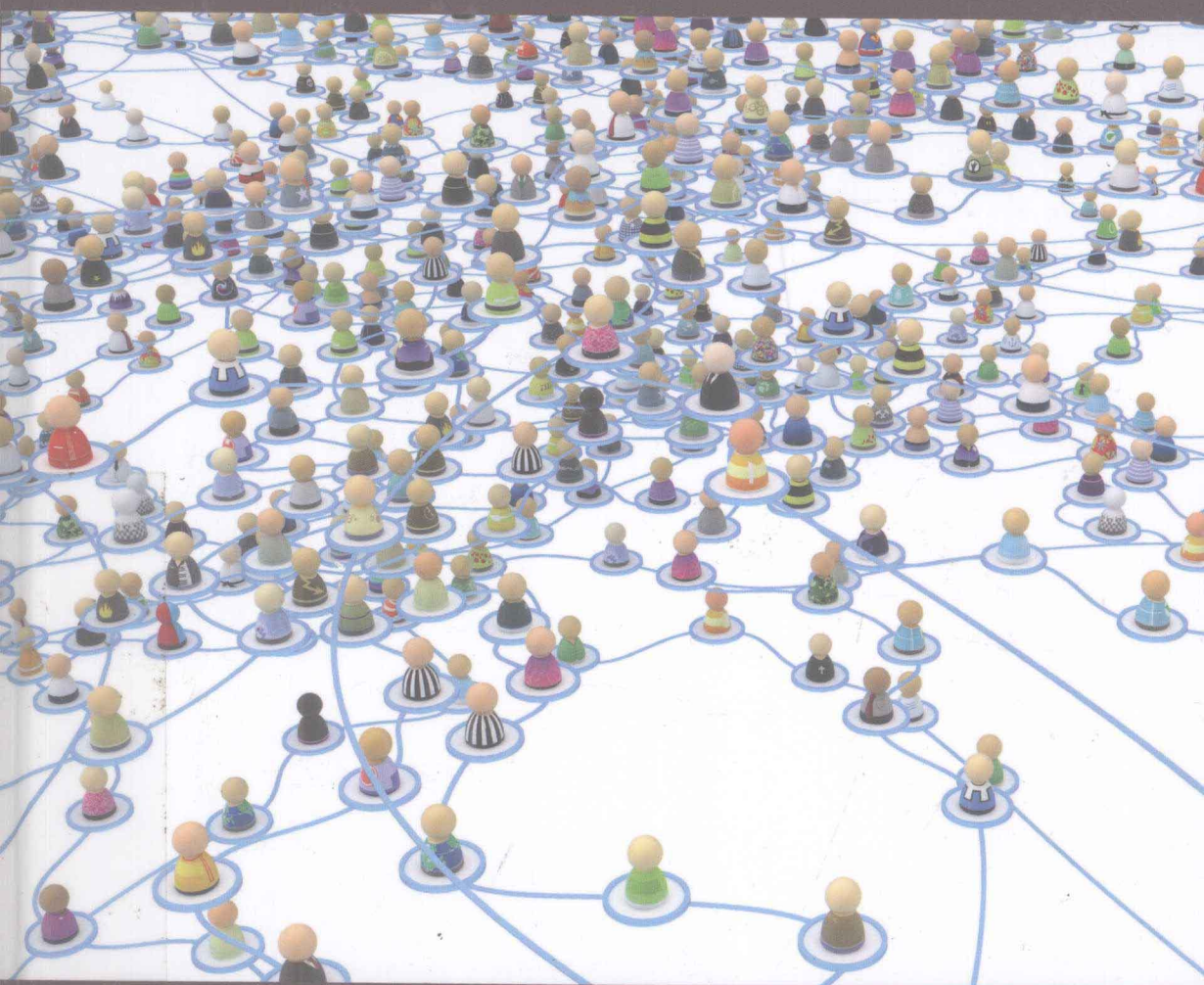


Comparative Law and Society

Edited by
David S. Clark



RESEARCH HANDBOOKS IN COMPARATIVE LAW

Series Editors: **Francesco Parisi** and **Tom Ginsburg**

Comparative Law and Society

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David S. Clark

Willamette University, USA

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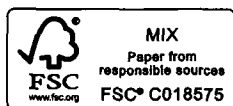
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Preface*

