## PART I: GENERAL ASPECTS OF COMPARATIVE LAW

Chapter 1. Introduction: What Is Comparative Law?	3
A. Doing Comparative Law: An Overview	
I. Comparative Law and Foreign Law Studies	3 4 4 5 6 7 7 9
1. Determining the Relevant Law	4
2. Comparison and Evaluation	5
3. National Reports and General Reports	6
4. "Foreign Law Studies" Does Not Exist	7
II. Functional Comparative Law	7
III. Individual Comparison and Type Comparison	9
B. Comparative Law and Other Disciplines	10
I. Legal Translation	10
II. Legal History	12
III. Sociology of Law	15
IV. Legal Ethnology, Legal Ethology, Legal Anthropology	17
1. Legal Ethnology	17
2. Legal Ethology	19
3. Legal Anthropology	19
V. Private International Law (Conflict of Laws)	20
VI. Comparative Politics	23
C. Comparative Law as an Independent Discipline: A Never-Ending Story	27
I. A Play on Words	27
II. Method or Independent Legal Discipline?	28
1. An Insignificant Question	28 28
2. Investigating the Historical Relations Between Legal Systems	29
3. Microcomparison as Method, Macrocomparison as Science?	30
D. Modesty in Comparative Law	31
E. Comparative Law in Many Fields of Law	34
I. Universality of Comparative Law	34
II. Ideology and Comparative Law	36
From Impartiality to Value Judgments	36
a) Political Values in Public Law and Beyond	36
b) Political Character and <i>Praesumptio Similitudinis</i>	37
c) Human Rights as a Yardstick	38
2. Universality and Relativity of Human Rights	39
a) Human Rights as Western and Individualistic Values	40
b) Human Rights as Claims	41
c) The Struggle for Human Rights—Independent of Culture and Religion	
d) Universality and Specific Circumstances	43
-,	-0
Chapter 2. Aims of Comparative Law	45
A. No Need for Justification	45
B. General Aims and Direct Uses of Comparative Law	46
I. Communication	47
Confidence on (Legal) Culture	47
2. Cultural Imperialism in Law	48
3. Legal Practice	50
J. Legal Hactice	50

	51
II. Significance for Legal Education	53
III. Improved Understanding of National Law	54
IV. Legislation and Comparative Law	54
Foreign Legal Influence in General     Foreign Legal Influence	5 <del>4</del>
a) Typical Examples of Foreign Legal Influence	55
b) Influence Beyond National Law	56
Taillean and Unen Unchulus	57
d) Foreign Legal Influence: Reasons and Empirical Importance	50
d) Foreign Legal Influence: Teachers	59 60
Legal Transplants     a) Typical Questions About Legal Transplants  All Provides:  All Provides:	62
a) Typical Questions About Legal 2-1-1	
b) Are Legal Transplants at All Possible?	63
c) Categories of Legal Transplants	64
<ul><li>3. Unification and Harmonization of Laws</li><li>a) Harmonization of Laws: Universal, European, Regional</li></ul>	64
	65
<ul><li>b) Uniform Laws, Model Laws</li><li>c) Setting an Example in Europe: The Principles of European Contract Law</li></ul>	66
	69
V. Interpretation and Comparative Law  1. Interpretation of Law with Foreign Elements: Comparative Interpretation in	(0
	69
a Wider Sense 2. Interpretation of Genuinely National Law: Comparative Interpretation in	
2. Interpretation of Genuinely National Law. Company	72
a Narrower Sense	72
a) The Traditional Call for Comparative Interpretation  a) The Traditional Call for Comparative Interpretation  The Traditional Call for Comparative Interpretation	
a) The Iraditional Call for Comparative and the "Fifth Method b) The Paradigm of Textual Evolution and the "Fifth Method	73
of Interpretation"	73
c) Toward a Cultural and Comparative Interpretation	75
d) Again: The Problem of National Autonomy	78
d) Again: The Problem of National Actions  e) Facilitating Interpretation in Difficult Cases: Classic Examples	81
3. Practical Problems and Solutions  GLavar Public International Law and EU Law	83
3. Practical Problems and Solutions VI. Comparative Law as a Source of Law: Public International Law and EU Law	
	87
Chapter 3. The Comparative Method	87
A The Methodological Problem of Comparative Law: All Overview	88
B. The Starting Point: Functional Comparison	90
C. Criticizing Functional Comparison	90
I. Criticizing the Process	90
1. The Function in Law	91
2. The Process of Comparison	92
3. The Cultural Context	92
4. Neutrality	94
II. Criticizing the Background	94
1. Fixation on Unity	94
2. Positivism, Not Realism	95
3. Goal Definition	96
4. Isolation	97
	97
1 The Problem of Description and Self-Description of Tossard	98
2 Basic Concepts of Postmodern Infliking	99
3. Postmodern Criticism of Comparative Law	102
D. Alternatives to Functional Comparison	102
T TT : .: of the ( 12001021 ADD) ( ) dCII	102
1. Determine, Understand, Compare: A 3-Phase Model	102
2. Practical Instructions in Eight Steps	104
a The Theory of Legal Formants	106
a) Formants and the Multiple Layers of Legar 2222	108
b) Of Preaching to the Choir, and its Dangers	100
D) 01120009	

