Comparative Private Law

Editors

Markus Müller-Chen Christoph Müller Corinne Widmer Lüchinger

Contributors

Patrick Brozzo Sandra Hotz Christoph Müller Markus Müller-Chen Olivier Riske Eveline Schneider Kayasseh Corinne Widmer Lüchinger



Table of Contents

Par	t One: Introduction to Comparative Private Law	1
Cha	apter 1: What is Comparative Law?	3
I.	The Meaning of Comparative Law	3
	A. 'Comparative law' defined	3
	1. Difficulties of a definition	3
	2. What comparative law is not	4
	a. Comparative law is not a 'law'	4
	b. Comparative law is not merely a process	4 6
	 c. Comparative law is not merely 'comparative legislation' B. Neighbouring disciplines 	9
	1. Foreign law studies	9
	 Legal history and sociology of law 	10
	3. Private international law	10
	a. General remarks	10
	b. The problem of classification	12
	c. The ordre public exception	15
	d. Application of foreign law	16
	e. Unification of private international law	18
••	4. Public international law	19
II.	The Origins of Comparative Law in Europe	20
	A. Continental Europe	20
	B. England	24
III.	Purposes and Benefits of Comparative Law	25
	A. Introduction	25
	1. The point of the question	25
	2. Purposes and benefits in academia	26
	3. Purposes and benefits in legal practice	28
	B. A tool for the legislator	29
	1. Historical development	29
	2. Purpose	29
	3. Scope of application of comparative law	30
	a. New domestic legislation	30
	b. Ratification of international law	30
	c. Reconstruction of a legal system	31
		-

			Some examples a. Switzerland b. Nordic countries c. Common law countries d. European Union A cautionary word	32 32 32 33 33 33
	С		tool for the judiciary	34
	с.	1.	 Relevance of comparative law in the courtroom a. Interpreting and filling the gaps in domestic law aa. In general bb. The Swiss model b. Applying uniform law or a provision derived from international law Examples a. Swiss Federal Supreme Court b. European Court of Justice c. Tribunals in international arbitration 	34 34 34 36 37 38 38 38 38 39
			d. US courts	40
	D.		tool for legal practitioners	41
			International legal service providers	41
			Comparative law and international commercial contracts	41
	_		Advising clients and choosing the applicable law	43
	E.		tool for harmonisation and unification	43
			Introduction	43
			Methodology and examples	45
		3.	The harmonisation and unification of the law within the European Union	48
			a. The example of the Draft Common Frame of Reference	48
			aa. Political context	48
			bb. Academic contribution	49
			cc. Contents	50
			dd. Impact	53
			b. Other examples	54
Cha	pte	er 2	: How to Compare	57
I.	Int	trod	luction	57
II.	M	etho	od of Functionality	57
			troduction	57
	B.	Tł	e negative aspect of functionality	59
			e positive aspect of functionality	60

	D. Micro-comparison and macro-comparison	61
	E. Criticism	63
III.	Economic Analysis	65
IV.	Setting of a Working Hypothesis	68
	A. Introduction	68
	B. The factual approach	69
	C. The legal approach	70
V.	Scope and Strategy of Comparison	71
VI.	Choosing the Legal System(s) to Compare	72
	A. Terminology	72
	B. Introduction	74
	C. The prevailing classifications	76
	D. Previous classification attempts	79
	E. Variations and criticism of the doctrine of legal families	81
	F. Further proposals	85
	G. Mixed legal systems	87
VII.	Description of the Findings	90
VIII	. Explanation of Similarities and Differences	91
IX.	Evaluation of the Findings	93
Cha	pter 3: Transplanting and Receiving Legal Concepts	97
I.	Introduction	97
II.	Terminology	98
III.	The Theory of Legal Transplants and its Challenges	99
	A. Theory of legal transplants	99
	B. Challenges	100
	C. Assessment	100
IV.	Types of Transplants	101
	A. Voluntary transplants	102
	B. Imposed transplants	103
	C. Semi-voluntary transplants	103
	D. Factual transplants	105

