

COMPARING LAW

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Bert Demarsin & Danny Pieters



Amsterdam
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Press

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LEGAL

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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 which were 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 these 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 has provided descriptions of the legal systems of Belgium, the Netherlands, France, the United Kingdom, 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 and to liability both in contract and in tort. 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 a close collaboration, and the final product can be seen as a joint result of the work of both authors who have critically examined, commented and – where necessary – adjusted the

parts written by the other. Thus, the 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 varies in different jurisdictions.

Bert Demarsin

Danny Pieters

Leuven, Summer 2022

PART I

LAW
COMPARISON

GENERAL
PRINCIPLES

WHAT IS LAW COMPARISON?

1. THE CONCEPT OF LAW COMPARISON

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

The law that is 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 do not 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 to 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 this in the following chapters.

The reader will notice that, rather unusually, we do not speak of comparative law, but instead adopt 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 better corresponds to the German (*Rechtsvergleichung*) and the Dutch (*rechtsvergelijking*) equivalents, which indicate clearly what we are talking about.

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