Preface

In this textbook, we provide an introduction to comparative law or, as we prefer to call it, law comparison. We have divided the introduction into three parts. In the first part, we focus on law comparison as a method and as a scientific discipline. In the second part, we introduce the reader to a dozen important legal systems. In the third part, we submit a number of specific areas of private law and public law to an elementary comparative study. Let us explain briefly how we will go about this.

In Part I, we try to answer some basic questions concerning law comparison. What is law comparison and why do we prefer this terminology to comparative law? Why should we engage in law comparison? How does one go about comparing laws? How should countries be grouped together? This part of the textbook was written by Danny Pieters, with the exception of the sections on legal families and monism/dualism (written by Bert Demarsin).

In Part II, we try to familiarize the reader with several important legal systems. We do this using a descriptive pattern that is as uniform as possible for all legal systems. First, we identify the legal system and examine its sources of law. Then we discuss the hierarchy of sources of law and how this hierarchy is respected. Special attention is paid to the enforcement of the constitution and the relation between national law and international or supranational law. We provide an overview of the most important courts and discuss some of the peculiarities of the legal system. Each description ends with a discussion of the influence the legal system has on other legal systems and the ways in which it has itself been influenced by other legal systems. Bert Demarsin provided descriptions of the legal systems of Belgium, the Netherlands, France, England, the United States of America, Brazil, Japan and China; Danny Pieters was responsible for the parts on German, Russian, Indian and Israeli law, as well as the descriptions of Islamic and African law.

In Part III, we illustrate what law comparison might look like, by providing some comparative reflections on selected topics from both private and public law. We examine the legal approach to the person, the family, property and transactions. Bert Demarsin was responsible for these excursions into private law comparison. The public law comparisons, examining the forms of government and exercise of public power, were dealt with by Danny Pieters.

While we have indicated the author of each specific part of this introductory textbook, both authors would like to emphasize that this textbook is the product of an intense collaboration and the final product can be seen as a joint result of the work of both authors. Not only did both authors critically examine, comment and – where necessary – adjust the parts written by the other author, but the whole approach to this textbook is the fruit of shared reflection. Moreover, both authors are especially grateful to the many colleagues and friends who have read (parts of) this work and given us very useful suggestions.

This textbook is not intended as the final word on law comparison, but rather as an introduction to one's own legal comparison journey: a first acquaintance which will, we hope, spark in the reader a desire to know more about law comparison and about how law in other places is different.

Bert Demarsin

Danny Pieters

Leuven, Summer of 2021

PART I – COMPARATIVE LAW – GENERAL PRINCIPLES

1. What is law comparison?

<a> The concept of law comparison

The concept of law comparison consists of two key elements: law and comparison.

The law being compared may be an entire legal system (all law valid at some point in a certain place); a major part of it (e.g. family law); a limited number of legal norms (e.g. the duties of parents towards their children); or certain legal institutions or legal concepts (e.g. good faith). The diversity of legal subjects that may be subject to comparison will be examined below.

The second key element is an act: the act of comparing. Comparing entails an examination of the differences and the similarities between two or more entities.

In essence, law comparison can be described as examining the similarities and differences between two or more legal systems or components of these systems. Law comparison may have a variety of goals; we don't think it necessary to include these in the definition of what law comparison is. Even the very general addition of 'to explain these differences and similarities' or 'to explain them and to evaluate them' does not, in our opinion, provide added value and can thus be deleted from the definition. Of course, when one establishes similarities and differences between legal systems, one is highly likely to ask why these appear. However, the question is whether the methods of law comparison alone can answer all these questions, or whether we might need to appeal other fields of expertise, such as history and sociology. The distinction between law comparison as a method and law comparison as a scientific discipline should probably be situated in this context. More will be said about all of this in the following chapters.

The reader will notice that, rather unusually, we do not speak of comparative law, but adopt instead the term 'law comparison'. Time and again, English authors have noted that the term 'comparative law' is somewhat misleading since comparative law is not a branch of law, like family law or administrative law. Incidentally, the same misleading conceptual approach also appears in French (*droit comparé*) and in Spanish (*derecho comparado*). Instead of complaining about how the usual term is misleading, we prefer to adopt an alternative term

('law comparison'). This alternative term is more accurate and also better corresponds to the German (*Rechtsvergleichung*) and the Dutch (*rechtsvergelijking*) equivalents, which clearly indicate what we are talking about.

