Comparative and Private International Law

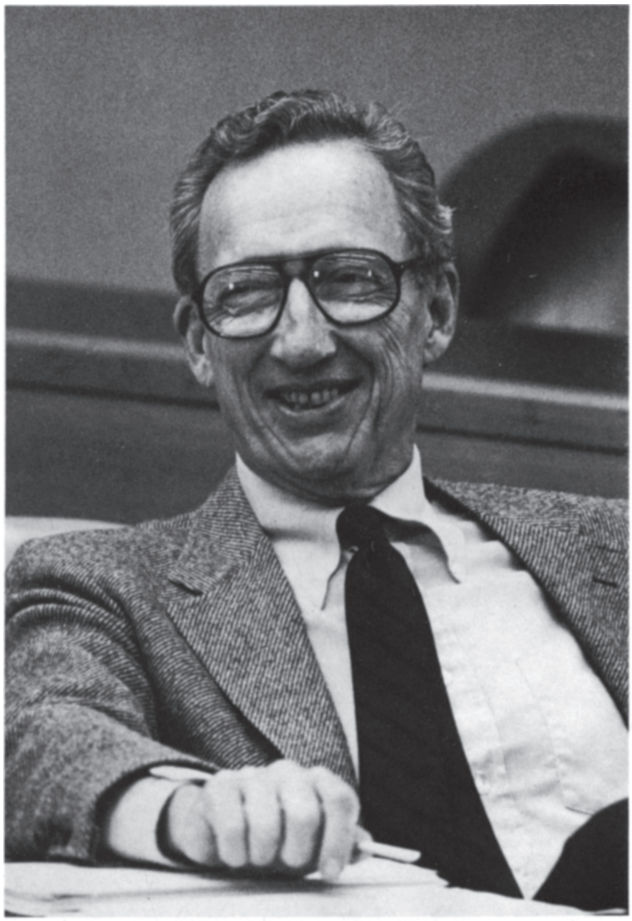
Essays in Honor of John Henry Merryman on his Seventieth Birthday

Edited by

David S. Clark

Duncker & Humblot · Berlin

Comparative and Private International Law



John Henry Merryman

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The Principal of Brasenose College, Oxford University.

Preface

The Festschrift Committee takes great pleasure in presenting to our esteemed friend and colleague, John Henry Merryman, this volume of essays. The occasion for celebration is John's seventieth birthday, February 24, 1990.

The authors who have prepared essays for this book are dispersed over four continents and reside in thirteen countries. North to Finland, south to Venezuela, east to Japan, this variety illustrates the wide influence John Merryman has exerted over his long and distinguished career.

The 26 essays in this volume discuss important issues in comparative law and private international law. They are organized into four parts, as shown in the Summary of Contents. Part I considers ways comparative law has developed, especially those ways influenced by the writings of John Henry Merryman. Prime legacies include the idea of the civil law tradition and the use of the concept of legal culture. Part II reveals the diversity of contemporary comparative law studies. Authors draw from several fields in making comparisons of laws and legal institutions: artistic patrimony, codification, contracts, constitutional justice, criminal justice, doctrine in courts, experts in courts, evidence, water law, and trusts. Some show the borrowing or transplantation of ideas about law across the divide of different traditions, which can be characterized by what Gino Gorla calls a civil law-common law dialogue. The full breadth of history is also explored here, from Roman law to the currently unfolding events within socialist countries suggesting a nascent rule of law. Part III looks at developments in western Europe, particularly for judicial review and for public administration, but also in the EEC since the Single European Act — as for product liability — that demonstrate the convergence and integration of legal systems. Part IV focuses on private international law, considering internationalism in this field, transnational bankruptcies, and the return of cultural property expropriated abroad. Part V, in conclusion, lists the publications of John Henry Merryman.