Contents	xiii
4. Dialectical Comparison	110
a) Comparison as an Evaluative Circular Process	110
b) Dialectics as Reality	111
II. Partial Modifications	112
1. Comparative Law and Economic Analysis	112
a) Economic Analysis of Law	112
aa) Liability as an Example	113
bb) Basic Ideas and Basic Terminology of Economic Analysis	114
b) Economic Analysis in Comparative Law	117 119
c) Criticizing Economic Analysis	119
<ul><li>(1) Of Fish and Smoke: Two Examples</li></ul>	119
(2) <i>Homo Economicus</i> and Thinking in Models	120
(3) Efficiency Criteria	122
(4) Monetization and Justice	123
(5) Treatment of Alternative Criteria	126
(6) Psychology, Didactics, and a Self-Fulfilling Prophecy	128
bb) Problems of an Economic Approach in Comparative Law	129
2. Conceptual Comparison	130
a) Modeling and Comparing: A Program in Two Phases	130
b) Importance and Influence of the Model	132
3. Statistical Comparison	134
a) Numerical Representation and Correlation of Law	134 136
b) The Devil in the Detail	136
<ul><li>aa) Reduction of Complex Facts to Simple Numbers</li><li>bb) Insinuating Scientific Precision</li></ul>	139
cc) Causalities	140
dd) Influences of Economic and Legal Policies	141
III. Different Aims	143
1. Legal Transplants	143
2. Comparative Jurisprudence	144
3. Legal Traditions	146
a) The Openness of Traditions	146
b) The Terminology of Legal Traditions	148
4. Big Issues	149
IV. And Postmodernism?	151
Toward a Contextual Comparison	152 152
I. Searching for Methods and Theories	152
1. In Search of the Recipe	153
<ul><li>2. Analytical Approach vs. Hermeneutics</li><li>a) Analytical and Historical Questions</li></ul>	154
b) Historical Questions and Hermeneutical Methods	156
c) Hermeneutics and Comparative Law	158
3. Comparative Law and Legal Methods	160
II. The Variety of Comparative Questions: A Typology	162
1. Classic Comparison: Comparing Problems and Comparing Concepts	162
2. Comparing the Operating Conditions of Law	164
3. Typical Sub-Questions	164
4. Voluntary Reference to Foreign Legal Ideas	165
5. Mandatory Comparisons	165
6. Abstract and Systematic Questions	166 166
III. Objectives and Limits of the Functional Method	166
<ol> <li>The Essence of Functional Thinking and its Caricature</li> <li>a) Functionalism: Self-Image and Perception by Others</li> </ol>	166
b) Ignoring the Diversity of Cultures and Functions?	167

E.

c) Fixation on Unity? d) Neutral Perspective?  2. Limits of Functional Thinking a) Limited Questions b) Exaggerated Conclusions 3. Different Styles of Thinking  IV. Context Comparison as the Common Element V. Unity in Diversity: A System of Mistakes in Comparative Law 1. Mistakes in Capturing Terms a) Problems of Reading and Translation b) Problems of Sources c) Understanding a Term's Content d) Prior Understanding of Terms: The Significance 2. Ignoring Functional Equivalents 3. A Narrow Field of Vision a) The Doctrinal Setting aa) Relativizing Differences bb) Typical Misinterpretations b) The Cultural Setting aa) Role of Law and Legal Institutions bb) Legal Thinking and Legal Tools c) Extra-Legal Aspects 4. Seeing Through National Lenses: Rule vs. Exception 5. Law in Books, Law in Action, and Law in Debate VI. Writing a Comparative Law Study: Some Practical Remarks 1. Possible Structures of a Classical Comparative Study a) Simple Juxtaposition and Comparison b) Dovetailed Comparison	168 168 170 170 171 173 173 174 175 175 176 177 179 180 180 180 180 181 182 182 183 185 185 185 186 188 189 189 192 193
c) Description from a Native Legal Perspective  2. A Classic Way to Proceed  a) Finding a Topic  b) Reading and Familiarizing  c) Studying Foreign Sources  d) Differences, Similarities, and Preliminary Structures  e) Broadening the View	194 194 195 196 198 199 200
f) Final Structure and Writing a First Draft  Chapter 4. Legal Families, Legal Culture, and Context  A. The Idea of Legal Families  B. Some Approaches to Legal Families  I. Conventional Classifications  II. Unusual Classifications  III. Hierarchical Classifications  IV. On Terminology: Legal Families, Legal Systems, Legal Groups  C. Sense and Nonsense of Classifications  I. Classification as a Scientific Task?  II. Choosing Foreign Legal Systems and Saving Effort?  III. Understanding the Context  IV. Didactics  V. Further Points of Criticism  VI. Practical Importance of Legal Families  D. The Debate on Legal Culture  I. The Comparative Starting Point  II. The Debate in Legal Sociology  1. Multitude of Definitions	201 201 201 201 203 204 204 205 205 206 208 208 208 210 211 211 212 212

Contents	XV

<ol> <li>The Dispute about the Purpose         <ul> <li>a) Theory vs. Pragmatism</li> <li>b) Further Problems of Legal Culture</li> </ul> </li> <li>III. Consequences for Comparative Law         <ul> <li>1. Different Interests and Different Approaches in Legal S</li> <li>2. The Specifically Legal Approach</li> </ul> </li> <li>E. A Pragmatic Contextual Perspective         <ul> <li>I. Context, Not Culture</li> <li>II. Exemplary, Not Ideal-Typical Approach</li> <li>III. Elements of Context</li> <li>1. Relative Importance of Historical Aspects</li> <li>2. Non-Legal Elements and Their Determination</li> <li>3. Multitude of Factors</li> </ul> </li> </ol>	214 214 216 216 216 218 220 220 221 222 222 222 223
PART II: THE CONTEXTS OF LEGAL SYSTEMS	
Chapter 5. The Context of Common Law	227
A. Common Law as Case Law	227
I. The Notion of "Common Law"	227
II. The Classic Core of Common Law	228
1. Development by Cases	228
a) Inductive Thinking: Of Colorful Walls	229
b) Legal Development in Common Law: The Snail in	the Bottle 232 238
2. Precedent and Distinguishing	239
a) Ratio Decidendi and Obiter Dictum	240
b) Hierarchy of Courts	240
c) Distinguishing	242
d) Persuasive Precedent  3. The Role of Statutes	242
4. The Role of Academic Literature	243
III. The Common Law Mindset	246
	246
1. Common Law as Judge-Made Law	247
2. Cases as Arguments	247
3. Procedural Orientation	249
<ul><li>4. System, Abstract Reasoning, and Law</li><li>5. Law and Fact</li></ul>	251
B. Historical Development	253
I. Formation of the Common Law After 1066	253
II. The Royal Courts in Westminster	254
III. Writs	256
Characteristics and Creation of Writs	256
Procedural vs. Substantive Thinking	257
3. End and Continuing Effect of Writs	259
IV. Equity	261
Basic Idea: Equity as a Question of Conscience	261
2. Typical Rules of Equity	262
3. Practical Problems of Equity	263
4. Equity Today	265
C. Courts and Jurists	266
I. Court Structure	266
<ol> <li>England: Complexity and Modernization</li> </ol>	266
a) Tribunals	267
b) Magistrates' Courts, County Courts	268
c) Crown Court	268