<a> Scientific discipline or method?

Is law comparison a scientific discipline or is it 'only' a method? Is law comparison a fully fledged science? Or just part of legal science? Or perhaps only an auxiliary science? Others have written many pages about these and similar questions. We agree with Kischel[1] that these questions only need answering if the answer will determine the outcome of concrete research problems. However, such a research problem has not yet appeared.

What is important is that law comparison uses a well-founded scientific method and that law comparison as a science has solid methodological grounds.

Comparing is not something one just does. It should be clear that the observation is objective, that what is being compared is in fact comparable and that other researchers can reach similar results based on the same facts. Comparing must be carried out in a scientifically substantiated manner, using a variety of methods related to the goals pursued.

A successful scientific comparison does not start from nothing, from a *tabula rasa*: we build on the work of others when defining the topic of our comparative research, when formulating the relevant questions, when situating them in a broader context, etc. We must know the methodological choices that others have made and we must be sure of the solidity of the foundations on which their research was built. The collection of all scientifically valid knowledge concerning the comparison of legal systems and components thereof can be seen as the constantly evolving science of law comparison. In this science, the knowledge acquired through the legal comparative method is of course essential, but this science also includes reflection on the methods and problems of comparative research, the knowledge acquired through other scientifically valid methods and the knowledge of other scientific domains. The latter is especially important in explaining and evaluating the established similarities and differences. In this way, research in history, sociology, etc., can help flesh out the science of law comparison. Law comparison can, in turn, contribute to research in law, history,

[1] U. KISCHEL, *Rechtsvergleichung*, Munich, Beck, 2015, no. 55.

sociology, etc., and, in such cases, law comparison may be seen as an auxiliary science.

All comparative research, regardless of the care with which it is performed, will be imperfect. This is due in part to the imperfections of the science of law comparison on which it is based and, in part, on constraints the researcher must accept when doing research. We will discuss the restrictions inherent in comparative activity later on. The fact that these restrictions are at the essence of law comparison arises from the almost deceptive complexity of the comparative activity. Of course, we can always build on the work of comparatists who have preceded us, both in terms of content and in terms of methods. We insist from the outset that imperfection is scientifically acceptable only if one is conscious of the restrictions one has accepted. The basic attitude of the good comparatist is: modesty!

<a> Types of law comparison

Kischel[2] writes that law comparison is possible and is actually practised in all domains of law, and we completely agree. To pretend that law comparison outside private law is of lesser importance is a stubborn misrepresentation of the facts. What is true is that in early law comparison, private law was often the object of comparative activity. Today, however, law comparison is practised both in relation to public and private law. We cannot and should not, therefore, rely exclusively on private law oriented approaches in a general introduction to law comparison.

Though there were precursors to law comparison in Ancient Greece, modern law comparison emerged in the course of the 19th century. The emergence of nation states with their own law and codes, the flourishing of world trade, a strong belief in progress, the simultaneous development of other comparative sciences such as comparative linguistics: all these factors are related to emerging attention to foreign law and the comparison of law in the same period. Regarding private law, the first international congress of comparative law in Paris in 1900 might be considered a milestone. The participants in the congress were not just interested in studying the recently introduced German *Bürgerliches Gesetzbuch* compared to the French *Code civil,* which was already a century old, but were also committed to the development of a *droit commun législatif*, a universal private law. Interest in law comparison continued after the First World War (WWI), but

[2] U. KISCHEL, *Rechtsvergleichung*, Munich, Beck, 2015, no. 68.

the universalist ambition faded. Yet, in this same period, the ‘general principles of law recognized by civilized nations’ became a complementary source of international law (more about this later on) and the International Institute for the Unification of Private Law, Unidroit, was founded. After the Second World War (WWII), comparatists’ attention was focused on solving methodological problems of law comparison and law comparison expanded to the most diverse areas of law.

Law comparison has since penetrated all areas of law: from private law to public law, from ancient areas of law to the most modern ones, such as IT law and environmental law. With the advent of globalization, national law and national lawmakers and practitioners are increasingly interested in what is occurring across borders. Law comparison is therefore omnipresent today.