V.	Pitfalls of (Semi-)Voluntary Transplants and Ways to Overcome Them	106
	A. Starting point	106
	B. Potential pitfalls and some remedies	106
VI.	Extent of Legal Transplants	109
	A. Transplanting an entire code	109
	B. Transplanting a singular legal concept or rule	110
VII.	Convergence and Uniformity through Legal Transplants?	110
	A. In general	110
	B. Globalisation and convergence of legal systems	111
	1. Notion of globalisation	111
	2. Effects of globalisation	111
VIII.	. Some Classic Examples of Legal Transplants	113
	A. The reception of Roman law in Europe	113
	1. In general	113
	2. Reception of Roman law in Germany and France	115
	B. Reception of the French and German Civil Codes	117
	1. Reception of the French Civil Code	117
	2. Reception of the German Civil Code and legal scholarship	118
	C. Diffusion of the Common law	120
	1. General development	120
	2. Expansion into specific countries	122
	D. European private law	123
	1. Preliminary remarks	123
	2. European private law as consumer law	124
IX.	Reception of the Swiss Civil Code in Modern Turkey	125
	A. Introduction	125
	B. History of the Turkish reception from the Ottoman Empire to the Turkish Republic	126
	C. Reception of the Swiss Civil Code: reasons and challenges	131
	D. Deviations from the Swiss Civil Code at the time of reception	134
	E. Law and social realities	135
	F. Developments after reception	137
	1. First phase (1926–1980)	137
	2. Second phase (1980–2002)	138
**	3. Third phase (2002-today)	139

	G. Aspects of cross-fertilisation	140
	H. Reception in Turkey of the abandoned Swiss Draft Tort Reform Proposal	1 141
	1. Introduction	141
	2. Grounds for reception	142
	3. Introduction of a general clause of strict liability for abnormally dangerous activities	144
Pa	t Two: Selected Legal Systems	
Ch	pter 4: Civil Law	151
I.	Introduction	151
	A. Terminology	151
	B. Geographic occurrence of Civil law	151
II.	Characteristic Elements of Civil Law	153
	A. In general	153
	1. Legal historical development	153
	2. Ways of thinking and communicating	154
	3. Codifications and statutory interpretation	154
	a. Codifications	154
	b. Statutory interpretation	156
	4. The public and private law dichotomy	158
	B. Sources of law	160
	 Primary sources of law Law enacted by the legislator 	161 161
	b. Custom	161
	2. Secondary sources of law	163
	a. Case law	163
	b. (Established) doctrine	166
	C. Predominant methods of dispute resolution	167
	1. Introductory remarks	167
	2. Court structure	168
	a. Overview	168
	b. Selected examples	170

		3.	Enforcement of private rights and obligations	172
			a. Civil proceedings	172
			b. Appellate proceedings	173
			c. Main differences between Civil and Common procedural law	174
			aa. No trial, no jury	174
			bb. Distribution of court costs and lawyers' fees	175
			cc. No contempt of court	177
			dd. Style of judgment	177
	n	Da	d. Alternative dispute resolution (ADR)	178 178
	D.		incipal players in the legal world and their role	
			Overview	178
			Legal scholars	180
		3.	Judges in Civil law countries	. 181
III.	Ill	ustr	ative examples	182
	A.	Ge	ermany	182
		1.	History	182
		2.	Political system	184
			a. Basic principles of State	184
			b. Organisation of the State	185
		3.	Economic system	185
		4.	Legal system	186
			a. German Civil Code	186
			b. Civil court structure in Germany	187
			c. Legal education	187
	B.	Fr	ance	188
		1.	History	188
			a. Pre-revolutionary period	188
			b. French Revolution	189
			c. 19th and 20th centuries	189
		2.	Political system	190
			a. Semi-presidential republic	190
			b. Government	191
			c. Parliament	191
		3.	Economy	191
		4.	Legal system	192
			a. French Civil Code	192
			b. Civil court structure in France	193
			aa. Ordinary courts	194
			bb. Special courts	194
			cc. The Cour de cassation	195
•			c. Legal education	195

.