Certain features in this book may help to guide the reader into the interstices of the essays and to their intellectual foundations. First, the Table of Contents provides an outline for each article. This serves as an ersatz index. Second, most articles begin with an asterisk footnote that lists the primary and secondary source material heavily relied upon in that particular article. Other features of citation style are adapted from usages in the *Rabels Zeitschrift für ausländisches und internationales Privatrecht*.

This volume was from the beginning a collaborative effort, most importantly by the members of the organizing Festschrift Committee and by the authors.

The editor would in particular, however, wish to thank Mauro Cappelletti, Ulrich Drobnig, and Hein Kötz for their early encouragement and support. In the production of the book, a great debt of gratitude is owed to the secretarial staff — headed by Ann Hail and assisted by Kathy Cooper and Shirley Ross — and the library staff — especially Kathy Kane, Chuck McKnight, Melanie Nelson, and Katherine Tooley — at The University of Tulsa College of Law. Rudy T. Rivas, a 1990 graduate from the College, helped in editing the Spanish language essays. Finally, Norbert Simon, Helmut Appelt, and their staff at Duncker & Humblot expertly finished the volume. To all, many thanks.

Tulsa, May 1989 David S. Clark

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In Honor of John Henry Merryman

Mauro Cappelletti*

> Render therefore to all their dues: tribute to whom tribute is due; . . . honour to whom honour.
>
> Romans 13:7

Writing about Professor John Henry Merryman means for me, first of all, to write about a collaboration that started over a quarter of a century ago, when we first met in Florence. The Law School of the University of Florence had just offered me the chair in comparative law, at that time the only such chair in the School (there are now five) and one of the then only two or three such chairs in the whole country (there are now dozens). In his turn, Merryman, as he wrote to me in a letter dated August 21, 1962, a few months after we first met, was just "beginning comparative work" at that time.

It was indeed a case of love at first sight! He had already spent several weeks in Florence, but his contacts had been limited to some colleagues whom I used to define as "thin-air thinkers"—speculating about law as "pure norm," applying a typically anti-realistic, if not pre-realistic approach. That was old and, at times, irritating stuff to me; it was simply incomprehensible to John. We met almost by chance, on the eve of his return to Stanford. Nancy and John, Mimma and myself dined in a typical small restaurant next to Ponte Vecchio. There, the magic encounter. He discovered that there existed after all a younger generation of Italian students of the law who were eager to repudiate and fight against certain features of the "Italian style" (and not only Italian, as I shall indicate in a moment): its reliance on statutory law as the only relevant source of the law; its "Montesquieuian" conception of the interpretive function (judicial and otherwise) as being a purely passive, noncreative, essentially mechanical reading and application of that law; its glorification of the normative element as the only factor worthy of study and teaching by the legal scholar—the "legal scientist"—leaving to "nonscientific sociologism" or "politologism" everything else. Thus, there was no room for the study of the producers as well as the consumers of law

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 This essay, with a few modifications, first appeared as John Henry Merryman the Comparativist: Stan. L. Rev. 39 (1987) 1079-86.

and justice, of the processes and institutions, and, generally, of the themes and problems concerning the relationship between law and society.

My youthful fury against this approach prevailing in the "legal academe" of Italy—but also, to a large extent, of other countries of Continental Europe and Latin America, that is, of the civil law world—met a sympathetic reception from that Stanford law professor in his early forties, imbued with American realism. He lent legitimacy to my reaction; also, and most importantly, he gave to it a dialectic expression and a cultural background. In turn, as I was soon to learn, my own fight had its counterpart in John's attempt to open up to transnational and comparative interests his own school, Stanford Law School, which in precisely those years was successfully struggling to rise to the level of one of the greatest schools in the United States and the world.

It was that night, in the Buca dell'Orafo restaurant, that our monograph, *The Italian Legal System,* in which Joseph M. Perillo also was to participate, was first conceived—as a critical analysis of the Italian system as it really is, not as it appears in the books. And, of course, the method to be used, explicitly or at least implicitly, was that of comparative analysis. This meant that much of what was to be said had to be seen in the light of problems shared by both Italy and the United States.