While law comparison examines the similarities and differences between legal systems or components thereof, an obvious starting point is comparison of national law between various states. International law comparison is indeed the most prominent type of law comparison, but there are also other possibilities:

- The concepts, institutions and norms of international and supranational law can be compared. For instance, the norms concerning the coordination of the social security systems valid in the European Union might be compared to those valid in Latin America; or the protection of human rights in the case law of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR). We will speak in this case of inter-international law comparison.
- The laws of federated states can be compared within the same country. For instance, the law on education in Flanders, in the French-speaking community of Belgium and in the German community of Belgium. The laws of local authorities can also be compared. For instance, the police regulations concerning abusive noise valid in various municipalities. When we compare law valid within one state, we will speak of intra-national law comparison.
- It is also possible to compare law emanating from non-public or not-purely-public entities (for instance, the law of churches, the internal regulations of trade unions, or the anti-doping laws in various sports federations). Different instances of transnational law, as established in agreements or codes of conduct for multinationals, can also be compared amongst each other and thus be the object of law comparison. We will speak in this case of private law comparison.

- Legal norms which operate within one and the same legal system can also be compared (for instance, one can compare the weight of penalties imposed within one legal system for different crimes; or the pension arrangements of wage-earners, self-employed and civil servants; or the liability of parents, teachers and employers). We call this purely internal law comparison.
- It is also possible to compare law that is valid at various points in time. This intertemporal law comparison, of course, comes very close to research in legal history. Yet, in some cases, it may be more useful to have an intertemporal comparison of two relatively static pictures of law rather than engaging in fully fledged historical research.
- Finally, a combination of the above enumerated sorts of law comparison. For instance, it is possible to compare repression, reconciliation and amnesty law following the fall of authoritarian regimes (1944 in Belgium; 1989 in Eastern Germany; 1994 in South Africa). Sometimes it is useful to compare, for instance, the law of states with the law of federate entities (e.g. comparing the law on education in Flanders with that of the Netherlands).

A crucial question which arises when comparing law is whether to compare law in action or law in the books. There will of course always be tension between the two, but this tension can be of variable importance. The law as applied and experienced may sometimes deviate from (or even be completely independent of) the law as described in statute books and even in case law and legal writing. Law comparison can deal with both the law in the books and the living law or law in action. However, as we will see later when dealing with the methodology of law comparison, it is most important to maintain a single focus. In other words, comparing the living law in one country with the law in the books in another is unacceptable.

In the literature, the distinction between law in the books and law in action is often linked to the distinction between dogmatic law comparison and functional law comparison. Dogmatic law comparison deals exclusively with current positive law. Functional law comparison takes a concrete problem as a starting point and examines how the living law deals with this problem. What function does law pursue? That is the central question.[3] However, we are not convinced of the

[3] In our teleological method of law comparison, it is not the function of law itself, but the function of the law comparison that is central.

usefulness of this distinction and have therefore left it out of the discussion that follows.

In the comparative law literature, a distinction is also drawn between micro- and macro-law comparisons. Macro-law comparison compares entire systems of law (or even groups of legal systems), addressing a specific topic, such as legal sources, legal reasoning or procedures that deal with conflicts. The grouping of legal systems in families is another important task of macro-law comparison. Micro-law comparison focuses on certain legal institutions or norms dealing with the same phenomenon or problem. Micro-law comparison and macro-law comparison do not, however, form a dichotomy; they are the two extremes of a sliding scale. There is also constant interaction between micro-law comparison and macro-law comparison: macro-law comparison helps to carry out micro-law comparison in a sensible manner and macro-law comparison feeds the overall picture used in macro-law comparison.

Some authors link the concepts of micro-law comparison and macro-law comparison with a question which was popular in (older) literature, namely, whether law comparison is aimed primarily at establishing similarities or at discovering differences between the examined legal systems. However, seeing no benefit to this debate, we choose to leave it aside. Others link the distinction between micro-law comparison and macro-law comparison with the question of whether law comparison is a method or a science: micro-law comparison would then be the method and macro-law comparison the scientific discipline. This approach does not convince us either.