D. TT: 1 Court	269
d) High Court	269
e) Court of Appeal	270
f) House of Lords and Supreme Court	272
2. USA: Federal Structure	272
a) State Courts and Federal Courts	273
b) Hierarchy of Federal Courts	273
aa) Federal District Court and Court of Appeals	273
bb) The Appeal Between Fact and Law	274
cc) U.S. Supreme Court	275
c) Federal and State Jurisdiction	275
II. Legal Education	275
- n 1 1	275
a) Between University and Practice: The Historical Development	277
b) University and Practical Phase: Legal Education Today	
c) Legal Education and Social Justice	278
2. USA	278
a) Law School Education and Bar Exam	278
b) Academic Character of the Best Law Schools	279
b) Academic Character of the Best Earl State	280
c) The Case Method: Some Aspects	281
III. Judges and Lawyers	281
1. England: The Power of Tradition	281
a) Judges Between Tradition and Change	281
aa) The Misleading Classic Picture	282
bb) The Style of Judgments	283
cc) The Way to the Bench	284
b) Barrister and Solicitor	284
aa) Traditional Role Allocation	285
bb) Hesitant Erosion of Differences	286
cc) Queen's Counsel	286
2. USA: The Modern Environment	286
a) Lawyers: Serving the Client	
b) Judges: The Political Dimension	287
D. The Common Law Process	288
D. The Common Law 1 locess	288
I. Adversarial Process	288
1. Classic Form	290
2. Critique and Change	291
3. Adversarial vs. Inquisitorial Process?	292
II. Jury	292
1. Fact-Finding and Law-Finding Function of the Jury	293
2. Historical Development of the Jury	295
3. The Jury Between Free Decision and Legal Entrenchment	295
a) Decision Without Reasons	296
b) The Jury Instructions	296
c) Possibility of Legal Review	298
d) Jury Equity	298
4. The Jury: Rooted in its Legal Context	300
E. Typical Aspects of Substantive Law	301
T C Interpretation	301
Statutory Interpretation     Statutory Interpretation as a Central, Controversial Problem	301
2. Classic Rules of Interpretation	_
2 Doubtful Use of Legislative History	303
4. The Otherness of Common Law Statutory Interpretation	304
II Deal Droperty	305
II. Real Property  1. Feudal Roots of Language and Thinking	305
Modern Aspects of Real Estate Law	308
2. Modern Aspects of real Estate ==	

	••
Contents	XVII

		3. Formalistic Structure	309
		4. The Embarrassing Rule Against Perpetuities	310
	III	. Trust	312
		1. Basic Idea of the Trust	312
		2. Flexibility of the Trust	313
		3. Fictional Trusts as a Pragmatic Tool	313
	IV	7. Consideration	314
		1. Consideration and Form	314
		2. Complexities and Contradictions	315
		3. The Opponent: Promissory Estoppel	317
	1	7. Public Law and Private Law	319
		1. The Lack of Administrative Law as a Myth	319
		2. Historical Background: Star Chamber, <i>Dicey, Laissez-Faire</i>	320
		3. The Otherness of Administrative Law Under Common Law	322
		a) Private Law Elements and the Lack of Administrative Courts	322
		b) Substantive Peculiarities	324
	V	. Balancing Civil Rights: Levels of Scrutiny	325
		1. Rational Basis, Strict Scrutiny, Intermediate Scrutiny	325
		2. Prediction of Outcome by Standard of Review	327
	VI	. Judicial Review of Statutory Interpretation by Agencies	329
		1. The Chevron Test	329
		2. Openness of the <i>Chevron</i> Test	331
		nglish or American?—Marked Contextual Differences	333
		Substantive and Institutional Differences	334
		1. Differences in Substantive Law and Their Importance	334
		2. Institutional and Procedural Differences	335
	TI	3. Differences Based on Federal Structure	336
	11	In Particular: Constitutional Law	338 338
		1. Prominent Role of American Constitutional Law	338
		2. Constitutional Law in England?	338
		<ul><li>a) Significance and Existence of English Constitutional Law</li><li>b) Sovereignty of Parliament in Retreat</li></ul>	341
	TI	England Under European Influence	342
		. Jurisprudential Basis: U.S. Legal Realism	344
	11	1. "We Are All Realists Now"	344
		2. Lack of Importance in England	347
	G C	ommon Law in the Rest of the World	348
		Between Anglo and American: The Continuum of Common Law	348
		Some Former Colonies	349
	-	1. Canada	349
		2. Australia	351
		3. New Zealand	353
	II	. And Scotland?	354
OI.			250
Ch		6. The Basic Context of Civil Law	359
		vil Law as a Unitary Context?	359
		gal Thinking in Civil Law	361
	]	. Where Does the Law Come From?—Sources of Law	361
		1. Pre-Eminent Role of Statutes	361
		a) Positivist Attitude	362
		b) Statute, Law, and Democracy	363
		c) No Mechanistic Concept of Statutory Law	365
		d) Varying Notions of "Statute"	366
		2. The Insignificant Rest	367
		a) Customary Law	367