	C.	Switzerland	197
		1. History	197
		2. Political system	198
		a. Brief overview	198
		b. Parliament (Bundesversammlung, Assemblée fédérale,	
		Assemblea federale)	199
		c. Government (Bundesrat, Conseil fédéral, Consiglio federale)	199
		3. Economy	200
		4. Legal System	201
		a. Civil Code and Code of Obligations	203
		b. Judicial structure	204
		c. Legal education	205
Ch	apte	r 5: Common Law and Related Systems	207
I.	Inti	roduction	207
	A.	'Common law' defined	207
	B.	Geographic distribution	210
		1. The reach of the Common law	210
		2. The Commonwealth of Nations	211
	C.	History of the Common law	211
		1. Introductory remarks	211
		2. History of English law	213
		a. The Norman Conquest	213
		b. 'Law French'	214
		c. The system of writs	215
		d. Common law and equity	218
		e. English (resistance against the) codification movement	219
		f. Developments in the 19th century	221
		3. The British Empire (1583–1914)	221
II.	Cha	aracteristics of Common Law Systems	222
	А.	Overview	222
	В.	Sources of law	223
		1. In general	223
		2. Case law	224
		a. Common law and equity	224
		b. Doctrine of binding precedent	224
		c. Style of cases	227
		d. Law reporting	228

	3. Legislation	229
	4. Custom	231
	C. Civil procedure	231
III.	The English Legal System	232
	A. A note on terminology	232
	B. Political and economic framework of the United Kingdom	233
	1. Introductory remarks	233
	2. Political structure	233
	3. Economic framework	234
	4. Current trends and challenges in society	235
	C. Judicial system in the United Kingdom	237
	1. Overview	237
	a. Court system	237
	b. Tribunal system	238
	2. The courts of England and Wales	239
	D. Sources of English law	241
	1. Overview	241
	2. Judicial precedent (case law)	242
	3. Legislation	242
	4. International law	243
	5. Custom	244
	E. Legal education and profession	244
	1. Introductory remarks	244
	2. Barristers and solicitors	245
	3. University law degree	247
IV.	The US Legal System	247
	A. Introduction	247
	B. Historical development	248
	1. Law in the colonies	248
	2. American independence	249
	3. Developments in the 20th century	250
	C. Political and economic framework of the USA	251
	1. Political structure	251
	2. Economic framework	252

D. Judicial system in the USA	253
1. Overview	253
2. Jurisdiction and venue	254
a. Subject-matter jurisdiction	254
b. Personal jurisdiction	256
c. Venue	257
d. Doctrine of forum non conveniens	257
3. Federal court system	258
4. State court system	260
E. Sources of US law	261
1. Overview	261
2. Common law and equity	262
3. Federal law	262
4. State law	263
a. Scope and contents	263
b. Unifying instruments	264
5. International law	266
6. Custom	266
F. Legal education and profession	267
G. US civil procedure and access to justice	268
1. Overview	268
2. Jury trial	268
3. American Rule	269
4. Contingent Fees	270
5. Class actions	270
Related Legal Systems	271
A. Overview	271
B. The example of Scotland	272
1. Introductory remarks	272
2. History	272
3. Judicial system in Scotland	273
4. Characteristics of Scottish law	275

V.

.

Cha	pter 6: Private Laws in East Asia	277
I.	Introduction	277
II.	Facts, Terminology and Legal Cultures	278
	A. Basic data	278
	B. Terminology and legal cultures	280
	1. Is there an 'East Asian legal culture'?	280
	2. The notion of 'rights'	281
	3. Attitudes regarding contractual disagreements and dispute resolution	284
	C. Access to legal information	285
III.	Historical Legal Context and Recent Trends	286
	A. Japan	286
	1. First legal codes	286
	2. Meiji period (1867–1912)	288
	3. The Japanese Civil Code: Minpô	289
	B. South Korea	290
	1. Chinese influence	290
	2. Joseon Dynasty (1392–1910)	290
	3. Colonial period: The Joseon Ordinance on Civil Matters (1913)	292
	4. The South Korean Civil Code: Minbeop	293
	C. China	294
	1. Early legislation, <i>Li</i> and <i>Fa</i>	294
	2. Qing Dynasty (1644–1911)	296
	3. Republic of China (1912–1949): the Minfa	297
	 The People's Republic of China since 1949: the general principles of civil law 	298
	D. Recent trends: civil codes in revision or evolution	299
	E. Synthesis: legal plural systems or hybrid systems	304
IV.	Institutional Context	307
	A. Japan	307
	1. Primary sources of law and legislative bodies	307
	2. The judicial system	308
	3. Other dispute resolution methods	312

.