The field of comparative law and society embraces the common or overlapping area of two constituent disciplines: comparative law, and law and society. That means that some comparative law aims, typically among many professional objectives and methods, such as most statutory interpretation and case analysis, would be of little interest to socio-legal scholars. Conversely, sociological or cultural aims and some professional objectives in comparative law, such as institution building, normally would be of interest. On the other side, socio-legal research that focuses on a single legal jurisdiction in which the comparatist resides—by itself—would not be useful to comparative law. Only when the researcher combines that work with other similar research on a foreign jurisdiction does the comparatist's curiosity arise.

Approaches to comparing legal systems or parts of legal systems often involve a broad view for the discipline of comparative law, something other than the narrow focus on legal rules for a professional or practical purpose. Since there have been many philosophies and definitions of law, ideas about legal systems have been similarly diverse. A legal system may refer to the rules of a tribe, city, nation, the international order or the natural rules for humankind itself. If the purpose of investigation is to accumulate knowledge or to test general explanatory propositions, it may be relevant for socio-legal scholars.

In general, a system involves regular interactions among elements that together make up an entity with boundaries. Thus, lawyers, judges, legislators, administrators, the police and legal scholars all work with rules in regularized ways that involve cultural expectations about their roles and the legal institutions with which they interact. This view of a legal system is greater than the rules themselves. Since comparison contemplates more than one legal system in the search for similarities and differences among them, one way to explore the field of comparative law and society is to consider the different approaches to and classifications of law and legal systems that various philosophers, jurists and researchers use. This volume provides 19 chapters that illustrate the diversity existing in this field.

Historically, Europe is the origin of most comparative law and socio-legal activity. Of the two subject matters, comparative law is the older field due in part to the traditional importance of law as a faculty (in reality two faculties—Roman law and canon law) at European universities. In addition, most law graduates took jobs working in local and regional secular government that had its own customary systems of law. By the second half of the nineteenth century, there were a few national organizations (some sponsoring scholarly journals) of comparative law, which increased in number during the early twentieth century along with international meetings of scholars. During this same period, there emerged national organizations with international congresses in most of the social science disciplines discussed in Part I. Some of these scholars, as illustrated, had an interest in law.

Comparative law is the science or practice of identifying, explaining or using the

* An earlier version of some material in this preface appeared in David S. Clark, 'Comparative Law Methods in the United States', 16 *Roger Williams University Law Review* 134–8 (2011).

similarities and differences between two or more legal systems or their constituent parts. The objectives or aims of comparative law include those that are practical or professional, scientific and cultural. Its scientific aspirations can be looser, in the sense of accumulating or applying systematic knowledge (*Wissenschaft*), tighter, such as empirically testing general explanatory propositions, or some intermediate endeavor. These activities involve many distinct methods. Legal systems can be international, national or subnational. They contain a complex mixture of distinctive legal norms, institutions, processes, actors and culture.

Comparatists confront many challenges in carrying out their objectives. First, they must select a legal element for study, such as a contract rule, the standard of proof in criminal procedure, the expected or actual role for prosecutors, civil discovery, legal education, the relationship among government structures, or people's attitudes toward mediation as a form of dispute resolution. As suggested earlier, this volume will primarily provide examples that are not rule focused. Second, comparatists should identify the aim of their inquiry—whether it is professional, scientific or cultural. Third, they must choose at least two legal systems, which typically are their home system and that of a foreign nation. This one often does implicitly. The investigator may state that she is only interested in a foreign example, such as the presence of rule of law in Indonesia, but she has to begin somewhere in her conceptual organization. That somewhere is usually the relevant element in the researcher's own home legal system. The two systems need not be contemporary; one may be historical or idealized. It is here that one can see overlap with legal history or legal philosophy. Fourth, comparatists must select a method or methods to use in making their comparison. These methods may have developed within other disciplines, which can make the activity interdisciplinary as is typical in law and society research.

There is further discretion in determining the nature and extent of the similarities or differences the investigator will emphasize. Some comparatists prefer identifying similarities in what they find, while others accentuate differences. This will often vary depending on the use or objective that the comparatist has.