	369
b) Further Sources of Law	371
3. And the Judge?	374
II. Law as a System	374
1 The Idea of Codification	374
a) Are Codes Typical for Civil Law?	375
b) What Is a Code?	376
	376
c) Different Concepts of Code  aa) Differentiation According to the Degree of Reform  aa) Differentiation According to the Degree of Reform  about the Previous Civil Law and Common Law Codes	378
11) Differentiation Delween Civil Law	380
d) The Structure of a Code: Two Examples	380
33) France and the Code Civil	381
bb) Germany and the BGB	383
and The Language of BGB and Com Com	385
2 Systematization and Conceptualization	385
	386
a) Unification of Concepts  b) General Part, Abstract Mindset, Conceptual Pyramids  b) General Part, Abstract Mindset, Cross Language of Statutes	388 390
b) General Part, Abstract Williams, Co. Mental Barriers, Quick Grasp, Language of Statutes	390
3. French Pragmatism	391
a) Similarities from an Outside Perspective	392
b) Differences from an Inside Perspective	392
III. Statutory Interpretation  1. The Aim of Interpretation: Objective and Subjective Theories	394
1. The Aim of Interpretation	394
Methods of Interpretation     a) The Classical Canon of Interpretation     a) The Classical Canon of Interpretation	398
a) The Classical Carlott of Metaps b) Methodological Problems and Repercussions	400
b) Practitioners' Nonchalance	401
3. Begriffsjurisprudenz and Its Successors	404
, n 1 Danallale	404
a) Similar Content, Different Terminology	404
Classical Debate: Ecole at LACKS	406
a) Today's Reality: Methodological (1889)	406
aa) Oscillating Methodology	407
bb) Additional Methods of Interpretation	409
IV. Applying the Law in Practice	409
1. Law and Fact	412
2 Subsumption	412
a) Basic Structure of Subsumption	$\begin{array}{c} 414 \\ 414 \end{array}$
Basic Structure of Substantial     Academic Controversies and Subsumption     Control Way of Thinking	414
c) Subsumption as a General Way of Thinking	417
d) Definitions as Distilled Legal Knowledge	417
3. The Legal Opinion Technique  a) How to Use the Legal Opinion Technique: An Overview  a) How to Use the Legal Opinion Technique: An Overview	418
	419
b) Legal Opinion Technique as Distilled Legal Knowledge c) Fixed Templates as Distilled Legal Knowledge	420
c) Fixed Templates as Distilled Legal Knowledge d) Formative and Practical Impact of the Legal Opinion Technique	421
4. The Technique of <i>Relation</i>	421
Visto a Roldtion	423
thinking in Iching of a remains	424
5. France: Similar Mindset, Different Realization	424
b) Pragmatic Solution Instead of Subsumption and	425
	427
c) Qualification as Interface Between Law and Table	429
V. Legal Authorities	429
1. Judicial Decisions	

	Contents	xix
	a) No Binding Precedent	429
	b) Style of Judgments	432
	aa) France	432
	bb) Germany	434
	2. The Role of Legal Literature	437
	a) Types of Literature: Commentary, Treatise, Journal	437
	b) Influence of the Literature	441
	VI. Historical Development	444
	1. France	444
	a) Customary Law and Roman Law	444
	b) Genesis of the <i>Code civil</i>	446
	c) Particularities and Critique of the Original Code civil	446
	d) Other Napoleonic Codes	448
	2. Germany	449
	a) The Fragmentation of German Law	449
	b) The Controversy over Codification	450
	aa) Early Codifications	450
	bb) Thibaut vs. Savigny	451
	cc) Historical School, Germanists, and Pandectists	453 454
	c) The Creation of the BGB	454
	d) Further Codifications	
C.	Courts and Jurists	457 457
	I. Court Structure	457
	<ol> <li>Germany</li> <li>a) Court Branches</li> </ol>	457
	b) First Instance, Appeal, <i>Revision</i> : Administrative Courts as an Example	458
	c) Special Features of Civil and Criminal Procedure	460
	d) The Federal Constitutional Court	461
	2. France	463
	a) Courts	463
	b) Appeal and cassation	464
	c) Court Hierarchy in Ordinary Courts	465
	aa) Civil Procedure	465
	bb) Criminal Procedure	466
	d) Court Hierarchy in Administrative Procedure	467
	e) Constitutional Jurisdiction	469
	aa) The Conseil d'État as a Constitutional Court?	469
	bb) The Conseil Constitutionnel	470
	II. Legal Education	471
	1. Germany: The "Uniform Jurist"	471
	a) Course of Studies	471
	b) Importance of Grades	472
	c) Content and Form of Studies	473
	d) Private Tutoring	474
	e) Practical Education: The Referendariat	474 475
	f) Critique of Legal Education	475 476
	2. France: Education in Stages	476 476
	a) Course of Studies b) Consent of Studies and Significance	476 477
	b) Content of Studies and Significance	478
	III. Judges and Attorneys	478
	<ol> <li>Germany: The Direct Start</li> <li>a) Judges: Career and Reputation</li> </ol>	478
	b) Attorneys and Notaries	480
	b) Intollieys and Installes	100