	B. South Korea	314
	1. Primary sources of law and legislative bodies	314
	2. The judicial system	316
	3. Other dispute resolution methods	320
	C. China	322
	1. Primary sources of law and legislative bodies	322
	2. The judicial system	326
	3. Other methods of dispute resolution	330
V.	Case Histories	332
	A. Mariko Fuji's employment contract (Japan)	332
	1. Contract story	332
	2. Primary legal sources	332
	3. Social practices at the workplace	334
	4. Mimoto hoshô-shô	335
	B. Long-term commitment of Dong Bang Shin Ki (South Korea)	336
	1. Contract story	336
	2. Case history	337
	3. Primary legal sources	337
	4. Context of the 'social order'	338
	C. Lu Shi's remedies (PRC)	340
	1. Contract story	340
	2. Primary legal sources	340
	3. Realities	344
	D. Summary	345
VI.	Concluding Remarks	346
Cha	apter 7: Legal Systems Influenced by Religion	349
I.	Introduction	349
	A. What is religious law?	349
	B. Geographic scope	349
	C. Coordination of religious law and secular law	352
	D. 'Islamic law' and 'Jewish law'	353
	E. 'Islamic Law' and 'Jewish Law' as a kind of Common law?	354
		

II.	Legal Systems Influenced by Islamic Law	355
	A. History of Islamic law	355
	1. Pre-Islamic Arabia and the advent of Islam	355
	2. The Rightly-Guided Caliphs	357
	3. The schism of Islam and the Umayyad Empire	357
	4. The formation of the Sunni Schools of law	358
	5. The age of <i>taqleed</i>	360
	6. The modern era: the formation of hybrid legal systems in the Middle East	360
	B. Notion of Islamic law	362
	C. Sources of Islamic law	362
	1. Introduction	362
	2. Primary sources	363
	3. Secondary sources	364
III.	Legal Systems in the Arabian Peninsula	365
	A. Introduction	365
	B. Historical development of the Gulf States	368
	1. Judicial and legal structure in early Arab Gulf societies	368
	Assertion of British extra-territorial jurisdiction in the Gulf States	369
	3. Legal reform before and after independence	372
	a. 1920s – late 1950s	372
	b. The years following independence	373
	C. Historical development of Saudi Arabia	377
	1. The rise of the <i>Āl Sa 'ūd</i> Dynasty	377
	2. The emergence of the modern Saudi State	378
	3. Political reform after the Gulf Wars	380
	D. Origin and role of the law-making and executive bodies	381
	E. Sources of law	384
	1. Classical Islamic law	384
	2. Law enacted by the legislator	387
	3. Customary law	389
	4. Case law	390
	5. Legal literature	391
	F. Legal transplants	391

	G. Dispute resolution mechanism	393
	1. Historical development	393
	a. The Gulf States	393
	b. Saudi Arabia	396
	2. Modern court system	396
	a. The Gulf States	396
	b. Saudi Arabia	399
	3. Alternative dispute resolution	400
	H. Legal education and profession	401
	I. The influence of religious law on private law matters	403
	1. Civil and commercial law	403
	2. Personal status matters	408
	J. Summary	411
IV.	The Israeli Legal System	411
	A. Introduction	411
	B. History and sources of Jewish law	413
	1. History	413
	2. Sources	416
	C. Founding of the State of Israel	417
	D. Israeli private law: a brief overview	417
	1. Characteristics of Israeli law	417
	2. Jurisdiction of civil courts	418
	3. Jurisdiction of religious courts	419
	E. Personal status matters in today's Israel: Jewish marriage law	
	as an example	421
	1. Introduction	421
	2. Prerequisites for marriage	421
	3. Marriage formalities	423
Ann	iex: Guidelines for Writing a Paper in Comparative Private Law	425
I.	Introduction	425
II.	Methodology	425
	A. Starting point	425
	B. Structure	426
	C. Reports setting out the law of the chosen legal systems	427

	D. Comparison	428
	E. Summary	428
III.	Hands-on Tips	428
	A. Choosing a topic	428
	B. Scope of comparison	429
	C. Processing case law and literature	429
	D. Documentation	430
	E. Citations	430
	F. Style	431
	G. Major Pitfalls	432
IV.	Conclusion	433
Index		435