John and I were perfectly aware of the fact that, although a country's legal system is an essential part of its cultural heritage—indeed a fundamental expression of the country's political and social philosophy—the study and teaching of the law in national universities tended to be too rigidly nationalistic and narrowly norm-oriented—or, as was the case for the United States, "judicial doctrine oriented"—largely neglecting the sociological, economic, political, and more generally functional, cultural, and humanistic aspects of law and the legal system. We were also convinced that comparative analysis had an important role to play in counteracting that tendency, for it is a highly effective means of arriving at a perception of the purposes and functions of law within a society.

Our book was not to be a detached, "neutral" description of data; rather, it was to be a battlecry for reform in thinking about and teaching the law. To be sure, the immediate targets of our criticism were to be the many obsolete elements of a system, the Italian, which was still very deeply rooted in and marked by the characteristics of an agricultural, pre-industrial, nonegalitarian, indeed essentially nonliberal society, even though such features were in stark contrast with a modern, civil-libertarian, socially minded Constitution that had just emerged from the ruins of dictatorship and war. (It should be remembered that, although the Constitution has been formally in force since 1948, it is only since 1956 that Italy has had an effective system of adjudication to enforce the Constitution, and, most particularly, the Constitution's liberal bill of rights.) Beyond such immediate targets, however, was the felt need for an overall attack against the traditionalism, the dogmatism, the sheer normativism or doctrinalism of the method of legal education then prevailing in Italy—a method not

without impact, albeit under different aspects, in America as well. Thus, John's choice of Italy as the focus for "beginning work in comparative law" was amply justified: for, on the one hand, those features of legal education were particularly accentuated in that country; on the other hand, Italy represented a typical case of a juxtaposition of "conflicting legal systems within a legal system"—the modern Constitution against the resistance of a sticky body of pre-constitutional law, approaches, and institutions.

There were, however, other very good reasons for John's choice. One of his great and lasting merits as a master comparativist has been his prompt understanding of the fact that, even in those rare American law schools then already offering some courses on comparative law, there was a gap, and indeed perhaps a basic error, in their usual approach to the study and teaching of that law. With one or two exceptions mainly limited to the law of the socialist countries (or some of them), comparative law teaching was not only Eurocentric, but centered exclusively on France or Germany, or both, as if those countries were adequately representative of the civil law tradition. As John and others have by now amply demonstrated, this was mistaken both historically and culturally.

It was mistaken because most of the creative eras of the civil law tradition found their focal point in the Mediterranean peninsula: Roman law with its grandiose millennium of evolution and proliferation; the renaissance of Roman law with the *jus commune* of the late Middle Ages; the *jus canonicum;* the *jus mercatorium* developed by the practices and institutions of the merchants; and, last but not least, the powerful integrational impact of teaching and learning in the universities modeled after the Bolognese Law School archetype of the Glossators and Commentators. A basic feature of all these layers of the civilian tradition was their "universal" character: Roman law, *jus commune, jus canonicum, jus mercatorium,* and university teaching all affirmed themselves as of universal, and not purely local or national, validity. It was only with the emergence of the nation states that law was conceived, more and more, as the legal order of a particular nation, and the state was seen as, essentially, the sole, omnipotent, arbitrary producer of that "positive law." This gradual transformation of the concepts of law and the legal order found its early proponents in the late fifteenth and sixteenth centuries in some of the humanists as well as the first theoreticians of the idea of the nation state—led by such towering Italian, indeed Florentine, figures as Politian (the master humanist) and Machiavelli, the founder of the modern theory of the state, "the philosopher who had broken away from all scholastic methods and tried to study politics according to empirical methods."[1]

There has been, of course, a further layer in the civil law tradition, one that was anticipated by the humanists and the early politologists, but which found its

[1] *Ernst Cassirer,* The Myth of the State (1946) 119.