2. France: Specialized Training and Recruitment

b) Training of Attorneys and the Unification of Legal Careers

a) Training of Judges and the Concours

480

481

482

IV. Judicial Procedure	483
1. Courts of First Instance as a Role Model	483
2. Some Typical Features of German Civil Actions	484
a) Paramount Role of the Judge	484
b) Settlement	485
c) Principle of Evidentiary Control and Evidentiary Proceedings	485
d) Costs	486
3. Administrative and Criminal Actions	487
a) Administrative Actions and Examination ex Officio	487
b) Special Features of Criminal Actions, and the Deal	487
4. The French Investigating Judge	490
D. Typical Legal Institutions	492
I. The German Principle of Abstraction	492
II. The French Cause	494
1. Basic Idea of the Cause	494
2. What is the Cause?	495 496
3. Functions and Critique of the Cause	490
III. Good Faith	497
1 Practical Results of Good Faith	497
<ol><li>Good Faith as an Invitation to Judicial Law-Making</li></ol>	470
IV. The Elements of a Criminal Offense: Constituent Elements,	499
Unlawfulness, and Culpability	499
1. Basic Template and Application	500
2. Theoretical and Practical Significance	501
V. J. 1:-i-l Deview of Administrative Acts	502
1 Differentiation Between Discretion and Indeterminate Legal Concepts	502
2. Independent Judicial Review of Indeterminate Legal Concepts	503
3. Limited Judicial Review of Discretion	505
VI. Human Dignity	505
1. Basic Idea of Human Dignity	505
2. Profound Implications of Human Dignity	507
3. Concrete Normative Content of Human Dignity	509
VII. Limits of Basic Rights: Proportionality	509
1. Area of Protection, Infringement, Limits	510
2. The Structure of Proportionality	511
3. Far-Reaching Significance of Proportionality	512
VIII. Constitutional Complaint and Concrete Judicial Review	512
1. Scope of Constitutional Complaints	
2. Constitutional Complaints and the Status of the Federal	513
Constitutional Court  3. Constitutional Law and General Law: A Difficult Differentiation	514
3. Constitutional Law and General Law. It Difficult Employees	515
4. Interaction with Concrete Judicial Review	
T. W	517
Chapter 7. Variety of the Civil Law Context	517
A. The Rough Categorization of Other Western European Countries	517
I. Austria and Switzerland	517
German Context—With Reservations     Howibility	<i>y</i> = <i>r</i>
<ol> <li>Austrian Constitutional Culture: Fragmentation, Flexibility,</li> </ol>	518
and Hans Kelsen	521
3. Swiss Constitutional Culture: <i>Volksrechte</i> , Federalism, Concordance	524
II. Spain	
Proximity to French Private Law: Historical Background	524
and Present Limits 2. Declining French Influence in Administrative and Criminal Law	526
2. Declining French influence in Administrative and Committee and Constitutional Law	527
3. The German Model in Constitutional Law	

		Contents	xxi
		a) Similarities with German Constitutional Law	527
		b) The Independence of Spanish Constitutional Law	528
		4. In Particular: Statutes of Autonomy and Monarchy	531
D	East	ern Europe: Differentiations After Transformation	533
В.	East	The Simplistic Image of Transformation	534
	11	The Complex Reality of Transformation	535
	11.	1. Repeated Transformations	536
		2. Hastily Drafted Statutes	536
		3. Remnants of "Socialist" Thinking	538
		4. Difficulties in the Application of Law	539
		a) Exaggerated Formalism	539
		b) Leadership and Flinching from Decisions	541
		c) Problems in Implementing the Law	541
		d) Initial and Continuing Legal Education	542
		5. The Influence of Old Elites	542
		6. Legal Nihilism	544
		7. Legal Literature and Law in Action	545 546
	III.	Three Groups Within the Eastern European Context	546
		1. Russia as an Independent Context	547
		a) Russian Legal Nihilism and its Consequences	549
		b) Self-Image and "Russian Values"	550
		c) The Russian Context in Other Countries	551
		2. The Eastern EU Member States: The European Prospect	553
0		3. Eastern European Countries Outside the EU: Slow Development	554
C.		ndinavia: Nordic Legal Thinking	554
	1.	Historical Background  1. Of Marriage and Divorce: Building States in Scandinavia	554
		External Legal Influences	556
		3. The Welfare State	557
	TT	Special Features of the Scandinavian Context	558
	11.	Lack of Codification	558
		2. Legal Sources	559
		3. Scandinavian Cooperation	562
		a) Meeting of Nordic Jurists and the Nordic Council	562
		b) Common Linguistic Ground	563
		c) Decreasing Significance of Scandinavian Cooperation	564
		4. Distinctive Characteristics of Nordic Jurists and Nordic Legal Thought	565
		a) The Advantage of Small Numbers	565
		b) Scandinavian Pragmatism: <i>Lagom</i>	565 566
		5. Reluctant Litigators?	567
	III.	Specific Legal Institutions	568
		1. The Ombudsman	568
		a) Variety of Ombudsmen	569
		b) The Basic Model of the Swedish Justice Ombudsman	570
		c) Ombudsman and Oversight of the Administration	571
		<ul><li>2. Principle of Open Government</li><li>3. Constitutional Law</li></ul>	574
		a) Limited Importance of Constitutional Law	574
		b) Influence of the Welfare State and Modern Contrary Tendencies	575
		c) Weak Judicial Review of Laws	576
	TV/	Scandinavian Legal Realism	577
	Τ 4	Scandinavian Legal Realism as a Philosophical Project	577
		a) A Difficult Topic	577
		b) A Tentative Approach	578
		aa) Rights as Mystical Concepts	578