Some comparative law utilizes a level of generality above the nation state. The classification of the world's national and subnational legal systems into families or traditions is an effort to simplify the universe by focusing on the similarities of selected components within a legal tradition and then often pointing out the differences between that tradition and others. For instance, legal scholars commonly speak of the civil law tradition or the Islamic law tradition. Further analysis may lead to the recognition of mixed jurisdictions that reflect legal pluralism within a single legal system, such as in Louisiana or Scotland.

From this portrayal, one can see that comparative law is not a discipline with fixed boundaries, either by subject or by method, and, certainly, it is not doctrinal in the narrow sense. Over the course of world history, many legal scholars and lawyers who worked on issues related to law that involved a foreign element did not think of themselves as comparatists. Chapter 1 traces much of this history.

Part I of the volume, *Methods and Disciplines*, then discusses a variety of comparative law methods with illustrative examples in six chapters, organized by discipline. These are the principal academic areas that include law as one of their interests: sociology, criminology, anthropology, economics, political science and psychology. All of these disciplines view law and its elements as integral parts of society, but analyze law's impact from a variety of perspectives.

Part II, Core Issues, covers major legal institutions, processes, professionals and cultures associated with certain legal subjects. Each chapter takes a comparative perspective that involves at least two legal systems, expertly presented by authors from England, Wales and Scotland in the United Kingdom, from Italy, the Netherlands and Sweden in continental Europe, and from Australia, Canada and the United States. These issues include the separation of government powers, federalism, judges and judicial independence, civil courts and alternative dispute resolution, criminal courts, administrative agencies, constitutional courts, legal cultures, legal education, legal professions and law firms, legal protection of the environment and the treatment of preventive health at work.

I am grateful to the authors for their prompt and cheerful participation in this project and to Jane Bayliss, Tara Gorvine, Alexandra Mandzak and Virginia Williams at Edward Elgar Publishing for their guidance in the production process. I am also indebted to Galin Brown, Willamette University Law Library Access Services Manager, for helpful interlibrary loan assistance and to the College of Law for a summer research grant that facilitated completion of Chapter 1.

David S. Clark
Salem, Oregon
January 2012

For Marilee and
Lee, Susanna, Eliina, Liisa, and David

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1 History of comparative law and society

David S. Clark*

1 INTRODUCTION

1.1 Comparative Law

Comparative law is as old as the existence of law. It arose with the first complaint of injustice directed against human action justified by a legal rule. The complainer, not having that law on her side, had to rely on a rule existing outside the actor's legal system, perhaps on a higher law. Ancient illustrations of law and justice may be of significance to theologians, philosophers or shamans. However, other than a legal anthropologist's interest in preliterate human societies, most comparatists today would not consider historical examples older than three millennia and much of that consideration is about classical European legal systems. Nevertheless, modern legal comparatists are continuing to push the boundaries of their discipline outward, intruding on sister fields in the social sciences and humanities—from economics to rhetoric—and expanding their consideration to ancient use of legal comparison in China and other parts of Asia.

The modern view is that comparison is inherent to humans and probably to other species. This insight comes from diverse disciplines ranging from social psychology to human evolutionary genetics.¹ Social comparison is how we make sense of the world in which we live and even understand ourselves. Legal comparison concerns that part of social reality involving laws and legal institutions. From this perspective, comparison does not need to be justified any more than rationality requires justification. Consciously rational comparison will involve aims and methods, but intuitive comparison may be sub-conscious. In thinking about legal norms, values and institutions, scholars for centuries have argued, sometimes violently, between concepts that are rooted in essentialism and nominalism. Comparison is integral to both these philosophical approaches and it applies to law as much as to other matters. Dialectical reasoning is another example involving comparison, since one must identify the antithesis to the thesis. One finds that dyadic conceptualism has dominated legal doctrine, principles and values across human cultures.

Sustained scholarly comparative law activity in the United States began in the early twentieth century. It developed together with organized networks of communication, often extending abroad, and the successful effort to establish scientific teaching and

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¹ See, e.g., Jerry Suls and Ladd Wheeler (eds), *Handbook of Social Comparison: Theory and Research* (New York: Kluwer Academic 2000).