<a> Relations with contiguous domains of law and science

<b> Law comparison vs. studying foreign law

It is often insisted that law comparison must be distinguished from the knowledge and examination of foreign law (*Auslandsrechtskunde*). Some see the study of foreign law as a first step before engaging in further examination of the similarities and differences between two or more legal systems or components thereof. They see it as necessary to proper law comparison. Others emphasize the subjective character of the notion of 'foreign law': domestic law for some is foreign law for those from other legal orders. In their opinion, knowledge of foreign law is no different from legal knowledge as such of the law as it is valid (elsewhere). Both approaches to the relation between law comparison and the knowledge of foreign law hold some element of truth. We are however convinced

that this relation is much more complex. Though it may be true that all law is ‘own’ law for some people, it remains necessary to make that law accessible to people from other legal traditions, from another country. The required translation is far from easy and demands significant comparative knowledge in order to translate the used concepts correctly. In other words, to describe foreign law in a scientific way, the methodology of law comparison must be respected. No knowledge of, or research into, foreign law is possible without law comparison. This law comparison element very often remains implicit, but its implicit character does not free the researcher from the demands of scientific accuracy.

The relation between law comparison and knowledge of foreign law is not unidirectional: law comparison will in principle take the knowledge of one or more foreign legal systems as a starting point. If this knowledge is wrong from the start, it undermines the law comparison itself. A particularly important, yet often underestimated, problem is the comparability with one’s own law. In order to avoid misrepresentations as a consequence of national bias, we recommend that the part of one’s own law relevant to the law comparison be ‘translated’ in the same way as the foreign legal systems. In other words, one’s own law becomes ‘foreign law’ in law comparison. If we don’t do this, we run the risk of carrying out a comparison with glasses coloured by our own legal system. In the methodological part of this textbook, we will expand further on the dangers of this form of ethnocentrism.

<b> Law comparison vs. legal translation and legal interpretation

Law comparison must also be distinguished from the activity of legal translation and legal interpretation. However, the relation between the two is similar to that described above between the knowledge of foreign law and law comparison. The legal interpreter or translator needs to have enough comparative knowledge to ensure that someone listening to or reading the resulting translation understands what was meant by the original speaker/author. This is an exceptionally difficult task when it is performed under time pressure. Legal dictionaries can provide some help, but do not guarantee a flawless result. It is important that the person interpreting or translating legal content master the languages of both legal systems, not just in terms of vocabulary, but also substantively. In an ideal world, the legal interpreter or translator would be a lawyer schooled in the relevant legal systems, but this is a big ask. And yet, one should not forget that the legal interpreter or translator plays an important role in overcoming (at least some of)

the barriers produced by the diversity of the languages involved in the law comparison.

The legal interpreter, the translator and the researcher interested in foreign law thus implicitly or explicitly carry out law comparison. As previously stated, implicit law comparison should not be non-qualitative. Both implicit and explicit law comparison can be qualitatively better or worse. We strive for comparative perfection perhaps, but we are unlikely to achieve that goal. At the other end of the spectrum, however, we find what I would call 'comparative tourism': 'excursions into foreign law', isolated facts related to foreign law, often associated in a non-scientific manner, with each other or with one's own legal system. These foreign excursions have very little to do with the method or science of law comparison. Yet they are increasingly common, even in academic circles or texts. While we insist that the comparatist must show modesty, this should not be a licence for a lack of ambition or quality.

<b> Law comparison vs. legal philosophy, legal theory, legal sociology and legal history

Law comparison belongs to the meta-legal domain of science and is as such related to legal philosophy, legal theory, legal sociology and history of law.

Legal philosophy and legal theory involve abstract reflection on law. Legal philosophy and legal theory sometimes rely on the results of law comparison. Conversely, law comparison sometimes functions as a benchmark for the universal validity of the theses presented by legal philosophy or legal theory.

Legal sociology examines the relation between society and law: how does law influence human behaviour and how is law influenced or determined by power relations in society? What is the reality behind the legal norms? In order to answer these and similar questions, it can be useful to draw on 'variables' from various legal systems. Here, law comparison can be extremely valuable for the legal sociologist. Legal sociology may in turn be useful for the comparatist, providing explanations for the established similarities and differences in the compared legal systems. Even at the initial stage of law comparison, legal sociology can be helpful in formulating the societal phenomenon or problems one wants to submit to comparative study in a scientifically correct way. The more law comparison focuses on what is called 'the living law' or 'law in action', the more the input of the legal sociologist is important.