11		580
	bb) The Struggle Against Natural Law	581
	2 Practical Significance Today?	583
	3 Relationship with U.S. Legal Realism	584
	V. Scandinavia as Part of the Civil Law Context	585
D.	Parand Furone: Latin America	585
D.	I Latin America as Part of the Civil Law Context	585
	1 Similarities and Differences in Context	586
	2. Early Pioneers: 19th Century Codifications	589
	3. External Influences	590
	4 Modified Views	590
	a) A Spanish-Portuguese Legal Family:	590
	b) Decreasing Importance of Codification:	591
	II Constitutional Law and Latin American Sen-image	592
	1. France and Europe as Historical Wodels	592
	a I I Josef Dovelonment	593
	2 The End of Military Dictatorships: A Change of Factorships	594
	a) All Generations of Fundamental Rights	595
	L) Judicial Enforcement of Fundamental rights	597
	III "Obeying, but Not Following": The Reality of Law	597
	1. Law in Action vs. Law in Books	597
	a) Basic Attitude	598
	b) An Example: "Constitutional Poetry"	600
	c) Example: Barrios and the Informal Sector	602
		603
	d) Inefficient Courts  2. Deficient Compliance: Historical, Political, and Social Backgrounds	605
	TT T I Disseliems The Ascent Of Hillian Regime with and	606
	1 Colonization Assimilation—Illegiation	608
	2 Indian Rights and the Degree of Their Recognition	611
	3. Evaluation and Enforcement of Protection	613
	<ul><li>4. The Significance of Indian Law</li><li>a) Constitutional Protection of Indian Law: Problems and Limits</li></ul>	613
	a) Constitutional Protection of Indian Law. Protection	615
	b) Resistance in Practice	616
	c) Substantive Content of Indian Law aa) Comprehensive and Flexible Character of Indian Law	616
	aa) Comprehensive and Flexible Character	617
	bb) The Example of Az Mapu	619
	E. Convergence of Civil Law and Common Law?	619
	I. The Fundamental Dispute About Convergence	619
	1. Convergence Is Obvious	621
	2. Convergence Does Not Exist	621
	3. An Overrated Debate  Solution of Comparage Hypotheses	622
	II. The Variety of Convergence Hypotheses	622
	<ol> <li>A Question of Perspective</li> <li>Convergence from an Historical Perspective</li> </ol>	623
	Convergence from a European Perspective     Convergence from a European Perspective	625
	4. Convergence of Specific Legal Rules and Fields of Law	626
	5. Convergence of Legal Contexts	629
	5. Convergence of Legal Contests	(21
_	The Context of African Law	631
C	Chapter 8. The Context of African Law	631
	A. Plurality as the Hallmark of African Law	632
	B. State Law	632
	I. Outward Appearances	632
	1 Common Law and Civil Law in Africa	632
	a) Colonization and Independence	633
	b) A Special Case: South Africa	634
	c) Current Influence of Parent Legal Orders	

	Contents	xxiii
	2. Influence of Islamic Law	635
	3. African Cooperation: OHADA	636
	II. Problems of Practical Effectiveness	637
	1. Failure of the Legal System	637
	2. Background	639
	a) Democratic Culture and the State in Africa	639
	b) Working Environment and Quality of the Judiciary	639
C.	Traditional Law	641 641
	I. A Functioning Law and Legal Awareness	641
	II. Concepts of Traditional Law	643
	<ul><li>III. Development of Traditional Law: An Overview</li><li>1. Basic Character of Traditional Law</li></ul>	643
	a) An Oral Law	644
	b) Creating Traditional Law	644
	c) Adaptability and Controversial Content	645
	d) Simplicity and Complexity	646
	e) Inequalities	646
	f) Legal Asymmetries	647
	g) Dispute Resolution	647
	2. Tribal Law in Colonial Times and After Independence	648
	3. Renaissance of Traditional Law	650
	IV. Typical Contents of Traditional Law	651 651
	1. Ubuntu	653
	2. Imbizo	654
	<ul><li>3. Marriage and Dowry</li><li>4. Procedural Aspects</li></ul>	657
	5. Excursus: Witchcraft	657
	a) Widespread Belief in Witchcraft	657
	b) Witchcraft and Criminal Law	659
	c) Importance of Superstition in General	661
	V. Traditional Law Between Urban and Rural Areas, Majority and Elites	661
	1. Multilayered and Complex Distribution in Society	661
	2. In Particular: Traditional Law in Urban Areas	663
	VI. Integration of Traditional Law into the State	664
	1. Degrees of Recognition	664 664
	a) Basic Governmental Attitudes Toward Traditional Law	665
	b) A Typical Problem: Traditional Criminal Law	666
	<ul><li>c) Recognition of Traditional Dispute Resolution</li><li>2. State Influence on Traditional Law</li></ul>	667
	3. Traditional Law and Modern Human Rights	669
	a) An Unsolvable Conflict of Principles?	669
	b) Example: Equal Rights in Inheritance	672
Chapt	ter 9. Contexts in Asia	675
-	Asia's Variety	675
11.	I. What is Asia?	675
	II. Forming Groups—Open to Development	676
B.	China: The Ruling Party	678
	I. Historical Development of Chinese Law	678
	1. The Era of Traditional Chinese Law	678
	a) Confucianism and Legalism	679
	aa) Confucian Ethics	679
	bb) <i>Li</i> Trumps <i>Fa</i>	680
	cc) Fa Instead of Li: The Legalist Alternative	681

b) The Development of Imperial Law Between Confucianism	682
b) The Development of Imposes	682
and Legalism  aa) The Integration of $Li$ into $Fa$ Culture of Legislation	002
bb) The Tang Code: A Sophisticated Culture of Legislation	(02
and Commentaries	683
c) Important Aspects of Traditional Chinese Law	686
c) Important Aspects of Haditional Communication of the Communication of	686
aa) Lack of Private Law bb) Reduced Governmental Law Enforcement	686
bb) Reduced Governmental Law Emotors	687
cc) Judges as Administrators	688
2. The Time of Western Reforms	688
a) Opium Wars, Unequal Treaties, and Law Reform	690
b) Revolution in Legal Thinking	691
c) Effectiveness of Reforms	691
3. Communist Rule Under Mao	691
a) The Early Years: From Acceptance to Rejection of Law	693
b) The Cultural Revolution	694
4. China After Mao	696
II. Superficial Legal Structures: An Overview	696
1. Government Structure	697
2. Court System	698
3. Sources of Law	699
4. Ties to Civil Law Thinking	700
III. Deeper Legal Structures	700
1. Party and State	700
a) The Party as Primary Power	703
b) Parallel and Interconnected Structures in Party and State	704
2. Beyond State Legislation	704
a) Political Norms	705
b) Party Norms	706
c) Areas of Weak Normativity	707
3. Socialist Foundations	708
4. Centralized Statutory Interpretation	708
a) Interpretive Authority of the Supreme reopies Goda	710
b) Functional and Practical Doubts	711
5. Dependence of the Judiciary	711
a) Dependence of Judges	712
b) Dependence of Courts	712
c) Autonomy of the Judiciary	713
6 Influence of Traditional Chinese Hilliking.	713
a) Destruction of Cultural Traditions	715
1) N. Integration of Legal Traditions	716
7. Multiple Levels of Authority in Urban and Rural Areas	717
8 Corruption	718
	718
TE - inical Importance Of Allemanic Dispus	720
b) Alternative Dispute Resolution and Chinese Patroza	721
IV. The Long March Toward Rule of Law:	721
1 Two Basic Positions	722
2. Fachian Eaghi: The Linguistic Basis	724
2 What Is It All About?—The Concept of Rule of Law	724
a) Simple and Ambitious Concepts of Kuic of East	724
b) Rule of Law or Rechtsstaat?	726
c) Positive Connotation of Rule of Law	726
4. Sequencing	727
5. Hope Remains	

