# **Comparative Private Law**

#### **Editors**

Markus Miiller-Chen Christoph Miiller Corinne Widmer Liichinger

#### Contributors

Patrick Brozzo
Sandra Hotz
Christoph Miiller
Markus Miiller-Chen
Olivier Riske
Eveline Schneider Kayasseh
Corinne Widmer Liichinger

## **Summary of Contents**

Index of Abbreviations	xxiii
Bibliography	xxxi
Part One: Introduction to Comparative Private Law	1
Chapter 1: What is Comparative Law?	3
Chapter 2: How to Compare	57
Chapter 3: Transplanting and Receiving Legal Concepts	97
Part Two: Selected Legal Systems	147
Chapter 4: Civil Law	151
Chapter 5: Common Law and Related Systems	207
Chapter 6: Private Laws in East Asia	277
Chapter 7: Legal Systems Influenced by Religion	349
Annex	425
Index	435

Pai	rt 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
	c. Comparative law is not merely 'comparative legislation'	6
	B. Neighbouring disciplines	9
	1. Foreign law studies	9
	2. Legal history and sociology of law	10
	3. Private international law	10
	a. General remarks	10
	b. The problem of classification	12
	<ul><li>c. The <i>ordre public</i> exception</li><li>d. Application of foreign law</li></ul>	15 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

		4.	Some examples	32
			a. Switzerland	32
			b. Nordic countries	32
			c. Common law countries	33
			d. European Union	33
		5.	A cautionary word	33
	C.		tool for the judiciary	34
		1.	Relevance of comparative law in the courtroom	34
			a. Interpreting and filling the gaps in domestic law	34
			aa. In general	34
			bb. The Swiss model	36
		2	b. Applying uniform law or a provision derived from international law	37
		2.	Examples	38 38
			<ul><li>a. Swiss Federal Supreme Court</li><li>b. European Court of Justice</li></ul>	38
			c. Tribunals in international arbitration	39
			d. US courts	40
	D.	A	tool for legal practitioners	41
		1.	International legal service providers	41
		2.	Comparative law and international commercial contracts	41
		3.	Advising clients and choosing the applicable law	43
	E.	A	tool for harmonisation and unification	43
		1.	Introduction	43
		2.	Methodology and examples	45
		3.		
			European Union	48
			a. The example of the Draft Common Frame of Reference	48
			aa. Political context bb. Academic contribution	48 49
			cc. Contents	50
			dd. Impact	53
			b. Other examples	54
Cha	ıpte	r 2	: How to Compare	57
I.	Int	rod	luction	57
II.	Me	etho	od of Functionality	57
	A.	In	troduction	57
	B.	Th	ne negative aspect of functionality	59
			ne 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.	Pit	falls of (Semi-)Voluntary Transplants and Ways to Overcome Them	106
	A.	Starting point	106
	B.	Potential pitfalls and some remedies	106
VI.	Ex	tent of Legal Transplants	109
	A.	Transplanting an entire code	109
	B.	Transplanting a singular legal concept or rule	110
VII.	Co	onvergence 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.	So	me 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
	В.	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.	Re	ception 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.	As	pects of cross-fertilisation	140
	Н.		ception in Turkey of the abandoned Swiss Draft Tort Reform	141
			Introduction	141
			Grounds for reception	141
			•	142
		3.	Introduction of a general clause of strict liability for abnormally dangerous activities	144
Pa	rt T	'wo	: Selected Legal Systems	
Ch	apte	er 4	: Civil Law	151
I.	In	trod	uction	151
	A,	Te	rminology	151
	В.	G	eographic occurrence of Civil law	151
II.	Cł	nara	cteristic 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
	В.	Sc	ources of law	160
		1.	Primary sources of law	161
			a. Law enacted by the legislator	161
			b. Custom	162
		2.	Secondary sources of law	163
			<ul><li>a. Case law</li><li>b. (Established) doctrine</li></ul>	163 166
	0	ъ		
	C.		edominant methods of dispute resolution	167
		1.	Introductory remarks	167
		2.	Court structure	168
			<ul><li>a. Overview</li><li>b. Selected examples</li></ul>	168 170
			o. Selected examples	1/0

		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
	_	_	d. Alternative dispute resolution (ADR)	178
	D.		incipal players in the legal world and their role	178
			Overview	178
		2.	Legal scholars	180
		3.	Judges in Civil law countries	181
II.	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
	В.	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.	Sw	vitzerland	197
		1.	History	197
		2.	Political system	198
			a. Brief overview	198
			b. Parliament (Bundesversammlung, Assemblee federate, Assemblea federate)	199
			c. Government (Bundesrat, Conseilfederal, Consiglio federate)	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.	Int	rod	uction	207
	A.	'Co	ommon law' defined	207
	B.	Ge	ographic distribution	210
		1.	The reach of the Common law	210
		2.	The Commonwealth of Nations	211
	C.	His	story 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
			<ul><li>e. English (resistance against the) codification movement</li><li>f. Developments in the 19th century</li></ul>	219 221
		3.	The British Empire (1583-1914)	221
II.	Ch		eteristics of Common Law Systems	222
11.			rerview	222
			urces of law	223
	В.	~ -	*********	223
			In general	
		2.	Case law	224 224
			<ul><li>a. Common law and equity</li><li>b. Doctrine of binding precedent</li></ul>	224
			c. Style of cases	224
			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
	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

253
253
254
254
256
257
257
258
260
261
261
262
262
263
263
264
266
266
267
268
268
268
269
270
270
271
271
272
272
272
273
275

V.

Cha	apter 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
	<ol> <li>Attitudes regarding contractual disagreements and dispute resolution</li> </ol>	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: <i>Minpd</i>	289
	B. South Korea	290
	1. Chinese influence	290
	2. Joseon Dynasty (1392-1910)	290
	3. Colonial period: The <i>Joseon</i> Ordinance on Civil Matters (1913)	292
	4. The South Korean Civil Code: <i>Minbeop</i>	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
	4. 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 hosho-sho	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	
	A. Introduction	
	B. Historical development of the Gulf States	368
	1. Judicial and legal structure in early Arab Gulf societies	368
	2. Assertion of British extra-territorial jurisdiction in the	260
	Gulf States	369
	Legal reform before and after independence     a. 1920s-late 1950s	372 372
	b. The years following independence	372
	C. Historical development of Saudi Arabia	377
	1. The rise of the <i>AI Sa'ud</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	e 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	ex:	Guidelines for Writing a Paper in Comparative Private Law	425
I.	Int	roduction	425
Π.	Methodology		
	A. Starting point		
		Structure	425 426
	C.	Reports setting out the law of the chosen legal systems	427

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