Legal history and law comparison often productively cooperate but they must nevertheless be distinguished. Legal historians follow the scientific methods of historians; their results are not limited to explaining similarities and differences. That said, law comparison, in explaining established similarities and differences, may appeal inter alia to historical explanations, historical developments and thus to legal history.

<b> Law comparison vs. international private law and international public law

It is self-evident that law comparison has to be distinguished from branches of law such as international private law or international public law.

International private law is part of (mainly national) positive law and resolves conflicts between various legal systems by indicating the applicable law, the applicable procedures and/or the competent judges. That it is important to have an understanding of foreign law and of law comparison if one is to apply foreign law seems self-evident. Law comparison will also be useful if unknown foreign legal institutions need to be qualified according to domestic law (for instance, how to translate repudiation into the law of Western European states?).

International public law accepts as a source of law 'the general principles of law recognized by civilized nations or the general principles of law which are universally accepted'[4]. In order to identify these general principles of law, one must rely on law comparison. Law comparison is also useful to define what is to be understood by international customary law. When countries conclude treaties, it may be useful to compare the legal systems of these states in order to interpret, for instance, the terms used in the treaties between these states.

Law comparison and 'law and economics'

In the 1960s, a new approach to law from an economic perspective originated in the United States. It became known as the law and economics approach. It developed and spread, reaching the height of its success in the 1980s and 1990s. We will not attempt to explain here what the law and economics approach entails, but very briefly it sees law as a directive instrument intended to corral people towards desired behaviour and keep them away from unwanted behaviour. What is 'desired' or 'non-desired' is often expressed in terms of economic efficiency. A law and economics approach to the law of damages, for instance, does not ask what a fair and equitable solution would be, but instead considers which

[4] Art. 38 I c Statute of the International Court of Justice.

approach is likely to avoid the most damage. In other words, it takes a preventive approach. To use an example from criminal law: the central question might be, 'How can I prevent people from committing crimes at the least cost to society?' The law and economics approach is certainly not undisputed: it is blamed for reducing everything to the maximization of 'economic' efficiency, for considering only costs and benefits, for focusing exclusively on value in monetary terms, for reducing the person to a purely rational 'homo economicus', for showing a heavy Western capitalist bias, etc.

Since 1994, law and economics and law comparison have intermingled, leading to the emergence of a 'comparative law and economics' approach which aims to explain changes in the law. This mutual influence also led to the 'legal origins' approach, which focuses on explaining economic results (such as growth and employment) using law comparison.

'Comparative law and economics' lawyers take as their starting point the idea that there is a competitive market for law. Law comparison teaches them that changes in law are often the product of legal transplants. Taking this a step further, they assume that various legal approaches are in competition and that this progressively leads to a choice in favour of the most efficient legal solution. It is accepted that the concept of effectiveness in this context should be broader than purely economic efficiency and that the transition from one legal approach (norm, way of conduct) to a more efficient approach may come with important transition costs (resistance from tradition, culture, religion, etc.). Thus, the same legal norm in one institutional context may be efficient, while in another it is not.

The 'legal origins' approach emanates from economists searching for an explanation for differences in economic results (protection of foreign investment, growth, unemployment, etc.) between states. Some have sought an explanation in the differences between the legal systems. As an example, it has been argued that the common law approach is superior to a civil law approach in terms of economic results, the former giving more space to private arrangements and market self-regulation and the latter relying more heavily on public policy and regulation. This 'legal origins' approach has been the object of substantial criticism: a very Anglo-Saxon bias, the wrong idea that law is static and does not interact with economic realities, etc.

The 'comparative law and economics' approach uses economic science to explain the results of law comparison. The 'legal origins' approach does the opposite; it

explains the results of comparative economic research using law comparison. In both cases it is important that the methodological standards of the two disciplines be maintained, since mixing both could result in a reduced ‘common denominator’ methodological standard. That said, combining law comparison and economic research can be particularly fruitful (as it has been, for instance, with law comparison and comparative sociological and cultural research). Law comparison is enriched by the results of other sciences, quantitative results in particular. These companion sciences may also help to question specific prejudices or established visions about, for instance, differences in legal systems. Legal comparatists should however refrain from uncritically adopting and using economic or social policy analysis, which often appears neutral and objective with long and complex calculations and tables. These economics and social policy studies are often based on their own presumptions, simplifications, error margins, etc., which cannot be overlooked when using their results. Prudence and modesty remain the key principles.