*Contents* xxv

C.	Japan, Taiwan, South Korea: The Southeast Asian Way on a Civil Law Basis	728
	I. Independence of the Southeast Asian Context	728
	II. Historical Westernization of Law	729
	1. Decisive Influence of Continental European Law	729
	a) Japan: Breaking with Legal Tradition	729
	aa) Traditional Japanese Law in Historical Context	729
	bb) Modernization and the Meiji Constitution	730
	cc) Renewal in Criminal and Private Law	731
	b) Taiwan: Continuity in Change	733
	c) Korea: Annexation and After-Effects	733
	aa) China's Early Influence	733
	bb) Japanese Annexation	734
	cc) The German turn after independence	734
	2. After World War II: Influence of U.S. Law	736
	a) Lack of Importance in Korea	736
	b) Some Influence in Taiwan	737
	c) Tensions in Japan	737
	d) Significance of Legal Education and General Legal Thinking	739
	III. Confucianism and the Reluctant Litigator	740
	Cultural and Political Background	740
	Debates About the Reluctant Litigator: The Focus on Japan	741
	3. Empirical Evidence: Judicial Caseloads	743
	IV. Some Southeast Asian Characteristics	745
	Traditional Values	745
		747
	2. Weighing of Interests	747
	3. Legal Education	749
	V. Constitutional Law Attitudes	
	1. The Development of Democracy from Dictatorial Roots	749
	2. Powerful Constitutional Courts	749
	3. Civil Rights vs. Conservative Traditions	750
	4. Social Change and Legal Awareness	751
100	5. Between Western Influence and Southeast Asian Characteristics	751
D.	India: Common Law and Hinduism	752
	I. Indian Law Between Reality and Romanticism	752
	II. Indian Common Law	753
	1. Historical Development	753
	a) Presidency Towns and <i>Mofussil</i>	753
	b) The Codification Movement	754
	2. Common Law Thinking in Legislation and Adjudication	755
	3. The Importance of Law in India	757
	a) The Reputation of Jurists	758
	b) The Pugnacious Supreme Court	759
	aa) Who Is Master of the Constitution?	759
	bb) Parliament and Supreme Court Today	761
	cc) The Supreme Court as Legislator	761
	c) Difficulties of Law in India	762
	aa) Law and Social Inequalities	762
	bb) Law and Social Change	762
	cc) Reactions: Legal Aid and Public Interest Litigation	764
	dd) Inefficiency of the Courts	765
	4. Religious Family Law Today	766
	a) Codified Personal Statute	766
	b) Customary Law and Judicial Decisions	767
	c) Remnant of Traditional Law: Joint Family	767
	d) Hindu Family Law as Subsidiary Personal Statute	768

III. Traditional Hindu Law  1. Dharma, Vedas, and Smritis  2. Sadachar  3. Commentaries, Digests, and Legal Schools  4. Caste System: Varna and Jati  5. The Faded Potential  E. Indonesia: Pluralism in a Multiethnic State  1. History: The Variety of Influences  1. Pre-Colonial Times: The Laws of Java  2. Colonial Times: Dutch Rule  3. Independence: The Long Way to Democracy  II. Indonesian Law Today  1. State Law in the Context of Civil Law  2. Adat  a) Content of Adat Laws  b) Adat Between Tradition and Modernity  3. Islam  a) Islamic Law Under State Influence  b) The Fight About the Seven Words  III. Law's Difficult Position  1. Contradictions and Uncertainties in State Law  2. Inefficiency of the Courts	769 769 770 771 772 773 773 774 774 775 776 777 777 778 778 778 778 778 778 778
3. Corruption	789
Chapter 10. The Context of Islamic Law  A. Classical Islamic Law: The Fundamentals  I. Divine Revelation and Human Elaboration  II. On Words: Islamic Law, Sharia, Figh  III. Legal Sources in Sunni Islam: Usul al-Figh  1. The Divine Foundation: The Koran  2. The Life of the Prophet: Sunna and the Hadiths  3. Consensus (Ijma)  4. Analogy (Qiyas)  5. General Welfare (Istihsan)  6. Continued Existence (Istihab) as a Rule of Evidence  7. Integration of External Law, Esp. Customary Law (Urf)  8. Other Secondary Sources  9. Interaction Between Sources and with Tafsir  IV. The Classical Schools of Islam  1. The Four Schools of Sunni Islam  a) Hanafites  b) Malikites  c) Shafiites  d) Hanbalites  2. Shiite Islam  a) The Shiite Secession  b) The Jafari School  V. Islam and Change: Ijtihad Today  1. The Classical Opinion: The Door Is Closed  2. What Is Ijtihad:  3. The End of Ijtihad: Consequences  4. The Opponents' View: The Door Is Open  a) Nobody Has Closed the Door  b) Hanbalites and Shiites as Classical Opponents  c) Modern Ijtihad	789 789 789 789 789 791 792 792 793 796 797 798 799 799 799 800 801 802 802 802 802 803 803 803 803 803 804 806 806 807 808 809 809 809

	Contents	xxvii
	aa) Reformists and Modernists	810
	bb) Critical Reassessment	811
	d) Eclectic Critique and Imaginary Law	812
	5. Change Without <i>Ijtihad</i>	813
	VI. The Judiciary in Islam	813
	1. "Kadi Justice"	813
	2. Tasks and Role of the Kadi	814
	3. Qualifications of the Kadi	815
	4. Procedural Law	816
	5. The Mufti as Legal Expert	816
	6. Manuals for Legal Practice	817
D	The Contents of Islamic Law (Figh)	818
B.	I. The Five Categories of Legal Consequences	818
	Legal, Moral, and Religious Aspects of the Categories	818
	<ol> <li>Legal, Moral, and Rengious respects of the Guegeste</li> <li>Wajib and Fard: The Obligatory</li> </ol>	819
	3. <i>Haram</i> : The Forbidden	819
	4. <i>Mandub, Makruh</i> , and <i>Mubah</i> as Intermediate Categories	820
	5. Complex Implications	820
	II. Aspects of Family and Inheritance Law	821
		821
	<ol> <li>Dowry (<i>Mahr</i>)</li> <li>Shiite Temporary Marriage (<i>Mut'a</i>)</li> </ol>	821
		822
	3. Divorce ( <i>Talaq</i> )	823
	<ul><li>4. Polygamy</li><li>5. Wives' and Daughters' Share of Inheritance</li></ul>	825
	III. Criminal Law	826
	1. From <i>Hadd</i> to <i>Tazir</i> : The Narrow Field of Application	826
	2. Restricting Severe <i>Hadd</i> Punishments: The Example of Theft	826
	3. Filling the Gaps Through State Law: <i>Tazir</i>	828
	4. The Critique of Islamic Criminal Law	828
	a) Criticism Based on Western and Human Rights Values	828
	b) Islamic Defense	828
	c) Islamic Reform in Theory and Practice	830
	5. Tendencies Towards a Fundamentalist Re-Islamization	/830
	6. Apostasy as an Instrument of Control	832
	IV. Islamic Finance and Banking	833
	1. A Promise of Justice	833
	2. Prohibition of Interest, and Possible Evasions	834
	3. Example: Islamic Credit Agreements	835
	4. Sharia Conformity: Certification and Risk	835
(	C. Islamic Law in Modern Countries	836
	I. Colonial Imprints	836
	II. Legislation According to Traditional Islamic Law: Siyasa and Qanun	838
	III. Strict Implementation of Islamic Law in the State: Saudi Arabia	839
	1. Wahhabism	839
	2. Koran and Sunna as Applicable Law	840
	3. Position of State Legislation	841
	IV. Primacy of State Law Between Self-Assertion and Retreat	841
	The Many Ways of Islamic Law	841
	2. Islamic Family and Inheritance Law: Codification and Reform	842
	3. Islamic Law as Inspiration for Legislators and Judges	844
	4. Islamic Law of Higher Rank	846
	a) Integration of Islamic Law into the Constitution	846
	b) Legal and Practical Significance of Contradiction Clauses	- /-
	and Source Clauses	847
	c) Which Islamic Law?	849

AATIA	850
d) The Example of Egypt	851
e) Islamization of the Constitution?	852
D. Excursus: Other Religious Laws	852
I. Jewish Law: The Power of Debate	853
1. A Layered Model of Law	853
a) Torah and Mishnah	853
1) Thered	855
c) Post-Talmudic Sources: Commentaries and Codifications	855
2. Bound by God, Changed by Men: The Schools	856
3. Jewish Law and State Law	857
4 Specific Features of Jewish Law	858
5. For Example: The Rejection of Polyganiy	859
6. Jewish Law in Israel	861
II. Canon Law: The Slow Retreat	861
1 Historical Importance	862
2. Relationship Between Canon Law and State Law	862
3. Divine Law and Human Law	864
4. Church Law Today	865
5. Canon Law in Comparison	
	869
Chapter 11. Contexts of Transnational Law	869
A. Comparative Law Beyond the State	870
- H C f Dublic International Law	870
I Classic Links Retween Public International Law and Companies.	872
II D. 11: International Law as an Object of Comparative Law	874
III Specific Features of the Public International Law Contest	874
1 Delitical Influence and Lack of Centralization	874
2. Sources: Consensual Lawmaking and "Soft Law"	876
3. Limited Legal Personality for Individuals	876
4 In Lincot Law Enforcement	878
6 Constitutionalization and Differentiation	879
6. Independence from Civil Law and Common Law Contexts	879
C. T. C of Furopean Union Law	0/9
I. EU Law in Comparative Perspective: Between Familiar Ground	970
and New Frontiers	879 881
II. In Search of a Context of EU Law	881
The Debate About a European Legal Culture	882
2. EU Law and National Contexts	884
3. Pluralism of EU Law	885
C T : CSuprapational HIII aW	885
III. Some Specific Traits of Supranational EG Edw.  1. Perspectives of European Policy: Of Romantics, Skeptics, and Technicians	887
2 Foderal Dovetailing	888
a Deficit Institutional Balance, Walket	889
4. The European Court of Justice: Apodictic Motor of Integration	890
5. Vast Expanses: Substantive EU Law	892
IV. Beyond EU Law	
TI C Mercatoria?	893 893
The Learn of International Economic relations	893
1 Content of Lex Mercatoria: The Fundamental Debate	894 894
1 I en Mercatoria as a Legal Order: Theoretical and Tractical Troopers	
2. The Multitude of Theories on Lex Mercatoria	896 896
III. Lex Mercatoria and Comparative Law	896
III. Lex mercunorm and company	